State of California
Office of Administrative Law

In re:
Board of Parole Hearings

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections: 2240
Amend sections:
Repeal sections: 2240

NOTICE OF APPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2018-0307-02

OAL Matter Type: Regular Resubmittal (SR)

This rulemaking action repeals the existing regulation regarding Comprehensive Risk Assessments (CRAs) for life-term inmates who are eligible for parole consideration after having served their minimum terms and replaces it with a new CRA regulation. CRAs are used in life-term inmate parole hearings as evidence of an inmate's potential for future violence if released.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 7/1/2018.

Date: April 17, 2018

Dale P. Mentink
Senior Attorney

For: Debra M. Cornez
Director

Original: Jennifer Shaffer, Executive Officer
Copy: Heather McCray

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CERTIFICATION

The foregoing table of contents constitutes the Board of Parole Hearings' rulemaking file for the subject regulations. The rulemaking file as submitted is complete. The rulemaking record for the subject regulations was closed on April 11, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sacramento, California, on April 11, 2018.

Signed:

HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

BPH RN 16-01: NOTICE OF PROPOSED ACTION

Title 15. CRIME PREVENTION AND CORRECTIONS
Division 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments
(*previously*: Psychological Risk Assessments for Life Inmates)

NOTICE IS HEREBY GIVEN that the Executive Officer of the Board of Parole Hearings (board), pursuant to the authority granted by Government Code section 12838.4 and Penal Code sections 3052 and 5076.2, authorizes the board to adopt the proposed Amended Section 2240 of the California Code of Regulations (CCR), Title 15, Division 2, concerning Psychological Risk Assessments for Life Inmates.

AUTHORITY AND REFERENCE

Government Code section 12838.4 vests the board with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation Authority, which no longer exist.

Penal Code section 3052 vests with the board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the board promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 3041 requires the board to meet with each inmate before the inmate's minimum eligible parole for the purpose of reviewing and documenting the inmate's activities.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial and guidelines concerning the inmate's right to petition the board concerning the results.

Penal Code section 3051 establishes the youth offender parole hearings and the procedures for reviewing the parole suitability of any prisoner who was under the age of 23 at the time of his or her controlling offense.

Penal Code section 11190 establishes the Western Interstate Corrections Compact, which provides for the development, and execution of programs, the co-operations for the confinement, treatment, and rehabilitation of offenders.

Penal Code section 11193 requires that any inmate under the jurisdiction of the California Department of Corrections and Rehabilitation, imprisoned in another state, shall be entitled to all

hearings, within 120 days of the time and under the same standards, which are normally accorded to persons similarly sentenced who are confined in institutions in this state.

The California Court of Appeal (First Appellate District) case *In re Lugo* and *In re Rutherford* required a remedial plan to be agreed upon by all parties to reduce the parole hearing backlog and bring the board in compliance with state law. (*In re Lugo* (2008) 164 CalApp.4th 1522; *In re Rutherford,* Cal. Super. Ct., Marin County, No. SC135399A.)

The California Court of Appeal (Third Appellate District) case *Sherman-Bey v. Shaffer* found the language of prior section 2240(b) lacks clarity because the term "may use" was permissive and "actuarially derived and structured professional judgment" was not easily understood by laypersons. (*Sherman-Bey v. Shaffer,* 2016 WL 193508, Case No. C077499.)

The Federal Eastern District Court of California case *Johnson v. Shaffer* approved a stipulated agreement between the parties requiring the discontinuation of subsequent risk assessments, replacement with comprehensive risk assessments, and a pre-hearing process through which inmates can object to factual errors. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the board. **THE WRITTEN COMMENT PERIOD ON THIS PROPOSED REGULATORY ACTION WILL COMMENCE ON NOVEMBER 4, 2016, AND WILL CLOSE AT 5:00 P.M. ON DECEMBER 19, 2016.** For comments to be considered by the board, they must be submitted in writing to the board's Contact Person identified in this Notice no later than the close of the comment period.

CONTACT PERSON

Please direct requests for copies of the Initial Statement of Reasons, the Proposed Text of the Regulation, or other information upon which the rulemaking is based to:

Heather L. McCray, Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 16-01**.

NO PUBLIC HEARING SCHEDULED

The board has not scheduled a public hearing on this proposed regulatory action. However, the board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period. Written or facsimile comments submitted during the prescribed comment period have the same significance and influence as oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive oral comments about the proposed regulations. It would not be a forum to debate the proposed regulations, and no decision regarding the permanent adoption of the proposed regulations would be rendered at a public hearing. The members of the board would not necessarily be present at a public hearing.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Board of Parole Hearings (board) proposes to amend California Code of Regulations, title 15, section 2240, which governs Comprehensive Risk Assessments (previously Psychological Risk Assessment for Life Inmates).

In 2006, the board formed the Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists who prepare risk assessments for use by hearing panels when determining an inmate's suitability for parole.

On April 20, 2012, the class action case *Johnson v. Shaffer* was filed, challenging the constitutionality of the protocol adopted by [the FAD] for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. On May 26, 2016, the court approved the parties' negotiated settlement agreement. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

In 2014, while the *Johnson* case was still pending, the Sacramento County Superior Court determined that language in subdivision (d) of section 2240 was vague and confusing. This decision was upheld by the California Third District Court of Appeal. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

This proposed regulation package is necessary to implement, interpret, and comply with the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement, the court order in *Sherman-Bey v. Shaffer*, and Penal Code Sections 3041, 3041.5, 3051, 11190, and 11193. The amendments included in this proposed action are intended to clarify, and increase efficiency for, comprehensive risk assessments, which will better meet the needs for inmates subject to the board's parole authority as well as other stakeholders.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS:

Updating the language to require risk assessment tools to be "generally accepted" will benefit inmates, victims, hearing panels, and the public by ensuring that any instruments FAD psychologists use to assess risk have been deemed appropriate by the general psychology community. These amendments will also benefit all stakeholders by providing greater clarity about the requirements for these instruments.

Eliminating the shorter "Subsequent Risk Assessments" and instead mandating a new "Comprehensive Risk Assessment" every three years benefits all stakeholders. Since the hearing panels will have access to a more current and robust evaluation of the inmate's risk at every hearing, the panels will be better informed, which will assist them in reaching increasingly accurate decisions regarding an inmate's suitability. This will not only benefit inmates by ensuring that suitable inmates will be granted parole, but also benefit victims and the general public by ensuring that inmates who continue to pose an unreasonable risk to public safety are denied parole.

Developing the pre-hearing appeal process to lodge objections to factual errors in a comprehensive risk assessment prior to the hearing will similarly benefit multiple stakeholders. Allowing these issues to be resolved prior to a hearing will benefit inmates by ensuring that only accurate information is used during the hearing to assess the inmate's current suitability for parole. Additionally, the pre-hearing process will reduce the number of postponements, which will benefit victims and all other hearing participants by reducing the number of wasted travel and appearances for hearings that ultimately do not go forward. Moreover, retaining an inmate's right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician's observations, opinions, or diagnoses ensures that hearing panels have the most accurate information possible when assessing an inmate's suitability for parole.

Finally, clarifying the FAD's authority with respect to inmates housed out of state will benefit out-of-state inmates by clarifying that they may be able to receive a risk assessment if licensing, confidentiality, and other restraints permit it, and the board exercises its discretion to prepare the assessment.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The board has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the board has concluded that these are the only regulations that concern the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

DISCLOSURES REGARDING THE PROPOSED ACTION

Local Mandates: The board has determined that the proposed action imposes no mandate upon local agencies or school districts.

Fiscal Impact Statement: The board has made the following initial determinations:

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: **None**
- Cost or savings to any state agency: **None:** In the prior fiscal year, the board requested and was granted position authority for three additional psychologist positions to meet the new requirements for Comprehensive Risk Assessments to be completed every three years instead of every five years. This means these new positions were established, but the board absorbed the costs with its existing budget. Additionally, the board had no discretion under the court order with respect to increasing the frequency of the Comprehensive Risk Assessments. Therefore, the regulations regarding the increase in frequency necessitating the new positions are only codifying the board's current mandated process, and will not result in any additional discretionary costs or savings to the board.
- Other non-discretionary cost or savings imposed on local agencies: **None**
- Cost or savings in federal funding to the state: **None**

Significant Statewide Adverse Economic Impact on Business: The board has determined that there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impacts on Representative Private Persons or Businesses: The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination or Expansion: The board has determined that adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within California; or (3) affect the expansion of businesses currently doing business within California. While three new psychologist positions were previously established to implement the increased frequency of the comprehensive risk assessments, as mandated by the court's order in *Johnson v. Shaffer*, the adoption of these regulations will not result in the creation or elimination of any additional jobs.

Effect on Housing Costs: The board has made an initial determination that the proposed action will have no significant effect on housing costs because housing costs are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

Small Business Determination: The board has determined that the proposed regulation does not have a significant adverse economic impact on small business because small businesses are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The board concludes that it is (1) unlikely that the proposed regulations will create or eliminate any jobs in California, (2) unlikely that the proposed regulations will create any new business or eliminate any existing businesses, and (3) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Anticipated Benefits to the health and welfare of California residents, worker safety, and the state's environment: As further explained in the Economic Impact Analysis, contained within the Initial Statement of Reasons, the proposed shift toward comprehensive risk assessments for regularly scheduled hearings, rather than the shorter subsequent risk assessments, will provide hearing officers charged with determining an inmate's suitability for parole with a greater understanding of the inmate's psychological features and their impact on his or her risk of violence. Additionally, the regulations increase protections to both victims and inmates by ensuring greater accuracy of risk assessments through newly implemented pre-hearing and at-hearing objection and clarification processes. This increased accuracy and hearing officers' enhanced understanding of an inmate's risk of violence when determining suitability will, in turn, promote both inmate rehabilitation and better protection of public safety.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Interested parties are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes during the public comment period.

AVAILABILITY OF PROPOSED TEXT

The board will make the rulemaking file available to the public throughout the rulemaking process at its offices located at 1515 K Street, Suite 600, Sacramento, California. As of the date this Notice is published in the Office of Administrative Law's Notice Register, the rulemaking file consists of this Notice, Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation and Initial Statement of Reasons. Copies of any of these documents may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the board may adopt the proposed regulations substantially as described in this Notice. If the board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the

changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulation text to the attention of the Contact Person identified in this Notice or by visiting the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html. If the board makes modifications, the board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, phone number, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

****END****

PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. ~~Psychological~~ Comprehensive Risk Assessments ~~for Life Inmates~~.

(a) ~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. The psychologists shall consider the current relevance of any risk factors impacting an inmate's risk of violence. The psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence.
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c) ~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three-year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court~~

~~order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case.~~
~~The 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. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case. A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d) ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, 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.~~(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) The board may prepare a risk assessment for inmates housed outside of California.

(e) ~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing.
(2) For the purposes of this section, "factual error" is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.

(f) ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be~~

~~prepared, or whether the errors may be corrected without conducting a new evaluation.~~(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and determine whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g) ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. The Chief Psychologist shall prepare an addendum to the risk assessment documenting his or her opinion and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision and Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, order a new or revised risk assessment, postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision and Chief Psychologist's addendum to the inmate or attorney of record. Impacted risk assessments shall be permanently removed from the inmate's central file.

(h) ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 days prior to

the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist may complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel may refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (3) or (4) of this subdivision.
(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.
(3) If the hearing panel determines the risk assessment may contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(4) If the hearing panel determines the risk assessment does not contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object to or clarify any statements a risk assessment attributed to the inmate, or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 11190, and 11193, Penal Code; In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A.

BPH RN 16-01: INITIAL STATEMENT OF REASONS

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

Amendment of Section 2240
Comprehensive Risk Assessments

INTRODUCTION:

Section 2240 governs the use of "Comprehensive Risk Assessments" for parole suitability hearings before the Board of Parole Hearings (board).

In 2006, the board formed the Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists who prepare risk assessments for use by hearing panels when determining an inmate's suitability for parole.

On April 20, 2012, the class action case *Johnson v. Shaffer* was filed, challenging the constitutionality of the protocol adopted by [the FAD] for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. On May 26, 2016, the court approved the parties' negotiated settlement agreement. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

In 2014, while the *Johnson* case was still pending, the Sacramento County Superior Court determined that language in subdivision (d) of section 2240 was vague and confusing. This decision was upheld by the California Third District Court of Appeal. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

This proposed regulation package is submitted to comply with the court orders in *Johnson* and *Sherman-Bey* so that the section governing comprehensive risk assessments is clearer, more efficient, and better meets the needs for inmates and stakeholders.

PROBLEM STATEMENT:

First, as currently written, section 2240(b) states in part, "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence." However, in *Sherman-Bey*, the court held that the phrases providing that psychologists "may" use the specific tools and that the tools used must be "actuarially derived" were vague and needed to be amended. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) The regulation must be updated to effectuate this change.

Second, as currently written, section 2240 requires FAD psychologists to complete a "Comprehensive Risk Assessment" only when more than five years had passed since the inmate's last comprehensive risk assessment and to complete a shorter "Subsequent Risk Assessment" for any hearings scheduled in less than five years. However, the court-approved *Johnson* settlement agreement eliminated "Subsequent Risk Assessments" and requires instead that FAD psychologists complete a full "Comprehensive Risk Assessment" for any hearing scheduled more

than three years from the date on which the last risk assessment was approved. The regulation must be updated to effectuate this change.

Third, as currently written, when an inmate or attorney wishes to challenge alleged errors in a risk assessment, section 2240(d) requires the inmate or attorney to raise the issue at the hearing because the inmate appeal process does not apply to risk assessments. However, the court-approved *Johnson* settlement agreement required the board to develop an appeal process to allow inmates or their attorneys to "lodge timely written objections asserting factual errors . . . before their parole consideration hearing occurs." (*Johnson v. Shaffer* (E.D.Cal. October 2, 2015, No. 2:12-cv-1059, Doc. 79, page 5, paragraph 7.) The regulation must be updated to effectuate this change.

PURPOSE:

The board proposes to amend California Code of Regulations, title 15, section 2240, as follows:

Subdivision (a) is *amended* to clarify that psychologists who administer Comprehensive Risk Assessments must be both licensed and employed by the board. Subdivision (a) also now clarifies the purpose of the risk assessment by using the *Kelly-Frye* standard of using "generally accepted" approaches when applying scientific evidence, previously contained in subdivision (b). The court noted "The Kelly-Frye language is the standard that California courts use in determining whether scientific evidence is admitted into a trial." (*People v. Kelly* (1976) 17 Cal.3d 24, 27.) This amendment clarifies that any tools, instruments, or approaches used by the psychologists must adhere be generally accepted in the psychology community.

Subsections (a)(1) and (a)(2) are *deleted* because the scheduling of new risk assessments is now covered in subdivision (d).

Subdivision (b) is *amended* to remove the scheduling language, which is now covered in subdivision (d) and to instead require risk assessments to consider the youth factors and their mitigating effects, in accordance with Penal Code section 3051, subdivision (f)(1), when completing a Comprehensive Risk Assessment for a qualified youth offender under Penal Code section 3051.

Subdivision (c) is *amended* to remove the requirements for Subsequent Risk Assessments and to instead provide guidelines for when the Chief Psychologist or Senior Psychologist may approve a Comprehensive Risk Assessment. This subdivision also clarifies the date on which a risk assessment becomes final.

Subdivision (d) is *amended* to remove the current process to challenge alleged errors in risk assessments, which is now covered in subdivisions (e) through (i). Instead, subsection (1) of this subdivision now clarifies that Comprehensive Risk Assessments will be scheduled for hearings if, on the date of the hearing, more than three years will have passed since the last risk assessment became final. Subdivision (g) was also relocated to become subsection (2) of this subdivision, and was re-worded to clarify that the board has the discretion to prepare risk assessments for inmate housed out of state but is not required to prepare one.

Subdivision (e) is *amended* to delete the prior requirement to raise any errors at a hearing and instead establishes the process through which an inmate, inmate's attorney of record, or prosecuting agency may challenge alleged factual errors in the comprehensive risk assessment prior to the hearing. This subdivision also provides the required deadlines for submission and defines the term "factual error" for the purpose of Section 2240 to provide greater clarity for all stakeholders. Finally, this subdivision provides instructions and timing for submitting pre-hearing objections to the board.

Subdivision (f) is *amended* to clarify the role of the Chief Counsel of the board or designee to determine whether an objection to a comprehensive risk assessment alleges a factual error and when to refer the objection to the Chief Psychologist of the board. This section also requires the Chief Counsel to promptly, but no later than 10 days prior to the hearing, provide a copy of the board's decision regarding the allegations if the inmate's objections fail to raise any factual errors. Prior requirements regarding factual errors were deleted and amended in subdivision (e).

Subdivision (g) is *amended* to remove the language regarding inmates housed out of state, which is now covered in subdivision (d)(2). This subdivision now clarifies the role of the Chief Psychologist of the board or designee to opine whether a factual error materially impacted the conclusions of the comprehensive risk assessment. Additionally, this subdivision requires the Chief Counsel to document his or her opinion in an addendum to the risk assessment. This subdivision also provides the description and timing of the actions the Chief Counsel must take based upon the Chief Psychologist's determination, which includes promptly, but no later than 10 days prior to the hearing, providing a copy of the board's decision regarding the allegations as well as the risk assessment addendum documenting the opinion of the Chief Psychologist. This subdivision further requires impacted risk assessments to be permanently removed from an inmate's file.

Subdivision (h) is *amended* to remove the language exempting medical parole and recall and resentencing procedures from the risk assessment process. Instead, subdivision (d)(1) now clarifies that comprehensive risk assessments shall only be completed for initial parole consideration hearings, subsequent parole consideration hearings, and subsequent parole reconsideration hearings. Additionally, subdivision (h) now clarifies the board's process upon receiving an untimely pre-hearing objection to alleged errors in a comprehensive risk assessment.

Subdivision (i) is *added* to clarify the hearing panel's process upon receiving an objection to alleged factual errors in a comprehensive risk assessment on the day of the hearing. This section defines "good cause" for failing to timely raise objections to alleged factual errors. This section also provides guidance to the panel on the determination the panel must make when confronted with at-hearing objections, the actions the panel must take upon determining that a risk assessment may contain a factual error that materially impacted the clinician's conclusions regarding risk of violence, and the circumstances under which the panel may proceed with the hearing or which necessitate postponement.

Subdivision (j) is *added* to clarify that inmates still retain the ability to object to or clarify for the record any statements that the clinician attributed to the inmate in the risk assessment, or respond to any of the clinician's observations, opinions, or diagnoses, all of which were exempted from the definition of "factual error" in paragraph (e)(2).

NECESSITY:

Updating the language regarding the risk assessment instruments that the psychologists use to evaluate risk is necessary to comply with the court's requirement in *Sherman-Bey* to provide clearer guidance on issue. (*Sherman-Bey v. Shaffer,* 2016 WL 193508, Case No. C077499.) Specifically, the *Sherman-Bey* court took issue with the language "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence," (emphasis added) previously contained in subdivision (b). The *Sherman-Bey* court found that the permissive nature of this statement, as well as the language "actuarially derived and structured professional judgment," was not sufficiently clear. The board addressed both issues in amended subdivision (a). Replacing the permissive language "may" with mandatory language "shall" is necessary to clarify that FAD psychologists are mandated to comply with these requirements. Additionally, adopting language from the *Kelly-Frye* test, requiring that instruments used by FAD psychologists be "generally accepted" instruments for the purpose of assessing offenders' future risk of violence, is necessary to ensure that instruments used are those that have been established in the psychology community as proper tools for this purpose. Moreover, clarifying this language is necessary to make the purpose of the risk assessments more easily understood by inmates, hearing panels, and other stakeholders.

The requirement for clinicians to consider the youth offender factors in Penal Code section 3051, subdivision (f)(1) when assessing a youth offender is necessary to comply with that statute. This section is also necessary to clarify that the clinician's consideration should specifically focus on the mitigating effects of those factors.

Mandating a new comprehensive risk assessment for suitability and reconsideration hearings that occur three years from the last supervisory approval date is necessary to comply with the court-ordered settlement agreement in *Johnson v. Shaffer*. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, though FAD psychologists previously spent significant time preparing the "Subsequent Risk Assessments," these assessments provided no updated opinion on the inmate's current risk of future violence. Consequently, the subsequent risk assessments often led to confusion on the inmate's progress and were deemed to be unhelpful by inmates, panel members, and other stakeholders. Thus, this amendment is necessary to ensure that inmates, attorneys, and panels have access to recently updated risk assessments for every hearing, which provides important information to assist hearing panels in determining an inmate's suitability for parole. This amendment further ensures that the resources of the FAD psychologists have been directed toward providing the most helpful services to the inmate and hearing panel.

Clarifying the board's ability to complete risk assessments for out of state inmates was necessary to resolve an ambiguity in the prior wording of the regulation. The previous wording of this provision in prior subdivision (g) stated, "Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, *may not* receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states." (Emphasis added.) This could be read to mean either (1) that the possibility existed that an out-of-state inmate would not receive a risk assessment due to licensing and other restraints or (2) that out-of-state inmates were prohibited from receiving risk assessments due to those restraints.

The board needed to clarify that the board retained discretion to complete a risk assessment for an inmate housed out of state if licensing, confidentiality laws, and other restraints permitted.

Developing the pre-hearing appeal process for inmate or their attorneys to "lodge timely written objections asserting factual errors . . . before their parole consideration hearing occurs" is necessary to comply with the court-ordered settlement agreement in Johnson v. Shaffer. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, as currently written, the requirement for inmates and their attorneys to raise issues with a risk assessment only at the hearing has led to the postponement of multiple hearings because the hearing panel needed to refer alleged errors to the Chief Psychologist of the board prior to continuing with the hearing. This process resulted in the waste of any resources spent to schedule and prepare for that hearing. Thus, this amendment is necessary to create a process through which these issues may be resolved prior to hearings so that the board may reduce postponements and wasted resources.

In creating this pre-hearing appeal process, the board found it necessary to limit the pre-hearing objection process to factual errors that materially impact the risk assessment's conclusions regarding the inmate's risk of violence. The settlement agreement expressly limited this pre-hearing process to "factual errors." (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist., p. 5, line 7.) This is because the board can confirm or reject allegations of factual by reviewing available documentation or evidence provided by the inmate or attorney. However, because the process of amending or completing an entirely new risk assessment is costly and delays an inmate's hearing, this should only be ordered if the alleged error actually had a material impact on the clinician's conclusions regarding the inmate's risk of violence. With that in mind, the board further found that establishing a two-part process to screen out objections to risk assessments that fail to allege factual errors is necessary to ensure the most efficient use of the Chief Psychologist's resources.

Additionally, establishing the 30-day timeline is necessary to ensure that the board has sufficient time to adequately consider and respond to each pre-hearing objection prior to 10 days before the hearing to preserve the inmate's disclosure rights. However, since inmates may sometimes not obtain the information or documentation necessary to support an objection to a risk assessment until after the regulatory timelines for pre-hearing objections has passed, establishing processes for submitting late objections or for presenting objections at a hearing is necessary to preserve inmates' rights. Requiring the inmate to have "good cause" for failing to raise the objection during the pre-hearing process is necessary to encourage the use of the pre-hearing process and limit the number of postponements and wasted resources due to at-hearing challenges that cannot be immediately resolved.

Finally, while the pre-hearing process was limited to the review of factual errors that materially impacted the risk assessment's conclusions regarding risk, the board found it necessary to preserve an inmate's ability to discuss other concerns exempted from the definition of factual error: statements a risk assessment attributed to the inmate or clinical observations, opinions, or diagnoses in a risk assessment. This process is necessary to ensure panels have the greatest possible understanding of the risk assessments during hearings to determine an inmate's suitability for parole. Since these clarifications and responses are resolved by determining the credibility of the inmate's assertions, they are more appropriately raised at the hearing where the panel may assess the credibility. Additionally, since these clarifications and responses are exempted from the

pre-hearing review process, they may be raised at the hearing without a good cause requirement, notwithstanding subdivision (i).

ANTICIPATED BENEFITS:

Updating the language to require risk assessment tools to be "generally accepted" will benefit inmates, victims, hearing panels, and the public by ensuring that any instruments FAD psychologists use to assess risk have been deemed appropriate by the general psychology community. These amendments will also benefit all stakeholders by providing greater clarity about the requirements for these instruments.

Eliminating the shorter "Subsequent Risk Assessments" and instead mandating a new "Comprehensive Risk Assessment" every three years benefits all stakeholders. Since the hearing panels will have access to a more current and robust evaluation of the inmate's risk at every hearing, the panels will be better informed, which will assist them in reaching increasingly accurate decisions regarding an inmate's suitability. This will not only benefit inmates by ensuring that suitable inmates will be granted parole, but also benefit victims and the general public by ensuring that inmates who continue to pose an unreasonable risk to public safety are denied parole.

Developing the pre-hearing appeal process to lodge objections to factual errors in a comprehensive risk assessment prior to the hearing will similarly benefit multiple stakeholders. Allowing these issues to be resolved prior to a hearing will benefit inmates by ensuring that only accurate information is used during the hearing to assess the inmate's current suitability for parole. Additionally, the pre-hearing process will reduce the number of postponements, which will benefit victims and all other hearing participants by reducing the number of wasted travel and appearances for hearings that ultimately do not go forward. Moreover, retaining an inmate's right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician's observations, opinions, or diagnoses ensures that hearing panels have the most accurate information possible when assessing an inmate's suitability for parole.

Finally, clarifying the FAD's authority with respect to inmates housed out of state will benefit out-of-state inmates by clarifying that they may be able to receive a risk assessment if licensing, confidentiality, and other restraints permit and the board exercises its discretion to prepare the assessment.

DOCUMENTS RELIED UPON:

The board, in proposing amendments to these regulations, relied on the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) The order is listed here pursuant to the order of the court. A copy of this order is attached to this initial statement of reasons as ATTACHMENT A. The board also relied on the court's order in *Sherman-Bey* requiring amendment of the language regarding the tools on which psychologists may rely. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) A copy of this opinion is attached to this initial statement of reasons as ATTACHMENT B.

The board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included this section.

ECONOMIC IMPACT ANALYSIS:

Creation or Elimination of Jobs within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. However, the board has determined that the proposed action will have no impact on the creation or elimination of jobs within the State of California. Specifically, the main substantive changes in this proposed action are replacing prior "subsequent risk assessments" with "comprehensive risk assessments" every three years and establishing a pre-hearing appeal process through which inmates may raise allegations of factual error in their risk assessments. The shift from SRAs to CRAs every three years increased the number of hours clinicians need to spend in their reviews of inmates who would otherwise have received the shorter SRA. Thus, with the increase in workload, in Fiscal Year 2015-2016, the board requested and was granted position authority for three new psychologist positions, the funds for which were reallocated from the board's existing budget. However, the board had no discretion under the court order with respect to increasing the frequency of the Comprehensive Risk Assessments. Therefore, the regulations regarding the increase in frequency necessitating the new positions are only codifying the board's current mandated process, and will not result in the creation of any additional new jobs. Additionally, while the creation of the FAD pre-hearing appeal process for factual errors also requires additional work hours, this function has been absorbed by current staff positions and has not resulted in the creation of any additional jobs. Therefore, the adoption of this regulation is not resulting in the creation or any new jobs in California. No jobs in California have been eliminated as a result of these changes.

Creation of New or Elimination of Existing Businesses Within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on the creation or elimination of businesses in California.

Expansion of Businesses within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting the expansion of business in California because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on business expansion in California.

Anticipated Benefits of the Regulations

As explained above, the proposed shift toward comprehensive risk assessments for regularly scheduled hearings, rather than the shorter subsequent risk assessments, will provide hearing officers charged with determining an inmate's suitability for parole with a greater understanding of the inmate's psychological features and their impact on his or her risk of violence. Additionally, the regulations increase protections to both victims and inmates by ensuring greater accuracy of risk assessments through newly implemented pre-hearing and at-hearing objection and clarification processes. This increased accuracy and hearing officers' enhanced understanding of an inmate's risk of violence when determining suitability will, in turn, promote both inmate rehabilitation and better protection of public safety.

ADDITIONAL FINDINGS:

The board has made an initial determination this regulatory action will not have a significant adverse economic impact on business. Neither the timing and requirements for risk assessments nor the process through which to submit objections to a risk assessment affects operation of businesses in California. No facts, evidence, documents, testimony, or other evidence to the contrary has been provided to or reviewed by the board.

The board has determined this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The Board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included above in the "Documents Relied Upon" section.

The board has determined that no alternative considered would be (1) more effective in carrying out the purpose of this action, (2) as effective and less burdensome to affected private persons than the action proposed, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

****END****

Attachment A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM JOHNSON, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

JENNIFER SHAFFER, et al.,

Defendants.

No. 2:12-cv-1059 KJM AC P

ORDER

The parties to this action move jointly for final approval of class action settlement. (ECF No. 158.) The court held a hearing on the matter on December 18, 2015, at which Keith Wattley appeared for the plaintiff class and Jessica Blonien and Heather Heckler appeared for defendants. As explained below, the court GRANTS the parties' motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This class action lawsuit challenges the constitutionality of the protocol adopted by California's Board of Parole Hearings' (Board) Forensic Assessment Division (FAD) for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. The class consists of California state prisoners who are serving life sentences and are eligible for parole consideration after having served their minimum terms. (ECF No. 40 at 14; ECF No. 44 at 2.)

This action was filed on April 20, 2012. (ECF No. 1.) Following service of process, defendants moved dismiss. (ECF Nos. 10, 11.) By order filed October 18, 2012, defendants' amended motion to dismiss was granted with leave to file an amended complaint. (ECF No. 17.) On November 15, 2012, plaintiff filed an amended complaint containing sixteen causes of action, (ECF No. 18), which defendants answered on December 6, 2012. (ECF No. 21.) Thereafter, discovery commenced, plaintiff moved for class certification, (ECF No. 29), and defendants moved for summary judgment. (ECF No. 30.) On November 1, 2013, the magistrate judge issued findings and recommendations recommending that the motion for class certification be granted and defendants' motion for summary judgment be granted in part and denied in part. (ECF No. 40.) Specifically, the magistrate judge recommended that the motion be granted as to plaintiff's equal protection and pendent state law claims, denied as to plaintiff's due process claims insofar as defendants relied on *Swarthout v. Cooke*, 562 U.S. 216 (2011) to support the motion, and denied in all other respects without prejudice to renewal after completion of discovery. (ECF No. 40 at 21-22.) The findings and recommendations were adopted in full by this court on March 31, 2014, (ECF No. 44), leaving only plaintiff's due process claims. (ECF No. 62 at 3.)

On April 14, 2014, defendants filed a petition for permission to appeal the order granting class certification. (*See* ECF No. 47.) On June 12, 2014, the United States Court of Appeals for the Ninth Circuit denied the petition. (ECF No. 53.)

On September 26, 2014, defendants filed a motion for judgment on the pleadings. (ECF No. 55.) On December 3, 2014, the magistrate judge issued findings and recommendations recommending that the motion be granted as to four of the six claims remaining in the action and denied as to two claims. (ECF No. 62.) The two surviving claims were characterized as "(1) a Due Process violation predicated upon the denial of a fair and unbiased parole procedure (the 'systemic bias' claim), as principally embodied in the First and Eleventh Claims; and (2) a Due Process violation predicated upon the denial of fair and unbiased parole panels, as principally embodied in the Tenth Claims." (ECF No. 62 at 26.) Five of the claims were "construed not as independent causes of action but as additional factual predicates for the overarching bias claims."

(ECF No. 62 at 26.) On May 15, 2015, this court adopted the findings and recommendations and set a status conference for August 13, 2015. (ECF No. 68.)

Thereafter, on July 17, 2015, the parties filed a joint status report informing the court of substantial progress in settlement negotiations. (ECF No. 73.) The court directed the parties to file a further status report on their settlement efforts by August 11, 2015. (ECF No. 76.) The parties filed a joint statement on August 11, 2015, indicating that settlement negotiations had been productive and they anticipated filing final settlement documents with the court by September 10, 2015. (ECF No. 77.) The court continued the status conference, (ECF No. 78), and on September 10, 2015, the parties filed a joint motion for preliminary approval of their settlement agreement. (ECF No. 79.)

On October 1, 2015, the court held a telephonic status conference on the motion for preliminary approval. (ECF No. 82.) Following the status conference, the court granted the motion, directed the parties to file a final version of the proposed settlement agreement removing paragraph 15 and incorporating deadlines for posting notice in prison housing units, postmarking comments to the court, filing final briefing, and setting a date for the final fairness hearing. (ECF No. 84.)

The court received numerous comments from prison inmates. (ECF Nos. 91-114, 116-132, 134-153, 155-157, 160.) On December 18, 2015, the court held a final fairness hearing. (ECF No. 161.) During the hearing, the court discussed with the parties issues raised in the objections, including (1) whether risk assessment interviews can be recorded; (2) whether the risk assessment tools have been validated or found reliable or proper for use in predicting potential recidivism among life inmates; and (3) whether there is a procedure for objecting to factual errors and/or conclusions in risk assessments. (ECF No. 163.) The court directed the parties to file further briefing concerning the validity of the risk assessment tools at issue. *Id.* at 8-9. The parties filed a joint brief and exhibits on January 8, 2016, (ECF Nos. 165, 166), which the court has now considered.

II. THE KEY TERMS OF THE SETTLEMENT AGREEMENT

Under the settlement agreement, defendants have agreed to the following changes in evaluating class members' eligibility for parole:

1. The Board agreed to, and did, submit a Budget Change Proposal to obtain additional funding in order to administer Comprehensive Risk Assessments (CRAs) every three years. (ECF No. 83 at 3.) The Board obtained the additional funding, and will now begin preparing new CRAs every three years for parole hearings scheduled on or after June 1, 2016, where the existing CRA is more than three years old. (*Id.*) Similarly, a new CRA will be prepared for hearings "advanced as a result of a petition to advance or the Board's administrative review process under California Penal Code § 3041.5(b)(4) or (d)(1)" where the existing CRA is more than three years old. These changes will be reflected in revised regulations. (*Id.*) Class counsel will be given multiple opportunities to comment to the Board and the Office of Administrative Law (OAL) on the proposed regulations. (*Id.* at 4.) As a result of these changes, the Board will no longer conduct Subsequent Risk Assessments. (*Id.*)

2. The agreement provides for class counsel to present an expert to the Board if, before December 31, 2016, the Board proposes any changes in how or whether the CRA will be administered, including any changes in the three risk assessment tools called into question by this action: the HCR-20 Version 3, PCL-R, and Static 99-R. The same expert presentation opportunity arises if the Board proposes using a risk-assessment tool other than the foregoing three tools. (*Id.*) The expert, who "must have experience with use of risk assessments in a correctional setting", will be allowed to speak and answer questions for up to two hours. (*Id.*)

3. The agreement provides for two presentations by the Board's Chief Psychologist to the Board's commissioners in open session, one regarding recidivism rates for long-term offenders and one regarding use of the Static 99-R, "a risk assessment tool used to predict an offender's risk of sexual recidivism." (*Id.* at 4.) The information presented to the Board will be put in text documents "and made available to class members through class counsel, on the Board's website . . . and . . .emailed to all attorneys on file with the Board who are currently representing life prisoners." (*Id.* at 4-5.) In addition, when the Static 99-R is used for a

risk assessment, the CRA "will inform the reader that the Static 99-R score alone generally does not assess dynamic characteristics that may mitigate or elevate a prisoner's risk." (*Id.* at 5.) Going forward, "CRAs will clarify that the Overall Risk Rating is relative to other life prisoners" and inform the report reader that "generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences." (*Id.*)

4. The Board will develop a formal process for inmates or their attorneys "to lodge timely written objections asserting factual errors in a CRA (to be defined in the regulations) before their parole consideration hearing occurs." (*Id.*) The Board will provide a written response to timely objections. (*Id.*) These changes will be incorporated in proposed regulations to be submitted to the OAL by July 1, 2016. (*Id.*) Class counsel will be given multiple opportunities to comment to the Board and the OAL on the proposed regulations. (*Id.*)

5. All defendants will be dismissed except defendant Shaffer, the Executive Officer of the Board. (*Id.*) The court will retain jurisdiction over this action until January 1, 2017. (*Id.*) Plaintiffs may seek an extension of the court's supervision based on evidence of material non-compliance with the agreement. (*Id.*)

III. THE SETTLEMENT AND FAIRNESS

A. Legal Framework

When parties settle a class action, a court cannot simply accept the parties' resolution; rather it must also satisfy itself the proposed settlement is "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). After the initial certification and notice to the class, a court conducts a fairness hearing before finally approving any proposed settlement. *Narouz v. Charter Commc'ns, Inc.*, 591 F.3d 1261, 1267 (9th Cir.2010); Fed. R. Civ. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."). A court must balance a number of factors in determining whether a proposed settlement is in fact fair, adequate and reasonable:

> [(1)] the strength of the plaintiffs' case; [(2)] the risk, expense, complexity, and likely duration of further litigation; [(3)] the risk of maintaining class action status throughout the trial; [(4)] the amount

> offered in settlement; [(5)] the extent of discovery completed and the stage of the proceedings; [(6)] the experience and views of counsel; [(7)] the presence of a governmental participant; and [(8)] the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026; *Adoma v. Univ. of Phx.*, 913 F.Supp.2d 964, 974–75 (E.D.Cal.2012). The list is not exhaustive, and the factors may be applied differently in different circumstances. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir.1982).

The court must consider the settlement as a whole, rather than its component parts, in evaluating fairness; the settlement "must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026. Ultimately, the court must reach "a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

B. The Strength of Plaintiff's Case

When assessing the strength of plaintiff's case, the court does not reach "any ultimate conclusions regarding the contested issues of fact and law that underlie the merits of [the] litigation." *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 720 F.Supp. 1379, 1388 (D.Ariz.1989). The court cannot reach such a conclusion because evidence has not been fully presented and the "settlements were induced in large part by the very uncertainty as to what the outcome would be, had litigation continued." *Id*. Instead, the court is to "evaluate objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach these agreements." *Id*.

A central issue in this action is the reliability of the three risk assessment tools referred to in the settlement agreement when used to evaluate the suitability of life inmates for parole. The parties disagree about the reliability of the instruments for use with California's life inmate population. (ECF No. 165 at 2-5.) The parties agree, however, that despite "extensive discovery" no evidence was presented "to support the claim that the Board intentionally chose flawed risk instruments." (ECF No. 158 at 11.)

The court agrees that evidence of such intent would be required for named plaintiff to prevail on his remaining claims. In light of the uncertainties of litigating this case in the face of this apparent evidentiary void, an immediate benefit to the purported class members is in their interest. *See Officers for Justice*, 688 F.2d at 625 (noting that "voluntary conciliation and settlement are the preferred means of dispute resolution").

This factor favors approving the settlement.

C. The Risk, Expense, Complexity and Likely Duration of Further Litigation

"Approval of settlement is 'preferable to lengthy and expensive litigation with uncertain results.'" *Morales v. Stevco, Inc.*, No. 09–00704, 2011 WL 5511767, at *10 (E.D.Cal. Nov. 10, 2011) (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc. (DIRECTV)*, 221 F.R.D. 523, 529 (C.D.Cal.2004)). The Ninth Circuit has explained "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992)).

Here, the parties agree there are significant risks associated with continued litigation of the claims in this case. The parties' dispute over the reliability of use of the risk assessment tools combined with the apparent dearth of evidence that defendants intentionally chose flawed risk instruments presents obstacles for plaintiff in pursuing these claims further. In response to the court's directive at the fairness hearing, the parties have provided an extended list, accompanied by evidence, of "studies and literature validating the risk assessment tools," which defendants aver "support use of the risk assessment tools on California life inmates." ECF No. 165 at 2-5 and evidence cited therein. This highlights the nature of the dispute, which is not resolved by the court in approving this settlement agreement. The difficulties plaintiff faces in turn would result in expenditure of more time and resources, for all parties. Given the high costs associated with litigating the claims at issue, and the potential lengthy duration of litigation, the court finds this factor too weighs in favor of approval.

These factors weigh in favor of approving the settlement.

D. The Settlement Agreement

As discussed above, the settlement negotiated by the parties provides for new risk assessments for class members every three years, and defendants have agreed to develop a process by which inmates can submit formal written objections to factual findings in the risk assessments. These changes will be formalized in new regulations and class counsel will have opportunities to comment on the proposed regulations before they are adopted. The agreement also provides for two presentations to the Board, one on recidivism rates of long-term offenders, and one on use of one of the risk assessment tools at issue. In addition, the agreement provides that class counsel will be given an opportunity to present expert testimony to the Board if by the end of calendar year 2016 the Board proposes any changes in administration of the risk assessments, including the tools used. Finally, the agreement provides for this court's continuing supervision until January 1, 2017, or longer if it is demonstrated that material compliance with the agreement has not been achieved.

Although the settlement does not require use of different risk assessment tools for use with California's life inmate population, it does incorporate several mechanisms that address concerns of possible bias in the risk assessment process and parole decisions based on such risk assessments. The parties have jointly moved the court to approve the settlement agreement, which was reached after "extensive arms-length negotiation." ECF No. 158 at 11. The nature of the settlement agreement weighs in favor of approval.

E. The Extent of Discovery and the Stage of the Proceedings

This action has been pending for almost four years. The class was certified in March 2014, (ECF No. 44), and the parties have engaged in "extensive discovery", ECF No. 158 at 9. In addition, the claims have been narrowed through resolution of a motion for summary judgment and a motion for judgment on the pleadings. (ECF Nos. 44, 68.) The court is satisfied that the proceedings in this matter have provided the parties with sufficient information to enable them to reach a meaningful settlement agreement.

F. The Experience and Views of Counsel

Class counsel is the founder and managing attorney of a non-profit organization that "provides advocacy and representation on behalf of individual prisoners and parolees, educates the public about the rights of life-term prisoners and parolees, and provides legal trainings to attorneys and law students across the state." (ECF No. 86-1 ¶¶ 1-2.) He has "litigated hundreds of prisoner and parolee cases over the last 15 years," including *In re Rutherford*, No. SC13599A (Superior Court for Marin County), a class action lawsuit that preceded this one and whose class had interests "closely aligned" with the present class. (*Id*. ¶ 2; ECF No. 40 at 19.) Defendants are represented by two attorneys with the California Office of the Attorney General, one of whom is a supervising deputy attorney general. The court has already found that counsel for both sides are "experienced and knowledgeable." (ECF No. 84 at 2.) Counsel agree that the settlement is fair and "benefits class members while eliminating the risk of trial for both sides." ECF No. 158 at 11. Accordingly, given the experience of counsel and their views, this factor favors approving the settlement. *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 447 (E.D.Cal.2013).

G. The Presence of a Governmental Participant

Here, defendants are state officials sued in their official capacities. (ECF No. 18 at 3-4.) There is no separate governmental participant involved in the issues presented by this litigation. *Cf. Hanlon*, *supra* (class action litigation against Chrysler Corporation seeking replacement of defective latches on minivans and damages paralleled National Highway Traffic Safety Administration investigation resulting in a voluntary resolution under which Chrysler agreed to, *inter alia*, replace the latches.) This factor is neutral.

H. The Reaction of the Class Members to the Proposed Settlement

As noted above, the court received numerous comments from prison inmates. (ECF Nos. 91-114, 116-132, 134-153, 155-157, 160.)[1] The number of objections and the content

[1] On February 8, 2016, inmate Avon Davies filed a document styled "Ex Parte Request for Subclass Certification, for Permission to Reply to Amended Stipulated Settlements 'Proposed Findings,' and for issuance of Findings and Orders related to these matters." The court construes this document as a request for leave to file late objections to the proposed settlement and, so

of those objections raised concerns about the settlement that were discussed with the parties at the final fairness hearing. One of those objections, the validity of the risk assessment tools, was the subject of further briefing required by the court. The court is satisfied that the objections have been addressed by counsel and do not outweigh the other factors favoring approval of the settlement agreement.

IV. FINAL APPROVAL OF THE CLASS SETTLEMENT IS APPROPRIATE

In conclusion, after considering the parties' submissions and oral argument at the final fairness hearing, and after considering the relevant factors, the court finds final approval of the class settlement to be appropriate. The court is mindful that "voluntary conciliation and settlement are the preferred means of dispute resolution" and that "[t]his is especially true in complex class action litigation. . . ." *Officers for Justice*, 688 F.2d at 625. The court concludes that the parties have reached a fair and adequate settlement and have satisfactorily addressed the questions raised by class members' objections.

Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to file the comments received from inmate Avon Davies nunc pro tunc to February 8, 2016; and

2. The joint motion of the parties for final approval of the settlement agreement (ECF No. 158) is GRANTED.

DATED: May 26, 2016.

UNITED STATES DISTRICT JUDGE

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construed, the request will be granted. The Clerk of the Court will be directed to file inmate Davies' comments nunc pro tunc to February 8, 2016.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SAM JOHNSON, Plaintiff, **v.** **JENNIFER SHAFFER, et al.,** Defendants.	2:12-cv-01059-KJM **AMENDED STIPULATED SETTLEMENT** Courtroom: 3 Judge: The Hon. Kimberly Mueller Action Filed: April 20, 2012

The parties enter into this Settlement to address Plaintiffs' claims regarding the Board of Parole Hearings' (Board) forensic assessment protocols and to settle this case.

The Plaintiffs are prisoner Sam Johnson and a certified class consisting of California state prisoners who are serving life sentences and are eligible for parole consideration after having served their minimum terms. The Defendants include the Executive Officer of the Board, Chief Psychologist of the Board, a Board Psychologist, the Secretary of the California Department of Corrections and Rehabilitation, and California Governor Edmund G. Brown Jr., who are sued in their official capacities as state officials.

The action was originally filed on April 20, 2012. After the original Complaint was dismissed, an Amended Complaint was filed on November 15, 2012. The Court certified the case as a class action on March 31, 2014, and has granted partial summary judgment in favor of Defendants – as to claims four, five, nine and twelve in the First Amended Complaint. All other claims in the Amended Complaint remain. There have been two discovery periods, the first closing before the class was certified. Discovery was reopened, beginning with the exchange of initial disclosures in August 2014. The parties then conducted additional discovery, which included depositions of Board officials, and Board psychologists involved in the forensic assessment protocols and parole process, and disclosure of training materials, reports and other documents.

The parties have conducted extensive negotiations over several months to resolve Plaintiffs' demands concerning Board protocols used in comprehensive risk assessments prepared in anticipation of parole consideration hearings. Those negotiations have been undertaken at arms' length and in good faith between Plaintiffs' counsel, Defendants' counsel and Defendant Jennifer Shaffer, Executive Officer of the Board. As a result of settlement negotiations the Board commenced reforming the forensic assessment protocols. The parties have reached agreement on changes to Defendants' forensic assessment protocols to settle Plaintiffs' claims for declaratory and injunctive relief. The parties freely, voluntarily, and knowingly, with the advice of counsel, enter into this Settlement for that purpose.

All parties and their counsel recognize that, in the absence of an approved settlement, they face lengthy and substantial litigation, including trial and potential appellate proceedings, all of which will consume time and resources and present the parties with ongoing litigation risks and

uncertainties. The parties wish to avoid these risks, uncertainties, and consumption of time and resources through the terms and conditions of this Settlement.

ACCORDINGLY, without any admission or concession by Defendants of any past or present and ongoing violations of a federal right, all claims in the First Amended Complaint shall be finally and fully compromised, settled, and released, subject to the terms and conditions of this Settlement, which the parties enter into freely, voluntarily, knowingly, and with the advice of counsel.

A. JURISDICTION AND VENUE

The Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in the Eastern District of California.

B. CLASS CERTIFICATION

On March 31, 2014, the Court certified a class consisting of California state prisoners who are serving life sentences and are eligible for parole consideration after having served their minimum terms.

C. TERMS AND CONDITIONS

1. Consistent with the terms negotiated with Plaintiffs, the Board of Parole Hearings submitted a Budget Change Proposal for additional funding to administer Comprehensive Risk Assessments (CRAs) every three years. The budget change was approved. As such, the Board will begin preparing new CRAs every three years for hearings scheduled to occur on or after June 1, 2016, if the CRA is older than three years. For hearings advanced as a result of a petition to advance or the Board's administrative review process under Penal Code section 3041.5 (b)(4) or (d)(1), a new CRA will be conducted if the prisoner's most recent CRA is more than three years old at the time of the advanced hearing; if the most recent CRA is less than three years old at the time of the advanced hearing, a new CRA will not be completed. The Board will revise its regulations to reflect this process.

2. Before the regulatory change in Paragraph 1 is submitted to the Office of Administrative Law (OAL), the Board will provide class counsel with a draft of the proposed

regulation. Class counsel shall have thirty days to review the draft and provide written comments and suggestions to the Board. The Board will provide a written response to class counsel's written comments within thirty days. When the proposed regulation is presented to the Board's commissioners for review and a vote, class counsel may submit additional comments and suggestions through the Board's public comment process. Once the regulation is submitted to the OAL, class counsel may again submit additional comments and suggestions through the OAL public comment process.

3. In accordance with Paragraph 1, the Board will no longer conduct Subsequent Risk Assessments.

4. If, before December 31, 2016, the Board proposes any changes in how or whether the CRA, including the HCR-20 Version 3, PCL-R, or Static 99-R will be administered, or proposes using a risk-assessment tool other than the HCR-20 Version 3, PCL-R, and Static 99-R, class counsel may present an expert to discuss the proposed changes to the Board's commissioners in open session. The expert will be allowed to speak and answer questions for up to two hours. The expert must have experience with the use of risk assessments in a correctional setting.

5. The Board's Chief Psychologist will again provide a presentation to the Board's commissioners in open session regarding the recidivism rates for long-term offenders. The information presented to the commissioners will be provided in a text document and made available to class members through class counsel, on the Board's web site (www.cdcr.ca.gov/BOPH), and will be emailed to all attorneys on file with the Board who are currently representing life prisoners.

6. The Board's Chief Psychologist will again provide a presentation to the Board's commissioners in open session regarding when and how the Board uses the Static 99-R, a risk-assessment tool used to predict an offender's risk of sexual recidivism. This presentation will include a discussion of how the Static 99-R accounts for an offender's age and other factors that can change over time. The information presented to the commissioners will be provided in a text document and made available to class members through class counsel, on the Board's web site

(www.cdcr.ca.gov/BOPH), and will be emailed to all attorneys on file with the Board who are currently representing life prisoners.

7. The Board will formalize a process for prisoners or their counsel to lodge timely written objections asserting factual errors in a CRA (to be defined in the regulations) before their parole consideration hearing occurs. If the Board receives a timely written objection in advance of a parole hearing, the Board will provide a written response within a reasonable period of time. The Board will submit draft regulations to reflect this process to the OAL by July 1, 2016.

8. Before the regulatory change in Paragraph 7 is submitted to the OAL, the Board will provide class counsel with a draft of the proposed regulation. Class counsel shall have thirty days to review the draft and provide written comments and suggestions to the Board. The Board will provide a written response to class counsel's written comments within thirty days. Class counsel will have additional opportunities to provide comments during the Board's and OAL's regular public comment periods.

9. When the Static 99-R is used, the CRA will inform the reader that the Static 99-R score alone generally does not assess dynamic characteristics that may mitigate or elevate a prisoner's risk.

10. All future CRAs will clarify that the Overall Risk Rating is relative to other life prisoners.

11. CRAs will inform the reader of the report that, generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences.

12. Plaintiffs will promptly dismiss all Defendants from this action except Defendant Jennifer Shaffer, the Board's Executive Officer.

D. TERMINATION OF CASE

13. The Court will retain jurisdiction over this case until January 1, 2017.

14. If within 30 days after January 1, 2017, Plaintiffs believe that Defendants have not submitted regulations to the OAL, completed the agreed upon presentations to the Board, and provided language to Board psychologists with instructions to include it in CRAs, Plaintiffs may

seek an extension of the Court's jurisdiction over this matter for a period not to exceed 12 months. To receive an extension of the Court's jurisdiction, Plaintiffs must demonstrate by a preponderance of the evidence that Defendants have not materially complied with the terms of this agreement. Defendants shall have an opportunity to respond to Plaintiffs' request and present their own evidence. If Plaintiffs do not seek an extension of the Court's jurisdiction within the period noted above, or the Court denies Plaintiffs' request for an extension, this agreement and the Court's jurisdiction shall automatically terminate, and the claims in this case shall be dismissed with prejudice.

15. It is the intention of the parties in signing this Settlement that upon completion of its terms it shall be effective as a full and final release from all claims asserted in the First Amended Complaint.

E. JOINT MOTION AND STAY OF PROCEEDINGS

The parties will jointly request that the Court preliminarily approve this Settlement, require that notice of the proposed settlement be sent to the class, and schedule a fairness hearing. The parties will also file a proposed order granting preliminary approval of this Settlement. With this Motion the Parties will also jointly request that the Court stay all other proceedings in this case pending resolution of the fairness hearing. Following the close of the objection period, the Parties will jointly request that the Court enter a final order containing all of the elements included in a proposed order, approving this Settlement, retaining jurisdiction to enforce it, and continuing the stay of the case pending the completion of this Settlement's terms.

F. ATTORNEYS' FEES

Defendants agree to pay Plaintiffs' counsel attorney's fees for work reasonably performed on this case until preliminary approval of this Settlement at the hourly rate set forth under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d). Plaintiffs shall have sixty days from the entry of a preliminary order approving this Settlement to file their motion for attorneys' fees for work reasonably performed before preliminary approval of this settlement. Defendants will not oppose a motion for reasonable attorney's fees and costs that does not exceed $120,000.

The notice to the class members shall explain that Plaintiffs will file a motion for attorneys' fees following entry of a preliminary order approving this Settlement.

G. CONSTRUCTION OF SETTLEMENT

This Settlement reflects the entire agreement of the parties and supersedes any prior written or oral agreements between them. No extrinsic evidence whatsoever may be introduced in any judicial proceeding to provide the meaning or construction of this Settlement. Any modification to the terms of this Settlement must be in writing and signed by a Board representative and attorneys for Plaintiffs and Defendants to be effective or enforceable.

This Settlement shall be governed and construed according to California law. The parties waive any common-law or statutory rule of construction that ambiguity should be construed against the drafter of this Settlement, and agree that the language in all parts of this Settlement shall in all cases be construed as a whole, according to its fair meaning.

This Settlement shall be valid and binding on, and faithfully kept, observed, performed, and be enforceable by and against the parties, their successors and assigns.

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The obligations governed by this Settlement are severable. If for any reason a part of this Settlement is determined to be invalid or unenforceable, such a determination shall not affect the remainder.

The waiver by one party of any provision or breach of this Settlement shall not be deemed a waiver of any other provision or breach of this Settlement.

IT IS SO STIPULATED.

Dated: October 2, 2015

Jennifer Shaffer, Chief Executive Officer
Board of Parole Hearings

Dated: October 2, 2015

Jessica N. Blonien
Supervising Deputy Attorney General
Attorneys for Defendants Shaffer, Cate, Brown, Kusaj, Hayward, Powers, and Fulbright
Kamala D. Harris
Attorney General of California

Dated: October 2, 2015

Keith Wattley
UnCommon Law
Attorneys for Plaintiff Sam Johnson and the Plaintiff Class

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Attachment B

Filed 1/14/16 Sherman-Bey v. Shaffer CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DARREN EUGENE SHERMAN-BEY, Plaintiff and Appellant, v. JENNIFER SHAFFER, as Executive Officer, etc., Defendant and Appellant.	C077499 (Super. Ct. No. 34201180000970CUWMGDS)

This case is about the validity of a regulation governing the use of psychological risk assessments in determining parole eligibility for life inmates, California Code of Regulations, title 15, section 2240 (section 2240).

But, this case turns in large part on an appellant's duty to include essential portions of the record on appeal needed to analyze the issues raised and the burden to persuade us that the trial court's ruling was wrong. Specifically, both appellants rely heavily on the rulemaking record for the regulation, as did the trial court, but contrary to the California Rules of Court, neither party has had transmitted to this court the entire

administrative record that was reviewed by the trial court in making its ruling here. It is their burden to do so. (Cal. Rules of Court, rules 8.120(a)(2), 8.123(b).) Without the administrative record, we cannot fully assess the validity of many of both appellants' major contentions. Thus, both parties have forfeited any contentions that require us to examine the administrative record.[1]

Regarding the claims that do not require us to examine the administrative record, we reject both parties' appellate arguments because they do not have a basis in either the law or facts.

We therefore affirm the judgment of the trial court, which granted in part Sherman-Bey's petition for writ of mandate challenging section 2240 because that section failed to comply with the Administrative Procedure Act's clarity standard.

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[1] The mistake Sherman-Bey repeatedly made is in failing to designate an administrative record to be transmitted to this court. (Cal. Rues of Court, rule 8.120(a)(2).) Instead, he designated, among other things in the clerk's transcript, "Notice of Lodging of Record and accompanying attachments filed on January 21, 2014." This two-page item in the clerk's transcript is indeed included in the record on appeal. When the administrative record containing the rulemaking record was (properly) not included in the clerk's transcript on appeal because it was never designated, Sherman-Bey filed a notice on incomplete clerk's transcript. In response, the trial court clerk declared that the document Sherman-Bey requested be lodged was indeed lodged (i.e., "Notice of Lodging of Record and accompanying attachments filed on January 21, 2014"). However, there were no accompanying attachments ever filed in the trial court, so the trial court could not include those documents.

Perhaps to remedy this problem, Sherman-Bey has included two portions of the administrative record as attachments to his reply brief, and we granted him permission to file those two attachments. To the extent the attachments have some bearing on our discussion of the contentions on appeal, we will address them in footnotes in this opinion.

We still note, however, the fundamental problem is that we do not have the entire administrative record the court reviewed in making its ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Life inmate Sherman-Bey filed a petition for writ of mandate in the trial court challenging section 2240, which provides as follows: Before a life inmate's initial parole consideration hearing, and every five years thereafter, a comprehensive risk assessment will be performed by a Board of Parole Hearings psychologist. (§ 2240, subds. (a), (b).) That comprehensive risk assessment "will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. *Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.*" (§ 2240, subd. (b), italics added.)

Section 2240 was adopted by the California Board of Parole Hearings in 2011 in response to a 2010 determination by the California Office of Administrative Law that the process by which the Board of Parole Hearings conducted psychological evaluations was an underground regulation.[2] That underground regulation had been in place since January 2009 and included a forensic assessment division to oversee preparing psychological evaluations for parole suitability hearings. Those psychological evaluations included use of several enumerated risk assessment tools to assess the inmate's potential for future violence.

Sherman-Bey's challenge to section 2240 in the trial court was based on contentions that he again raises here, namely, that the Board of Parole Hearings failed to substantially comply with the requirements of the Administrative Procedure Act because the board did not adequately respond to public comments, the board misrepresented facts,

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[2] Any regulation not properly adopted under the California Administrative Procedure Act (Gov. Code, § 11340 et seq.) is considered an underground regulation. (*Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429.)

and the board improperly mandated the use of specific risk assessment tools. Sherman-Bey also argued, as he does here, that section 2240 conflicts with other laws and that psychological evaluations completed by the board from the time the underground regulation was in effect are invalid and should be removed from inmates' files.

Sherman-Bey's challenge to section 2240 in the trial court was also based on his contention that the Board of Parole Hearings failed to substantially comply with the Administrative Procedure Act's clarity standard. With regard to this contention, the trial court ruled "the regulation substantially fails to comply with the [Administrative Procedure Act's] clarity standard, both because the regulation uses terms that do not have meanings generally familiar to those directly affected by the regulation, and because the language of the regulation conflicts with the agency's description of the effect of the regulation." "This language lacks clarity because the terms 'actuarially derived and structured professional judgment' are not 'easily understood' by or 'generally familiar' to life inmates, who are directly affected by the regulation." "In addition, the regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. By using the word 'may,' the regulation suggests Board psychologists have discretion to decide not only whether to incorporate 'actuarially derived and structured professional judgment approaches' in evaluating an inmate's potential for future violence, but what, if any, 'approaches' to use." "In contrast, the Board's description of the regulation in the Statement of Reasons refers to a 'battery' of risk assessment tools 'selected' by the Board, and the Statement of Reasons assumes the risk assessment tools will be 'administered' to inmates to determine their risk of future violence. [Citations.] As a result, the regulation is unclear with respect to the responsibilities of the Board psychologists who will implement it."

As to the remedy, the trial court granted in part Sherman-Bey's petition for writ of mandate, "allow[ing] Respondent Board eight months to correct the identified deficiencies in [section 2240] by adopting a new or amended regulation, in compliance

with the requirements of the [Administrative Procedure Act]." "If the regulation is not amended or replaced within eight months after entry of judgment, the portion of the regulation providing that 'Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence,' which is severable, shall be invalidated as of that date, and the Board shall be permanently enjoined from enforcing that provision after that date." The trial court entered judgment on September 9, 2014.

In this court now, the board challenges the trial court's partial grant of Sherman-Bey's petition for writ of mandate.

DISCUSSION

I

The Board Has Failed To Carry Its Burden As Appellant Both To Persuade This Court That The Trial Court Erred In Finding Section 2240 Lacked Clarity And To Provide Us An Adequate Record On Review

The board contends the trial court erred in finding that section 2240 did not comply with the Administrative Procedure Act's clarity requirement because in its view (a) the term " 'actuarially derived and structured professional judgment' " approaches is clear; and (b) the term does not conflict with the board's description of the effect of the regulation.

As we explain, as to (a), the board's one-line argument that the term " 'actuarially derived and structured professional judgment' " approaches is clear ignores statutory language and fails to carry its burden as appellant to persuade us that the trial court erred in finding the term unclear. As to (b), the board has failed to provide us an adequate record to review its contention.

A

The Board Has Not Carried Its Burden As Appellant To Persuade Us That The Trial Court Erred In Finding Unclear The Term " 'Actuarially Derived And Structured Professional Judgment' " Approaches

The Administrative Procedure Act (Gov. Code, § 11340 et seq.) requires that agencies draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . . ." (Gov. Code, § 11346.2, subd. (a)(1).) A regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code, § 11349, subd. (c).) "A regulation shall be presumed not to comply with the 'clarity' standard if," among other things, "the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute." (Cal. Code Regs., tit. 1, § 16, subd. (a)(3).) Persons who are presumed to be "directly affected" by a regulation are those who are legally required to comply with or enforce the regulation or who receive a benefit or suffer a detriment from the regulation that is not common to the public in general. (Cal. Code Regs., tit. 1, § 16, subd. (b).) Here, as the trial court correctly found, "the persons 'directly affected' by the regulation are the Board [of Parole Hearings] psychologists who prepare the parole suitability risk assessments, and the life inmates who are subject to them."

With these definitional principles in mind, we turn to the board's first contention. As to that contention, the entirety of its argument is as follows: "The regulatory language at issue, however, provides notice to those affected by it that Board psychologists will use their professional judgment in conducting Comprehensive Risk Assessments. It, therefore, does not lack clarity." The language to which the board is referring is as follows: "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for

future violence." (§ 2240, subd. (b).) In the trial court's view, "[t]his language lacks clarity because the terms 'actuarially derived and structured professional judgment' are not 'easily understood' by or 'generally familiar' to life inmates, who are directly affected by the regulation."

The problem with the board's contention is that it has not carried its burden as the appellant to persuade us that the trial court erred in holding that this language lacks clarity. As this court has stated, "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. (See *People v. $ 497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152-153.)" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) The board's one-line argument as to why the regulatory language is clear falls short of carrying its burden to affirmatively demonstrate error. Specifically, the board's argument equates "actuarially derived and structured professional judgment" approaches to a psychologist's "professional judgment." The problem with this argument is that it reads out of section 2240 the words "actuarially derived" and "structured . . . approaches," the very words that the trial court found were not easily understood by or generally familiar to life inmates.

The board does not point us to a definition of "actuarially derived" or "structured . . . approaches" and does not explain what they mean. If the drafters of section 2240 had meant simply that the Board of Parole Hearings psychologists may use their professional judgment to evaluate an inmate's potential for future violence, there was no need to use the words "actuarially derived" and "structured . . . approaches" to modify the type of judgment the psychologist may use. "It is a settled principle of statutory construction that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.' " (*In re C.H.* (2011) 53 Cal.4th 94, 103.) The board's argument ignores this settled principle, indeed ignoring the very words the trial court found lacking in clarity. Thus, the board's

argument has failed to persuade us that the trial court erred in finding that the language in section 2240, subdivision (b) that "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence" lacks clarity.

B

The Board Has Not Carried Its Burden To Provide Us With An Adequate Record To Assess Its Claim That The Court Erred In Finding That The Term "Actuarially Derived And Structured Professional Judgment Approaches" Conflicts With The Board Of Parole Hearings' Description Of The Effect Of The Regulation

"A regulation shall be presumed not to comply with the 'clarity' standard if," among other things, "the language of the regulation conflicts with the agency's description of the effect of the regulation." (Cal. Code Regs., tit. 1, § 16, subd. (a) (2).)

The trial court ruled that in addition to section 2240 lacking clarity because the terms "actuarially derived and structured professional judgment" are not easily understood by or generally familiar to life inmates, "the regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. By using the word 'may,' the regulation suggests Board psychologists have discretion to decide not only whether to incorporate 'actuarially derived and structured professional judgment approaches' in evaluating an inmate's potential for future violence, but what, if any, 'approaches' to use." "In contrast, the Board's description of the regulation in the Statement of Reasons refers to a 'battery' of risk assessment tools 'selected' by the Board, and the Statement of Reasons assumes the risk assessment tools will be 'administered' to inmates to determine their risk of future violence. [Citations.] As a result, the regulation is unclear with respect to the responsibilities of the Board psychologists who will implement it."

The board contends the trial court erred in this finding because section 2240 does not conflict with its description of the effect of the regulation. As we explain, the board

again fails to carry its burden as the appellant to demonstrate error, but this time because it has failed to have the administrative record transmitted to our court, which is necessary for us to resolve its contention.

The board's contention of no conflict is based on its view that "the regulation does not state that Board psychologists have discretion to choose what risk assessment instruments to use" and "although the explanation of the regulation refers to a 'battery of risk assessments adopted by the Board, nowhere does it state that the adopted risk assessments will be used during each and every comprehensive risk assessment. In fact, the evidence demonstrates that there are instances where none of these risk assessment tools are used."

The board's contention turns on "the evidence," namely, the rulemaking record. Indeed, the trial court cited nine pages of the rulemaking record in its analysis of why there was no clarity on this point. Included in these nine pages is the statement of reasons that the court relied on in making its determination of no clarity. However, the board fails to provide us with this evidence. Instead, the board cites as "the evidence" "CT . . . 217," which is its brief in the trial court entitled, "Opposition to Opening Brief." If we follow the trail, that portion of its trial court brief contains a citation to a declaration from the Chief Psychologist of the Forensic Assessment Division at the Board of Parole Hearings that is included as an exhibit to its "Opposition to Opening Brief." Doing some more investigation into how this declaration may fit into the evidence, we find that in the board's "SUR-REPLY" brief in the trial court, the board claims that "all the information in [that psychologist's] declaration . . . is also in the rulemaking file."

The board, however, has not incorporated the rulemaking file into the record on appeal. As the appellant challenging the trial court's ruling that section 2240 lacked clarity, it is its burden to include the administrative record if, as it did, it intended to raise any issue that requires its consideration. (Cal. Rules of Court, rules 8.120(a)(2).) Specifically, "[i]f an appellant intends to raise any issue that requires consideration of the

record of an administrative proceeding that was admitted in evidence, refused, or lodged in the superior court, the record on appeal must include that administrative record, transmitted under rule 8.123." (*Ibid*.). Here, the administrative record was lodged in the trial court. The board, either as appellant or respondent here, should have requested transmission to this court of the administrative record that was lodged in the trial court. (Cal. Rules of Court, rule 8.123.) We, as the appellate court, have no responsibility to perfect an inadequate record. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498-499.) "Failure to provide an adequate record concerning an issue challenged on appeal requires that the issue be resolved against the appellants." (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366.)[3]

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[3] Some, but not all, of the rulemaking record that the trial court relied on in making its determination of lack of clarity in our part 1B of the Discussion above is included in exhibit 1 provided by Sherman-Bey attached to his reply brief.

Looking at the pages we do have, the board still has not carried its burden to persuade us the trial court's ruling was wrong. Section 2240, subdivision (b) states, "Board of Parole Hearings psychologists *may* incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence." (Italics added.) Use of the word "may," rather than the directive "shall," connotes that psychologist have discretion to "incorporate actuarially derived and structured professional judgment approaches." (See *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 348 [it is a well established rule of statutory construction that the word "shall" connotes mandatory action and "may" connotes discretionary action].) The board has argued that the term "actuarially derived and structured professional judgment approaches" simply means "professional judgment." So, given that and the meaning of the word "may," it follows that the board's argument is that section 2240, subdivision (b) means that psychologists "may" incorporate their "professional judgment" to evaluate an inmate's potential for future violence.

This conflicts with the board's description of section 2240 in the revised final statement of reasons that we do have. The revised final statement of reasons refers to a "risk assessment battery" that "is necessary to assist [Board of Parole Hearings] psychologists in anchoring their clinical opinions regarding violence risk by insuring overall objectivity and reliability." The revised final statement of reasons also names two specific assessment instruments (the "HCR-20 and LS/CMI") that "would be

II

As To Sherman-Bey's Appellate Contentions Regarding Public Comments And Alleged Misrepresentation Of Facts, He Has Failed To Carry His Burden To Show Error Because He Has Failed To Provide An Adequate Record

Sherman-Bey contends the Board of Parole Hearings failed to substantially comply with the Administrative Procedure Act because: (a) the board did not adequately respond to public comments; and (b) the board misrepresented facts, namely the findings of an expert panel of psychologists concerning various risk assessment instruments that were to be used as part of the psychological risk assessment process.

Regarding the public comments, Sherman-Bey "urge[s] this court to review the record and arguments," which he claims will lead us to the conclusion that the Board of Parole Hearings did not substantially respond to the substance of the public comments. However, as we noted with the board, appellant Sherman-Bey has also failed to provide us with the entire rulemaking record that the trial court reviewed to make its decision. Specifically, the trial court based its ruling on review of the rulemaking record containing, among other things, the public comments and the Board of Parole Hearings' responses, noting the portions of the record it reviewed. It then made a factual finding that the Board of Parole Hearings adequately responded to the public comments. On appeal, we cannot reverse the trial court's factual finding unless the appellant has provided us with a record demonstrating that the finding is not supported by substantial

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administered as part of the risk assessment battery." This requirement in the revised final statement of reasons for a risk assessment battery consisting of two specific instruments to anchor the psychologist's clinical opinion is contrary to the board's argument that there is no conflict between section 2240 and the board's description of the effect of the regulation. The trial court was correct in ruling the regulation was unclear in this regard as well.

evidence. Without providing us with the rulemaking record, we cannot fully assess the evidence. Sherman-Bey has failed to provide us with such a record.[4]

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[4] To the extent some of those comments and responses are contained in exhibit 1 attached to Sherman-Bey's reply brief, we address them here.

Sherman-Bey admits that the "Board did respond in a technical sen[s]e, but in reality the responses were incomplete, incorrect, or inadequate." As the trial court correctly ruled: (1) the board substantially responded to the substance of the public comments; and (2) to the extent Sherman-Bey disagreed with the substance of the board's responses, a disagreement with an agency's response does not constitute a failure to respond. (See *California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 307 [a court may declare a regulation invalid only for lack of "substantial failure" to comply with the Administrative Procedure Act].)

One comment noted that section 2240, subdivision (b) does not specify the risk assessment instruments the psychologist "may" use and noted that the section " 'must explicitly prohibit the use of any risk instruments . . . specifically, the PCL-R, HCR-20, LS/CMI, and, optionally, the Static-99.' " The board did substantially respond to this comment. The board stated, "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.' " And then the board went on to explain that the first three enumerated risk instruments are "among the most studied and commonly used violence risk assessments instruments in the field of forensic psychology." The board then cited to and explained in detail the studies that supported its view. To the extent that Sherman-Bey in his briefs to this court notes that the term "actuarially derived and structured professional approaches" lacks clarity and conflicts with the revised final statement of reasons, we have already addressed this in part I of the Discussion.

Another comment claimed 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." The board did substantially respond to this comment. It stated it "disagrees." The board then explained that the risk assessments were "reasonably necessary to assist the Board in determining whether an inmate . . . poses a current unreasonable risk of danger to society if released on parole," but they were only "one piece of information available to a hearing panel." As to reliability, the board explained that reliability referred to "the ability of a test to provide consistent results" and numerically demonstrated that instruments used by the forensic assessment division had an inter-rated reliability of "above .80," which was considered "excellent."

Regarding the misrepresentation of facts, Sherman-Bey contends the Board of Parole Hearings misrepresented the findings of the expert panel of psychologists, namely, the board falsely claimed that the panel of expert psychologists reached a consensus regarding which risk assessment instruments should be used to assess an inmate's risk, but that no such consensus was actually reached.

The trial court found that the Board of Parole Hearings "did not misrepresent the existence of the minutes of the meeting at which the panel of experts voted on the risk assessment tools." Further, "even if there was a misstatement, it was minor, and it was corrected in the Final Statement of Reasons, where the Board clarified that the risk assessment tools were selected based on a 'ranked vote.' " In making these findings, the trial court cited the rulemaking record that we do not have. Just like with Sherman-Bey's contention regarding the public comments, we cannot reverse the trial court's factual finding unless the appellant has provided us with an adequate record. Because he has not provided us with the entire rulemaking record that was lodged in the trial court, Sherman-Bey has failed to meet his burden in this regard.[5]

Finally, a third set of comments claimed particular risk assessment tools were not valid for life inmates. Again the board did substantially respond to these comments. The board acknowledged that "some researchers have correctly observed that no risk assessment tools have been specifically validated for the life inmate population" but that the tools used by the forensic assessment division "have been developed and/or cross-validated for use with correctional populations and allows reasonably modest inferences to be drawn from comparisons between life inmates and other prisoners."

[5] To the extent we can piece together at least some of the rulemaking record (both in the clerk's transcript and in exhibit 1 of Sherman-Bey's reply brief) that the trial court examined to address this contention, we discuss that record here.

In the revised initial statement of reasons, the board stated there was a "consensus" of an expert panel that "the HCR-20/PCL-R and LS/CMI were the most appropriate risk-assessment tools for the California lifer population, and the panel recommended this battery of tools to the [board]." Sherman-Bey contends as he did in the trial court that this was a misrepresentation because no consensus was actually reached. He notes that in

III

Sherman-Bey's Contention That The Board Of Parole Hearings Improperly Focused On The Use Of Certain Risk Assessment Tools In Implementing Section 2240 Does Not Demonstrate That Section 2240 Was Unnecessary

For a regulation to comply with the Administrative Procedure Act, the regulation must be reasonably necessary to effectuate the purpose of the statute that the regulation implements, interprets, or makes specific. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*, *supra*, 199 Cal.App.4th at p. 316.)

Focusing not on the regulation but on the risk assessment tools (which are not mentioned in section 2240), Sherman-Bey contends, as he did in the trial court, "that the risk assessment tools were not reasonably necessary to effectuate a determination of an inmate[']s suitability for parole." He claims that the Board of Parole Hearings' focus on particular risk assessment tools was "not supported by substantial evidence" and was based "on a misrepresentation," which shows that the board's "determination was arbitrary and capricious and should not be deferred to."

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the final statement of reasons, this notation of "consensus recommendation" was changed to the following: "The panel agreed that a multi-method psychological risk assessment battery would be employed by the State of California for [life inmates]. 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." (Italics added.)

Assuming there is a difference between the term "consensus" and "ranked vote," this does not show a "mischaracterization" on the part of the board or a lack of substantial compliance with the Administrative Procedure Act in a way that compromises any of its reasonable objectives, namely here, meaningful participation by the public who has "timely received all available information that is relevant to the proposed regulations, accurate, and as complete as reasonably possible." (*Sims v. Department of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059, 1073.) The board clarified that it meant ranked vote instead of consensus recommendation and the public was informed of this change in the final statement of reasons.

In responding to this contention, the trial court focused on the necessity of section 2240, noting the reasons the Board of Parole Hearings cited for the regulation, including the following: (1) the Board of Parole Hearings' duty to consider an inmate's past and present mental state when considering the inmate's parole suitability; (2) the requirement in Penal Code section 5068 for preparation of a psychological evaluation before the release of a life inmate; (3) ongoing concerns about mental health staff from the California Department of Corrections and Rehabilitation performing the psychological evaluations of life inmates, as their primary job was providing mental health care to mentally ill inmates, so the evaluations were often not completed in time for the inmates' parole suitability hearing; (4) orders from another trial court in a class action lawsuit that the Board of Parole Hearings develop a " 'streamlined psychological risk assessment' " process to be used for parole suitability hearings and that a minimum number of qualified psychologists be in place to prepare the psychological evaluations; and (5) the Office of Administrative Law's determination that the psychological reporting process of the Board of Parole Hearings was an underground regulation.

The trial court's focus on the necessity *of the regulation* was proper. The reliability of the specific risk assessments used was not an issue properly before the trial court because (even as Sherman-Bey admits) the regulation does not specify the risk assessment instruments that the Board of Parole Hearings' psychologists may use. In reviewing "whether the regulation is 'reasonably necessary' . . . the court will defer to the agency's expertise and will not 'super-impose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.' " (*Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 308.) Here, Sherman-Bey does not challenge the five enumerated reasons the Board of Parole Hearings cited for the necessity of the regulation, so he has not demonstrated that the use of those reasons made the board's determination of necessity arbitrary and capricious.

IV

Sherman-Bey Has Not Carried His Burden To Demonstrate That Section 2240 Conflicts With Other Laws

Regulations must be reviewed for consistency with other laws (along with reviewing for necessity and clarity, among others factors). (Gov. Code, § 11349.1, subd. (a)(4).) Sherman-Bey contends, as he did in the trial court, that section 2240 conflicts with the requirement that the denial of parole suitability be based on evidence of current dangerousness (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191) and with the requirement that prohibits (with some exceptions) conducting biomedical and behavioral research on prisoners (Pen. Code, §§ 3502, 3516).

The trial court concluded that section 2240 does not conflict with *Lawrence* because the psychological evaluations in section 2240 are used to help determine an inmate's current dangerousness, and section 2240 does not contravene the prohibition on inmate research because it does not authorize the Board of Parole Hearings to conduct research on inmates.

The trial court was correct. As to *Lawrence*, section 2240, subdivision (b) requires in the comprehensive risk assessment an analysis of "both static and dynamic factors," which may include, but is not limited to, the inmate's "present mental state." This is consistent with *Lawrence*, which requires an assessment of current dangerousness and not just static factors such as the egregiousness of the commitment offense. (*In re Lawrence, supra*, 44 Cal.4th at p. 1191.) As to inmate research, as Sherman-Bey himself notes, section 2240 "does not on its face authorize research on inmates." But then he cites portions of the rulemaking record that he claims "describes that [the Board of Parole Hearings] will conduct research on inmates." As to this latter claim based on the rulemaking record, we must resolve it against Sherman-Bey because he has failed to provide us with the rulemaking record. (*Hernandez v. California Hospital Medical*

Center (2000) 78 Cal.App.4th 498, 502 ["Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]"].)[6]

V

The Board Of Parole Hearings Was Not Required To Remove Psychological Evaluations Performed Before The Enactment Of Section 2240 From Sherman-Bey's File

Sherman-Bey contends, as he did in the trial court, that all psychological evaluations completed by the Board of Parole Hearings conducted pursuant to the underground regulation are invalid and should be removed from his and other inmates' files.

Sherman-Bey has standing to challenge only his own psychological evaluations. "As a general rule, legal standing to petition for a writ of mandate requires the petitioner

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6 To the extent there is a section entitled "future research," in the revised final statement of reasons contained in exhibit 1 attached to Sherman-Bey's reply brief, that Sherman-Bey contends touches on "inmate research," we address that here.

The section entitled "future research" states "[t]he panel felt that it would be valuable to conduct research to validate the reliability of risk assessment results for a[] [life] inmate population." The section then delineates four "[a]reas of particular need for future research": (1) "[t]rack[ing] the performance of the [level of service/case management inventory] and [historical, clinical, and risk management-20 test] for predicting institutional behavior"; (2) "[c]ompar[ing] the [level of service/case management inventory and historical, clinical, and risk management-20 test] for overlap, reliability, and incremental validity"; (3) "[a]nalyz[ing] the effect of rater reliability on the administration of risk assessment tests and their corresponding results"; and (4) "[d]eploy[ing]" [a corrections assessment intervention system] or [case management inventory] on subsets of inmate population to evaluate the effect of various needs of assessment instruments."

This section does not authorize the board to conduct research on inmates. Rather, this section details part of a process to track the reliability and validity of the battery of tests used to "assess risk of or determine the likelihood of dangerousness or violence" of inmates eligible for parole and to ensure that the risk assessment tools the psychologists employ are also reliable and valid for life inmates.

to have a beneficial interest in the writ's issuance." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 913.) " 'The requirement that a petitioner be "beneficially interested" has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) Here, Sherman-Bey has a beneficial interest in only his own psychological evaluations. Thus, he does not have standing to argue that all the psychological evaluations of other inmates during the relevant time period be declared invalid.

Turning to his own evaluations, Sherman-Bey has still not demonstrated that the Board of Parole Hearings had a duty to remove from his prison central file the psychological evaluations completed pursuant to the underground regulation. The California Supreme Court has addressed what happens when a petitioner challenges an agency's decision made pursuant to a policy determined to be an underground regulation. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576-577.) "[T]he . . . policy may be void, but the underlying . . . orders are *not* void." (*Id*. at p. 577.) If the underlying orders were void, it would undermine the controlling law. (*Ibid*.) Here, since the evaluations themselves are not void, Sherman-Bey has no right to have them removed from his file simply because they were promulgated pursuant to an underground regulation.

We note one final point. The law provides Sherman-Bey with an adequate remedy if he believes there is a basis for questioning a psychological evaluation in his file. "In every case where the hearing panel considers a psychological report, 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." (§ 2240, subd. (d).)

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Mauro, J.

BPH RN 16-01: NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS AND ADDITION OF DOCUMENTS AND INFORMATION TO RULEMAKING FILE

Title 15. CRIME PREVENTION AND CORRECTIONS
Division 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments
(*previously*: Psychological Risk Assessments for Life Inmates)

Modifications to Text of Proposed Regulations

Pursuant to the requirements of Government Code section 11346.8(c), and section 44 of Title 1 of the California Code of Regulations, the Board of Parole Hearings (board) is providing notice of changes made to proposed regulation section 2240, governing Comprehensive Risk Assessments. This section was the subject of a regulatory hearing held on January 18, 2017. These changes are in response to comments received regarding the proposed regulation as well as amendments to the *Johnson v. Shaffer* class action case. (*Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].)

If you have any comments regarding the proposed changes, the board will accept written comments between FRIDAY, DECEMBER 22, 2017, and MONDAY, JANUARY 8, 2018. All written comments must be submitted to the board no later than 5:00 p.m. on **MONDAY, JANUARY 8, 2018**, and must be addressed to:

Heather L. McCray, Assistant Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 16-01**.

All written comments received by **MONDAY, JANUARY 8, 2018**, that pertain to the indicated amendments to the proposed regulations will be reviewed and responded to by the board in the Final Statement of Reasons as part of the compilation of the rulemaking file. **Please limit your comments to the modifications to the text**.

Addition of Documents and Information to Rulemaking File

Pursuant to the requirements of Government Code section 11346.8(d), 11346.9(a)(1), and 11347.1, the board is providing notice that documents and other information that the board has relied on in adopting the proposed regulations have been added to the rulemaking file and are available for public inspection and comment.

The documents and information added to the rulemaking file are as follows:

1. Laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.)
2. Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.)
3. Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)
4. Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf.)
5. Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.
6. Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7. Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.
8. Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9. *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10. December 22, 2017 Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

These documents are available for public inspection at the board's office located at 1515 K Street, 6th Floor, Sacramento, CA from FRIDAY, DECEMBER 22, 2017, through MONDAY, JANUARY 8, 2018, between the hours of 9:00 a.m. and 5:00 p.m. If you have any comments regarding the documents and other information, written comments must be submitted to the board by 5:00 p.m. on **MONDAY, JANUARY 8, 2018** to:

Heather L. McCray, Assistant Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 16-01**.

All written comments received by **MONDAY, JANUARY 8, 2018**, that pertain to the indicated amendments to the proposed regulations will be reviewed and responded to by the board in the Final Statement of Reasons as part of the compilation of the rulemaking file.

DATE OF NOTICE: **DECEMBER 22, 2017**

****END****

PROPOSED REGULATORY TEXT

ORIGINAL Proposed additions are indicated by single underline and deletions are indicated by single ~~strikethrough~~.

NEW Proposed additions are indicated by double underline and deletions are indicated by double ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. ~~Psychological~~ Comprehensive Risk Assessments ~~for Life Inmates~~.

(a) ~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. ~~The p~~Psychologists shall consider ~~the current relevance of any~~ factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate ~~standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence~~ structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.

~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~

~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~When preparing a risk assessment under this section for a youth offender, as defined in Penal Code section 3051, subdivisions (a) and (h), the psychologist shall also take into consideration the

youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c) ~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three-year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case. The 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. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~(1) A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation~~, and reliable and valid principles and methods have been appropriately applied to the facts of the case~~.
(2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d) ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, 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.~~(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) ~~The board may prepare a risk assessment for inmates housed outside of California~~ Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing.

(e) ~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of

the hearing. Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.
(2) For the purposes of this section, "factual error" is ~~defined as an explicit finding about a~~ an untrue circumstance or event ~~for which there is no reliable documentation or which is clearly refuted by other documentation~~. ~~Factual errors do not include~~ A disagreement~~s~~ with clinical observations, opinions, or diagnoses is not a factual error ~~or clarifications regarding statements the risk assessment attributed to the inmate~~.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." ~~Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.~~

(f) ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.~~(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and ~~determine~~ evaluate whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 calendar days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g) ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. Following the review, the Chief Psychologist shall promptly take one of the following actions:
(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, ~~T~~the Chief Psychologist shall direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.

(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 calendar days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall ~~overrule the objection,~~ issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision, the revised risk assessment, and the Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, ~~order a new or revised risk assessment,~~ postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision, the new or revised risk assessment, and Chief Psychologist's addendum to the inmate or attorney of record.
(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, ~~Impacted risk assessments shall be permanently removed~~ from the inmate's central file.

(h) ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist ~~may~~ shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel ~~may~~ shall refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (~~3~~2) or (~~4~~3) of this subdivision.
~~(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.~~

(~~3~~2) If the hearing panel determines the risk assessment may contain a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(~~4~~3) If the hearing panel determines the risk assessment does not contain a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object ~~to or clarify any statements a risk assessment attributed to the inmate,~~ or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 11190, and 11193, Penal Code; ~~In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A~~*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.

BPH RN 16-01: SUPPLEMENT TO INITIAL STATEMENT OF REASONS

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

Amendment of Section 2240
Comprehensive Risk Assessments

INTRODUCTION:

The Board of Parole Hearings (board) is issuing this supplement to the Initial Statement of Reasons (ISOR) for BPH Regulation Number (RN) 16-01 governing Comprehensive Risk Assessments to provide additional information regarding necessity of the proposed regulations and the documents relied on in reaching determinations about possible alternatives to these regulations.

PURPOSE:

As noted in the original Initial Statement of Reasons, the board proposes to amend California Code of Regulations, title 15, section 2240, as follows:

Subdivision (c) is *amended* to remove the requirements for Subsequent Risk Assessments and to instead provide guidelines for when the Chief Psychologist or Senior Psychologist may approve a Comprehensive Risk Assessment. This subdivision also clarifies that a Comprehensive Risk Assessment shall not become final until approved by a supervisor and establishes that the date on which a risk assessment becomes final is the date of supervisorial approval.

NECESSITY:

Requiring supervisorial approval before a Comprehensive Risk Assessment may be finalized is necessary for the board to conduct proper oversight and ensure that clinicians are properly administering these assessments and basing their clinical conclusions on sound psychological reasoning. Additionally, selecting the date of approval as the date on which a risk assessment becomes final is necessary to ensure both that (1) CRAs are not finalized before being reviewed and approved by a supervising clinician and (2) the date of the CRA's validity for the next three years runs from a date on which it was independently deemed satisfactory and approved by the supervising clinician.

DOCUMENTS RELIED UPON:

As noted in the original Initial Statement of Reasons, the board, in proposing amendments to these regulations, relied on the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P)

2016 U.S. Dist.) The order is listed here pursuant to the order of the court. A copy of this order is attached to this initial statement of reasons as ATTACHMENT A. The board also relied on the court's order in *Sherman-Bey* requiring amendment of the language regarding the tools on which psychologists may rely. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) A copy of this opinion is attached to this initial statement of reasons as ATTACHMENT B.

In addition to the documents above, the Board relied on all of the following technical, theoretical, or empirical studies, reports, or documents in considering other alternatives to these regulations:

1. Laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.)
2. Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.)
3. Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)
4. Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf.)
5. Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.
6. Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7. Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.
8. Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10. This Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

The board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included this section.

****END****

BPH RN 16-01: FINAL STATEMENT OF REASONS

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

Amendment of Section 2240
Comprehensive Risk Assessments

UPDATE OF INITIAL STATEMENT OF REASONS:

During the 45-day public comment period regarding the Regulation Number (RN) 16-01, governing Comprehensive Risk Assessments, which ended on December 19, 2016, the Board of Parole Hearings ("board") received comments from 45 members of the public. One member of the public requested a public hearing, which the board held on Wednesday, January 18, 2017. At that hearing, the board received written comments from one member of the public and oral comments from three public speakers.

The board considered each public comment received regarding the Regulation Number (RN) 16-01, governing Comprehensive Risk Assessments. Additionally, the court in *Johnson v. Shaffer* issued a new court order mandating additional requirements for the proposed regulations. (*Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].) Following the comments and court order, the board made substantive amendments to the original proposed regulations. As explained in greater detail below under the section titled "Summary and Explanation of Amendments to Original Proposed Regulation Submitted for Re-notice on December 22, 2017," and the Updated Informative Digest, these amendments are sufficiently related to the subject matter of the originally proposed regulations. The board also declined several suggestions, the board's reasons for which are explained in greater detail below under the section titled "Summary and Response to Comments Received during the Notice Period of November 4, 2016, to December 19, 2016, and the Public Hearing Held on January 18, 2017."

The amended proposed regulations were publically presented at the board's Executive Board Meeting on December 18, 2017. Subsequently, on December 22, 2017, the board re-noticed the amended proposed regulations to all persons who submitted comments during the original public comment period and all persons on the board's registry who requested re-notifications. The re-notice further contained the list of all documents added to the rulemaking file. The comment period for the re-noticed amended regulations and documents added to the rulemaking file ran from December 22, 2017, to January 8, 2018.

The board considered each public comment received during the 15-day re-notice comment period. For reasons explained below in further detail under the section titled "Summary and Response to Comments Received during the Re-Notice Period of December 22, 2017, to January 8, 2018," the board declined to make any further amendments to RN 16-01.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF NOVEMBER 4, 2016, TO DECEMBER 19, 2016, AND THE PUBLIC HEARING HELD ON JANUARY 18, 2017:

The board received written comments from a total of 45 members of the public (including 37 inmates) during the public comment period of November 4, 2016, through December 19, 2016. Each comment from the 45 commenters was individually identified with a unique identification ("ID") number as follows: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. (For example, the comment identified as 16-01-**06**-**02** would indicate that comment was made in or by the **sixth** letter/speaker received and was the **second** comment from the author of that letter/speaker.) The board received a total of 192 individual comments from the 45 written commenters. The comment ID numbers for comments received during the public comment period ranged from 16-01-01-01 through 16-01-45-13. Tables containing the identification number for each comment along with the commenter's name, date of the comment, category of the comment, and the board's determinations regarding the comment are included in the comment tab. Additionally, copies of each correspondence are included in the comments tab.

The board also received comments from four members of the public during the public hearing on January 18, 2017. The board received a total of 18 individual comments from the four commenters during the public hearing. Three comments from one commenter were received by letter on the date of the hearing. The remaining 15 comments were received orally from three speakers at the hearing. Each comment from the four commenters was individually identified with a unique ID number: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. The comment ID numbers for comments received during the public hearing ranged from 16-01-46-01 through 16-01-49-05. Tables containing the identification number for each comment along with the commenter's name, date of the comment, category of the comment, and the board's determinations regarding the comment are included in the comment tab. Additionally, copies of the written correspondence as well as the verbatim transcript of the January 18, 2017, public hearing are also included in the comments tab.

Many of the comments raised similar issues or proposed amendments. Thus, the board will address each category of comment below and identify the specific comment ID numbers included in each category.

ISSUE 1: Standards of Professional Conduct

Comment ID Numbers: 16-01-01-03; 16-01-17-03; 16-01-17-04; 16-01-17-05; 16-01-17-06; 16-01-25-11; 16-01-28-03.

Sub-Issue 1. Several of these comments suggested the board expressly adopt a specific American Psychological Association Principle or Ethical Standard in its regulations to require the board's Forensic Assessment Division (FAD) psychologists to adhere to those principles or ethical standards in the completion of their Comprehensive Risk Assessments ("CRAs"). Two other comments expressed concern that the proposed regulation does not encourage or clarify which

specific professional standards will apply to the psychologists conducting CRAs. One commenter expressed concern that clinicians can "say anything they want."

1. RESPONSE: DECLINED IN FULL AS BOTH OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND UNNECESSARY

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The psychologists completing these assessments are not entering clinician-patient relationships with the inmates whose assessments they conduct. Rather, the FAD psychologists operate as forensic psychology experts for the purpose of gathering and assessing information from the inmate and the inmate's record and forming opinions from that information regarding the inmate's current risk of committing any future violence. Thus, regulating any principles or ethical standards relating to clinician-patient relationships is outside the scope of this regulation.

To the extent that any of the proposed principles or ethical standards applies to forensic psychologists, the proposed regulation already addresses the requirements to which the FAD psychologists must adhere. Specifically, section 2240, subdivision (a), expressly requires any psychologist performing a CRA to be "licensed," meaning that the psychologist must have obtained a valid license to practice psychology within the state of California. This requirement necessarily means that any FAD clinician is already subject to all of the principles and ethical standards inherent in holding a license to practice psychology.

In California, psychologists are governed by laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.) Additionally, psychologist candidates must pass a law and ethics examination to qualify for licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.) When renewing psychologist licenses, "Licensees must check a box self-certifying that they have kept abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)

Therefore, the board finds no justification to incorporate into this regulation ethical practices that are already addressed in laws and regulations and enforced by the Board of Psychology, particularly when the ethics code referenced in the public comment applies only to members of a private professional organization. The board further finds it would be both unnecessarily duplicative and legally inappropriate for the board to regulate ethical standards to apply to FAD psychologists when they are already bound by the standards to maintain their licenses. Thus, the board declines to adopt this amendment.

Sub-Issue 2. One commenter states that the regulations are unclear about which standards will be applied in any attempt at lodging an appeal under the proposed regulation subdivisions (e) and (f). The commenter appears to have concerns about whether the regulation, which is in part codifying the stipulated agreement in *Johnson v. Shaffer*, will be governed by California law, and appears confused about what legal standards will specifically govern the pre-hearing appeal process for

factual errors. This commenter also seemed to suggest that the board should acknowledge California Evidence Code, sections 801 and 802 as governing these regulations.

2. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the legal standards to be applied in the newly created pre-hearing appeal process for regulations. However, each of these comments is based on the commenter's misunderstanding of the legal standards established in the regulations and the governance of California law. Moreover, the commenter offered no alternatives to the current proposed text. Therefore, the board declines to make any further amendments based on these comments.

First, the commenter appears confused about the legal standards that will apply to pre-hearing appeal process for factual errors. However, the board's regulations already address the legal standards. Specifically, subdivision (e)(2) defines "factual error," which sets the legal definition that the board will be applying when evaluating whether an objection legally meets the requirements to be considered a factual error for the purpose of this process. Next, subdivision (f) establishes the process through which the Chief Counsel will make the legal determination regarding whether an objection meets the definition of factual error. If yes, subdivision (f) requires the Chief Counsel to refer the error to the Chief Psychologist; if not, subdivision (f) requires the Chief Counsel to overrule the objection. The board further notes that subdivision (g), as amended following the 45-day public comment period, now requires the Chief Psychologist to take steps to correct all errors referred by the Chief Counsel in addition to analyzing the clinical impact of those errors. Thus, the regulations already address the legal standards and process through which those standards will be applied to pre-hearing objections to alleged factual error.

Second, this commenter references the *Johnson v. Shaffer* stipulated agreement (*Johnson v. Shaffer* (E.D. Cal. October 2, 2015) No. 2:12-cv-1059, Doc. 83 [stipulated agreement]) and the language in that agreement stipulating that the agreement would be governed by California law. The commenter appears confused about what California laws would govern the appeal process enacted in these regulations to satisfy the requirements of the *Johnson* agreement, and appeared to suggest that California Evidence Code, sections 801 and 802 govern the regulations. The commenter appears to have confused the laws which govern the agreement versus an agency's regulations. The language in the stipulated agreement requires the actual settlement reached in the class action case *Johnson v. Shaffer* to be governed by California law. The laws governing the proposed regulations remain the same as any other agency's regulations, meaning the regulations are governed by the California constitutional provisions, California statutes, and case law these regulations are interpreting as well as the California Administrative Procedure Act and other laws governing agency rulemaking.

Additionally, as explained below in ISSUE 4, SubIssue (4) of the response to comments received during the original 45-day period, this commenter's reference to California Evidence Code, sections 801 and 802 is misplaced because these statutes are not appropriately applied to the risk assessment process. These sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration by a board hearing panel.

Moreover, to any extent they do apply, these support the board's interpretation of the importance of distinguishing between fact and opinion. Thus, since this comment appears to have been based on the commenter's misunderstanding of the laws and standards that apply to this regulation and did not offer any alternatives, the board declines to make any further amendments as a result of this comment.

ISSUE 2: Recording of CRA Interviews

Comment ID Numbers: 16-01-02-01; 16-01-03-01; 16-01-04-01; 16-01-06-01; 16-01-08-01; 16-01-09-01; 16-01-10-01; 16-01-11-01; 16-01-12-01; 16-01-13-01; 16-01-14-01; 16-01-16-02; 16-01-18-01; 16-01-19-01; 16-01-22-01; 16-01-23-01; 16-01-24-01; 16-01-25-08; 16-01-26-01; 16-01-28-01; 16-01-30-02; 16-01-31-02; 16-01-32-01; 16-01-33-02; 16-01-34-01; 16-01-35-01; 16-01-26-01; 16-01-37-01; 16-01-38-01; 16-01-39-01; 16-01-40-01; 16-01-41-01; 16-01-42-01; 16-01-43-01; 16-01-44-01; 16-01-45-03; 16-01-46-01; 16-01-48-02; 16-01-49-02.

Each of these comments offered various arguments in favor of recording CRA interviews between inmates and the FAD psychologists assigned to complete their risk assessments. Some of the commenters suggested all CRA interviews be tape recorded, whereas others suggested the interviews be video recorded. Some commenters suggested CRA interviews be recorded only at the request of the inmate. Several commenters argued that recording CRA interviews was necessary to preserve transparency and enable inmates to resolve disputes about what was said during the interviews. Some commenters argued that recording CRA interviews was necessary to preserve equal protection or "truth in evidence" for inmates and to ensure error-free evaluations. Several commenters argued the board's stated reasoning for declining this amendment when originally raised, specifically the impact to the budget and the concern regarding a chilling effect on interviews, was invalid. One commenter suggested the impact to the budget and chilling effect would be minimal if recording was voluntary. One commenter specifically suggested recording CRA interviews with Blue Microphones Snowball (USB Microphone) to create .wav files. One commenter argued the board failed to provide a substantive response to this concern when it was initially raised by the plaintiffs' attorneys in *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to how risk assessment interviews should be conducted in preparation for a psychologist completing a CRA. However, after substantive consideration, the board finds that recording CRA interviews would adversely impact the board's ability to fulfill its primary mission and is both unprecedented and unnecessary. Therefore, the board declines to adopt these proposed amendments.

The board considered audio recording or video recording all CRA interviews and transcribing either all or requested recordings, but for a variety of reasons ultimately determined it would not record CRA interviews. First, the board scheduled over 5,300 hearings during calendar year 2015 and, while not every hearing has a corresponding CRA interview, a substantial majority of hearings do have corresponding CRA interviews. The board projects approximately 3,624 CRAs

will be completed in fiscal year 2017-2018. The cost to transcribe our hearings is $6.00 per page. Since each interview lasts an average of approximately two-and-a-half hours, the board determined that the average cost to transcribe a CRA interview would be approximately $744.00 per transcript based on the average number of pages from transcribed hearings that lasted approximately two-and-a-half hours. Multiplying the approximate cost for an average CRA interview transcript times the number of projected CRA interviews, the board calculated the approximate anticipated costs for transcribing CRA interviews to be approximately $2.7 million per year. Consequently, the board determined the resources required to record and transcribe each of these interviews would significantly increase state expenditures and would inevitably lead to an increase in the number of hearings being postponed for technical or mechanical issues with these recordings. The postponement of hearings would substantially affect the board's ability to carry out its primary function of providing timely hearings for these inmates.

The board also considered audio or video recording only those CRA interviews where the inmate requested recording and transcribing only those records where the inmate subsequently raised concerns with statements the risk assessment attributed to the inmate. As an initial matter, the board determined that limiting transcripts to only cases in which it is requested would likely still result in a high volume of transcripts since it is probable that many if not most inmates would request transcripts. Moreover, even if limited to inmates requesting recordings, the board still finds this would negatively impact the board's ability to carry out its primary function because it would fundamentally change the hearing process. Specifically, when an inmate raised concern with a clinician's wording of a statement attributed to the inmate, this requirement would substantially lengthen the hearing process. Based on the average transcription times for hearings, the request for a transcript would likely add 30 days to allow time for the transcription, and board staff would be required to timely review the CRA interview transcript, which would further add time to the process. Since the board cannot anticipate which inmates would request transcripts and which would not, the board would be required to substantially lengthen the pre-hearing process for all inmates on the chance that this additional time was needed. The board is also concerned that recording the CRA interviews may elevate the importance of the wording of a CRA interview, rather than having the panels appropriately focus on the substance of the report as just one of many pieces of evidence to consider in weighing the inmate's current suitability for parole.

Furthermore, recording these interviews is unnecessary in light of the proposed amendments to these regulations. Specifically, the board's pre-hearing objection process in subdivisions (e) through (h) provides inmates with a mechanism for challenging perceived factual errors they find in their CRAs, which now also includes challenges to statements the CRA attributes to the inmate. This remedy obviates any need inmates have for recording their CRA interviews.

Moreover, after reviewing other forensic psychological evaluations, the board determined recording these assessments would be unprecedented. Specifically, in researching other forensic psychological reporting, both within and outside of parole functions, the board found no precedent for recording interviews that are conducted for forensic reports. Interviews are not recorded for mentally disordered offender evaluations, sexually violent predator evaluations, psychiatric hospital release evaluations, sanity evaluations, competency evaluations, or any other forensic psychological evaluations for use by a court. Rather, in those situations, a psychologist interviews the subject and drafts an expert report based on his or her findings. The expert report then becomes the official record of the expert's forensic opinions for use by the hearing officers. In its CRA

process, the board follows the same process used in all other forensic psychological reporting processes.

Finally, the board has considered and addressed this issue on multiple occasions, including within the now-settled *Johnson v. Shaffer* litigation. Specifically, the board first considered this issue when reaching the stipulated settlement agreement on October 2, 2015. The board then reconsidered this issue and again addressed reasons for declining to adopt this amendment in responding to a letter from the *Johnson v. Shaffer* plaintiff attorney before first presenting these regulations for a board vote of adoption. Additionally, when plaintiffs' counsel again raised these issues at a public board meeting on August 15, 2016, the board opted to delay the vote on the regulation package for further consideration of this proposed amendment. Following additional reconsideration, the board newly addressed additional reasons for declining the amendment at the next public board meeting on September 19, 2016, after which the majority of the board members voted to adopt the regulation without this amendment. The minutes of this discussion and the board's vote are included in the rulemaking packet. The board then considered this issue one additional time in response to the public comment raising this request and, for the reasons stated above, the board declines these amendments. Notably, this issue was extensively litigated in the *Johnson v. Shaffer* case and, in its decision and order dated October 6, 2017, the *Johnson* court determined that recording of CRA interviews was not a component of the *Johnson* settlement agreement and, thus, was not required of the board. Thus, the board declines any further amendments based on these comments.

ISSUE 3: Concern Errors Will Remain in Risk Assessments

Comment ID Numbers: 16-01-04-04; 16-01-13-04; 16-01-15-03; 16-01-16-05; 16-01-18-03; 16-01-22-04; 16-01-26-04; 16-01-28-02; 16-01-28-09; 16-01-28-10; 16-01-30-01; 16-01-34-02; 16-01-35-03; 16-01-36-03; 16-01-37-04; 16-01-38-03; 16-01-39-04; 16-01-40-04; 16-01-41-04; 16-01-42-04; 16-01-43-04; 16-01-44-04; 16-01-45-08; 16-01-45-09.

Sub-Issue 1. Some of these comments expressed concern that the proposed regulation allows errors to remain in risk assessments, even after the errors are identified by the inmate, thus potentially perpetuating the error into future assessments and hearings. One commenter suggested that the board redact any identified errors from CRAs regardless of whether the errors were deemed materially impactful.

1. RESPONSE: IMPLEMENTED IN FULL

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of the pre-hearing CRA objection process for factual errors contemplated in the proposed regulation.

Under the original proposed regulations, only CRAs that were identified to have material errors were removed from the inmate's record. While the concern that this would perpetuate errors was unfounded because the regulation required other documentation of the error to permanently become part of the inmate's record, the board nonetheless considered these comments as well as the *Johnson v. Shaffer* court's October 6, 2017, order. After consideration, the board amended the

proposed regulations to require that all errors, including even the most immaterial, be corrected in the CRAs and that the board be required to request removal of any CRA containing an error, regardless of its impact. Thus, the comments asking the board to remove the limitation on removing only CRAs with materially impactful errors was IMPLEMENTED.

Sub-Issue 2. Some commenters also expressed concern that the proposed regulation does not address errors identified in old risk assessments completed before the board's adoption of this proposed regulation. One commenter argued that the proposed regulation fails to include a provision regarding the "CRA Review Fact-Checking Process" and expressed concern that the proposed regulation does not require the board to investigate or respond to factual errors and do not require consideration of individual claims. This commenter also expressed concern that the proposed regulation only requires the Chief Counsel to review a CRA to determine whether an objection has raised a factual error.

2. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of the pre-hearing CRA objection process for factual errors contemplated in the proposed regulation. These comments, however, were all based on the commenters' misunderstanding of the proposed regulation and incorrect assertions about how they will be implemented. Therefore, the board declines to adopt these proposed amendments.

First, while the proposed regulation does not expressly address old risk assessments, the proposed regulations allow an inmate to (1) utilize the board's pre-hearing written objection process to challenge old risk assessment errors, (2) explain the past error during the interview with the current clinician for clarification or correction in the current CRA, and (3) utilize the board's at-hearing objection process to address factual errors in prior risk assessments (if the inmate has good cause for not raising them during the pre-hearing process). Thus, the proposed regulation allows inmates to address potential errors in old risk assessments.

With regard to the claim that the proposed regulation fails to include a provision regarding the "CRA Review Fact-Checking Process" and does not require the board to investigate or respond to factual errors or consider individual claims, the board does not understand this comment. To the extent the commenter is concerned the proposed regulation does not mandate a response by the board to pre-hearing or at-hearing objections, this concern is misplaced. The proposed regulation specifically requires the board to take action to resolve any timely submitted allegation of error, in accordance with the settlement agreement, which necessarily includes investigating whether the allegation raises a factual error. Moreover, the proposed regulation mandates the board act, if sufficient time allows, to resolve even untimely allegations, or, if sufficient time is not available, to refer those allegations to the hearing panel for resolution at the hearing. The proposed regulation also specifies the various actions available to hearing panels to resolve at-hearing objections.

One commenter also expressed concern that the proposed regulation only requires the Chief Counsel to review a CRA to determine whether an objection has raised a factual error. This is because the determination of whether an allegation meets the legal definition of "factual error" under the regulation is a legal determination, not a clinical one. If the CRA is found to contain a factual error, the determination of the clinical impact of that error is a clinical determination more appropriately made by the Chief Psychologist of the board, and not the Chief Counsel.

ISSUE 4: Definition of Factual Error

Comment ID Numbers: 16-01-02-02; 16-01-02-06; 16-01-04-02; 16-01-06-02; 16-01-08-02; 16-01-11-02; 16-01-13-02; 16-01-15-01; 16-01-16-01; 16-01-18-02; 16-01-19-02; 16-01-22-02; 16-01-25-09; 16-01-25-12; 16-01-26-02; 16-01-32-02; 16-01-35-02; 16-01-36-02; 16-01-37-02; 16-01-38-02; 16-01-39-02; 16-01-40-02; 16-01-41-02; 16-01-43-02; 16-01-44-02; 16-01-45-04; 16-01-45-05; 16-01-46-03; 16-01-48-03.

Each of these comments expressed concern with the board's proposed definition for the term "factual error" contained in the proposed regulation. To best explain the varying comments below, the board notes as an initial matter that the *Johnson v. Shaffer* settlement specifically required the board to create a pre-hearing objection process for resolving alleged "factual errors." *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]. To that end, the board was required to define the term "factual error" for this purpose.

To follow the court's mandate, the board attempted to distinguish issues that can be independently substantiated by supporting documentation in the record from those that cannot. The board categorized the issues inmates historically raised with their CRAs and determined that inmates generally raise concerns regarding: (1) the clinical observations, diagnoses, or opinions of the clinician who conducted the CRA, (2) statements the CRA attributed to the inmate, and (3) factual statements in the CRA that can be verified in the inmate's record as being incorrect. The board then determined that, when an inmate objects to a finding of fact in the CRA that is independently verifiable in the inmate's record or through documentation the inmate provides, these allegations best met the spirit of the specific words "factual error" selected in the *Johnson v. Shaffer* settlement agreement as well as current forensic practices in legal proceedings. Consequently, the board initially limited the definition of factual error for purposes of the board's pre-hearing CRA objection process to only those allegations challenging independently verifiable factual statements.

Following the initial public comment period, the comments identified for this issue each raised varying concerns with the board's definition of factual error, which fell into four sub-issues addressed below.

Sub-Issue 1. Some of these comments expressed concern with the board's proposed definition for the term "factual error" contained in the proposed regulation, arguing it was unnecessarily narrow because it screened out valid objections to statements the risk assessment attributes to the inmate. Some commenters suggested the board broaden the definition of "factual error" to include challenges to statements the risk assessment attributed to the inmate.

1. RESPONSE: IMPLEMENTED IN FULL

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within in the proposed regulation. The board considered these comments.

In interpreting the words "factual error," the board originally excluded challenges to statements the CRA attributed to the inmate because the board initially determined presenting these arguments directly to the hearing panel would be a more appropriate remedy. However, after considering these comments and the court's October 6, 2017, order in *Johnson v. Shaffer*, the board amended the proposed regulations to delete the omission of objections to statements the CRA attributed to the inmate in the definition of factual error such that they are included in the board's pre-hearing objection process for factual errors. Thus, these comments were IMPLEMENTED.

Sub-Issue 2. Some of the comments expressed concern with the board's proposed definition for the term "factual error" arguing that the board's definition was unnecessarily narrow because it screened out valid objections to clinical observations, opinions, or diagnoses. These commenters suggested the board broaden the definition to include any error or at least to include clinical observations, opinions, and diagnoses as "factual errors."

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within in the proposed regulation. The board considered these comments; however, each of these comments is based on the commenters' misunderstanding of the reasoning behind the board's decision to separate factual errors for the purpose of the pre-hearing objection process from broader disagreements with clinical determinations, opinions, or diagnoses that may be raised and discussed by the inmate at a suitability hearing before the hearing panel. Therefore, after substantive consideration, the board declines to adopt these proposed amendments.

The board determined that issues involving clinical observations, diagnoses, or opinions of the clinician were all based on varying types of opinions from the clinician, namely the clinician's opinions about what he or she observed during the CRA interview, the clinician's diagnosis of any mental health issues, and the clinician's opinions on how to psychologically interpret various facts from the inmate's record and CRA interview to determine the inmate's level of insight or remorse, current way of thinking, and risk of committing future acts of violence. None of these are "facts" capable of being proved or disproved because they are understood to be opinions drawn by an expert based on his or her education and experience in the field. Thus, disagreements with clinical observations, diagnoses, or opinions of the clinician are not deemed "factual errors" subject to the pre-hearing written objection process. However, the board also recognized the need to make clear that inmates or their attorneys have an opportunity to provide clarifying information to the hearing panel so that the panel members may determine what weight, if any, to place on the clinician's expert opinions. Consequently, subdivision (j) expressly authorizes an inmate to raise concerns with, and provide clarifying information regarding, clinical observations, diagnoses, or opinions directly to the hearing panel at the inmate's hearing.

Sub-Issue 3. In addition to the first two sub-issues, comment 16-01-45-05 suggested that the definition of factual error should include disagreements with clinical diagnoses and expert opinions when they are directly based on obviously erroneous information.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY ADDRESSED IN THE PROPOSED REGULATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the board's definition for the term "factual error" within the proposed regulation. The board finds that this comment is based on the commenters' misunderstanding of the regulation; however, the board also determined that the outcome this commenter was seeking is already encompassed in the current proposed regulation.

Specifically, while the definition of factual error excludes challenges to clinical diagnoses and expert opinions, subdivision (g) clarifies that, if any clinical conclusions regarding an inmate's risk of violence were impacted by information deemed factually erroneous, the CRA must be amended or completely redone. Thus, this commenter's underlying concern regarding conclusions or opinions formed from erroneous information has already been addressed in the current proposed regulation. Therefore, the board finds any further amendments to address this commenter's concerns are unnecessary because the regulation already IMPLEMENTED these concerns in full.

Sub-Issue 4. Some commenters argued the board's definition of factual error was contrary to California Evidence Code sections 801 and 802 such that the pre-hearing process was rendered a "sham" and prohibited any meaningful redress. One commenter argued that forcing inmates to raise other errors during their hearings is unconstitutional because the inmate is forced to either raise the issue with an untrained lay person or forego any objection. This commenter further argued that the board's definition of factual error allowed for a denial of liberty based on a fraudulent record.

4. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within the proposed regulation. The board considered these comments; however, each of these comments is based on the commenters' misunderstanding of the reasoning behind the board's decision to separate factual errors for the purpose of the pre-hearing objection process from broader disagreements with clinical determinations, opinions, or diagnoses that may be raised and discussed by the inmate at a suitability hearing before the hearing panel. Therefore, the board declines to adopt these proposed amendments.

These commenters erroneously argue that the regulations violate the California Evidence Code sections 801 and 802. These statutes both govern the testimony of experts providing opinions on scientific evidence. These sections state in full:

> 801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
> (Enacted by Stats. 1965, Ch. 299.)

> 802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.
> (Enacted by Stats. 1965, Ch. 299.)

As an initial matter, these sections are not appropriately applied to the risk assessment process because these sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration in an administrative proceeding. Even so, these Evidence Code provisions support the board's proposed regulations by confirming that persons considered experts in a field may issue opinions based on their area of expertise. Since licensed psychologists are experts in the field of psychology, these sections expressly permit them to issue opinions based on their expertise. The regulations, therefore, do not include clinician's expert opinions on an inmate's risk in the pre-hearing objection process for factual errors because opinions are not considered facts. Instead, the appropriate avenue for an inmate to challenge a clinician's opinion is with the hearing panel, which may then use its discretion to consider and rule on the inmate's objection.

Second, these commenters additionally argued that forcing inmates to raise issues with the hearing panel violated their constitutional rights to due process. Again, this argument fails as it is based on a misunderstanding of these regulations and the rights of due process. Specifically, challenges to factual errors in the risk assessment are properly delegated to the Chief Counsel to determine whether the allegation raises a factual error under the definition in the regulations, and then to the Chief Psychologist to determine the clinical impact of that error. However, challenges to an expert's opinion must be properly delegated to the hearing panel over the hearing at issue. Opinions are not facts that are true or untrue; they are conclusions reached by experts based on their specialized training and education, unique knowledge and skill, and the evidence they have considered. The purpose of an expert opinion is to assist the trier of fact in better understanding

the issues in a case. Thus, an expert opinion cannot be "corrected" during a pre-hearing objection process. Rather, as previously noted, the appropriate avenue for an inmate to challenge a clinician's opinion is with the hearing panel, which may then exercise its discretion to consider and rule on the inmate's objection. Moreover, since the regulations expressly provide an appropriate remedy through which inmates may present arguments to challenge clinician's opinions in risk assessments, the regulations provide inmates with due process on this issue.

Finally, the board disagrees with the allegations that the definition of factual error renders the process a sham or allows hearings to be based on a fraudulent record. On the contrary, the regulation expressly provides a mechanism through which inmates can object to any factual errors, and requires that all errors confirmed by the board be corrected. Therefore, the board declines to makes any additional amendments based on these comments.

ISSUE 5: Timelines and Deadlines

Comment ID Numbers: 16-01-02-04; 16-01-04-03; 16-01-06-03; 16-01-06-04; 16-01-10-02; 16-01-11-03; 16-01-11-04; 16-01-12-02; 16-01-13-03; 16-01-15-02; 16-01-16-04; 16-01-18-04; 16-01-19-03; 16-01-19-04; 16-01-21-03; 16-01-22-03; 16-01-26-03; 16-01-28-04; 16-01-28-05; 16-01-36-04; 16-01-37-03; 16-01-39-03; 16-01-40-03; 16-01-41-03; 16-01-42-03; 16-01-43-03; 16-01-44-03; 16-01-45-06; 16-01-45-07; 16-01-46-02.

Each of these comments expressed concern with timelines or deadlines established in the proposed regulation for the pre-hearing CRA objection process, or the lack of established timelines or deadlines. Specifically, the commenters raise three separate but related sub-issues:

Sub-Issue 1. Some commenters expressed concern that the regulation does not impose deadlines on the board for when CRAs must be issued to inmates and suggested imposing deadlines for CRAs to be completed and issued to inmates. One commenter requested the proposed regulation require CRAs to be issued to inmates six months before their hearing.

1. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. After considering these comments and the court's October 6, 2017, order in *Johnson v. Shaffer*, the board amended the proposed regulations to establish a requirement for the board to serve the completed CRAs on inmates at least 60 calendar days before their hearings. Thus, the comments requesting a deadline for CRA completion were IMPLEMENTED.

The board also considered the request to have CRAs completed and provided to inmates at least six months before the scheduled hearing date. The board determined that completing and submitting the CRAs six months ahead of the hearing was not possible given the increasing numbers of hearings coming before the board as the result of changes in legislation and pending litigation, including youth offender, elderly, and expanded medical parole hearings. Shifting the timeline forward by six months does not seem feasible in light of this increased volume of cases.

Additionally, many hearings are required to be scheduled in less than six months due to court orders or changes in eligibility; thus, requiring CRAs to be provided at least six months ahead of the hearings would result in these hearings being significantly delayed. Instead, the board determined that distributing the CRA at least 60 days before the hearing, which provides inmates with a minimum of 30 days to review their CRAs and submit objections, was sufficient to ensure that inmates had enough time to submit their objections at least 30 calendar days before their scheduled hearings while also balancing the need to keep the CRAs as current as possible. Therefore, this request was declined.

Sub-Issue 2. Some commenters expressed concern that imposing a deadline for inmates to submit objections to factual errors at least 30 days before the hearings did not provide sufficient time for inmates to review their CRAs, consult with legal counsel, and submit objections. One commenter also expressed concern that the proposed regulation "screens out" an inmate's objections if not timely received.

2. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. However, the comments under this sub-issue were based on a misunderstanding of how the timelines and deadlines establishing for the pre-hearing CRA objection process will apply. Therefore, the board declines to adopt these proposed amendments.

As an initial matter, the establishment of a regulatory deadline by which pre-hearing CRA objections to factual errors would be considered "timely" was contemplated by the court-ordered settlement in *Johnson v. Shaffer*. Specifically, in creating the pre-hearing review process for factual errors, the court required the board's regulations to mandate the board to "provide a written response to ***timely*** objections." *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement], emphasis added. Thus, to give meaning to that requirement, the board needed to establish a deadline by which objections would be considered timely.

As explained above, the board established a 30-day deadline before which, if an inmate submits a CRA objection, the board is required to respond during the pre-hearing process. Given the board's current practice of completing and sending out CRAs at least 60 to 90 days or more before the hearing when possible, the 30-day deadline provides inmates and their attorneys with at least 30 days to provide their objections to the board's legal office. As explained above in Sub-Issue (1) of this issue, the board determined this was sufficient time for inmates and their attorneys to review the CRAs and submit their objections. The board is then required to respond promptly, but in no case less than 10 days before the hearing, meaning that when the inmate submits an objection on the 30-day deadline, the board must respond within 20 calendar days. The purpose of the deadline is to encourage inmates to submit their objections in a timely manner so that the board can complete the pre-hearing objection review process and resolve these issues before inmate's

hearings whenever possible. Thus, the request for the board to delete or shorten the deadline for timely submissions was declined.

Moreover, as explained above, upon receiving an untimely objection, the original proposed regulation did not permit the board to ignore or automatically "screen out" the objection. Instead, the board also established a process for responding to untimely objections submitted after the 30-day deadline. Specifically, subdivision (h) of the original proposed regulations expressly required the Chief Counsel to determine whether sufficient time exists to complete the pre-hearing objection review and, if so, the Chief Counsel and Chief Psychologist had the discretion to complete the review. In its disapproval decision dated November 8, 2017, the Office of Administrative Law noted that the discretionary wording of the original proposed regulation did not clarify how or when the Chief Counsel and Chief Psychologist would exercise that discretion. Therefore, the board determined that it needed to amend this section to clarify the board's practice that, when the Chief Counsel and Chief Psychologist determined that sufficient time existed to respond to an untimely objection, they were mandated to complete the response. Thus, the board IMPLEMENTED this amendment to alleviate the concern that untimely objections could be screened out.

The board further notes that, even if the Chief Counsel determined that sufficient time did not exist to complete the pre-hearing review, the original proposed regulation required the Chief Counsel to forward the inmate's or attorney's objections to the hearing panel for consideration at the hearing. If the inmate can establish "good cause" at the hearing by demonstrating that he or she had an excusable reason for failing to timely submit the objection, the hearing panel is required by subdivision (i) to complete the at-hearing objection process. Finally, even if the inmate is not able to demonstrate good cause for a late submission, the panel nevertheless has the discretion to hear and rule on the objection.

Sub-Issue 3. Some commenters expressed concern that, while inmates were required to submit their objections to factual errors at least 30 days before the hearing, the board had no requirement to respond promptly and instead was only required to respond 10 days before the hearing. Some of these commenters also argued that the proposed regulation allows the board to delay responses. One commenter argued that the requirement for the board to respond "promptly" does nothing to ensure this will happen.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. Because the board's current proposed regulation already contains requirements addressing this issue, the board has determined these requests are already IMPLEMENTED in full.

The main focus for each of these comments rests on a misunderstanding of the language contained in subdivisions (f) and (g) requiring the board to act "promptly." These two subdivisions expressly require that, when either the Chief Counsel or Chief Psychologist of the board is issuing a final

decision on a CRA objection, they must submit the decision "promptly" after receipt. The 10-day requirement sets the final date by which a decision can be issued so that the final decision can be served on the inmate at least 10 days before the hearing, in accordance with the board's requirements in the California Code of Regulations, title 15, section 2247 disclosure rules. However, this end-date requirement does not permit the board to delay until 10 days before the hearing if such a delay would not be a prompt response. Rather, regardless of the date on which the inmate submits a timely CRA objection, the Chief Counsel or Chief Psychologist are required to respond promptly and to avoid delay.

Thus, if for example an inmate submitted a CRA objection substantially before the hearing, the board would be obligated to promptly review and process the response. The board would not be permitted to delay beginning the review of the objections until the final deadline. However, if an inmate submits a particularly lengthy objection 30 days before the hearing, which is the last day the objection would be considered timely, the board's regulation dictates that, regardless of what might normally have been considered a prompt reply, the board's response must be transmitted to the inmate and hearing parties by no later than 10 days before the hearing so that the response does not violate the disclosure requirements under section 2247.

One commenter expressed concern that the board's mandate to respond promptly does not actually require the board to do so. This comment was based on a misunderstanding of the effect of regulations, which once enacted have the force and effect of law. Upon enactment, the board will be obligated by this regulation to respond promptly to CRA objections. Thus, the board declines any further amendment.

ISSUE 6: 2010 Report from the Office of the Inspector General and Other Prior Reports

Comment ID Numbers: 16-01-25-07; 16-01-39-07.

Both of these comments claimed that the board's proposed regulation fails to address issues identified in the 2010 Report from the Office of the Inspector General ("2010 OIG Report"). One comment specifically argued the proposed regulation fails to address (1) a lack of reliable data to determine the number of factual errors, (2) a lack of reliable data on the numbers of assessments at each risk level, (3) weak oversight for the FAD psychologists, and (4) insufficient training to panel members. This commenter further cited to a statement regarding previous perceptions of risk assessments from a 2007 California District Attorneys Association Notebook.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND BASED ON INCORRECT ASSERTIONS

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The regulation was not designed to implement solutions for the issues identified in the 2010 OIG Report because these issues were already resolved through the board's 2011 Corrective Action Plan in response to this report.

Moreover, the assertion that the board failed to resolve the issues raised in the 2010 OIG Report is erroneous. Following the 2010 OIG Report, the board developed a Corrective Action Plan to address each of the issues raised in the 2010 OIG Report. This plan was closed as fully resolved on July 1, 2011. The board further notes that, while this was not the main purpose of this regulation, the proposed regulation from this rulemaking package furthers the objectives of the 2010 OIG Report by creating a permanent process for addressing alleged factual errors contained in CRAs.

Additionally, one commenter referenced a 2007 California District Attorneys Association Notebook statement that low-risk assessments did nothing to help an inmate, but higher-risk assessments were detrimental to suitability. The board finds this 10-year-old opinion from an outside stakeholder irrelevant to current board practices, particularly in light of the significant changes in how risk assessments are completed since that time. Specifically, while the FAD began to administer risk assessments in early 2007, the FAD was not fully formed and functioning until 2009. Notably, many life inmates who were denied parole multiple times before 2007 were granted parole only after a FAD psychologist assessed their risk. Therefore, the board found this issue to be outside the scope of the current proposed regulation and based on inaccurate assertions, and consequently declines any further amendments based on this comment.

ISSUE 7: Oversight of FAD Psychologists

Comment ID Numbers: 16-01-04-06; 16-01-25-02; 16-01-28-08; 16-01-32-05; 16-01-33-01; 16-01-47-02; 16-01-49-05.

Each of these comments argued that the proposed regulation does not build in oversight or accountability for the FAD psychologists completing the CRAs. Specifically, the commenters raise three separate but related sub-issues:

Sub-Issue 1. Some of the commenters expressed concern that the regulation does not create any oversight for the psychologists conducting CRAs.

1. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE CURRENT PROPOSED REGULATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of oversight of psychologists completing CRAs by the board's Senior Psychologists. However, the board determined these comments were based on a misunderstanding of the oversight provision in the proposed regulation and that the issues raised in these comments have already been implemented by the current proposed regulation.

These comments fail to account for the language in subdivision (c) of the proposed regulation, which expressly established oversight of clinicians completing CRAs by Senior Psychologists or the Chief Psychologist of the board. Specifically, this subdivision originally stated in part: "A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate

scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case." This subdivision clarifies that no CRA will be considered final until it has been reviewed and approved by a supervisor. Therefore, this subdivision already establishes oversight of the clinicians completing CRAs and has, thus, already been IMPLEMENTED in full.

The board notes, however, that to better clarify the supervision of the clinicians, the board amended subdivision (c) to remove the language "and reliable and valid principles and methods have been appropriately applied to the facts of the case." On November 8, 2017, OAL expressed concern that the terms "principles and methods" were unclear. Thus, since the main focus of the supervisorial oversight was to ensure that the risk assessments were based upon adequate scientific foundation, the board removed the language at issue to clarify the focus of the supervision.

Sub-Issue 2. Some commenters argued that the board was biased in favor of FAD psychologists and suggested that determinations regarding factual errors be handled by an independent agency.

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of who bears responsibility for review during each step in the pre-hearing CRA objection process. After substantive consideration, the board determined that contracting with an outside agency was unnecessary because the regulation already creates a process through which the determinations regarding factual errors are handled by a different division than the FAD within the board. Therefore, the board declines to adopt these proposed amendments.

As an initial matter, the board has no bias toward or against the clinicians completing CRAs for the board. Moreover, because the board is invested in ensuring that risk assessments contain the most accurate and supportable information possible, the proposed regulation establishes both a pre-hearing and at-hearing process through which inmates are able to address factual errors including disagreements with statements the CRA attributed to the inmate as well as disagreements with a clinician's observations, opinions, and diagnoses.

The main focus for each of these comments rests on a misunderstanding of the language creating the pre-hearing objection process. Specifically, subdivisions (e) through (h), which establish the board's pre-hearing objection process, bifurcate review between the Chief Counsel and Chief Psychologist of the board. The Chief Counsel is responsible for independently assessing whether an inmate's objection has raised a factual error as defined by the regulation. If so, the matter is then referred to the Chief Psychologist who independently assesses whether, in his or her opinion, that error materially impacted the clinician's conclusions regarding risk of violence in the CRA. This process ensures an unbiased review by requiring two reviewers separate from the authoring clinician to determine whether the inmate has identified an error in the CRA and whether that error materially impacted the conclusions.

Sub-Issue 3. Some commenters generally argued that the FAD is insulated from any oversight and generally requested the regulation require greater transparency in the trainings provided to FAD psychologists.

3. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND BASED ON INCORRECT ASSERTIONS

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address outside oversight or how the board will internally train FAD psychologists to complete their assignments; therefore, the board finds these comments outside the scope of this regulation and declines any further amendments based on these comments.

Moreover, as explained above in greater detail in response to **ISSUE 6: 2010 Report from the Office of the Inspector General and Other Prior Reports** (FSOR, pages 16-17), the assertion that FAD psychologists have no oversight is not accurate. First, as noted above, FAD psychologists are subject to oversight from Senior Psychologists and the Chief Psychologist, as indicated in the proposed regulation. Second, all CRA objections result in review by the board's Chief Counsel or a hearing panel. Moreover, all functions of the correctional system, including parole suitability hearings and their preparation, are subject to review by the Office of the Inspector General, as displayed in the 2010 OIG Report, and all FAD clinicians are licensed by the state's Board of Psychology. Thus, the FAD is not insulated from oversight as suggested in these comments.

ISSUE 8: Challenge to Duties Assigned

Comment ID Numbers: 16-01-02-03; 16-01-02-05; 16-01-25-10.

Each of these comments argued that assigning the responsibility for determining whether CRAs contain factual errors to the Chief Counsel for the pre-hearing objection process in proposed subdivisions (f) and (h), and to the hearing officers when errors are raised at hearings in proposed subdivisions (i) and (j), is unlawful because the Chief Counsel and hearing officers are not psychologists and not properly training to assess clinical reports. One comment further argued that assigning the responsibility to hearing officers of resolving inmate challenges to clinical observations, opinions, or diagnoses, or to statements the CRA attributed to the inmate, is similarly unlawful because hearing officers are also not properly trained to determine the veracity of risk assessments. None of the comments offered alternative suggestions to address their concerns.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's assignment of responsibility for resolving inmate objections to factual errors in CRAs within in the proposed regulation. However, all of these comments were based on the commenters' misunderstanding of the regulation and incorrect assertions about how it will be implemented. As explained below, the proposed regulation assigns duties to appropriate parties given their roles and expertise with the board. Therefore, the board declines to amend the proposed regulation regarding duties assigned.

The main focus for each of these comments rests on a misunderstanding of the language contained in these subdivisions assigning responsibilities to the Chief Counsel and hearing panel members. Specifically, subdivision (f) requires the Chief Counsel to review each CRA objection to determine "whether the risk assessment contains a factual error as alleged." The question at issue is whether the inmate's allegation and supporting documentation meet the legal definition of factual error established in the regulation, which requires a legal analysis appropriate for the Chief Counsel, not a clinical one. Once the Chief Counsel makes a legal determination that the inmate has raised a factual error, the Chief Counsel is then required to refer the clinical decision regarding the impact of that error to the Chief Psychologist. Likewise, subdivision (h) requires the Chief Counsel to determine upon receipt of an untimely CRA objection if there remains sufficient time to complete the pre-hearing process at least 10 days before the hearing. Again, this is a workload determination, not a clinical assessment, and is appropriate for the Chief Counsel of the board.

Similarly, the duties assigned to the hearing panel members are also appropriate. Subdivision (i) requires hearing panel members to determine (1) whether an inmate has demonstrated good cause, as defined in that subdivision, to raise an untimely allegation of factual error, (2) whether the CRA contains an alleged factual error that "may" materially impact the CRA's conclusions regarding risk of violence, and (3) whether, after disregarding any potential factual errors, the remaining evidence available to the panel is sufficient for the panel to reach a determination regarding the inmate's current suitability for parole. Determinations regarding good cause and the sufficiency of evidence to reach a decision both fall squarely within the duties of an administrative hearing panel. Moreover, the determination of whether a piece of evidence may contain a materially impactful factual error does not require a clinical assessment, but rather a determination in the hearing officers' opinions of whether the inmate has raised an allegation that could meet the legal definition of factual error and whether that error appears significant enough that it may have impacted the CRA's conclusions. Hearing officers are well trained to assess and weigh the significance of evidence. Thus, all of these duties are appropriately assigned to hearing panel members, who are ultimately responsible for determining an inmate's suitability for parole.

Additionally, subdivision (j) requires hearing panel members to consider an inmate's objections or clarifications regarding any clinical observations, opinions, or diagnoses in a CRA. Again, considering and weighing these objections and clarifications from inmates does not require a clinical analysis, but rather requires the panel to assess and weigh the credibility and relevance of the inmate's statements and determine how they affect the panel's reliance on the CRA as a piece of evidence during the hearing. Thus, these duties are also appropriately assigned to the hearing panel members.

Notably, the board did amend subdivisions (g) and (h) to better clarify the duties and requirements of both the Chief Counsel and Chief Psychologist; however, none of these amendments altered the persons responsible for each step in this process.

ISSUE 9: Access to Psychologist Notes

Comment ID Number: 16-01-16-03.

This commenter argued that inmates, their attorneys, and their privately-retained psychologists should have access to the notes of the psychologist completing the CRA.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to resolving allegations of error in CRAs. After substantive consideration, however, the board determined that this amendment is unprecedented, unnecessary, and would lead to potential confusion. Therefore, the board declines to adopt this proposed amendment.

As addressed above in ISSUE 2: Recording of CRA Interviews, the board found no precedent for disclosing an expert's notes associated with the preparation of a forensic report. A forensic psychologist's notes are not disclosed in mentally disordered offender evaluations, sexually violent predatory evaluations, psychiatric hospital release evaluations, sanity evaluations, competency evaluations, or any other forensic psychological evaluations for use by a court. As explained above, in those situations, a psychologist interviews the subject and drafts an expert report based on his or her findings. The expert report then becomes the official record of the expert's forensic opinions for use by the hearing officers. In its CRA process, the board follows the same process that is used in all other forensic psychological reporting processes. Furthermore, the board determined that disclosing the clinician's notes is unnecessary because the clinician has already included all relevant information from his or her notes in the final CRA. Finally, disclosing the clinician's notes would include disclosure of quantitative scores and ratings associated with proprietary structured risk assessment forms, which would be confusing to inmates and other non-clinicians.

ISSUE 10: Americans with Disabilities Act Accommodations during CRA Interviews

Comment ID Numbers: 16-01-04-05; 16-01-13-05; 16-01-16-06; 16-01-22-05; 16-01-23-02; 16-01-26-05; 16-01-35-04; 16-01-37-05; 16-01-39-05; 16-01-40-05; 16-01-41-05; 16-01-42-05; 16-01-43-05; 16-01-44-05; 16-01-45-10.

These comments all expressed concern that the proposed regulation does not require Americans with Disabilities Act ("ADA") protections and accommodations to be provided during CRA interviews. One commenter specifically suggested that the regulation should prohibit CRAs from assessing cognitively impaired inmates based on their ability to discuss issues beyond their capacity, should require foreign language speakers to have access to in-person interpreters at

interviews, and should require CRA reports to be translated into a foreign language speaker's native language. This commenter further argued that the regulation should allow ADA accommodation failures to be grounds for objection.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds these comments relevant to the regulation because they pertain to how CRA interviews will be conducted. The board determined, however, that ADA requirements fall outside the scope of the current regulation, which is meant to address the timing and requirements for CRAs as well as the processes through which to address issues in the CRAs. Americans with Disabilities Act accommodations and protections are already addressed in the Americans with Disabilities Act of 1990 104 Stat. 328, 42 U.S.C. §§ 12101 et seq., *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849, the 2010 Armstrong II Amended Remedial Plan, and the California Code of Regulations, title 15, sections 2251.5, 2251.6, 2251.7, and 2252. Additionally, because these issues remain subject to court oversight and monitoring under the *Armstrong* class action case, any changes or amendments to these issues or regulations must be done through the class action and are more appropriately handled in a separate regulation package if deemed necessary. Therefore, the board declines to adopt these proposed amendments in this rulemaking package.

ISSUE 11: *Sherman-Bey* Requirements

Comment ID Number: 16-01-25-06.

This commenter argued the proposed regulation is still invalid because it does not meet the requirements of the court order in *Sherman-Bey v. Hoshino* (July 3, 2014) Sacramento Sup. Ct. Case No. 34-2011-80000970, Ruling on Submitted Matter.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to the board's attempt to correct the language previously deemed by the *Sherman-Bey* court to be unclear. After substantive consideration, the board initially determined that the language selected complies with the court requirements in *Sherman-Bey* and clarified the board's requirement concerning the use of psychological tools to complete CRAs. However, after reviewing the November 8, 2017, disapproval from the Office of Administrative Law, the board determined that additional changes could further clarify the types of tools that psychologists could use.

Specifically, the regulation removes the language "actuarially derived and structured professional judgment" and initially replaced it with the common and more well-known court standard "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence." For further clarity about the types of instruments to be used, the board amended this subdivision to require psychologists to incorporate "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals." This

new language clarifies both the types of risk assessment instruments by giving specific examples and noting that the instruments must be commonly used by experts conducting these types of assessments. Thus, the board IMPLEMENTED this comment by clarifying the Sherman-Bey language at issue.

ISSUE 12: Compliance with Administrative Procedure Act Requirements

Comment ID Numbers: 16-01-01-02; 16-01-21-01; 16-01-21-02; 16-01-25-03; 16-01-25-04; 16-01-25-05; 16-01-39-06; 16-01-45-01; 16-01-45-13.

Each of these commenters raised arguments as to why they felt the proposed regulation does not meet the California Administrative Procedure Act ("APA") requirements found in Government Code section 11340 et seq. One commenter stated generally that the proposed regulation does not meet the requirements under the APA of necessity, authority, clarity, consistency, or reference to law, but did not explain why. One commenter claimed the regulations were not easily understood but did not explain why. Some commenters argued that the proposed regulation does not meet the necessity standard on the grounds that the board did not demonstrate necessity for conducting risk assessments for all prisoners appearing for suitability hearings and should not be conducting this task. This commenter further argued that the Initial Statement of Reasons for this proposed regulation misrepresented the nature and effects of the appeal process because the right to clarify objections to observations, opinions, diagnoses, or statements the CRA attributed to the inmate is defined "so narrowly" as to be meaningless. Another commenter claimed the proposed regulations did not explain the benefits to human health or welfare. Other commenters requested "clarity" on what constituted generally accepted tools and the definition of material impact. One commenter claimed the regulations fail to meet APA requirements because they did not cite to any empirical study.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertains to the procedures the board followed in promulgating its regulation package. After substantive consideration, the board determined it complied with all procedural requirements under the APA and none of the comments provided any suggestions on how to improve the clarity, authority, necessity, consistency, or reference of the proposed regulation. Therefore, the board declines to adopt these proposed amendments.

The commenter who generally argued that the proposed regulation does not meet the requirements under the APA of necessity, authority, clarity, consistency, or reference to law did not cite to any evidence to support this conclusion. The board notes that, in the Initial Statement of Reasons and Notice of Proposed Action filed concurrently with this proposed regulation, the board explained the necessity, authority, clarity, and consistency of the proposed regulation, and cited to all authority and reference laws, as required by the APA. With the exception of the necessity statements noted in the November 8, 2017 OAL disapproval and corrected in the supplemental Initial Statement of Reasons, the board disagrees with this commenter's general allegations.

The next contention, that the board should not have determined it is required to conduct risk assessments, fails to account for the regulations in place already mandating the board to complete CRAs for parole consideration hearings. Specifically, the California Code of Regulations, title 15, section 2240, the section amended by this proposed regulation, already required the board to complete CRAs for parole consideration hearings. Moreover, the court's order approving the parties' negotiated settlement agreement in *Johnson v. Shaffer*, requires the board to complete CRAs for parole consideration hearings every three years. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].) Therefore, the board appropriately determined it is currently required to complete CRAs for parole suitability hearings.

The argument that the board misrepresented the nature and effects of the appeal process in the initial statement of reasons is similarly without merit. As mandated by the court-ordered stipulated agreement in *Johnson v. Shaffer*, the board defined the term "factual error" and developed a pre-hearing process through which inmates can seek redress for alleged factual errors in CRAs. However, because the board initially determined that statements in a CRA attributed to an inmate and disagreements with clinical observations, opinions, or diagnoses do not fall within the category of factual error, the board specifically created subdivision (j) through which the board preserves an inmate's ability to object to those issues at his or her hearing and provide the panel with any clarifications needed. Both processes were fully explained in the initial statement of reasons. Moreover, after reviewing public comments and the October 6, 2017 *Johnson* court order, the board amended the regulations to include statements in a CRA attributed to an inmate as factual errors.

Additionally, the board notes that it explained the benefits and necessity of the regulation provisions in both the Initial Statement of Reasons and the Notice of Proposed Action. The board is not required to rely on any empirical studies although the board subsequently added studies to the rulemaking record. Finally, the board notes that the requests for clarity did not offer any suggestions from which the board could make amendments.

Therefore, the board declines to make any further amendments based on these comments. However, some of the amendments the board did elect to make may clarify some of the issues raised by these commenters.

ISSUE 13: Fiscal Impact

Comment ID Number: 16-01-02-07.

This commenter argued that the current regulation will result in numerous lawsuits that will impact costs and savings to the State of California.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the fiscal impact of the regulation. However, the commenter misunderstands the application of the proposed regulation and how it meets the requirements of the *Johnson v. Shaffer* settlement agreement. Therefore, the board declines to adopt this proposed amendment.

This commenter essentially argues that the board failed to meet the requirements of the *Johnson v. Shaffer* settlement agreement and, therefore, the board will be subjected to numerous lawsuits successfully challenging the regulation. This argument is without merit. A review of the settlement agreement demonstrates that, on its face, the board met each requirement of the agreement pertaining to regulating the CRA process. The board eliminated subsequent risk assessments and reduced the number of years in which a new CRA must be prepared from five years to three years. The board defined "factual error," as instructed by the court, and established a pre-hearing appeal process for correcting factual errors. Moreover, the board established an at-hearing process allowing inmates to object to and clarify disagreements with a clinician's observations, opinions, or diagnoses. Therefore, the board appropriately did not factor in the hypothetical cost of unmeritorious lawsuits in the financial assessment for this proposed regulation, and this comment is declined.

ISSUE 14: Structure and Applied Weight for Youth Factors

Comment ID Numbers: 16-01-16-08; 16-01-47-06; 16-01-49-03.

These commenters all argued that the board should require any clinicians completing CRAs for inmates who qualify as "youth offenders" under Penal Code section 3051 to give "great weight" to the three youth factors: (1) the diminished culpability of juveniles as compared to that of adults, (2) the hallmark features of youth, and (3) any subsequent growth and increased maturity of the individual. The proposed regulation currently requires clinicians to consider those factors when completing CRAs for qualified youth offenders. Additionally, one commenter argued the regulation should provide greater structure on CRA discussions of the youth offender factors in the CRAs because they have not been standardized on how the factors are addressed.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to subdivision (b) and the proposed requirement for clinicians to consider the youth factors when completing CRAs for qualified youth offenders. However, the proposed regulation as currently drafted mirrors the language of the governing statute, which dictates the weight that clinicians are expected to give to youth offender factors. Therefore, the board declines to adopt this proposed amendment.

Penal Code section 3051 established specific parole consideration laws for qualified youth offenders. Additionally, section 4801, subdivision (c), requires that, when weighing evidence for and against parole suitability for a youth offender, the hearing panels must give "great weight" to the youth factors listed above. However, when discussing the requirements for psychologists charged with clinically assessing future risk of violence for qualified youth offenders, section 3051, subdivision (f)(1) specifically states, "In assessing growth and maturity, psychological

evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall **take into consideration** the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Emphasis added.) In simultaneously enacting Penal Code sections 3051 and 4801, subdivision (c), in the same bill, the legislature created two distinct standards, one for psychologists clinically assessing future risk of violence and one for board hearing panels assessing an inmate's suitability for parole. (*See* Senate Bill 260 (Reg. Sess. 2013-2014).)

While these commenters argue that the board should require clinicians to give heavier weight to the youth offender factors in assessing risk of violence, the board does not agree. Board psychologists are professionally trained experts in administering forensic psychological tools that assess various aspects of an inmate's risk of violence, and in reviewing all relevant and reliable information in addition to the results of the tools to reach their own conclusions regarding the inmate's risk of future violence. Psychologists are further professionally trained to exercise expert judgment in determining the value of each piece of information in assessing that risk of violence. The governing statute requires board psychologists to "take into consideration" the three youth factors; it does not require them to give the factors "great weight." Had the Legislature intended clinicians to give the factors "great weight," it presumably would have used that term in the governing statute, as it did in Penal Code section 4801, subdivision (c). Therefore, the board declines to amend the proposed regulation as suggested because to do so would be inconsistent with the governing statute.

ISSUE 15: Limitations on Information Considered

Comment ID Number: 16-01-28-06.

This commenter argued that the language of subdivision (a) limits clinical review in risk assessments to only negative risk factors and does not allow consideration of all relevant reliable information, such as mitigating factors.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to the meaning of the language in subdivision (a) regarding what psychologists may consider. After substantive consideration, the board implemented this comment.

The main focus for this comment rests on the original language contained in subdivision (a), "The psychologists shall consider the current relevance of any risk factors impacting an inmate's risk of violence." This commenter expressed concern that focusing clinical review on "risk factors" limits the clinicians to only considering negative or aggravating factors. This is a misunderstanding of the original language. Specifically, nothing in the original proposed text limited clinicians from considering protective or mitigating factors that impacted the inmate's risk of violence. Rather, the language only mandated consideration of risk or aggravating factors.

After substantively considering this comment, however, the board elected to amend subdivision (a) to require clinicians to consider "any" factors impacting an inmate's risk of violence, including both aggravating and mitigating factors, such as those factors identified in sections 2281 and 2402 of the board regulations as tending to demonstrate an inmate's suitability or unsuitability for parole. Thus, this request was IMPLEMENTED.

ISSUE 16: Equal Treatment for Out-of-State Inmates

Comment ID Number: 16-01-49-04.

This commenter argued the current proposed regulation does not clarify how the board will deal with out-of-state housed inmates because the regulation only states those inmates "may" receive a psychological evaluation whereas inmates housed in California are required to receive those evaluations. This commenter argued the difference in treatment was not equal treatment under the law.

RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the proposed regulation's requirements for inmates housed out of state. Specifically, to the extent this comment relates to clarifying the requirements for inmates housed in California and those housed in other states, the board acknowledges that paragraph (d)(1) of the original proposed regulation required CRAs for inmates housed in California, whereas paragraph (d)(2) only permitted CRAs for inmates housed in other states. After reviewing OAL's November 8, 2017, disapproval and further evaluating the ability of the FAD clinicians to practice in other states, the board deleted paragraph (d)(2) regarding CRAs for inmates housed outside of California. This amendment resolves the clarity issue by deleting the unclear language regarding out-of-state inmates; therefore, this portion of these comments was IMPLEMENTED.

The additional comments, requesting the board to require CRAs for out of state inmates, must be declined. For inmates housed within the state, any clinician in the board's Forensic Assessment Division will necessarily possess the licensure required to interview and forensically assess that inmate's risk of future violence. However, other states may have different rules regarding the licensure required to perform forensic psychological evaluations on persons living within that state. Therefore, since the board cannot guarantee its ability to complete CRAs within the licensing rules of other state jurisdictions, the board cannot regulate a requirement to complete them in the event that the board was legally barred from doing so under that state's laws. The board notes that, under Penal Code sections 11190 and 11193, any inmate retains the right to request transfer back to California for his or her parole consideration hearing, which would trigger the board's requirement to complete a CRA for that inmate since the inmate would then be housed within California.

ISSUE 17: Request for Public Hearing

Comment ID Number: 16-01-07-01.

This commenter requested the board to hold a public hearing to accept further comment on this regulation package.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to a request for a public hearing under the APA. (See Govt. Code § 11346.5, subd. (a)(17).) This request was received by the board on November 22, 2016, which was at least 15 days before the close of the public comment period.

The board approved this request and held a public hearing for this regulation package on Wednesday, January 18, 2017, which was after the public comment period had closed. Therefore, this comment was IMPLEMENTED.

ISSUE 18: Request for Dates of Public Comment Period

Comment ID Number: 16-01-01-04.

This commenter requested information on the public comment period for this regulation package.

RESPONSE: DECLINED AS NOT CONTAINING A COMMENT CAPABLE OF RESULTING IN AMENDMENT; REQUEST WAS NONETHELESS GRANTED

The board fulfilled this request by submitting a copy of the Notice of Proposed Action containing this information to the commenter on November 15, 2016. This commenter subsequently provided additional public comment within the public comment period. Therefore, no amendments were made from this comment, but the commenter's request was GRANTED.

ISSUE 19: Request for Tape Recordings of Parole Consideration Hearings

Comment ID Number: 16-01-24-02.

This commenter requested that inmates be allowed to receive tape recordings of their board hearings.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds this comment not relevant and not within the scope of the regulation because it does not pertain to comprehensive risk assessments and did not raise any suggestions or issues

regarding the proposed regulation. Therefore, the board declines to adopt this proposed amendment.

ISSUE 20: Use of Specific Risk Assessment Tools

Comment ID Numbers: 16-01-13-06; 16-01-16-07; 16-01-25-01; 16-01-29-01; 16-01-29-03; 16-01-47-03; 16-01-47-04; 16-01-47-05.

Sub-Issue 1. Some of these commenters raised various arguments regarding regulating the specific assessment tools the board's psychologists should be required to use in completing CRAs or recommending that the board require the psychologists to use certain recommended tools in the regulation.

1. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of the regulation because they pertain to how a clinician will use a standard approach to assessing risk of violence with the CRAs, as required by subdivision (a) of the proposed regulation. After considering these comments as well as the November 8, 2017, OAL disapproval, the board elected to amend the regulations to clarify in subdivision (a) the types of risk assessment tools clinicians must use in conducting these evaluations. Therefore, these comments were IMPLEMENTED in part.

However, after consideration of these comments, the board declines to adopt all other suggestions regarding which tools the clinicians should use or other arguments for or against the board's current selected risk assessments because it would impair the board's ability to meet its other obligations under the same subdivision.

Specifically, after amendment, subdivision (a) of the proposed regulation mandates board psychologists to incorporate "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals." Each of the risk assessment tools and instruments used by board psychologists was selected after consulting with subject matter experts and soliciting input from stakeholders, public discussion of the strengths and limitations of the assessments, and extensive review of the scientific literature. Consequently, the risk assessment tools used by FAD clinicians have been determined to meet the requirement of being commonly used by other clinicians conducting similar violence risk assessments. The other suggestions for tools raised in these comments have not been deemed by the board to meet this requirement.

Moreover, the board still retains the discretion to update the tools and assessments used, should any future assessments become more commonly used for this purpose. The board notes that any future changes to the tools and instruments used by the board's clinicians would be done under the same process of seeking input from stakeholders, public discussion of the strengths and limitations of the assessments, and extensive review of the scientific literature. In addition, the board holds public meetings monthly at which any member of the public may speak on any topic, including risk assessment tools. Thus, these commenters, and the public in general, have the opportunity to

provide input on tools currently used by the board and will have the opportunity to provide input on any future adoption or update of risk assessment tools used by the board. Therefore, the comments suggesting the board adopt specific tools or arguing against the tools currently used by the board are declined.

Sub-Issue 2. Some of these commenters raised various arguments expressing concern with the tools and instruments currently employed by board psychologists. Specifically, several commenters noted that the current risk assessment tools used by board psychologists have not been "validated" for use on the life inmate population. One commenter argued that the board should be required to state the limitations for these risk assessment tools including the base rate of recidivism and peer studies on validation.

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant because it subsequently updated the regulations to provide examples of the kinds of risk assessment tools the clinicians are mandated to use in completing CRAs. After consideration, the board finds that the commenters' rationale for raising these concerns is contrary to the scientific literature. Therefore, the board declines to adopt this proposed amendment.

Some commenters argued that the risk assessment tools and instruments used by board psychologists have never been "validated" for the life inmate population, only for the inmate population in general. That argument ignores two important factors.

First, to properly "validate" these tools on the life inmate (or more accurately, the long-term offender population, since not all offenders who have parole hearings are life inmates) the board would be required to conduct assessments on a random, but sufficiently large (statistically significant) sample of inmates ranging from the lowest to the highest levels of risk. The board would then be required to release all of those inmates into the community without any regard for each inmate's individual level of risk or current suitability for parole and then track them for a period of time to confirm whether inmates assessed to be "high risk" engage in violence at a higher rate than those assessed to be "low risk." Not only would such an action substantially endanger the public safety in direct contravention to the main mission of the board, but both the department and the board are legally prohibited from releasing inmates without legal authority to do so. No law authorizes the release of life inmates for this purpose. On the contrary, Penal Code section 3041 clearly mandates the board to provide hearings for life inmates for the purpose of determining whether that inmate is currently suitable for parole. Only upon a finding that the inmate is currently suitable may the board and CDCR release a life inmate from prison.

Second, multiple studies have been conducted on the specific instruments and tools currently used by board psychologists, which demonstrate the validity of using these risk assessment tools on the inmate population under the board's jurisdiction and confirm that these are the most generally accepted forensic tools for assessing inmates' potential risk of future violence, including long-term inmates:

- Campbell, French, and Gendreau (2009) conducted a meta-analysis of 88 studies from 1980 to 2006 that compared risk instruments and other psychological measures and their ability to predict general (primarily nonsexual) violence in adults. The HCR-20 and PCL-R were among the five instruments that generated the most predictive validity research with respect to violence. (Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.)

- Yang, Wong, and Coid (2010) conducted a meta-analysis of "nine commonly used risk assessment tools and their subscales to compare their predictive efficacies for violence. The effect sizes were extracted from 28 original reports published between 1999 and 2008, which assessed the predictive accuracy of more than one tool." Authors concluded that "each of the three HCR-20 subscales demonstrated similar predictive effects compared with other instruments. The three subscales [used by the HCR-20] also appeared to have a synergistic effect. The overall predictive efficacy appeared higher when the subscales were combined, which is the way the tool was developed." The authors cautioned "different tools are designed for different functions in addition to risk prediction. Tools with dynamic risk predictors can assess change in risk while those with static predictors cannot." This sentiment fits well with the board's selection of the HCR-20-V3 for use with long-term inmates. Unlike many risk instruments referenced in this meta-analysis, the HCR-20-V3 assesses dynamic/changeable risk predictors and current relevance of static/unchangeable predictors. (Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.)

- Singh, Desmarais, Hurducas, et al. (2014) surveyed members of 59 national and international organizations to examine methods of violence risk assessment across six continents and to compare the perceived utility of these methods by mental health and allied professionals. Surveys were completed by 2,135 respondents from 44 countries. The HCR-20 was the instrument most commonly used for conducting violence risk assessments, developing risk management plans, and monitoring risk management plans. Given that users of [structure professional judgement] instruments [such as the HCR-20 that the board uses] rated them as very useful in the development and monitoring of risk management plans, assessors working in rehabilitation and recovery-focused settings may wish to consider adopting such tools." (Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.)

- Guy, Kusaj, Packer, and Douglas (2014) examined the risk characteristics of 5,181 indeterminately sentenced inmates assessed by psychologists who administered the HCR-20, PCL-R, and LS-CMI and concluded that, in general, inmates obtained lower scores and ratings on these instruments than is typically observed in correctional settings. This is consistent with the scientific literature, which suggests that advanced age and long-term confinement generally lowers an inmate's potential risk of future violence. On the LS-CMI and PCL-R, for example, inmates obtained average total scores that were roughly one standard deviation below the mean relative to standardization sample norms. Similarly, most inmates were given a summary risk rating on the HCR-20 that reflected low to moderate risk and only 11.3% were rated high risk. Authors concluded this inmate sample was a "relatively Low risk" sample just as their average age and length of incarceration and estimated recidivism rates might suggest. All three instruments were associated with

parole decision making and of the three the HCR-20, and particularly items that emphasize dynamic/changeable risk, had the most robust relationship with board decisions regarding future dangerousness and parole suitability. (Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.)

NOTE: Each of these studies is cited in the updated information digest, was noticed to the public in the re-notice dated December 22, 2017, and are attached as part of the rulemaking record.

Therefore, the arguments regarding the validity of the tools and instruments currently employed by the board psychologists are not supported by available published research and are contrary to standardized approaches for identifying, measuring, and categorizing an inmate's risk of violence that are generally accepted in the psychological community. The board further notes, as explained above, that each of the current tools and instruments used by the board were adopted following significant public discussion and input.

Finally, the board considered the suggestion to include statements regarding limitations of the risk assessment tools, but finds the suggestion to be unnecessary. CRAs already contain information in accordance with the *Johnson v. Shaffer* stipulated agreement qualifying the information contained in the reports by putting the information into greater context about recidivism generally. Thus, the board declines to adopt this suggestion.

ISSUE 21: New Proposed CRA Requirements

Comment ID Numbers: 16-01-06-05; 16-01-06-06; 16-01-27-01; 16-01-28-07; 16-01-30-03.

Each of these comments suggested imposing additional requirements during the CRA process.

Sub-Issue 1. One comment stated CRA interviews should be timed with a timer.

1. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation sets any time limits or minimum time requirements on CRA interviews because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians must have the flexibility to spend whatever is the appropriate amount of time to interview each inmate that is required to obtain all of the information they need to make those individual determinations. Thus, because timing interviews is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 2. Another comment argued questions asked during a CRA interview should be easier to understand. Further, this comment expressed concern with an inmate's ability to comprehend interview questions.

2. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how CRA interviews should be conducted or the types of questions that should be asked because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians must have the flexibility to ask whatever questions are necessary to gather all of the information they need to make those individual determinations. Moreover, to the extent that this suggestion is attempting to raise ADA issues, as discussed above, those issues are more appropriately handled in a different regulation package. Thus, because the types of questions clinicians ask during CRA interviews is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 3. One commenter stated the regulations should expressly require psychologists to consider elderly factors or other applicable mitigating factors in addition to the youth offender factors when conducting a risk assessment.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of the regulation because it pertains to the substance of what information must be considered in a CRA. After considering this comment, the board determined that this suggestion was already included in the requirements of the regulation, both as originally written and as amended in the re-noticed text.

Specifically, subdivision (b) of this proposed regulation already mandated the clinicians to consider the youth factors for any qualified youth offender. Additionally, the original text of subdivision (a) required clinicians to consider any factors impacting an inmate's risk of violence. This necessarily includes youth factors, elderly factors, and any other factors mitigating an inmate's risk of violence since those impact the determination of risk. Moreover, as amended, the new proposed text of subdivision (a) clarifies that all factors must include the suitability (mitigating) and unsuitability (aggravating) factors that impact the inmate's risk of violence. Therefore, the board finds that this suggestion was already IMPLEMENTED in the proposed regulation and has been further clarified in the amendments.

Sub-Issue 4. One commenter argued that psychologists should be required to directly observe an inmate's interactions with others to determine social skills as part of the CRA process.

4. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how clinicians should obtain information during CRA interviews, file reviews, or other information-gathering processes for use in conducting the CRAs because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians are free to observe inmates or gather any other information within the scope of the risk assessment that the clinician finds relevant to the inmate's risk; however, direct observation of an inmate's social interactions may not be relevant in every case. Clinicians must have the flexibility to gather whatever information they need to make those individual determinations through interview questions, file reviews, or whatever other means are appropriate in each individual case. Thus, because the methods through which clinicians gather the information relevant to their CRAs is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 5. One commenter argued that clinicians should explore questions and answers that lead to negative evaluations and clarify those questions for inmates.

4. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how clinicians should conduct their interviews or frame their questions. Clinicians must have the flexibility to use their expert training to determine the best way to frame their interview questions to obtain the information they need from the inmates. Thus, because the methods through which clinicians conduct interviews is outside the scope of this regulation, the board declines to adopt this amendment.

ISSUE 22: Statements Regarding Specific Inmate Cases

Comment ID Numbers: 16-01-17-02; 16-01-31-01; 16-01-32-04; 16-01-39-09; 16-01-45-12.

These commenters all raised concerns regarding specific objections to individual inmate comprehensive risk assessments.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds these comments not relevant and not within the scope of the regulation because they do not pertain to regulating the process or requirements for comprehensive risk assessments and do not raise any suggestions or issues regarding the proposed regulation. Specifically, each of these commenters raised individual issues pertaining to unique cases, but did not provide comments on specific portions of the regulation or recommendations for how they should be amended. Therefore, the board declines to adopt amendments to the proposed regulation based on these comments as they did not contain any recommended amendments.

ISSUE 23: Statements in General Support or Opposition

Comment ID Numbers: 16-01-01-01; 16-01-05-01; 16-01-07-02; 16-01-17-01; 16-01-20-01; 16-01-29-02; 16-01-32-03; 16-01-39-08; 16-01-45-02; 16-01-45-11; 16-01-47-01; 16-01-48-01; 16-01-48-04; 16-01-49-01.

These commenters all raised comments either generally supporting or opposing this regulation package.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE IN GENERAL SUPPORT OR OPPOSITION

The board finds these comments are not relevant and not within the scope of the regulation because each of them only raised general support or opposition. Therefore, the board declines to adopt amendments to the proposed regulation based on these comments as they did not suggest any proposed amendments.

SUMMARY AND EXPLANATION OF AMENDMENTS TO ORIGINAL PROPOSED REGULATION SUBMITTED FOR RE-NOTICE ON DECEMBER 22, 2017:

1. Amended subdivision (a) to add language requiring FAD clinicians to clarify that clinicians completing CRAs must consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division."

The original proposed text of subdivision (a) required psychologists to "consider the current relevance of any factors impacting an inmate's risk of violence" when preparing a comprehensive risk assessment (CRA) for use by a hearing panel. However, the Office of Administrative Law's (OAL's) disapproval decision dated November 8, 2017, expressed concern that the language was unclear about "what risk factors impacting an inmate's risk of violence are which psychologists must consider." Thus, on further review, the board determined that, to provide additional information about the types of factors the clinicians need to consider, the board should reference the factors of suitability and unsuitability already contained in the regulations. Thus, the board amended this sentence to require FAD clinicians to consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of

this division." This clarifies that, in addition to any other relevant or reliable evidence about risk of violence, the types of factors the clinicians must consider mirror the factors considered by hearing panels in assessing an inmate's suitability for parole. These changes were necessary to provide clearer guidance to clinicians and they benefits inmate and other stakeholders by clarifying the types of factors that should be considered when assessing an inmate's risk of violence.

2. Amended subdivision (a) to <u>delete</u> the text "the current relevance of any."

The board removed the text "the current relevance of any" because the board determined this language was unnecessary and redundant. Assessing an inmate's risk of violence necessarily requires the clinician to assess the current impact of that risk. Thus, the board determined that requiring clinicians to consider "the current relevance" of factors was already implied. Additionally, the intent of this subdivision was to require the clinicians to consider the factors themselves, not just their current relevance. Thus, the amendment to this sentence more accurately captures the intended requirement for the clinicians in reviewing evidence for the CRAs.

3. Amended subdivision (a) to specify the types of risk assessments clinicians must use when conducting CRAs by <u>deleting</u> the text "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and <u>adding</u> the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals" in its place.

The original proposed text of subdivision (a) required psychologists to incorporate "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" when preparing a comprehensive risk assessment for use by a hearing panel. In OAL's November 8, 2017 disapproval decision, however, OAL expressed concern that the language was unclear about how the board would determine what tools were generally accepted and by which psychological community. After review, the board removed the text "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and replaced it with the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals." These changes were necessary to clarify the kinds of assessments clinicians will use to assess risk by providing examples of the assessments used, and to ensure that any tool used by the board are the most commonly used assessments by the specific community of clinicians who conduct these same kinds of risk assessments. This clarification benefits all stakeholders by increasing public confidence in the risk assessment tools used because the board is ensuring they are the most commonly used among experts conducting these assessments.

4. Amended subdivision (b) to <u>add</u> "as defined in Penal Code section 3051, subdivisions (a) and (h)."

The original proposed text of subdivision (b) did not include text defining which inmates constitute a youth offender for whom a psychologist must take into consideration specified youth factors and their mitigating effects when preparing a risk assessment. On further review, the board determined it needed to clarify that this reference to "youth offenders" was meant to refer to the group of persons as defined in California's youth offender statute. Thus, the board added "as defined in Penal Code section 3051, subdivisions (a) and (h)" to clarify the intended meaning of "youth offender" in this subdivision. This change was necessary to ensure that inmates and other stakeholders understood that this subdivision specifically applies to person qualified as youth offenders under California's youth offender statute. This clarification benefits all stakeholders by reducing potential confusion on this issue.

5. Amended paragraph (c)(1) to <u>delete</u> the text ", and reliable and valid principles and methods have been appropriately applied to the facts of the case."

The original proposed text of paragraph (1) of subdivision (c) stated that, prior to being finalized, a risk assessment needs to be reviewed by the Chief Psychologist or a Senior Psychologist "to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case." In its November 8, 2017 disapproval decision, however, OAL expressed concern that the language was unclear about "principles and methods" were. Thus, the board removed the text "and reliable and valid principles and methods have been appropriately applied to the facts of the case" because the main focus of this requirement was for supervisors to ensure that assessments were based on adequate scientific foundation such that they warrant approval. This change was necessary to remove unclear language and the clarification will benefits stakeholders by focusing the regulation instead on the main goal of supervision.

6. Amended paragraph (d)(2) to <u>delete</u> the provision "The board may prepare a risk assessment for inmates housed outside of California," to remove the board's discretion to prepare risk assessments for out-of-state inmates.

The original proposed text of paragraph (2) of subdivision (d) stated the board "may prepare a risk assessment for inmates housed outside of California." In its November 8, 2017 disapproval decision, however, OAL expressed concern that the language was unclear about how the board would make determinations about when it could or could not conduct assessments for out-of-state inmates. Thus, the board deleted this original proposed text. This change is necessary to remove the problematic language.

7. Amended paragraph (d)(2) to <u>add</u> the provision "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days before the date of the hearing," to establish a deadline by which the board must serve inmates with their completed CRAs.

The original proposed text did not include a deadline by which the board must complete, approve, and serve a risk assessment on an inmate. Following review of public comment

received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that establishing a deadline would benefit inmates and all other hearing participants by mandating that inmates be served with the risk assessment with sufficient time to review it prior to the hearing. Additionally, the deadline better ensures that inmates will receive their risk assessments with sufficient time to raise any objections to factual errors within the pre-hearing objection process. Thus, the original proposed text of paragraph (2) of subdivision (d) was replaced with the text "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing." The board determined that 60 days was an appropriate deadline because it provides inmates 30 days to review the CRA and provide any objections to factual errors to the board a least 30 days prior to their hearings. This change was necessary to better protect inmate's abilities to use the pre-hearing process.

8. Amended paragraph (e)(1) to <u>delete</u> the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence," to broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

The original proposed text of paragraph (1) of subdivision (e) permitted an inmate or inmate's attorney of record to send a written objection regarding alleged factual errors in a risk assessment to the Chief Counsel no less than 30 calendar days before a hearing. In the original proposed text, however, the inmate or inmate's attorney had to believe that the alleged factual errors were such that they materially impacted "the risk assessment's conclusions regarding the inmate's risk of violence." Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that inmates needed the ability to raise all factual errors, even non-material errors, to ensure the accuracy of the record available to the hearing panel members. Thus, the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" was removed to allow inmates to raise all factual errors, regardless of the significance of their impact. This change was necessary to ensure the accuracy of the information in CRAs. Additionally, the change benefits all stakeholders because increasing the accuracy of the record increases confidence in the information on which hearing panels rely to assess the inmate's suitability for parole.

9. Amended paragraph (e)(1) to <u>relocate</u> the text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" from paragraph (e)(3).

The text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" was originally contained in paragraph (e)(3). However, the rest of this paragraph dealt with how written objections need to be addressed. The timing of objection submissions was instead discussed in paragraph (e)(1). Thus, since this text was more appropriately included with the other text discussing timing of submissions, the board found it necessary to relocate this text to paragraph (e)(1). This change will benefit all stakeholders by grouping all of the statutory rules and requirements about the timing of submitting CRA objections into a single paragraph.

10. Amended paragraph (e)(2) to replace the definition of factual error "an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation" with the new definition "an untrue circumstance or event."

The original proposed text of paragraph (2) of subdivision (e) defined "factual error" as "as explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation." Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that the original proposed definition had the potential to confuse inmates and other stakeholders. Thus, the text "defined as an explicit finding about a" and "for which there is no reliable documentation or which is clearly refuted by other documentation" was removed, and the text "an untrue" was added before "circumstance or event," such that the term factual error is now more simply defined as "an untrue circumstance or event." The board found the portions of the original definition it deleted were unnecessary because they are already incorporated by the concept of the CRA finding being "untrue." This simpler definition was necessary to avoid potential confusion and benefits stakeholder by providing an easier to understand definition of this term.

11. Amended paragraph (e)(2) to delete the text excluding "clarifications regarding statements the risk assessment attributed to the inmate," from the definition of factual errors inmates may raise during the pre-hearing objection process for factual errors.

The original proposed text of paragraph (2) of subdivision (e) excluded "clarifications regarding statements the risk assessment attributed to the inmate" from the definition of "factual error" for the purpose of the board's pre-hearing objection process for factual errors. Instead, the board created a remedy under subdivision (j) for inmates to raise these concerns directly with the hearing panels at their hearings. Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board elected to include objections to statements attributed to the inmate under the definition of factual errors. Thus, the text "or clarifications regarding statements the risk assessment attributed to the inmate" was removed from the exclusionary provision of the prior factual error definition. Consequently, these objections are now included in the board's pre-hearing objection process for factual errors and must be raised prior to the hearing absent good case. This amendment was necessary to bring the board into compliance with the Johnson court's October 6, 2017 order. Additionally, it benefits inmates by allowing these issues to be resolved prior to an inmate's hearing.

12. Amended paragraph (f)(1) to replace the word "determine" with "evaluate" for the duty of the Chief Counsel in this provision.

The original proposed text of paragraph (f)(1) required the Chief Counsel to "determine" whether a risk assessment contains a factual error as alleged when reviewing either a written objection to an alleged factual error in a risk assessment or a risk assessment referred by the board. On further review, the board determined that a more accurate description of the Chief Counsel's role at this step in the objection process was to evaluate whether a risk assessment contains a factual error. Then, following evaluation, the Chief Counsel can reach a

determination about whether the allegation did raise a factual error, which dictates the Chief Counsel's next obligation. Thus, the text "determine" was removed and replaced with the text "evaluate." This amendment was necessary to more accurately describe the Chief's counsel's role during this step of the CRA objection review process, and the clarification benefits all stakeholders by clarifying that evaluation is required before the Chief Counsel may reach a decision.

13. Amended subparagraphs (f)(2)(A) and (g)(2)(A), and subdivision (h), to add the word "calendar" to the deadlines "10 calendar days" to clarify the timing of these provisions.

The original proposed text of subparagraph (A) of paragraph (2) of subdivision (f) required the Chief Counsel, after determining that a risk assessment does not contain a factual error as alleged, to provide a copy of the miscellaneous decision associated with that determination to the inmate or attorney of record no less than "10 days" prior to a hearing. However, on further review, the board determined this cause potential ambiguity about whether the board intended this to be 10 calendar days (including weekends and holidays) or 10 business days (meaning only week days on which the board is open as a state agency). Thus, the text "calendar" was added between "10" and "days" to clarify that the Chief Counsel is required to provide a miscellaneous decision containing the results of the board's review of the CRA objections promptly, but not later than 10 calendar days prior to the hearing. This amendment was necessary to clarify these deadlines and ensure they match the disclosure requirements contained in section 2247 of the board's regulations. Additionally, these amendments benefit all stakeholders by ensuring that hearing parties know when to expect their decisions.

14. Amended paragraph (g)(1) to add subparagraphs (g)(1)(A) and (g)(1)(B) to clarify the duties and requirements of the Chief Psychologist on reviewing an error referred by the Chief Counsel. Subparagraph (g)(1)(A) established requirements when the Chief Psychologist deems the error to be immaterial and specifically still requires the error to be corrected in addition to other actions. Subparagraph (g)(1)(B) established requirements when the Chief Psychologist deems the error to have a material impact on the risk assessment's conclusions and requires a new or revised risk assessment in addition to other actions. Amended subparagraph (g)(2)(B) to delete the provision requiring the Chief Counsel to "order a new or revised risk assessment."

The original proposed text of paragraph (g)(1) required the Chief Psychologist, after opining whether a factual error referred by the Chief Counsel materially impacted the conclusion of a risk assessment, to prepare an addendum to the risk assessment documenting his or her opinion and notify the Chief Counsel of the addendum. Following review of the public comments, the board determined that the regulation did not fully explain all of the requirements for the Chief Psychologist following his or her review. For example, if the Chief Psychologist opined that a factual error did not materially impact a risk assessment's conclusions regarding an inmate's risk of violence, the original proposed text did not require the Chief Psychologist to take any actions to correct the error. Additionally, the original text did not identify the specific actions the Chief Psychologist must take after opining that a factual error did materially impact a risk assessment's conclusions. Further, if the Chief Psychologist opined that a factual error had a material impact, the original text only required the Chief Psychologist to prepare an

addendum. The determination of whether to order a new risk assessment was assigned to the Chief Counsel.

Thus, the text "Following the review, the Chief Psychologist shall promptly take one of the following actions" was added. Additionally, subparagraph (1)(A) was added to require that, if the Chief Psychologist opines a factual error did not materially impact the risk assessment's conclusions, the Chief Psychologist must take all of the following steps: "direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum." Similarly, subparagraph (1)(B) was added to require that, if the Chief Psychologist opines a factual error did materially impact the risk assessment's conclusions the Chief Psychologist must take all of the following steps: "order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum." Finally, subparagraph (g)(2)(b) was amended to delete the requirement for the Chief Counsel to "order a new or revised risk assessment," because this duty was reassigned to the Chief Psychologist as explained above.

These amendments were necessary to clarify for stakeholders the complete CRA objection process regardless of whether the Chief Psychologist finds an error to be materially impactful. They were also necessary to ensure that all errors, even non-material errors, were corrected and fully documented in the risk assessment to increase the accuracy of the inmate's records. Moreover, the board determined that the decision regarding whether an error required a new or revised risk assessment was a clinical determination, not a legal one, and thus was more appropriately assigned to the Chief Psychologist than Chief Counsel.

The amendments also benefit inmates by ensuring that any objections deemed by the Chief Counsel to raise factual errors must be corrected following referral to and review by the Chief Psychologist, and that the determination about the most clinically appropriate means of correcting the error is made by the board's clinical expert, the Chief Psychologist. The amendments also clarify for all stakeholders the complete CRA objection process and how the board's determinations will be documented in both situations following the Chief Psychologist's review.

15. Amended subparagraph (g)(2)(A) to <u>delete</u> the provision requiring the Chief Counsel to "overrule the objection" when the Chief Psychologist found it to be immaterial since the amendments to subparagraph (g)(1)(A) now require the board to take action to correct these errors.

The original proposed text of subparagraph (g)(2)(A) required the Chief Counsel to overrule an objection to an alleged factual error in a risk assessment after receiving an addendum from the Chief Psychologist in which he or she opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence. As explained in Item 14, following review of the public comments, the board determined that all errors required correction to increase the accuracy of the inmate's records. Thus, the text "overrule the objection" was removed. Removing this text was necessary to harmonize this subparagraph

the board's amendments in Item 14 to require correction of all errors, including non-material errors. This amendment was also necessary to harmonize with the board's determination that the decision about how best to correct a factual error, including non-material errors, was more appropriately assigned to the Chief Psychologist. As noted above, this amendment benefit inmates by ensuring all errors are corrected and documented to increase the accuracy of the record for the hearing.

16. Amended subparagraph (g)(2)(A) to <u>add</u> the text "the revised risk assessment" to the documents the Chief Counsel is required to provide to the inmate or attorney who raised immaterial errors, and amended subparagraph (g)(2)(B) to <u>add</u> the text "the new or revised risk assessment" to the documents the Chief Counsel is now required to provide to the inmate or attorney who raised material factual errors.

The original proposed text of subparagraph (g)(2)(A) did not require the Chief Counsel to provide a copy of a revised risk assessment to an inmate or attorney if the Chief Psychologist determined a factual error had no material impact. As explained above in Item 14, however, the board determined that all identified errors should be corrected, even immaterial errors. Since this amendment in turn requires the board to prepare a revised risk assessment in every case where the Chief Counsel determines that objections raise factual errors, the board needed to add a corresponding amendment requiring the Chief Counsel to provide a copy of the revised risk assessment along with any other documentation of the board's decision. Thus, the text "the revised risk assessment" was added to the list of documents the Chief Counsel is required to provide to the inmate or attorney following correction of any identified factual errors the Chief Psychologist found to be immaterial.

Similarly, the original proposed text of subparagraph (g)(2)(B) did not require the Chief Counsel to provide a copy of the new or revised risk assessment to an inmate or attorney after the Chief Psychologist determined a factual error materially impacted the clinician's conclusions and the CRA was corrected. The board determined that, to mirror the requirements of subparagraph (g)(2)(B) and ensure the inmates received a copy of the new or revised CRA after raising material errors, this subparagraph should be amended similarly to (g)(2)(A) to clarify this requirement. Thus, the text "the new or revised risk assessment" was added to the list of documents the Chief Counsel is required to provide to the inmate or attorney after the Chief Psychologist deemed an identified error to have a material impact and ordered a new or revised risk assessments.

These amendments were necessary to maintain consistency with the new requirements in subparagraph (g)(1)(A) requiring correction of immaterial factual errors and subparagraph (g)(1)(B) requiring the Chief Psychologist to order a new or revised risk assessment following a determination that a factual error had material impact. These amendments benefit inmate by ensuring they receive copies or their revised or new CRAs any time the board determines that their objections have raised factual errors.

17. Amended paragraph (g)(3) to <u>replace</u> the text "Impacted risk assessments shall be permanently removed from the inmate's central file" with "The board shall request that the department permanently remove any risk assessments that are revised under

paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file."

The original proposed text of paragraph (g)(3) required CRAs containing materially impactful errors to be "permanently removed" from an inmate's central file. As discussed in the amendments made in Item 14, the board determined that all errors should be corrected. Thus, under the new amendments, all identified factual errors will result in a revised or new risk assessment. Thus, the board determined that it needed to amend this subparagraph to address the removal all revised or replaced risk assessments. Additionally, after further review, the board determined that it has no legal authority to add or remove documents from an inmate's central file. That authority lies only with the department in accordance with Penal Code section 2081.5. Thus, the board's authority is limited to issuing a request to the department for the removal of these documents. This paragraph required revision to clarify the board's authority and requirements. Thus, the text "Impacted risk assessments shall be permanently removed" was replaced with the text: "The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised under paragraph (1)(B) of this subdivision from the inmate's central file."

This amendment was necessary to ensure that the board exercised its authority to initiate removal of any CRAs that are revised or replaced from an inmate's central file to increase the accuracy of the information available to hearing panels. The amendment was also necessary to clarify the board's role in initiating the removal of these documents in accordance with the limitations on the board's authority respecting an inmate's central file. This amendment benefits inmates by ensuring that the board initiate removal of any revised or replaced CRA. It also benefits all stakeholders by better clarifying the board's role in the process of initiating removal.

18. Amended subdivision (h) to <u>replace</u> the word "may" with "shall" to clarify (1) that the Chief Counsel and Chief Psychologist are mandated, not just permitted, to complete the review process before a hearing if the Chief Counsel has determined that sufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection, and (2) that the Chief Counsel is mandated, not just permitted, to refer an objection to the hearing panel for consideration if he or she determined insufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection.

The original proposed text of subdivision (h) gave the Chief Counsel and Chief Psychologist discretion regarding whether to complete the review process before a hearing after the Chief Counsel determines sufficient time exists to complete the review process for a CRA objection postmarked or electronically received less than 30 days prior to a hearing. However, OAL's November 8, 2017 disapproval decision expressed concern about how the Chief Counsel and Chief Psychologist would determine whether to complete the review process for untimely objections when sufficient time remained before the hearing, or whether to refer the objections to the panel when insufficient time remained to respond. In reviewing this concern, the board determined that this subdivision did not accurately capture the requirement the board intended to place on the Chief Counsel and Chief Psychologist. The board's intent was to grant the

Chief Counsel discretion to determine, from a workload perspective, whether sufficient time remained to complete the CRA objection process at least 10 calendar days prior to the hearing. If the Chief Counsel determined sufficient time remained, the board intended to mandate the Chief Counsel and Chief Psychologist complete the process at least 10 days prior to the hearing. If, on the other hand, the Chief Counsel determined insufficient time remained, the board intended to mandate the Chief Counsel to refer the untimely objections to the hearing panel for its determination as to whether the inmate had good cause for failing to timely raise the objections. Thus, the text "may" was changed to "shall" for both of the above obligations to clarify that these actions are required, not just permissive.

These amendments are necessary to clarify the board's intention to mandate completion of the CRA objection process or referral to the panel, depending on the Chief Counsel's determination regarding whether sufficient time remained to respond at least 10 calendar days prior to the hearing. These amendments benefit inmates by mandating a board action following the Chief Counsel's decision and clarifying those actions.

19. Amended subdivision (i) to <u>add</u> the text "or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section" to clarify that this subdivision governing untimely hearings also applies to untimely objections referred by the Chief Counsel.

The original proposed text of paragraph (i)(1) only required a hearing panel to determine whether an inmate demonstrated good cause for failing to submit a written objection 30 or more calendar days before a hearing if the inmate or attorney of record raised an objection to an alleged factual error in a risk assessment for the first time at the hearing. After further review, the board determined this language appeared to exclude untimely objections referred by the Chief Counsel to the hearing panel under subdivision (i). The board intended paragraph (i)(1) to require the hearing panel to determine good cause for any untimely objections to factual errors before the panel, including those objections referred by the Chief Counsel under subdivision (h). To clarify this intention, the board determined that it should amend this paragraph to expressly state that referrals from the Chief Counsel were included in this provision. Thus, the board added "or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section."

This amendment was necessary to clarify the board's intent for hearing panels to determine whether good cause existed for untimely objections referred by the Chief Counsel. This amendment benefits inmates by ensuring that untimely objections submitted pre-hearing and referred to the hearing panel will still be reviewed for good cause.

20. Amended subdivision (i) to <u>delete</u> original paragraph (i)(2) containing a definition for good cause to remove unclear language. Other paragraphs were renumbered within this subdivision and the internal references in paragraph (i)(1) were amended consistent with this renumbering.

The original proposed text of paragraph (i)(2) defined good cause for purposes of subdivision (i) as "an inmate's excused failure to timely object to the risk assessment earlier than he or she did." However, OAL expressed concern with the clarity of this definition. The board elected to

delete the definition after determining the additional language was unnecessary. Thus, paragraph (i)(2) was removed from the proposed regulation, the remaining paragraphs in this subdivision were renumbered, and the internal references within paragraph (i)(1) were adjusted to correspond to the renumbering. These amendments were necessary to resolve any ambiguity arising from the board's prior definition of good cause. Instead, the panel will retain discretion to determine whether and how an inmate raising untimely objections has good cause. The amendments will benefit inmates by removing any specific restrictions about good cause and allowing them to raise any arguments regarding the good cause for their untimely objections for the panel's consideration.

21. Amended new paragraphs (i)(2) and (i)(3) (previously (i)(3) and (i)(4)) to <u>delete</u> the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence."

The original proposed text of the paragraphs originally numbered as (i)(3) and (i)(4), now numbered as paragraphs (i)(2) and (i)(3), respectively, limited the scope of untimely factual errors a hearing panel must consider to only those errors the panel determined could potentially have a material impact on the risk assessment's conclusions regarding the inmate's risk of violence. As explained above in item 14, however, the board subsequently determined that all identified errors should be corrected in an inmate's record. To best ensure this goal, the board determined these subdivisions required amendment to both require panels to refer any possible errors back to the Chief Counsel and Chief Psychologist and disregard those possible errors if moving forward with the hearing. Thus, the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" was removed from the text of new proposed paragraphs (i)(2) and (i)(3).

This amendment was necessary to retain consistency with the amendments discussed in Item 14. The amendment benefits inmates by expanding the scope of possible factual errors a hearing panel must refer to the Chief Counsel and Chief Psychologist and must disregard if proceeding with the hearing. The amendments also benefit all stakeholders by furthering the board's goal of increasing the accuracy of inmates' records.

22. Amended subdivision (j) to <u>delete</u> "to or clarify any statements a risk assessment attributed to the inmate," from the at-hearing objection process since this objections are now included as factual errors under the amendments to paragraph (e)(2), which means that they must be raised during the pre-hearing objection process and not in the at-hearing process.

The original proposed text of subdivision (j) required the inmate have the opportunity at a hearing to object to or clarify statements a risk assessment attributed to an inmate. As discussed in Item 11, however, following public comment and the *Johnson v. Shaffer* court's October 6, 2017 order, the board elected to redefine "factual error" to include disagreements with statements the CRA attributes to the inmate. Because these types of objections are now included in the pre-hearing process for factual error, these objections no longer require the at-hearing remedy. Thus, the text "to or clarify any statements a risk assessment attributed to the inmate" and a comma following the text was removed from the at-hearing objection process in subdivision (j). This amendment was necessary to retain consistency with the amendments

made in Item 11. The amendment benefits all stakeholders by resolving these issues prior to the hearing to increase the accuracy of the information before the hearing panels.

23. Amended the reference note to delete references to *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A. Also amended this note to add references to *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] and *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.

The original proposed text included *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A as references the board was implementing, interpreting, or making specific by adopting the regulation. The board initially referenced these cases because they contained the court's original references to the requirement for CRAs. After reviewing OAL's November 8, 2017 disapproval letter, however, the board determined it was not actually interpreting, implementing, or making specific the orders from these cases. Instead, the board was implementing the requirements of the *Johnson v. Shaffer* and *Sherman-Bey* court orders. Thus, the references to "In re Lugo, (2008) 164 CalApp.4th 1522 [and] In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A" were removed from the reference list, and references to "*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] [and] *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499" were added. These amendments were necessary to more accurately reflect the legal sources the board was interpreting, implementing, and making specific. The amendments benefit all stakeholders by providing them with more accurate references to the sources of these regulations.

Following the initial 45-day public comment period, the board also elected to make the following non-substantial and sufficiently-related amendments to its proposed regulation for section 2240:

1. Amended subdivision (a) to delete the word "The" and capitalize the letter "P" in the word "Psychologists" in subdivision (a).

2. Amended subdivision (c) by dividing it into paragraphs (1) and (2), with paragraph (1) retaining all of the originally proposed text of subdivision (c) except for the last sentence, which was relocated to paragraph (2).

3. Amended paragraph (e)(2) to replace "Factual errors do not include" with "is not a factual error."

4. Amended paragraph (e)(2) to add the word "A" and replace "disagreements" with the singular version of that word.

5. Amended subparagraph (g)(1)(A) to delete the capitalization of the word "the."

6. Amended subparagraph (g)(2)(A) to add the word "the" before "Chief Psychologist's addendum."

All of these amendments were made to increase the readability of these regulations and will benefit all stakeholders by making the regulations easier to understand for all members of the public.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY RE-NOTICE PERIOD FROM DECEMBER 22, 2017, THROUGH JANUARY 8, 2018:

After issuing re-notice of the above changes on December 22, 2017, the board explained that it would accept public comment on the regulations from that date through and including January 8, 2018, for a total of 18 days.

The board received written comments from a total of 11 members of the public (including six inmates) during the re-notice public comment period of December 22, 2017, through January 8, 2018. As before, each comment from the 11 commenters was individually identified with a unique identification ("ID") number as follows: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. The numbering of the commenters began with 50, since we had received comments from 49 commenters in the original comment period. Thus, for example, the comment identified as 16-01-50-03 would indicate that comment was contained in the **fiftieth** letter received and was the **third** comment from the author of that letter. The board received a total of 89 individual comments from the 11 written commenters. The comment ID numbers for comments received during the public comment period ranged from 16-01-50-01 through 16-01-60-16. Tables containing the identification number for each comment along with the commenter's name, date of the comment, category of the comment, and the board's determinations regarding the comment are included in the comments tab. Additionally, copies of each correspondence are included in the comments tab.

Many of the comments raised similar issues or proposed amendments. Thus, the board will address each category of comment below and identify the specific comment ID numbers included in each category.

As a brief note, the board determined that the letter identified as 16-01-55 was written by the same author as, and was substantially identical to, the letter identified as 16-01-51. Therefore, these comments were addressed under the individual comment ID numbers labeled in letter 16-01-51.

ISSUE 1: Comments Not Directed Towards Re-Notice Text

Comment ID Numbers: 16-01-51-03; 16-01-51-06; 16-01-52-05; 16-01-54-02; 16-01-54-06; 16-01-56-02; 16-01-56-03; 16-01-56-05; 16-01-58-02; 16-01-58-07; 16-01-58-10; 16-01-58-11; 16-01-58-20; 16-01-59-01; 16-01-59-03; 16-01-59-04; 16-01-59-05; 16-01-59-06; 16-01-59-08; 16-01-60-04; 16-01-60-06; 16-01-60-08; 16-01-60-12; 16-01-60-13; 16-01-60-14.

These comments were related to the original text of the regulations, but not specifically related to the changes in the re-notice text.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE NOT RELEVANT TO THE RE-NOTICE LANGUAGE

The board finds these comments are not relevant to the re-notice changes made to the proposed regulatory text. Only comments specifically directed to the proposed action in the re-notice text will be given a response. (Gov. Code § 11346.8, subd. (c).)

As explained in greater detail above, the re-notice textual changes were related to: (1) factors considered by psychologists when preparing comprehensive risk assessments; (2) structured risk assessment instruments used by psychologists when preparing comprehensive risk assessments; (3) defining a youth offender for the purpose of this section; (4) how the Chief Psychologist or a Senior Psychologist reviews a risk assessment before finalizing; (5) the deadline for a risk assessment to be completed, approved, and served on an inmate; (6) the pre-hearing process for objecting to an alleged factual error in a risk assessment; (7) redefining factual error; (8) the Chief Counsel's review of a risk assessment containing an alleged factual error and applicable pre-hearing deadlines; (9) the actions available to the Chief Psychologist after reviewing a risk assessment that was referred by the Chief Counsel; (10) the actions available to the Chief Counsel upon receipt of a risk assessment addendum from the Chief Psychologist and applicable pre-hearing deadlines; (11) the board's requirement to request permanent removal by the department of specified risk assessments; (12) the timeline and process for review of an objection to an alleged factual error that is raised through written objection to the Chief Counsel less than 30 calendar days before a hearing; (13) the definition of good cause; (14) the degree of factual error necessary in a risk assessment for a hearing panel to either refer a risk assessment to the Chief Counsel for review or overrule an objection and complete a hearing; (15) objections an inmate may raise for the first time at a hearing; and (16) references to the laws the board is implementing, interpreting, or making specific by adopting the regulations.

None of the comments listed above were specifically directed to any of the proposed actions in the re-notice text because they were related to: (1) psychologist accountability; (2) the weight given by psychologists to post-conviction achievements; (3) an impartiality requirement on psychologists; (4) the recording and transcription of risk assessment interviews; (5) the training of individuals making determinations on risk assessment validity; (6) the degree of consideration psychologists must give to youth offender factors when preparing a risk assessment for a youth offender; (7) a requirement that clinicians make a written inventory of everything youth offenders provide related to the youth offender factors; (8) inmate rights pertaining to plausible denials; (9) the definition of a clinical opinion; (10) repercussions of the board's failure to address a timely objection; (11) the timeline for the board to correct errors in a risk assessment that were found to be factual errors by a hearing panel; (12) the date rationale for selecting when a risk assessment becomes final; (13) claiming that the definition of factual error should not exclude clinical observations, opinions, or diagnoses; (14) requiring psychologists to list raw data obtained from using a structured risk assessment instrument on an inmate within the CRA; (15) the need for supervising psychologists to document disapprovals and amendments during reviews; (16) addressing ADA issues involving risk assessments and assessment interviews; (17) whether anti-social personality disorder is a valid diagnosis or should be eliminated, and (18) the language that should be included in CRAs based on the *Johnson v. Shaffer* October 6, 2017, court order.

Thus, the board declines to adopt amendments to the proposed regulation based on any of these comments as they did not suggest any proposed amendments to the re-noticed text. The board notes that many of these comments were raised by other commenters during the 45-day comment period. Commenters may find applicable responses to the issues raised during the 15-day comment period in the board's responses to comments made during the 45-day comment period.

ISSUE 2: Comments in General Support or Opposition

Comment ID Numbers: 16-01-52-01; 16-01-53-01; 16-01-54-01; 16-01-56-01; 16-01-57-01.

These commenters all raised comments either generally supporting or opposing this regulation package.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE IN GENERAL SUPPORT OR OPPOSITION

The board finds these comments are not relevant and not within the scope of the regulation because each of them only raised general support or opposition. Only comments specifically directed at the proposed action or the procedures followed in proposing or adopting the action will be given a response. (Gov. Code § 11346.9, subd. (a)(3).) The board declines to amend the proposed regulation based on these comments as they did not suggest any specific changes for implementation.

Additionally, one commenter claimed he has not received updates on the *Johnson v. Shaffer* class action and would like to be kept informed of the proceedings. The commenter should contact the class action plaintiffs' counsel for the requested updates.

ISSUE 3: Removal of CRAs Containing Errors

Comment ID Numbers: 16-01-50-01; 16-01-50-02; 16-01-50-03; 16-01-53-02; 16-01-53-03; 16-01-53-04; 16-01-53-05; 16-01-54-04; 16-01-58-09; 16-01-58-17; 16-01-60-09.

These commenters all raised comments pertaining to the board's amendment to the text in paragraph (i)(3), in which the board deleted the language "Impacted risk assessments shall be permanently removed" [from the inmate's central file] and replaced it with the language "The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision" [from the inmate's central file].

Sub-Issue 1. One commenter argued that the new language is less clear than the prior language and questions the board's reasons for this amendment, but did not suggest any alternatives.

1. RESPONSE: DECLINED IN FULL BECAUSE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS

APPLICATION AND DID NOT CONTAIN A COMMENT CAPABLE OF RESULTING IN AMENDMENT

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (i)(3). However, because the commenter did not offer any other alternatives to this proposed amendment, the board is not able to respond to this comment by making any amendments. Rather, the board explained earlier in this Final Statement of Reasons the rationale for making this amendment.

Notably, the board disagrees with the assertion that the new proposed amendment is less clear. The new language more clearly explains the board's role in the process of removing CRAs containing errors from an inmate's file. Specifically, as explained above in greater detail, under Penal Code section 2081.5, the board has no lawful authority to add or remove any documents from an inmate's central file. That power rests solely with the department. In the prior regulation, the text of this paragraph vaguely stated that risk assessments with errors shall be removed without explaining the actual requirement or role of the board in carrying out that process. Under the new amendments, the proposed regulation clarifies that the board must submit the request to the department for the removal of a CRA deemed to contain an error. Thus, this amendment clarifies the actual step the board must take to initiate this process. The process by which the department responds to the board's request is under the purview of the department and, as such, can only be regulated by the department in Division 3 of this title. The board has no legal authority to regulate the department's processes; therefore, this comment is declined.

Sub-Issue 2. Some commenters suggested that the regulations contain a requirement for the board to verify removal of the risk assessment, and that this should be required before the inmate's next scheduled hearing. One commenter argued that requesting removal of a risk assessment without verification is meaningless. Some commenters also argued that the board should regulate a requirement to retain the board's request to the department.

2. RESPONSE: DECLINED IN PART AS OUTSIDE THE SCOPE OF THE BOARD'S LAWFUL AUTHORITY; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION.

The board finds the comments suggesting the board must confirm the department's removal of erroneous risk assessments relevant as they pertain to the board's amendment to paragraph (g)(3); however, the suggestions are outside the scope of the board's lawful authority. Specifically, as explained above in further detail, Penal Code section 2081.5 clarifies that an inmate's case records are under the custody of the department. Therefore, since the board has no lawful authority to add or remove documents from an inmate's record, the board amended this section to clarify that its role in the process of removal is to submit the request to the department for permanent removal of these documents.

The board further finds the comments suggesting the board retain records of its requests to be relevant and within the scope of this regulation because they pertain to the board's amendment to paragraph (g)(3). After substantive consideration, the board finds this amendment to be unnecessary because the process through which the board accomplishes this requirement,

including how the board documents the completion of the request process or how the board retains its records, is more appropriately classified as internal management. Specifically, the request and record retention processes have no impact on the rights or interests of the persons subject to these regulations, namely inmates, because the manner in which the board completes the request process or stores its records does not impact whether the request is made. Rather, the board is required to ensure the impact to the inmates, which is requesting that the department remove the erroneous document from the inmate's central file, is completed. How the board accomplishes this is not appropriate for regulation because the board needs to retain flexibility to (1) determine the most effective way to complete the request process and (2) update that process as needed to accommodate future changes to technology or the department's or board's electronic tracking systems. Thus, the board declines to adopt this suggestion.

Sub-Issue 3. One commenter argues that the amendments to paragraph (i)(3) are unclear about the criteria a hearing panel will use to overrule a factual error at the hearing and how that will impact the removal of a CRA with a factual error now that removal no longer requires the error to be material.

3. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (i)(3). Because the commenter did not offer any other alternatives to this proposed amendment, the board is not able to respond to this comment by making any amendments. Rather, the board explained above in greater detail the reasons for making this amendment.

Additionally, subdivision (i) already clarifies the process a hearing panel must take when hearing objections raised at a hearing. Specifically, under paragraph (i)(2), if a hearing panel determines there is even a possibility that a CRA contains a factual error, the panel is obligated to refer that error to the Chief Counsel and Chief Psychologist and may only continue forward with holding the hearing if that panel determines that sufficient other evidence exists to evaluate the inmate's suitability without any reliance on the identified error or any affected conclusions. The panel may only overrule the objection if the panel finds the objection does not raise a factual error in the CRA. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 4. One commenter suggested that error-filled reports must be removed from a prisoner's files. Another commenter suggested that all errors, including non-material errors, be removed from the files.

4. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's amendment to paragraph (g)(3). After review, the board finds this

comment is already included in the amended text. Specifically, the board amended the language limiting removal of CRAs to only those containing materially impactful errors and replaced it with language requiring the board to request the department to remove any CRA with any identified error, since the board is now required to correct each error even when the error is immaterial. Therefore, the current proposed regulation already IMPLEMENTED this request in full.

ISSUE 4: Standards of Professional Conduct

Comment ID Numbers: 16-01-51-01; 16-01-51-02.

These comments raised issues with the licensing and ethics requirements of the psychologists completing the CRAs. Specifically, this commenter suggested that, in the regulations, the board indicate who the licensing authority is for forensic psychologists. This commenter further suggested that BPH clinicians should be obligated by regulation to (a) comply with a clear and transparent code of professional ethics that conforms to basic professional principles of accuracy, truthfulness, and integrity, (b) avoid misrepresenting facts, and (c) safeguard the welfare and rights of the inmates.

RESPONSE: DENIED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments are marginally relevant to the amendments the board made regarding the type of information the clinicians must consider when completing CRAs and the standards of review by their supervisors. However, as noted in the board response to ISSUE 1 of the comments submitted during the original 45-day public comment period, the board finds these comments outside the scope of this regulation as well as unnecessary.

Specifically, as explained in **ISSUE 1: Standard of Professional Conduct** (FSOR, pages 2-5) of the comments received during the board's original 45-day public comments, subdivision (a) expressly requires any psychologist performing a CRA to be "licensed," meaning that the psychologist must have obtained a valid license to practice psychology within the state of California. This requirement necessarily means that any FAD clinician is already subject to all of the principles and ethical standards inherent in holding a license to practice psychology. Since these principles and ethical standards have already been developed and are under the jurisdiction of the California Board of Psychology, which monitors clinicians licensed in California, it is inappropriate and outside the board's lawful authority to regulate different ethical standards for forensic clinicians employed by this agency. Therefore, the board declines to adopt these amendments.

ISSUE 5: Oversight of FAD Clinicians

Comment ID Numbers: 16-01-51-04.

This commenter suggests adding the language "which is not obsolete, or based upon an obsolete record" into subdivision (c) governing supervisor review of the risk assessments. This commenter

further suggests defining obsolete as "more than 50 (fifty) years out of date unless it resulted in a criminal conviction for murder, armed robbery or kidnapping."

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it offers additional suggestions about the board's amendment to subdivision (c). However, after substantive consideration, the board finds that this suggestion is unnecessary and already addressed in subdivision (a). Specifically, subdivision (a) directs FAD clinicians completing CRAs to specifically consider factors "impacting" an inmate's risk of violence. Any information that was actually "obsolete," meaning it had no impact on the inmate's risk, is already excluded from subdivision (a). Moreover, to the extent that information more than fifty years old remains relevant because of additional current factors pertaining to an inmate, excluding this information would cause the clinician to actually violate subdivision (a) by failing to consider it. Thus, the board declines to make any further amendments as a result of this comment.

ISSUE 6: Definition of Factual Error

Comment ID Numbers: 16-01-52-02; 16-01-52-06; 16-01-56-04; 16-01-58-01; 16-01-58-03; 16-01-59-07; 16-01-60-11.

These commenters all raised comments pertaining to the board's amendment to the text in paragraph (e)(2), in which the board amended the definition of factual error from "For the purposes of this section, 'factual error' is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate," to "For the purposes of this section, 'factual error' is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error."

Sub-Issue 1. One commenter objected to the definition of factual error because the commenter believed it prevented all objections containing disagreements with clinical observations, opinions, or diagnoses.

1. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). However, the board finds that the commenter misunderstands the regulation.

Under subdivisions (e) and (j), the exclusion of objections containing disagreements with clinical observations, opinions, or diagnoses are limited to the pre-hearing objection process for factual errors. In accordance with the *Johnson v. Shaffer* stipulated agreement, the board was mandated to create a process allowing inmates to challenge factual errors in their CRAs before their hearings.

The purpose of this process is to give the board the opportunity to revise any factually incorrect information in the CRA before the report is reviewed by the hearing panel. In contrast, expert opinions, including observations and diagnoses, by nature, are not "facts" capable of being confirmed and corrected. Rather, they are conclusions the expert has drawn based on their expertise, education, experience, skills, and analysis of the facts they have considered. Therefore, objections based on disagreements with the clinician's expert observations, opinions, or diagnoses are not appropriately included in the objection process for factual errors as there is nothing for the board to confirm or correct. Instead, these objections are more appropriately heard and considered by the hearing panels, which can use their discretion to determine whether the inmate's arguments about their disagreements with the clinical opinions have merit. Therefore, the board appropriately placed the inmate's remedy to raise disagreements with the clinician's expert observations, opinions, or diagnoses in subdivision (j) governing the board's at-hearing CRA objection process. Since this remedy is already included in the regulations, in contrast to this commenter's assertions, the board declines any further amendments based on this comment.

Sub-Issue 2. One commenter objected to the definition of factual error because the commenter believed it provided no meaningful appeal process for inmates to challenge statements attributed to the inmate.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation.

Specifically, as originally written, the board's proposed regulations included statements attributed to the inmate under the board's at-hearing objection process under subdivision (j) because the board felt these objections were more appropriately considered by the hearing panel. However, following the original public comment period and the *Johnson v. Shaffer* court's October 6, 2017, order, the board elected to shift consideration of these objections to the pre-hearing objection process for factual errors under subdivisions (e) through (h) rather than the at-hearing process. Consequently, the board deleted the language in paragraph (e)(2) excluding objections to statements attributed to the inmate from the definition of factual error so that these objections would now be included in the definition of factual error. Additionally, since these objections are now handled under the pre-hearing objection process, the board deleted the language referencing these objections in subdivision (j) because these objections should no longer be raised for the first time at the hearing unless the inmate has good cause for failing to raise them during the pre-hearing process. Thus, since this remedy is already included in the regulations, in contrast to this commenter's assertions, the board declines any further amendments based on this comment.

Sub-Issue 3. One commenter argued that the amended regulations contain no provision for identifying and addressing factual errors that were previously screened out under the board's prior

definition for factual errors in the original proposed regulations. The commenter further claimed these objections were left without remedy.

3. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation.

As explained above, in contrast to this commenter's assertions, the proposed regulations as original written contained remedies for objections to statements the CRA attributed to the risk assessment. The remedy was to raise them for consideration at the hearing. Thus, while these objections were screened out when raised during the pre-hearing objection process, the board's responses informed the inmate of his right to raise these objections during the hearing. The amendments to subdivisions (e) and (j) only change the timing of when the objections must be raised from at the hearing to during the pre-hearing process. Thus, since this comment was based on a misunderstanding of the original and amended text of the regulation, the board declines to make any further amendments based on this comment.

Sub-Issue 4. One commenter argued that the amended definition of factual error is flawed because circumstances and events cannot be "untrue," only the statements made about them. This commenter suggested revision to a "factually untrue statement about a circumstance or event."

4. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board substantively considered this comment.

While the board understands the commenter's reasoning behind this suggestion, the board finds the amendment to be unnecessary at this time because the current language adequately conveys the board's intention of confirming whether the CRA's findings about a circumstance or event are true or untrue. Thus, after substantive consideration, the board declines to adopt this amendment at this time.

Sub-Issue 5. Some commenters argued that the amended definition of factual error does not comport with California Evidence Code sections 801 or 802 because they give clinicians the ability to say anything they want with absolute immunity from error.

5. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation and the laws cited.

As explained above in **ISSUE 4 Definition of Factual Error, Sub-issue (4)** (FSOR, pages 11-12) of the response to comments received during the original 45-day period, these statutes are not appropriately applied to the risk assessment process because these sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration by a board hearing panel. Moreover, to any extent they did, these support the board's interpretation of the importance of distinguishing between fact and opinion. Finally, the board disagrees that the amended definition of factual error permits clinicians to say anything with immunity from error; in contrast, the amended proposed regulations expressly establish a pre-hearing objection process though which inmates and their attorneys may challenge and correct any factual errors. Thus, since this comment appears to have been based on the commenter's misunderstanding of the regulation and the statutes cited, the board declines to make any further amendments as a result of this comment.

Sub-Issue 6. One commenter objected to the definition of factual error's exclusion of disagreements with clinical observations, opinions, or diagnoses because the commenter was concerned that CRAs include erroneous characterizations of prior risk assessments or focus on negative information over positive information.

6. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). However, the board finds that the commenter misunderstands the regulation.

To the extent this comment is concerned about CRAs stating incorrect information about opinions rendered in prior risk assessments for an inmate, this would be an "untrue circumstance or event" since the CRA would be stating as a fact that a prior risk assessment stated an opinion that the prior assessment did not actually state. Thus, the board would consider this a factual error within the meaning of this regulation. Since this remedy is already included in the regulations, the board declines any further amendments based on this comment.

To the extent this comment is concerned about CRAs in which the clinician has used his or her education and expert training in psychology to determine that negative information in an inmate's record is more relevant and probative to the determination of that inmate's risk of violence than the positive information in that inmate's record, this kind of determination falls squarely within the professional expertise of the licensed clinicians that conduct these assessments. Thus, as previously discussed in Sub Issue 1, these determinations are not errors, but the proper exercise of the clinician's expert judgment. Therefore, the appropriate remedy for inmates with concerns about these kinds of expert opinions is to discuss their concerns directly with the hearing panel at their hearings, and the board declines any further amendments based on this comment.

ISSUE 7: Compliance with Administrative Procedure Act Requirements

Comment ID Numbers: 16-01-52-03; 16-01-52-04; 16-01-52-08; 16-01-56-06; 16-01-57-02; 16-01-58-12; 16-01-58-14; 16-01-58-15; 16-01-58-18; 16-01-58-19.

These comments all raised concerns that the board's re-noticed text or documents did not meet APA requirements.

Sub-Issue 1. One commenter generally claimed the regulations cannot be easily understood but did not identify any text requiring amendment. This commenter further argued the record fails to demonstrate evidence of necessity and that the regulations were unclear regarding the standards to be applied to CRA appeals. Another commenter argued the amendments to subdivision (h) remained unclear because the regulations did not identify how the board would determine whether sufficient time existed to address an untimely objection pre-hearing. Another commenter generally argued the APA requires regulations to be specific, but did not identify any specific problems with the current text.

1. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds each of these comments relevant and within the scope of this regulation because they raise questions about the board's compliance with the APA in its re-noticed text. However, after substantive consideration, the board disagrees with each of these comments. Moreover, none of the comments offered any alternative suggestions.

Specifically, following the board's consideration of each of these comments, the board finds that it has already addressed the necessity for these regulations in the Initial Statement of Reasons and Supplemental Initial Statement of Reasons, in accordance with the APA. Additionally, in the absence of any specific identified problems with the text of the regulations, the board disagrees that the regulations are not easily understood or that the CRA appeal standards are unclear. The board also finds that the regulations are specific in accordance with the APA. Finally, as explained above in greater detail, the board amended subdivision (h) to remove the unclear language and retained discretion where necessary to determine whether sufficient time exists to address an untimely pre-hearing objection based on the length and complexity of the allegations. Therefore, the board declines any further amendments based on these comments.

Sub-Issue 2. One commenter argued that the board did not personally respond to her prior comments, despite that her comments were addressed in the board's prior rulemaking submission. Another commenter argued that the regulations were unclear regarding (1) what other factors clinicians may consider beside the suitability and unsuitability factors in subdivision (a), (2) how clinicians will make determinations about these factors when they have no legal training, and (3) how the board will make determinations about whether to conduct CRAs for out-of-state inmates. These comments also raised APA-related issues by questioning the board's reasons for deleting the prior definition of good cause and the provision in subdivision (j) allowing inmates to challenge statements attributed by the CRA to the inmate during the hearing.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds each of these comments relevant and within the scope of this regulation because they raise questions about the board's compliance with the APA in its re-noticed text. However, the board finds each of these comments demonstrate a misunderstanding of the regulation or the board's requirements under the APA. Therefore, the board declines to make any further amendments based on any of these comments.

Specifically, the board is not required to personally respond to each individual commenter under the APA; rather the board is required to address each comment in the Final Statement of Reasons. The board has met that obligation.

Additionally, the board disagrees that the amended text in subdivision (a) regarding the factors to be considered by clinicians conducting CRAs is unclear because the reference to the suitability factors contained in another portion of the regulations was meant to serve as a list of some of the factors that the clinicians should consider. This was added in to provide greater clarity on this issue, in accordance with the OAL November 8, 2017, disapproval. Moreover, the regulation contains no requirement for clinicians to make legal determinations. Rather, the regulation clarifies that clinicians must consider factors impacting an inmate's risk of violence, including, but not limited to, the types of factors listed in the referenced suitability and unsuitability regulations. This reference was intended to provide examples of the kinds of factors the clinicians should consider.

The board further disagrees that the amended text in subdivision (d) is unclear about how the board will handle out-of-state inmates. As explained above in greater detail, the board deleted the language in original paragraph (d)(2) regarding out of state inmates to eliminate the unclear language.

Finally, the board finds that it met APA requirements by explaining the reasons for its amendments to the good cause definition and the inmate's at-hearing objection process in this document, as well as the necessity for these amendments. Therefore, the board declines any further amendments based on these comments.

ISSUE 8: CRA Objection Process

Comment ID Numbers: 16-01-52-07; 16-01-54-05; 16-01-60-16.

These comments all raised issues with the board's amended text in subdivisions (e), (f), (g), and (i) regarding the pre-hearing and at-hearing objection process for factual errors in the CRA.

Sub-Issue 1. One commenter claimed that subdivisions (f)(1) and (i)(1) allow untrained laypersons, meaning the Chief Counsel and hearing panel members, to make determinations about CRAs, which the commenter believes is practicing psychology without a license.

1. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment does not appear to be relevant to any of the board's re-noticed amendments to the text regarding the pre-hearing CRA objection process. However, because the board made unrelated changes to these sections, which this commenter may have been referring to, the board has elected to respond to this comment. The board finds the comment demonstrates a misunderstanding of the regulation and its effect.

As explained in **ISSUE 8: Challenges to Duties Assigned** (FSOR, page 19-20) of the comments received during the board's original 45-day public comments, subdivision (f) requires the Chief Counsel to review each CRA objection to determine "whether the risk assessment contains a factual error as alleged," which requires a legal analysis appropriate for the Chief Counsel, not a clinical one. Similarly, subdivision (i) requires hearing panel members to determine (1) whether an inmate has demonstrated good cause, as defined in that subdivision, to raise an untimely allegation of factual error, (2) whether the CRA contains an alleged factual error that "may" materially impact the CRA's conclusions regarding risk of violence, and (3) whether, after disregarding any potential factual errors, the remaining evidence available to the panel is sufficient for the panel to reach a determination regarding the inmate's current suitability for parole, each of which fall squarely within the duties of an administrative hearing panel. Thus, these duties are not clinical duties, but legal and administrative determinations appropriately assigned to the Chief Counsel and hearing panel members. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 2. One commenter generally claimed the hearing panels should have greater authority to immediately address objections and correct irregularities in a fair manner and not prejudicially.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's re-noticed text regarding the pre-hearing CRA objection process. The board finds the comment demonstrates a misunderstanding of the regulation and its effect.

Specifically, the original and amended text under subdivision (i) already provides hearing panels with substantial authority to address any identified errors in a risk assessment. Inmates who raise timely pre-hearing objections under subdivisions (e), (f), and (g) will have their objections ruled on and, if appropriate, corrected for the hearing panels before their hearings. Inmates who fail to raise timely pre-hearing objections may still raise objections to factual errors at their hearings if they can demonstrate good cause for failing to raise them timely. Moreover, subdivision (i) allows hearing panels to bypass the good cause standard and hear untimely objections without good cause at the panel's discretion. Additionally, the amendments to subdivision (i) now require the panels to address all factual errors, not just those deemed potentially material. Finally, the panel is also required under subdivision (j) to address any disagreements with clinical observations, opinions,

or diagnoses. Thus, the board finds that this comment was based on a misunderstanding of the panel's authority to address errors and the board declines to make further amendments.

Sub-Issue 3. One commenter argued that, when the Chief Psychologist is reviewing a referred factual error, the Chief Psychologist should not limit review to material impact on risk of violence, but should also review for impact on any conclusion that could impact the board's decision to grant, such as insight or minimization.

3. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's re-noticed text regarding the pre-hearing CRA objection process. The board substantively considered this comment.

The board finds that the regulation as amended does not preclude the Chief Psychologist from considering impact on other conclusions. Rather, it just requires the consideration of impact on risk of violence since this has the most direct applicability to an inmate's suitability for parole. Additionally, any other conclusions, such as insight or minimization, that actually impact the overall conclusion regarding an inmate's risk of violence would fall within information impacting that overall risk. Thus, the board declines to adopt this suggestion.

ISSUE 9: Use of Specified Risk Assessment Tools

Comment ID Numbers: 16-01-57-03; 16-01-57-04; 16-01-57-05; 16-01-58-13; 16-01-59-02; 16-01-60-01; 16-01-60-02; 16-01-60-03; 16-01-60-07; 16-01-60-15.

These commenters all raised issues concerning the amended text in subdivision (a) and the addition of the references to the two example risk assessment tools, the HCR-20-V3 and STATIC-99R. Specifically, these commenters questioned the appropriateness of each of these tools, and one commenter claimed that the HCR-20-V3 was not an "actuarial assessment." Several commenters raised concern that these two risk assessment tools had not been "validated" on the life inmate population, the population of inmates with lower IQs, the population of inmates with underlying mental illnesses, the population of inmates with other mental or cognitive disabilities, or the population of inmates who had not committed new offenses for the past several years. One commenter suggested the regulations be amended to require risk assessment tools be validated for specific populations before their use on those populations and that subdivision (c) regarding supervisorial review should be amended to require reviewing clinicians to verify the CRA was conducted using only a validated risk assessment tool. Another commenter argued that the Static-99R was less accurate for predicting risk in non-Caucasian inmates and contradicts youth offender case law because the creators of that tool actually warn against using it on youth. This commenter recommended instead the California Static Risk Assessment (CSRA). One commenter argued that the board should refrain from listing specific tools in the regulations because this limits the board's ability to adopt the use of better tools in the future. Finally, one commenter claims the regulations should allow an inmate to challenge the use of an inappropriate assessment instrument.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of this regulation because they raise issues with the board's re-noticed text regarding subdivision (a), specifically referencing examples of risk assessments for use by the clinicians completing CRAs. However, after substantive consideration, the board declines to make any further amendments based on these comments.

As fully explained under ISSUE 20, Sub-issue (2) of the comments submitted during the original 45-day comment period, the board has no legal mechanism through which to "validate" any risk assessment tools on the populations under the board's jurisdiction and, even if it did, to do so would substantially threaten public safety. Specifically, validation would require the board to release inmates who were unsuitable for parole, meaning they continue to pose a current unreasonable risk of danger to the community. Moreover, the instruments currently used by FAD clinicians have been thoroughly tested and studied by the community of psychologists assessing risk of violence in inmates, and they are the most commonly used risk assessments tools in this community across the country. Finally, the board notes that the references to the HCR-20-V3 and STATIC-99R are meant as examples of the kinds of risk assessments the board will use, not as mandates to use only these two tools. Therefore, the board declines all of the comments challenging the references to these two risk assessment tools.

ISSUE 10: Limitations on Information Considered

Comment ID Numbers: 16-01-51-05; 16-01-57-06; 16-01-57-07; 16-01-57-08; 16-01-59-09.

These comments all raise concerns and suggestions relating to the board's amendment to subdivision (a) referencing factors contained in sections 2281 and 2402 of the board's regulations as examples of the types of factors CRA clinicians should consider when assessing the inmate's risk of violence. These commenters objected to incorporating these factors into CRA clinician's assessments because they felt these factors conflicted with youth offender laws, were unreliable as predictors of danger, included consideration of outdated juvenile records, are overly narrow, failed to include cultural factors such as age or mental disorder, and unfairly reference mental illness as a factor of potential aggravation. One commenter suggested amending this subdivision to limit the scope of reliance on mental illness. Finally, one commenter requested that clinicians be mandated to give sufficient credit to inmates for their positive post-conviction achievements and laudatory accomplishments including chronos and certificates earned.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of the regulation because they pertain to the board's amendments to subdivision (a). The board substantively considered these comments.

The board finds that amendments based on these concerns are unnecessary. The reference to these regulations in subdivision (a) was added following the November 8, 2017, OAL disapproval letter in an attempt to further clarify the kinds of factors that CRA clinicians must consider when assessing the inmate's risk. However, the amended proposed subdivision makes clear that (1)

CRA clinicians are not limited to considering only these factors, rather they are meant to clarify for clinicians, inmates, and the public the kinds of factors the clinicians will consider, and (2) the clinicians are still mandated to consider all information that impacts the inmate's risk of violence. Clinicians are experts trained in determining which psychological, mental health, cultural, personal, and other factors and information bears relevance to evaluating the risk of violence an inmate presents. Consequently, the board disagrees that the reference to these regulations overly narrows the information a clinician may consider or causes clinicians to consider inappropriate information. Moreover, to the extent that these comments are suggesting that ADA accommodations be added into these regulations, or have ADA concerns with the board's current suitability and unsuitability regulations and their connection to mental health issues, these requests were already addressed in **ISSUE 10: Americans with Disabilities Act Accommodations during CRA Interviews** (FSOR, page 21) of the comments received during the board's original 45-day public comments, where the board explained that ADA issues are outside the scope of these regulations and are more appropriately addressed in separate regulations. Finally, the modified text of subdivision (a) already requires clinicians to consider any factor that has an impact, either positive or negative, on the inmate's risk of violence and specifically references as guidance the board's regulations on factors of both suitability and unsuitability. Thus, mandating clinicians to give credit to positive post-conviction achievements is unnecessary because the regulation, as amended, already addresses this. Therefore, the board declines to make any further amendments based on these comments.

ISSUE 11: Timelines and Deadlines

Comment ID Number: 16-01-58-04; 16-01-58-05; 16-01-58-06; 16-01-58-08; 16-01-58-16; 16-01-60-10.

These comments all raised issues with the board's amended text regarding timelines or deadlines established in the regulations.

Sub-Issue 1. Two commenters argued the 60-day deadline established in the re-noticed text to serve the approved CRA on the inmate was inadequate and one commenter requested 90 days instead. These commenters specifically expressed concern that, because state-appointed inmate attorneys are required to meet with their clients at least 45 days prior to the hearings to preserve the inmate's ability to submit a timely request for waiver at least 45 days before the hearing, this only provided the inmate's attorney with 15 days to review the CRA, meet with his or her client, and make any determinations necessary regarding the appropriateness of a waiver request.

1. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of this regulation because they raise an alternate suggestion about the board's re-noticed text establishing a deadline by which CRAs must be served on the inmates. The board substantively considered this suggestion.

After consideration, the board determined that 60 calendar days was a reasonable final deadline to establish for serving the CRA on the inmates. While the board strives to serve these documents on the inmates as quickly as possible and, in many cases, is serving the inmates 90 or more days

before their hearings, multiple factors exist that sometimes require the board to schedule hearings quickly. For example, court orders, continued hearings, legislative changes, and shifts in credit earning from new proposition requirements have all resulted, within the past year, in the board being required to schedule hearings on the next available calendars. Requiring the board to serve all CRAs at least 90 days before the hearing would not give the board sufficient time to assign it to a clinician and complete the CRA in a timely manner. This would ultimately result in the board being required to delay multiple hearings because the board would need additional lead time to reschedule them in accordance with victim and prosecutor notification laws.

The board further notes that the CRA is one piece of evidence before the hearing panel and is based on other evidence in the inmate's file along with the clinician's interview of the inmate. Inmate counsel has full access to all other non-confidential information in the inmate's central file, which in most cases is adequate to determine whether waiver is necessary. Moreover, in 2017, only 31% of the board's hearings were initial parole hearings, meaning that in the other 69% of the hearings, the attorney would also have had access to the prior risk assessments. The prior assessments would have provided additional information about what to expect in the current risk assessment. Additionally, the board reiterates that the 60-day deadline is a final deadline, which means that in most cases, the attorneys will be receiving the CRAs prior to 60 days before the scheduled hearing. Finally, the board notes that, even if the attorney receives the CRA on the 60th day before the hearing, 15 calendar days should still be sufficient time for the attorney to review the document, meet or confer by phone with the client, and determine whether a waiver is appropriate. Notably, the inmate and attorney would still have another 15 calendar days beyond that time to submit any objections to the CRA, since those are not required until the 30th day before the hearing. Thus, since the board determined that a 60-day deadline is both realistic and reasonable as a final deadline to serve the CRA on the inmate, the board declines to adopt this suggestion.

Sub-Issue 2. One commenter argued that the 10-day deadline for a decision is unreasonably tight.

2. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of the regulation because it pertains to the board's deadline for issuing a decision regarding an alleged factual error in a risk assessment. The board has determined that the commenter's concern regarding the timeliness of the board's decision on written objections to alleged factual errors in risk assessments is already addressed and IMPLEMENTED in the proposed regulation.

Under subdivisions (f) and (g), the board is required to act "promptly" to issue a final decision on a CRA objection. This requirement is imposed on both the Chief Counsel and the Chief Psychologist throughout the CRA objection process. The 10-calendar-day requirement sets the final date by which a decision can be issued so that the final decision can be served on the inmate at least 10 calendar days before a hearing, in accordance with the board's requirements in the California Code of Regulations, title 15, section 2247 disclosure rules. This end-date requirement does not permit the board to delay until 10 calendar days before a hearing if such a delay would not be a prompt response. Rather, regardless of the date on which the inmate submits a timely

CRA objection, the Chief Counsel and Chief Psychologist are required to respond promptly and to avoid delay.

Thus, if for example an inmate submitted a CRA objection substantially before the hearing, the board would be obligated to promptly review and process the response. The board would not be permitted to delay beginning the review of the objections until the final deadline. However, if an inmate submits a particularly lengthy objection 30 days before the hearing, which is the last day the objection would be considered timely, the board's regulation dictates that, regardless of what might normally have been considered a prompt reply, the board's response must be transmitted to the inmate and hearing parties by no later than 10 days before the hearing so that the response does not violate the disclosure requirements under section 2247. Therefore, the board finds that the current amended regulations already IMPLEMENTED requirements to alleviate this concern.

Sub-Issue 3. One commenter argued that the regulation should mandate state-appointed inmate attorneys to meet with their clients at least 60 days prior to the hearing, and should mandate the attorneys meet with their clients a second time after the board responds to CRA objections.

3. RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments not relevant and outside the scope of the proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address how state-appointed inmate attorneys should represent their clients. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 4. One commenter argued that the establishment of the date on which a CRA is considered "final" in paragraph (c)(2) of the regulations should be amended from the date on which the CRA is first approved by the Chief Psychologist or a Senior Psychologist to the date on which the authoring clinician completes the interview with the inmate.

4. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment does not appear to raise questions about the board's re-noticed amendments to the text regarding the pre-hearing CRA objection process as this requirement was unchanged from the original language. However, because the board offered additional information in the Supplement to the Initial Statement of Reasons referencing this section to explain why a different requirement was necessary, the board has elected to consider this issue. After substantive consideration, the board declines to adopt this amendment.

Under the proposed regulations, the board has decided that it will consider CRAs to be valid for three years from the date on which the CRA has been deemed final. Thus, it is necessary for the board to establish the date on which this report is considered to be final. Setting that date to be the date of the clinician's interview with the inmate would not be appropriate because the interview is

only one of the steps the clinician must take to properly assess the inmate's risk of violence. The clinician must review the inmate's entire record, complete the risk assessment tools, and then use his or her clinical judgment to evaluate all of the information gained from all of those sources and reach clinical conclusions about the inmate's risk of violence. Moreover, as explained in the Supplement to the Initial Statement of Reasons, requiring supervisorial approval is necessary for the board to conduct proper oversight and ensure that clinicians are properly administering these assessments and basing their clinical conclusions on sound psychological reasoning. Therefore, the board determined that only when a clinician has (1) completed each of these above steps, (2) fully written out his or her complete risk assessment report, and (3) received the supervisorial approval verifying that the opinions the clinician reached in the report are based upon adequate scientific foundation should that report be considered final and valid. Thus, the board declines to adopt this amendment.

ISSUE 12: Training Issues for FAD Clinicians

Comment ID Numbers: 16-01-54-03; 16-01-59-10; 16-01-60-05.

These comments stated the regulations needed to require psychologists receive training on clinical and anthropological knowledge about other cultures, the impact of CDCR policies and procedures on prison life for people with disabilities, and administering the tools used in preparing a risk assessment.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments outside the scope of the proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address how the board will internally train FAD psychologists to complete their assignments. Thus, the board declines to adopt this amendment.

ISSUE 13: Statements Regarding Specific Inmate Cases

Comment ID Numbers: 16-01-52-09.

This comment raised concerns regarding specific objections to his individual CRA.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds this comment not relevant and outside the scope of the regulation because it does not pertain to regulating the process or requirements for comprehensive risk assessments and does not raise any suggestions or issues regarding the proposed regulation. Therefore, the board declines to adopt amendments to the proposed regulation based on this comment.

UPDATED FISCAL AND ECONOMIC IMPACT:

The board initially submitted its final Form 399 Fiscal and Economic Impact Statement to the Department of Finance, which signed it on September 20, 2017, in preparation for the board to submit the original proposed regulations. Following that submission, the board amended the regulations and submitted the amended regulations for re-notice on December 22, 2017. None of the amendments have any further fiscal impact because they only relate to re-wording legal definitions or requirements and clarifying deadlines.

None of these changes have any impact on the resources or staff the board will need to carry out these functions. Therefore, the September 20, 2017, Fiscal and Economic Impact Statement remains current and accurate.

LOCAL MANDATE DETERMINATION:

The board has determined this action imposes no mandates on local agencies or school districts, nor does it impose a mandate that requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES:

No alternatives were proposed to the board that would lessen any adverse economic impact on small businesses.

ALTERNATIVES DETERMINATION:

The board has determined that no alternative considered would be either more effective in carrying out the purpose of this action, as effective and less burdensome to affected private persons than the action proposed, or more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The amendments adopted by the board are the only regulation provisions identified by the board that accomplish the goal of bringing this regulation into compliance with the court orders in *Johnson v. Shaffer* and *In re Sherman-Bey*, as described in the Initial Statement of Reasons. Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the board's attention.

****END****

BPH RN 16-01: UPDATED INFORMATIVE DIGEST

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

Amendment of Section 2240
Comprehensive Risk Assessments

As explained in greater detail in the Final Statement of Reasons, following the initial 45-day public comment period, the board elected to make the following substantial and sufficiently-related amendments to its proposed regulation for section 2240 submitted for re-notice on December 22, 2017:

1. Amended subdivision (a) to add language requiring FAD clinicians to clarify that clinicians completing CRAs must consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division."

2. Amended subdivision (a) to delete the text "the current relevance of any" as unnecessary and redundant.

3. Amended subdivision (a) to specify the types of risk assessments clinicians must use when conducting CRAs by deleting the text "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and adding the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals" in its place.

4. Amended subdivision (b) to add "as defined in Penal Code section 3051, subdivisions (a) and (h)," to further define which inmates are considered youth offenders under this subdivision.

5. Amended paragraph (c)(1) to delete the text ", and reliable and valid principles and methods have been appropriately applied to the facts of the case," to remove the unclear reference to "principles and methods."

6. Amended paragraph (d)(2) to delete the provision "The board may prepare a risk assessment for inmates housed outside of California," to remove the board's discretion to prepare risk assessments for out-of-state inmates.

7. Amended paragraph (d)(2) to add the provision "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days before the date of the hearing," to establish a deadline by which the board must serve inmates with their completed CRAs.

8. Amended paragraph (e)(1) to delete the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence," to broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

9. Amended paragraph (e)(1) to relocate the text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" from paragraph (e)(3) to this paragraph because it was more closely related to the discussion of when inmates and attorneys must submit their objections contained in paragraph (e)(1).

10. Amended paragraph (e)(2) to replace the definition of factual error "an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation" with the new definition "an untrue circumstance or event," to broaden what may be considered a factual error.

11. Amended paragraph (e)(2) to delete the text excluding "clarifications regarding statements the risk assessment attributed to the inmate," from the definition of factual error to further broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

12. Amended paragraph (f)(1) to replace the word "determine" with "evaluate" as this word more accurately captured the duty of the Chief Counsel in this provision.

13. Amended subparagraphs (f)(2)(A) and (g)(2)(A), and subdivision (h), to add the word "calendar" to the deadlines "10 calendar days" to clarify the timing of these provisions.

14. Amended paragraph (g)(1) to add subparagraphs (g)(1)(A) and (g)(1)(B) to clarify the duties and requirements of the Chief Psychologist on reviewing an error referred by the Chief Counsel. Subparagraph (g)(1)(A) established requirements when the Chief Psychologist deems the error to be immaterial and specifically still requires the error to be corrected in addition to other actions. Subparagraph (g)(1)(B) established requirements when the Chief Psychologist deems the error to have a material impact on the risk assessment's conclusions and requires a new or revised risk assessment in addition to other actions. Amended subparagraph (g)(2)(B) to delete the provision requiring the Chief Counsel to "order a new or revised risk assessment" as this duty required a clinical determination and was thus deemed more appropriately handled by the Chief Psychologist in subparagraph (g)(1)(B).

15. Amended subparagraph (g)(2)(A) to delete the provision requiring the Chief Counsel to "overrule the objection" when the Chief Psychologist found it to be immaterial since the amendments to subparagraph (g)(1)(A) now require the board to take action to correct these errors.

16. Amended subparagraph (g)(2)(A) to add the text "the revised risk assessment" to the documents the Chief Counsel is required to provide to the inmate or attorney who raised immaterial errors, and amended subparagraph (g)(2)(B) to add the text "the new or revised risk assessment" to the documents the Chief Counsel is now required to provide to the inmate or attorney who raised material factual errors. These amendments were intended to correspond with the new requirements in subparagraph (g)(1)(A) requiring correction of immaterial factual errors

and subparagraph (g)(1)(B) requiring the Chief Psychologist to order a new or revised risk assessment following a determination that a factual error had a material impact.

17. Amended paragraph (g)(3) to replace the text "Impacted risk assessments shall be permanently removed from the inmate's central file" with "The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file" because the board determined that it has no legal authority to add or remove documents from an inmate's central file. That authority lies only with the department in accordance with Penal Code section 2081.5. Thus, the board's authority is limited to issuing a request to the department for the removal of these documents.

18. Amended subdivision (h) to replace the word "may" with "shall" to clarify (1) that the Chief Counsel and Chief Psychologist are mandated, not just permitted, to complete the review process before a hearing if the Chief Counsel has determined that sufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection, and (2) that the Chief Counsel is mandated, not just permitted, to refer an objection to the hearing panel for consideration if he or she determined insufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection.

19. Amended subdivision (i) to add the text "or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section" to clarify that this subdivision governing untimely hearings also applies to untimely objections referred by the Chief Counsel.

20. Amended subdivision (i) to delete original paragraph (i)(2) containing a definition for good cause to remove unclear language. Other paragraphs were renumbered within this subdivision and the internal references in paragraph (i)(1) were amended consistent with this renumbering.

21. Amended new paragraphs (i)(2) and (i)(3) (previously (i)(3) and (i)(4)) to delete the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" to expand the scope of factual errors a hearing panel must consider when hearing an inmate's at-hearing objections. Following this change, hearing panels must also consider and respond to identified non-material errors.

22. Amended subdivision (j) to delete "to or clarify any statements a risk assessment attributed to the inmate," from the at-hearing objection process since this objections are now included as factual errors under the amendments to paragraph (e)(2), which means that they must be raised during the pre-hearing objection process and not in the at-hearing process.

23. Amended the reference note to delete references to *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A since the board determined it was not actually implementing, interpreting, or making specific requirements from these cases. Also, amended this note to add references to *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] and *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499, because these proposed regulations were implementing and interpreting these two court orders.

Next, as explained in greater detail in the Final Statement of Reasons, following the initial 45-day public comment period, the board elected to make the following non-substantive amendments to its proposed regulation for section 2240:

1. Amended subdivision (a) to delete the word "The" and capitalize the letter "P" in the word "Psychologists" in subdivision (a).

2. Amended subdivision (c) by dividing it into paragraphs (1) and (2), with paragraph (1) retaining all of the originally proposed text of subdivision (c) except for the last sentence, which was relocated to paragraph (2).

3. Amended paragraph (e)(2) to replace "Factual errors do not include" with "is not a factual error."

4. Amended paragraph (e)(2) to add the word "A" and replace "disagreements" with the singular version of that word.

5. Amended subparagraph (g)(1)(A) to delete the capitalization of the word "the."

6. Amended subparagraph (g)(2)(A) to add the word "the" before "Chief Psychologist's addendum."

Each of these amendments was made available for public inspection during normal business hours from December 22, 2017, through January 8, 2018 and was noticed to the public in the December 22, 2017 Notice of Modifications to Text of Proposed Regulations and Addition of Documents and Information to the Rulemaking File, as stated in the Statement of 15-Day Notice of Availability of Modified Text. There have been no other changes in the laws related to the proposed action or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

The board, in making the above changes and declining any additional amendments to these regulations, relied on all of the following technical, theoretical, or empirical studies, reports, or documents:

1. Laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.)
2. Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.)
3. Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)
4. Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf.)
5. Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.

6. Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7. Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.
8. Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9. *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10. December 22, 2017 Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

Each of these additional documents was listed in the board's December 22, 2017 Notice of Modifications to Text of Proposed Regulations and Addition of Documents and Information to the Rulemaking File. These documents made available for public inspection during normal business hours from December 22, 2017, through January 8, 2018.

The board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document that is not already identified in the complete rulemaking file for BPH RN 16-01.

BPH 16-01: STATEMENT OF MAILING NOTICE
(Section 86 of Title 1 of the
California Code of Regulations)

The Board of Parole Hearings has complied with the provisions of Government Code section 11346.4, subdivision (a)(1) through (4), regarding the mailing of the notice of proposed regulatory action. All required notices were mailed no later than October 28, 2016, or faxed by no later than October 28, 2016, which was at least 45 days prior to the end of the public comment period. Additionally, the board posted copies of the notice, initial statement of reasons, proposed text, and economic impact statement (Form 399) on the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, by no later than November 4, 2016.

A Public Hearing was held on January 18, 2017, in accordance with a request received in public comment at least 15 days prior to the end of the public comment period. All required notices for this hearing were mailed no later than January 5, 2017, or faxed by no later than January 5, 2017, which was at least 13 days prior to the date of the public hearing. Additionally, the board posted copies of the notice for the public hearing along with the board's agenda for this hearing on the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, by no later than January 6, 2017.

Dated: 3/7/2017

HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

STATEMENT OF 15-DAY NOTICE
OF AVAILABILITY OF MODIFIED TEXT
(Section 44 of Title 1 of the California Code of Regulations and Section 11347.1 of the Government Code)

Modifications were made to the text of the regulations originally noticed to the public on November 4, 2016. There were 49 persons who fell within the categories listed in subsections (a)(1) through (4) of section 44 of Title 1 of the CCR and to whom notice of the availability of the modified text had to be mailed. Notice of the availability of the modified text and the modified text were mailed to these 49 persons, as well as all individuals in the Board of Parole Hearings' notice registry, on December 22, 2017. Additionally, notice of the availability of the modified text and documents/information added to the rulemaking file, as well as the modified text, were available to the public from December 22, 2017 through January 8, 2018, at the Board's office at 1515 K Street, Suite 600, Sacramento, CA, on the Board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, and at each institution. Additionally, paper copies of all of the documents relied on were made available to the public for review at the Board's office at the above address from December 22, 2017 through January 8, 2018. The public comment period for the modified text was from December 22, 2017 through January 8, 2018.

Dated: 4/11/2018

HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT

DEPARTMENT NAME	CONTACT PERSON	EMAIL ADDRESS	TELEPHONE NUMBER
Board of Parole Hearings	Heather L. McCray	Heather.McCray@cdcr.ca.gov	(916) 322-6729

DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400	NOTICE FILE NUMBER
Comprehensive Risk Assessments	Z

A. ESTIMATED PRIVATE SECTOR COST IMPACTS *Include calculations and assumptions in the rulemaking record.*

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts business and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☒ g. Impacts individuals
- ☐ h. None of the above (Explain below):

If any box in Items 1 a through g is checked, complete this Economic Impact Statement.
If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.

2. The Board of Parole Hearings (Agency/Department) estimates that the economic impact of this regulation (which includes the fiscal impact) is:

- ☒ Below $10 million
- ☐ Between $10 and $25 million
- ☐ Between $25 and $50 million
- ☐ Over $50 million *[If the economic impact is over $50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]*

3. Enter the total number of businesses impacted: 0

Describe the types of businesses (Include nonprofits): n/a

Enter the number or percentage of total businesses impacted that are small businesses: 0

4. Enter the number of businesses that will be created: 0 eliminated: 0

Explain: n/a

5. Indicate the geographic extent of impacts: ☒ Statewide

☐ Local or regional (List areas):

6. Enter the number of jobs created: 0 and eliminated: 0

Describe the types of jobs or occupations impacted: no private sector jobs were created or eliminated

7. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? ☐ YES ☒ NO

If YES, explain briefly:

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2013)

ECONOMIC IMPACT STATEMENT (CONTINUED)

B. ESTIMATED COSTS *Include calculations and assumptions in the rulemaking record.*

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ 0

   a. Initial costs for a small business: $ 0 Annual ongoing costs: $ 0 Years: 0

   b. Initial costs for a typical business: $ 0 Annual ongoing costs: $ 0 Years: 0

   c. Initial costs for an individual: $ 0 Annual ongoing costs: $ 0 Years: 0

   d. Describe other economic costs that may occur: no change (decrease or increase) of costs anticipated for private sector businesses or individuals as a result of these regulations

2. If multiple industries are impacted, enter the share of total costs for each industry: n/a

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.* $ n/a

4. Will this regulation directly impact housing costs? ☐ YES ☒ NO

   If YES, enter the annual dollar cost per housing unit: $

   Number of units:

5. Are there comparable Federal regulations? ☐ YES ☒ NO

   Explain the need for State regulation given the existence or absence of Federal regulations:

   Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $

C. ESTIMATED BENEFITS *Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: Ensure greater accuracy of risk assessments, which will increase BPH hearing officers' understanding of an inmate's current risk of violence. This will result in more informed decision-making in parole hearings, which will benefit public safety.

2. Are the benefits the result of: ☒ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

   Explain: These regs are clarifying and interpreting specific requirements from the Johnson and Sherman-Bey court orders.

3. What are the total statewide benefits from this regulation over its lifetime? $ 0 (impact is non-monetary)

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: none

D. ALTERNATIVES TO THE REGULATION *Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: The BPH was mandated to increase the timing of its risk assessments and establish a prehearing objection process for factual errors. Various alternate methods were considered, but as described in the FSOR, BPH determined these regulations best meet the requirements.

ECONOMIC IMPACT STATEMENT (CONTINUED)

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation: Benefit: $ 0 Cost: $ 0

Alternative 1: Benefit: $ 0 Cost: $ $2.7 million/year

Alternative 2: Benefit: $ _____ Cost: $ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: The main alternative method considered was recording of CRA interviews with clinicians. However, it would not have resulted in a benefit and would have cost over $2.7 million/year.

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☒ YES ☐ NO

Explain: All standards are performance standards

E. MAJOR REGULATIONS *Include calculations and assumptions in the rulemaking record.*

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises **exceed $10 million**? ☐ YES ☒ NO

If YES, complete E2. and E3
If NO, skip to E4

2. Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

(Attach additional pages for other alternatives)

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: Total Cost $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: Total Cost $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: Total Cost $ _____ Cost-effectiveness ratio: $ _____

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding $50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through12 months after the major regulation is estimated to be fully implemented?

☐ YES ☒ NO

If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.

5. Briefly describe the following:

The increase or decrease of investment in the State: None. The board established new state government positions but absorbed the cost with its existing budget. Therefore, there was no increase or decrease of investment in the state.

The incentive for innovation in products, materials or processes: N/A

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: Increase in safety to both victims and the general public by increasing accuracy of parole decision making; increase in benefit to inmates paroling.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT *Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

☐ a. Funding provided in _____

Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. Funding will be requested in the Governor's Budget Act of _____

Fiscal Year: _____

☐ 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

Check reason(s) this regulation is not reimbursable and provide the appropriate information:

☐ a. Implements the Federal mandate contained in _____

☐ b. Implements the court mandate set forth by the _____ Court.

Case of: _____ vs. _____

☐ c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____

Date of Election: _____

☐ d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: _____

_____

☐ e. Will be fully financed from the fees, revenue, etc. from: _____

Authorized by Section: _____ of the _____ Code;

☐ f. Provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each;

☐ g. Creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Annual Savings. (approximate)

$ _____

☐ 4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations.

☒ 5. No fiscal impact exists. This regulation does not affect any local entity or program.

☐ 6. Other. Explain _____

_____

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD 399 (REV. 12/2013)

FISCAL IMPACT STATEMENT (CONTINUED)

B. FISCAL EFFECT ON STATE GOVERNMENT *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☒ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ 504,404 per year. See attached.

It is anticipated that State agencies will:

☒ a. Absorb these additional costs within their existing budgets and resources.

☐ b. Increase the currently authorized budget level for the _____ Fiscal Year

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☐ 3. No fiscal impact exists. This regulation does not affect any State agency or program.

☐ 4. Other. Explain _____

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ _____

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☒ 3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program.

☐ 4. Other. Explain _____

FISCAL OFFICER SIGNATURE	DATE
Jimeka A. Harris	9/19/2017

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY	DATE
[signature]	9-20-17

Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER	DATE
[signature]	9/20/17

BPH 16-01: ATTACHMENT TO FORM 399
FISCAL AND ECONOMIC IMPACT STATEMENT

Attachment to:
Fiscal Impact Statement, Section B. Fiscal Effect on State Government, Paragraph 1.

Position authority requests are made when the board already has determined how to allocate the funds for these positions from its current budget. These requests do not result in any change to the state's budget. Rather, position authority requests to the Department of Finance are solely for the purpose of seeking authority to establish the positions and reallocate funds from the agency's existing budget to fund the positions.

In Budget Change Proposal Request 5225-281-BCP-BR-2015-A1, submitted in Fiscal Year 2015-2016 under the description "Board of Parole Hearings Court Order Workload," the board requested and was subsequently granted position authority for three clinical psychologists at an annual cost of approximately $504,404.00. The purpose of this request was to allow the Board to conduct Comprehensive Risk Assessments every three years and eliminate Subsequent Risk Assessments, which is one of the amendments mandated by the *Johnson v. Shaffer* Stipulated Settlement Agreement these regulations seek to effectuate.

As noted above, the original request for these positions was submitted and approved for a prior fiscal year (FY 2015-2016) following the mandates of the *Johnson v. Shaffer* Stipulated Settlement Agreement, and in anticipation of these regulations. No new budget change proposals have been submitted or required to implement the amendments from these proposed regulations during either the fiscal year in which this package was originally filed (FY 2016-2017) or the fiscal year in which the final rulemaking package is being submitted (FY 2017-2018). Thus, while these positions will continue to cost approximately $504,404.00 per year for the next two fiscal years, the board has continued to absorb the cost of the three clinical psychologist positions within its existing budget and will continue to do so in future fiscal years.

BOARD OF PAROLE HEARINGS
Executive Board Meeting
September 19 & 20, 2016

September 19, 2016

Meeting Called to Order at 1:04 p.m.

Roll Call: Commissioners Garner, Chappell, Fritz, Grounds, Minor, Montes, Peck, Roberts, Turner and Zarrinnam present. Commissioners Anderson and Labahn absent.

Commissioner GARNER stated that a majority of currently-appointed commissioners is present.

CONSENT CALENDAR

Public Comment on Consent Calendar
KEITH WATTLEY, Uncommon Law, stated that the draft minutes of the August 2016 minutes do not reflect the commissioners' questions, comments and concerns expressed regarding the draft Forensic Assessment Division regulation. He requested that the minutes be amended to reflect the commissioners' discussion of the regulation.

Commissioner MINOR moved to approve the consent calendar. Commissioner TURNER seconded the motion, which carried unanimously.

REPORTS AND PRESENTATIONS

Report from Executive Officer, Jennifer Shaffer
SHAFFER congratulated Commissioners Anderson, Fritz, Labahn, Minor and Zarrinnam on their reappointment to the board. She introduced and welcomed newly appointed Commissioner GROUNDS to the board.

SHAFFER stated that the September 2016 Three-Judge Panel status report has been filed. From January 1, 2014 to August 31, 2016, there have been 1,766 youth offender hearings, resulting in 480 grants, 1,073 denials and 213 stipulations to unsuitability. There are no split votes. There were 984 hearings waived, postponed, cancelled or continued.

From January 1, 2015 to August 31, 2016, 8,515 non-violent, second-strike inmates have been referred to the board, which approved 2,914 inmates for release and denied release to 2,790 inmates. Other reviews are pending, since the 30-day comment period has not elapsed or the inmate is not within 60 days of his or her 50 percent time-served date. Another 27 hearings were postponed, continued or cancelled.

There were 1,525 elderly parole hearings between February 11, 2014 and August 31, 2016, of which 389 resulted in grants, 1,012 in denials and 115 in stipulations to unsuitability. There are no split votes. A further 696 hearings were waived, postponed, continued or cancelled.

BOARD OF PAROLE HEARINGS
Executive Board Meeting
September 19 & 20, 2016

As of September 9, 2016, the board has held 88 medical parole hearings and another 27 hearings were scheduled but postponed, continued, or cancelled.

SHAFFER stated that the Governor signed Assembly Bill 898, which takes effect January 1, 2017. The bill requires the board to send a hearing notice to the employing fire department whenever a case involves the murder of a fire fighter.

On August 26, 2016, SHAFFER visited the Central California Women's Facility and spoke to about 100 to 150 long-term inmates. The visit was well-received, but it is apparent that there remains considerable misinformation among the inmate population about the board's hearing processes.

In August 2016, the California Department of Corrections and Rehabilitation published its 2015 report on recidivism. Of 95,690 inmates released in fiscal year 2010-11, 44.6% returned to prison within 3 years. This marks the fifth consecutive year that the recidivism rate for CDCR inmates declined. The report also tracked the recidivism of lifer parolees granted parole by the board, 392 of whom were released in fiscal year 2010-11. Less than one percent (3 inmates) returned to prison with a new term and 16 returned with a parole violation. The report is on the CDCR website and was distributed to the commissioners and deputy commissioners.

Report from Chief Counsel, Jennifer Neill
NEILL stated that the board has filed a petition for review of the *Butler* decision in the California Supreme Court. It is anticipated that the court will decide by the end of this year whether to accept the petition. NEILL also reported that the draft youth offender regulations are available today. The board will not be voting on them at this meeting. The board is seeking public comment and input on the draft regulations.

NEILL stated that Senior Staff Attorney, KATIE RILEY has accepted a promotion at CDCR. She thanked RILEY for her service to the board.

SHAFFER stated that the board will continue to calculate terms for lifer inmates, but not for determinately-sentenced inmates. She also thanked RILEY for her service.

Report from Chief Deputy of Program Operations, Sandra Maciel
The Northern California inmate panel orientation took place in Sacramento on September 12, 2016. Twenty-seven state-appointed attorneys attended along with six other participants. MACIEL stated that the Southern California orientation will be in Diamond Bar on September 26, 2016.

Report from Chief Deputy of Field Operations, Rhonda Skipper-Dotta
SKIPPER-DOTTA stated that on September 13, 2016, the board hosted an orientation in Sacramento for independent evaluators for mentally-disordered offenders. The board will host additional orientations on September 20, 2016 at Atascadero State Hospital and on September 27, 2016 in Diamond Bar.

SKIPPER-DOTTA also reported that the hearing room at the California Institution for Men is being moved from the administrative building to new premises with greatly improved facilities. The new hearing room is expected to be available for the November 2016 hearing calendar.

SKIPPER-DOTTA announced the retirement of Deputy Commissioners STUART GARDNER and RITA WAGNER and thanked them for their service.

Report from Chief Psychologist, Forensic Assessment Division, Dr. Cliff Kusaj
KUSAJ stated that, in September, the forensic assessment division's psychologists were assigned 290 comprehensive risk assessments to be completed in October. Most of the assessments are for hearings scheduled after December 15, 2016. It is anticipated that all assessments will be completed and distributed at least 30 days before the hearing, with more than 85% being completed at least 60 days before the hearing. Approximately 35% will be completed at least 90 days before the hearing. There are no unassigned assessments on the December calendar and only 54 assessments for the January, 2017 calendar are currently unassigned. In October 2016, there will be 185 fewer assessments to be assigned as compared with October 2015.

DISCUSSION ITEMS

Regulation Regarding the Forensic Assessment Division, presented by Chief Counsel, Jennifer Neill
NEILL summarized the draft of the revised California Code of Regulations, title 15, section 2240. She highlighted amendments resulting from comments at the August 2016 executive meeting and received thereafter. Section 2240, subdivision (a) requires the board's psychologists to incorporate standardized approaches generally accepted in the psychological community to identify, measure, and categorize the inmate's risk of violence. Under subdivision (b) of the section, psychologists must take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1).

Every risk assessment must be reviewed by the chief psychologist or senior psychologist before being finalized. The assessment becomes final on the date it is first approved by the chief or senior psychologist. A new risk assessment must be prepared for a hearing if more than three years have passed since the last assessment became final. Subdivision (d)(2) enables the board to prepare a risk assessment for inmates housed outside California. This provision resulted from comments made at the August 2016 meeting.

Subdivision (g) requires the chief psychologist to prepare an addendum to a risk assessment containing an identified factual error. The addendum must address whether the error materially impacted the assessment's conclusions about the inmate's risk of violence. The addendum must be sent before the hearing to the inmate and his or her attorney of record, together with the chief counsel's miscellaneous decision.

Subdivision (j) was added to permit the inmate at the hearing to supplement the record with objections to the assessment's conclusions or clarifications of statements which it attributes to the inmate.

NEILL recommended that the board approve the regulation as currently drafted.

Public Comment on the Draft Regulation

KEITH WATTLEY, Uncommon Law, stated that the regulation does not address his concerns, as expressed at the August 2016 meeting or in subsequent correspondence. He predicted that the Office of Administrative Law will not approve the regulation. WATTLEY stated that issues of quality control, training, and assessment review have undermined inmates' confidence in the process. Many believe that the board's clinicians are hostile to inmates. He maintained that clinicians' interviews with inmates should be recorded and stated that it would not inhibit open discussion. He stated the proposed review procedures are unfair. False reporting of an inmate's statement should be considered a factual error. He recommended a compromise in which the hearing panel could postpone a hearing and request that a recorded interview be transcribed if deemed necessary. That way it would not be necessary to transcribe all recorded interviews but only those requested to be transcribed by the board or the board's chief counsel.

ROBIN GILMORE, Life Support Alliance, read a letter from VANESSA NELSON-SLOANE, objecting to the regulation. The regulation has not been amended materially, despite the submission of written comments. NELSON-SLOANE supported recording the clinicians' interviews and stated that the proposed appeal procedures are inadequate. She recommended that the board reject the draft regulation.

KONY KIM, Uncommon Law, stated that there is insufficient quality control of risk assessments. There are frequent factual errors and failure to document inmates' programming. It is essential that inmates receive the assessments in good time, so that they might challenge any inaccuracies. The failure to correct errors in inmate statements is highly prejudicial, particularly in relation to the Governor's review of parole grants.

JILL KLINGE, Alameda County District Attorney's Office, welcomed extending risk assessments to out-of-state inmates. She expressed concern that subdivision (b)(2) only provides that the board "may" rather than "shall" prepare an assessment for such inmates.

DR. ELLEN YATES, former forensic psychologist, supported recording clinicians' interviews and denied that there would be any inhibiting effect. She expressed the view that CDCR's treating clinicians are frequently negative and hostile towards inmates and that the quality control of risk assessments is inadequate.

Commissioner ROBERTS moved to approve the draft regulation and the motion was seconded by Commissioner ZARRINAM. The motion carried unanimously.

PUBLIC COMMENT

KEITH WATTLEY, Uncommon Law, expressed concern about scheduling youth offender hearings. Inmates who were eligible for a hearing at the time the legislation came into effect must have their hearing scheduled by December 31, 2017. WATTLEY stated that youth offenders who became eligible for youth offender hearing after Senate Bill 261 became effective

must have their hearing scheduled immediately. As such, the board should expedite hearings for those inmates or risk litigation.

Meeting recessed at 2:06 p.m.

September 20, 2016

Meeting called to order at 10:04 a.m.

Roll Call: Commissioners Garner, Chappell, Fritz, Grounds, Labahn, Minor, Montes, Peck, Roberts, Turner, and Zarrinnam present. Commissioner Anderson absent.

Commissioner GARNER stated that a majority of currently-appointed commissioners is present.

EN BANC REFERRALS

Referral pursuant to Penal Code section 1170(e) to determine eligibility for recommendation to sentencing court for recall of sentence.

A. DIAS, WILFRED P-70537

AARON WEST, Santa Clara County District Attorney's Office, opposed a recommendation for recall of sentence.

B. MARTINEZ, ARMANDO F-91845

No speakers.

C. ZELINSKI, DAVID J-58252

No speakers.

Referral by the Chief Counsel pursuant to Penal Code section 3041(b) and California Code of Regulations, title 15, section 2042, to assure complete, accurate, consistent and uniform decisions and the furtherance of public safety.

D. RAMIREZ, ESTEBAN K-96812

No speakers.

BOARD OF PAROLE HEARINGS
Executive Board Meeting
September 19 & 20, 2016

Referral by the Governor pursuant to Penal Code section 3041.1 and California Code of Regulations, title 15, section 2044(b) to request review of a parole decision by the full board.

E. BROOKS, RAYLEEN W-40103

BRIAN PRATT, Los Angeles Police Department captain and victim's brother, opposed the inmate's release on parole.

CHRISTINE WARD, I-Can and Crime Victims Action Alliance, read a letter from CHARLES BECK, Chief of Police, Los Angeles Police Department, opposing the inmate's release on parole.

JERRY ELSTE, Ripple Effects, supported the inmate's grant of parole.

CELIA POLITEO read a letter from DONNA LEBOWITZ, Los Angeles County District Attorney's Office, recommending ordering a rescission hearing.

F. PRITCHARD, ERIC K-78061

CELIA POLITEO read a letter from DONNA LEBOWITZ, Los Angeles County District Attorney's Office, recommending ordering a rescission hearing.

OPEN COMMENTS

VANESSA NELSON SLOANE, Life Support Alliance, stated that the Amends Project has been introduced in another three institutions and it is intended to expand the project into more institutions. She expressed concern that panels do not give great weight to youth offender factors and the hallmark features of youth. The issues are often only considered superficially at hearings and panels' decisions generally do not address them sufficiently.

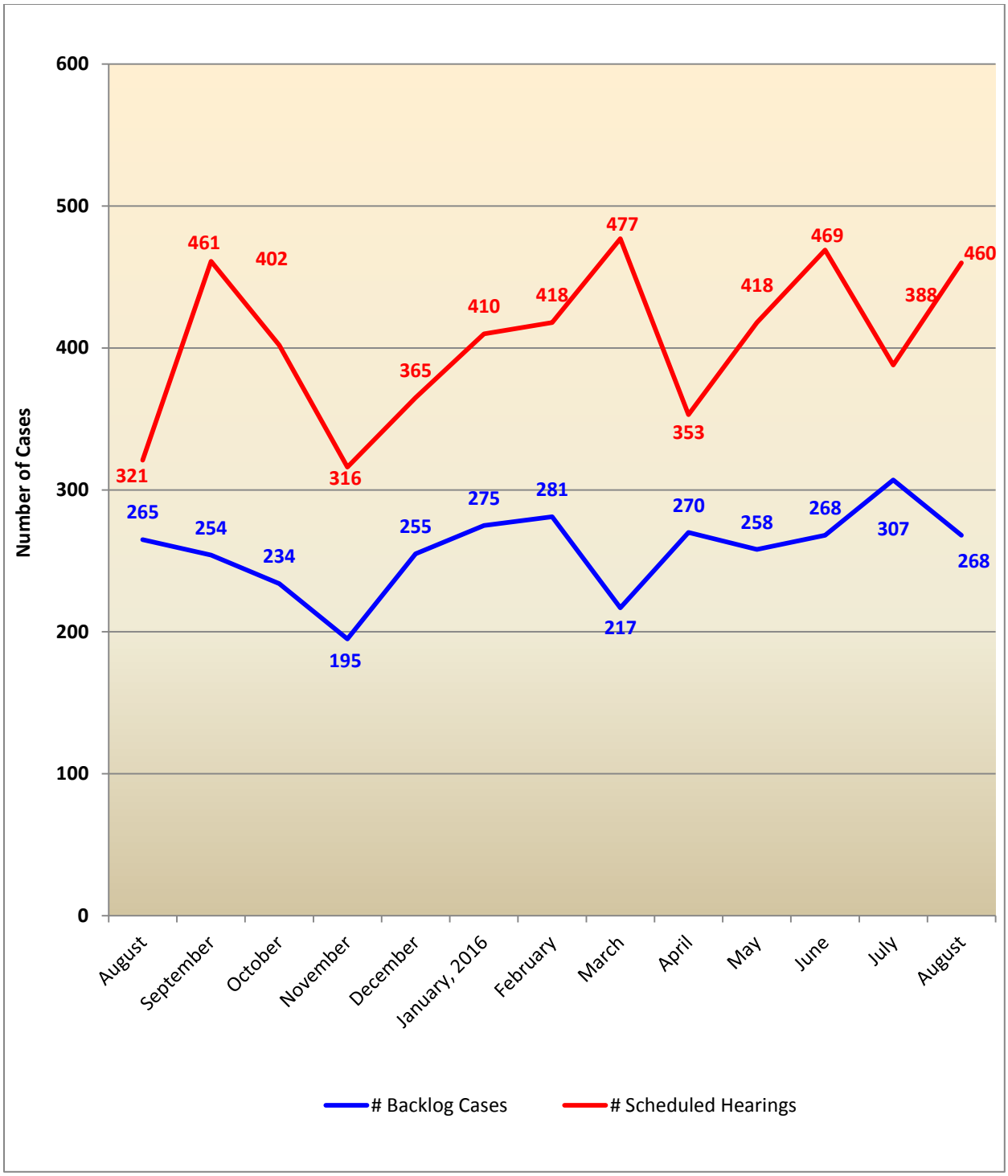
Meeting adjourned at 10:36 a.m.

Board of Parole Hearings

Scheduled and Backlog Hearings Report

Penal Code section 3041(d)

October, 2016



BOARD OF PAROLE HEARINGS
Executive Board Meeting
February 20 & 21, 2018

February 20, 2018

Meeting Called to Order at 1:03 p.m.
Roll Call: Commissioners Anderson, Barton, Cassady, Castro, Dobbs, Grounds, Labahn, Long, Minor, Peck, Roberts, Ruff and Turner present. Commissioners Chappell and Montes absent.

Commissioner ANDERSON stated that the majority of currently-appointed commissioners are present.

CONSENT CALENDAR

Open Comments
VANESSA NELSON-SLOANE, Life Support Alliance, stated that there is an error in the minutes of the January 16, 2018 meeting. The peer reentry event of January 29, 2018 was organized by the Division of Adult Parole Operations and not Life Support Alliance. She stated that Life Support Alliance is organizing an event on February 24, 2018.

Commissioner TURNER moved to approve the minutes, as amended. Commissioner ROBERTS seconded the motion, which carried unanimously, with Commissioner LONG abstaining.

REPORTS AND PRESENTATIONS

Report from Executive Officer, Jennifer Shaffer
SHAFFER introduced Commissioner LONG and congratulated him on his appointment to the board.

Report from Chief Counsel, Jennifer Neill
NEILL gave an overview of the board's decision review process. She also gave an overview of the role of victims' representatives at parole consideration hearings.

Report from Chief Deputy of Program Operations, Sandra Maciel
MACIEL described the new California Department of Corrections and Rehabilitation's learning management system. She stated she attended an event on January 26, 2018, at San Quentin State Prison celebrating the 100th edition of the San Quentin newspaper.

Report from Chief Deputy of Field Operations, Rhonda Skipper-Dota
SKIPPER-DOTA invited Associate Chief Deputy Commissioners SHANNON HOGG, KELLY FOWLER and ALI ZARRINNAM to introduce recently-appointed deputy commissioners.

DISCUSSION ITEMS
NEILL summarized the changes to the board's draft Forensic Assessment Division regulations.

Commissioner ROBERTS moved to approve the regulations. Commissioner TURNER seconded the motion, which carried unanimously.

BOARD OF PAROLE HEARINGS
Executive Board Meeting
February 20 & 21, 2018

PRESENTATIONS

I Got This, Do You? Surviving Trauma, presented by Mindi Russell, Executive Director and Senior Chaplain at Law Enforcement Chaplaincy, Sacramento
RUSSELL gave a presentation.

Overview of the Board's Correspondence Management Module (BCMM), presented by Tara Doetsch, Staff Services Manager,
DOETSCH gave a PowerPoint presentation.

OPEN COMMENTS

MARC NORTON, attorney, welcomed the legislation regarding youth offenders and stated that hearing panels are generally applying the great weight standard to the hallmark features of youth. However, he expressed concern that comprehensive risk assessments do not consider the features in sufficient depth.

VANESSA NELSON-SLOANE, Life Support Alliance, reiterated her concerns, expressed at the January, 2018 meeting, regarding inmates transferring to Pelican Bay State Prison and being unable to participate effectively in programming. She expressed concern about inmates' being asked at hearings whether they have debriefed from security threat groups.

ELLEN Yates supported Attorney NORTON's concerns about the consideration of the hallmark features of youth in comprehensive risk assessments.

Meeting recessed at 1:54 p.m.

February 21, 2018

Meeting called to order at 10:06 a.m.

Roll Call: Commissioners Anderson, Barton, Cassady, Castro, Dobbs, Grounds, Labahn, Long, Minor, Montes, Peck, Roberts and Turner present. Commissioners Chappell and Ruff absent.

Commissioner ANDERSON stated that the majority of currently-appointed commissioners are present.

BOARD OF PAROLE HEARINGS
Executive Board Meeting
February 20 & 21, 2018

EN BANC REFERRALS

Referral by the Governor, pursuant to Penal Code section 4802, to review a commutation application.

A. GREEN, CHARLES D-50639

JOHN BALAZS, inmate's attorney, and BEVERLY GREEN, inmate's sister, supported the application.

JILL KLINGE, Alameda County District Attorney's Office, accepted that it would be appropriate to commute the inmate's sentence to life with the possibility of parole but opposed a commutation that would result in his immediate release.

B. MCFADDEN, JACK D-34424

No speakers.

Referral by the Governor, pursuant to Penal Code section 4802, to review a pardon application.

C. BURTON, DERRICK K-76660

No speakers.

Referral, pursuant to Penal Code section 1170(e), to determine eligibility for recommendation to the sentencing court for recall of sentence.

D. HOLLIDAY, GARY D-14314

No speakers.

E. LABRANCH, GARY E-09061

JUDITH LARA, inmate's mother, FRANK LARA, inmate's step-father and JOHANNA KWASNIEWSKI, inmate's sister, supported a recommendation for recall of sentence.

SHAFFER stated that the board has received four letters of support for the inmate, which will be considered in deliberation.

F. WATTS, MYRON C-90336

RICHARD PRICE, San Joaquin County District Attorney's Office, SAM HILLO, victim's brother, RAQUEL HILLO, victim's sister-in-law, opposed a recommendation for recall of sentence.

Referral by the Chief Counsel, pursuant to Penal Code section 3041(b) and California Code of Regulations, title 15, section 2042, to assure complete, accurate, consistent and uniform decisions and the furtherance of public safety.

G. IRVIN, FXXI P-04360

SHIMERE DAY and YVONNE BROWN BAILEY, inmate's friends, IREENII IRVIN, inmate's sister, FRANCES IRVIN, inmate's mother and ERVA WATTS, inmate's aunt, supported his release on parole.

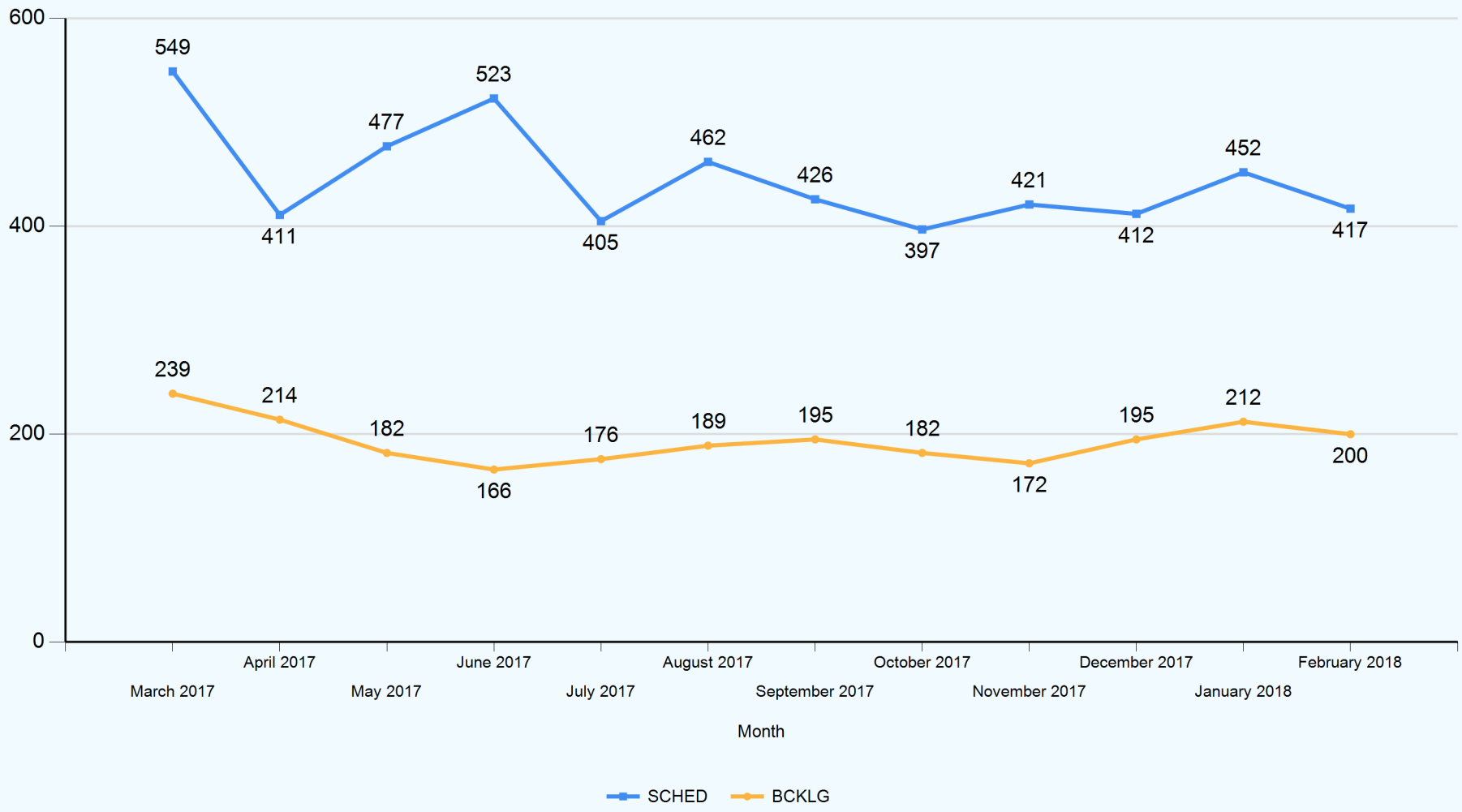
NEILL stated that the Legal Division has received support letters for the inmate, which will be considered in deliberation.

OPEN COMMENTS

VANESSA NELSON-SLOANE, Life Support Alliance, stated that many inmates are confused by the consultation process and often find the panel's recommendations to be of limited usefulness. She stated that Life Support Alliance is holding a seminar on Saturday, February 24, 2018. From 8.00 a.m. to 3.30 p.m.

Meeting adjourned at 11:06 a.m.

Board of Parole Hearings
Scheduled and Backlog Hearings Report
Penal Code Section 3041(d)
March 2018



BPH 16-01: FINAL PROPOSED REGULATORY TEXT

ALL FINAL Proposed additions are indicated by single underline and
deletions are indicated by single ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. ~~Psychological~~ Comprehensive Risk Assessments ~~for Life Inmates~~.

(a) ~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. Psychologists shall consider factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~When preparing a risk assessment under this section for a youth offender, as defined in Penal Code section 3051, subdivisions (a) and (h), the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c) ~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of~~

~~Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three-year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case.~~
~~The 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. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~(1) A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation.
(2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d) ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, 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.~~(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing.

(e) ~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing. Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.
(2) For the purposes of this section, "factual error" is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection."

(f) ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be~~

~~prepared, or whether the errors may be corrected without conducting a new evaluation.~~(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and evaluate whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 calendar days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g) ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. Following the review, the Chief Psychologist shall promptly take one of the following actions:
(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 calendar days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision, the revised risk assessment, and the Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, postpone the hearing if appropriate

under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision, the new or revised risk assessment, and Chief Psychologist's addendum to the inmate or attorney of record.
(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file.

(h) ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (2) or (3) of this subdivision.
(2) If the hearing panel determines the risk assessment may contain a factual error, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(3) If the hearing panel determines the risk assessment does not contain a factual error, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 11190, and 11193, Penal Code; *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.

BPH RN 16-01 (CRA) PUBLIC COMMENT TRACKING LIST

FOR COMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD OR AT THE 1/18/17 PUBLIC HEARING

Reg Package	Comment ID#	Name of Author /Commenter	Date Received	How received?	Within Public Comment Period?
BPH RN 16-01	16-01-01-01	Bergne, Peter (E57901)	11/10/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-01-02	Bergne, Peter (E57901)	11/10/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-01-03	Bergne, Peter (E57901)	11/10/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-01-04	Bergne, Peter (E57901)	11/10/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-01	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-02	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-03	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-04	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-05	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-06	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-02-07	Hawk, Shawn (J99681)	11/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-03-01	Zenc, John (B89092)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-01	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-02	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-03	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-04	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-05	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-04-06	Colt, Thomas (E63137)	11/21/2016	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-05-01	Bouras, George (E02509)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-01	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-02	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-03	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-04	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-05	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-06-06	Glover, Ronald (H32746)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-07-01	Clark, Michael (C90391)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-07-02	Clark, Michael (C90391)	11/22/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-08-01	Robbins, Lee (E69926)	11/23/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-08-02	Robbins, Lee (E69926)	11/23/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-08-03	Robbins, Lee (E69926)	11/23/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-09-01	Gonzalez, Alejandro (C47744)	11/23/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-10-01	O'Brien, Maury (F70946)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-10-02	O'Brien, Maury (F70946)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-11-01	Bing, Darnell (D65215)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-11-02	Bing, Darnell (D65215)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-11-03	Bing, Darnell (D65215)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-11-04	Bing, Darnell (D65215)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-12-01	Rosenberg, Roger (D36432)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-12-02	Rosenberg, Roger (D36432)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-13-01	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-13-02	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-13-03	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-13-04	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-13-05	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-13-06	Carr, Orrin (B70020)	11/28/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-14-01	Heilman, Thomas (H76785)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-15-01	Nivette, James Ph.D. (V08954)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-15-02	Nivette, James Ph.D. (V08954)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-15-03	Nivette, James Ph.D. (V08954)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-01	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-02	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-03	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-04	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-05	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-06	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-07	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-16-08	Radke, Mark (E70238)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-01	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-02	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-03	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-04	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-05	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-17-06	Bergne, Peter (E57901)	11/29/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-18-01	Lambirth, Raymond (B83952)	12/1/2016	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-18-02	Lambirth, Raymond (B83952)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-18-03	Lambirth, Raymond (B83952)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-18-04	Lambirth, Raymond (B83952)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-19-01	Adams, Timothy (H72199)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-19-02	Adams, Timothy (H72199)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-19-03	Adams, Timothy (H72199)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-19-04	Adams, Timothy (H72199)	12/1/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-20-01	Stephen, Jimmie (C56483)	12/5/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-21-01	Abney, Thomas (P82196)	12/8/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-21-02	Abney, Thomas (P82196)	12/8/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-21-03	Abney, Thomas (P82196)	12/8/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-22-01	Lathan, Kerry (H29762)	12/6/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-22-02	Lathan, Kerry (H29762)	12/6/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-22-03	Lathan, Kerry (H29762)	12/6/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-22-04	Lathan, Kerry (H29762)	12/6/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-22-05	Lathan, Kerry (H29762)	12/6/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-23-01	Truman, Charles (E34112)	12/9/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-23-02	Truman, Charles (E34112)	12/9/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-24-01	Dull, James (P42825)	12/9/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-24-02	Dull, James (P42825)	12/9/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-01	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-25-02	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-03	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-04	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-05	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-06	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-07	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-08	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-09	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-10	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-25-11	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-25-12	Ott, Dennis (J78934)	12/12/2016 and 12/19/2016 (duplicate letters)	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-26-01	Carlburg, Lenona M.	12/12/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-26-02	Carlburg, Lenona M.	12/12/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-26-03	Carlburg, Lenona M.	12/12/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-26-04	Carlburg, Lenona M.	12/12/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-26-05	Carlburg, Lenona M.	12/12/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-27-01	Elizabeth Wilson	12/12/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-28-01	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-02	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-03	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-04	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-05	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-06	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-07	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-08	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-09	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-28-10	Rogowski, Marko (H27508)	12/16/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-29-01	Thomas, Janice Ph.D.	12/18/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-29-02	Thomas, Janice Ph.D.	12/18/2016	Email	YES: During 45-Day

BPH RN 16-01	16-01-29-03	Thomas, Janice Ph.D.	12/18/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-30-01	Stephens, Phillip (B85483)	12/2/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-30-02	Stephens, Phillip (B85483)	12/2/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-30-03	Stephens, Phillip (B85483)	12/2/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-31-01	Daniels, Sonya (W75006)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-31-02	Daniels, Sonya (W75006)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-32-01	Hicks, Robert	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-32-02	Hicks, Robert	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-32-03	Hicks, Robert	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-32-04	Hicks, Robert	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-32-05	Hicks, Robert	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-33-01	Hicks, Maxine	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-33-02	Hicks, Maxine	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-34-01	Herrera, Raul Sr. and Maria	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-34-02	Herrera, Raul Sr. and Maria	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-35-01	Rosser, Larry (K26537)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-35-02	Rosser, Larry (K26537)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-35-03	Rosser, Larry (K26537)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-35-04	Rosser, Larry (K26537)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-36-01	Strickman, Carol	12/16/2016	Fax	YES: During 45-Day
BPH RN 16-01	16-01-36-02	Strickman, Carol	12/16/2016	Fax	YES: During 45-Day
BPH RN 16-01	16-01-36-03	Strickman, Carol	12/16/2016	Fax	YES: During 45-Day
BPH RN 16-01	16-01-36-04	Strickman, Carol	12/16/2016	Fax	YES: During 45-Day

BPH RN 16-01	16-01-37-01	Johns, Jerald (C71995)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-37-02	Johns, Jerald (C71995)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-37-03	Johns, Jerald (C71995)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-37-04	Johns, Jerald (C71995)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-37-05	Johns, Jerald (C71995)	12/16/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-38-01	Sparks, Andre (H37315)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-38-02	Sparks, Andre (H37315)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-38-03	Sparks, Andre (H37315)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-01	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-02	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-03	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-04	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-05	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-06	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-07	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-08	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-39-09	Bigelow, Wendell (K66059)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-40-01	Clark, Bradfield (D08863)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-40-02	Clark, Bradfield (D08863)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-40-03	Clark, Bradfield (D08863)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-40-04	Clark, Bradfield (D08863)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-40-05	Clark, Bradfield (D08863)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-41-01	Jackson, Robin (E76458)	12/19/2016	Mailed Letter	YES: During 45-Day

BPH RN 16-01	16-01-41-02	Jackson, Robin (E76458)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-41-03	Jackson, Robin (E76458)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-41-04	Jackson, Robin (E76458)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-41-05	Jackson, Robin (E76458)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-42-01	Victory, Michael (P07048)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-42-02	Victory, Michael (P07048)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-42-03	Victory, Michael (P07048)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-42-04	Victory, Michael (P07048)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-42-05	Victory, Michael (P07048)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-43-01	Montes, Carlos (D81378)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-43-02	Montes, Carlos (D81378)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-43-03	Montes, Carlos (D81378)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-43-04	Montes, Carlos (D81378)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-43-05	Montes, Carlos (D81378)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-44-01	Helms, David (P14415)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-44-02	Helms, David (P14415)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-44-03	Helms, David (P14415)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-44-04	Helms, David (P14415)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-44-05	Helms, David (P14415)	12/19/2016	Mailed Letter	YES: During 45-Day
BPH RN 16-01	16-01-45-01	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-02	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-03	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-04	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day

BPH RN 16-01	16-01-45-05	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-06	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-07	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-08	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-09	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-10	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-11	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-12	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-45-13	Wattley, Keith (JvS Plaintiff's Counsel)	12/19/2016	Email	YES: During 45-Day
BPH RN 16-01	16-01-46-01	Letarte, Diane	1/18/2016	Email	YES: During Public Hearing
BPH RN 16-01	16-01-46-02	Letarte, Diane	1/18/2016	Email	YES: During Public Hearing
BPH RN 16-01	16-01-46-03	Letarte, Diane	1/18/2016	Email	YES: During Public Hearing
BPH RN 16-01	16-01-47-01	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-47-02	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-47-03	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-47-04	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-47-05	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-47-06	Yates, Ellen	1/18/2017	Hearing Comment	YES: During Public Hearing

BPH RN 16-01	16-01-48-01	Kim, Koni	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-48-02	Kim, Koni	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-48-03	Kim, Koni	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-48-04	Kim, Koni	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-49-01	Nelson-Sloane, Vanessa	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-49-02	Nelson-Sloane, Vanessa	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-49-03	Nelson-Sloane, Vanessa	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-49-04	Nelson-Sloane, Vanessa	1/18/2017	Hearing Comment	YES: During Public Hearing
BPH RN 16-01	16-01-49-05	Nelson-Sloane, Vanessa	1/18/2017	Hearing Comment	YES: During Public Hearing

16-01-01

2016-11761

CDCR: E57901
Hrg Date: 3/07/17
Inst: SQ

BTH
RN
6-01-01
Public
Comment

November 5th, 2016

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Ms. Heather L. McCray
Senior Staff Attorney
Board of Parole Hearings
Post Office Box 4036
Sacramento, Calif. 95812-4036

Subject: Proposed Regulatory Amendments and Essential Modification Needed Human and Civil Rights Issues

Dear Ms. McCray,

I would first like to thank you kindly for your letter dated Sept. 20, 2016, and your comments regarding the Proposed Regulatory Amendments to C C R, Tit. 15, Div. 2, §2240, governing C R As. I received a letter from the Office of Administrative Law and am responding accordingly with the new information. (See **EXHIBIT 1 & 2** herein at page 3-4).

Pursuant to Calif. Gov. Code, Sections **11349.1(a) and 11346.8(a)**, I am requesting the date when the proposed amendments will be filed (or have been filed) with the Office of Administrative Law (OAL). Also, during the public comment period of the OAL, I will be permitted to submit a 'Written Statement with Arguments and Contentions' to the OAL for their review and consideration. (Refer to Cal. Gov. Code §11349.8(a)). What exactly will be the time frame for the public comment period be for submitting material to the OAL?

01

It is important to note that the Proposed Amended Regulations will have an adverse impact harmful to human and civil rights of eligible parole applicants under constitutional and statutorial law as well as within the meaning of Cal. Gov. Code, §11346.3(a). Moreover, and irrespective of any cost factors which are not at issue, the Proposed Amended Regulations if adopted 'will not benefit the human health and welfare' of deserving parole-eligible candidates who are rehabilitated and reformed after many years of positive programming and self-improvement. (Refer to Cal. Gov. Code, §11346.2(b)(5)(B)).

02

03

A fortiori, the real problem that exists with the current and proposed regulations is that the forensic psychologists of the BPH can still be able to say virtually anything they want in their CRAs without any accountability for adherance to the professional APA ethics and standards of their profession. The ethics and standards that psychologists must follow are clearly enunciated under the American Psychological Association's Code of PRINCIPLES, ETHICS and CONDUCT[1/]. The lapse or breach in the structuring and content of the Proposed Regulatory Amendments can only produce harmful results with no professional accountability to a significant class of aggrieved individuals.

I am submitting this letter in the hope that the quality of the proposed regulations can be improved in the interests of human rights and civil justice. Any changes or modifications that the BPH can implement may be rewritten and resubmitted to the Office of Administrative Law pursuant to Gov. Code, §11349.4(a).

I appreciate your interest and the work of the BPH, and I pray that something better can be worked out with regard to the APA Code and resubmitted to the OAL. Also, I look forward to your reply. Enclosed is an SASE envelope to help defray your mailing costs. I have ample resources and can afford it.

04

Finally, to clarify myself, I will ask that you please let me know when the Proposed Regulatory Amendments were filed with the OAL, and what the dates for the public comment period will be at the OAL??

Respectfully submitted,

Peter M. Bergne

PETER M. BERGNE, E-37901
Eligible Parole Applicant
who has already served 27 years as
first-termer, currently 74 years old

cc: Office of Administrative Law
Office of Inspector General

1. Though I do not expect the BPH to propose regulatory amendments that would include the entire APA Code, I would strongly suggest that APA Principles 'A' and 'C' be definately implemented in addition to APA Ethical Standards 2.06(a), 3.04 and 9.08(a) for future use.

STATE OF CALIFORNIA – GOVERNMENT OPERATIONS AGENCY EDMUND G. BROWN JR., Governor

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

October 18, 2016

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, California 94974

Dear Mr. Bergne:

Thank you for letting us know about your proposals. Please be sure to comment during the appropriate Administrative Procedure Act time frames as that is your opportunity to get your comments into the rulemaking file so that OAL may properly consider them. We are returning your originals.

The Legal Staff
Enclosure

WHAT ARE THE DATES FOR THE TIME FRAME?

CTU: mm

EXHIBIT 1

STATE OF CALIFORNIA

EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

September 20, 2016

Peter Bergne, E57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, CA 94974

RE: Your Comments on the Proposed Regulations Governing Comprehensive Risk Assessments

Dear Mr. Bergne:

This letter is to acknowledge that the Board of Parole Hearings (board) received your correspondence in which you expressed your concerns with the proposed regulatory amendments to the California Code of Regulations, Title 15, Division 2, section 2240, governing comprehensive risk assessments (CRAs). These amendments are intended to implement the settlement agreement reached in the *Johnson v. Shaffer* class action case.

The board did not receive your comments in time to consider them in making additional amendments to the proposed regulations previously distributed at the board's Executive Board Meeting on August 15, 2016. The new amended draft was publically distributed and discussed at the board's Executive Board Meeting on September 19, 2016.

However, please note that these proposed regulations have not yet been filed with the Office of Administrative Law (OAL). Once the proposed amendments are filed with OAL, the public will have an additional 45-day public comment period to offer comments and suggestions on these regulations.

Thank you for your submission.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

EXHIBIT

STATE OF CALIFORNIA

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

Peter Bergne, E57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, CA 94974

LEGAL MAIL
CONFIDENTIAL

P. M. BERGNE, E-57901
HOUSING UNIT 4-W-45
WEST BLOCK CENTER
SAN QUENTIN STATE PRISON
SAN QUENTIN, CAL. 94974

SAN FRANCISCO CA 940
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MRS. HEATHER L. McCRAY
SENIOR STAFF ATTORNEY
BOARD OF PAROLE HEARINGS
POST OFFICE BOX 4036
SACRAMENTO, CALIF. 95812-4036

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ıtin, Calif. 94974

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BY:

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NOV 29 2015
CORRESPONDENCE UNIT

HEATHER L. McCRAT
SENIOR STAFF ATTORNEY
BOARD OF PAROLE HEARINGS
POST OFFICE BOX 4036
SACRAMENTO, CALIF. 95812-4036

LEGAL MAIL
CONFIDENTIAL

FIRST CLASS

16-01-02

2016-17747

CDCR: J99681
Hrg Date: 3-2-17
Inst: FOL

Shawn Hawk (J99681)
Post Office Box 950
Folsom, California (95763)

BPH RN 16-01-02 Public Comment

November 7, 2016

Heather McCray, Senior Staff Attorney
Board of Parole Hearings
1515 'K' Street
Post Office Box 4036
Sacramento, California 94812-4036

Regarding: Comments and Objections to BPH RN 16-01: Notice of Proposed Action.

Heather McCray, Senior Staff Attorney:

As a member of the plaintiff class in Sam Johnson v. Jennifer Shaffer, et al., I am writing to oppose and object to the proposed regulations regarding the Comprehensive Risk Assessments (CRAs), BPH RN 16-01 NOTICE OF PROPOSED ACTION. The specific objection or opposition, and the reasons therefore, are set out below and where appropriate are based on personal, first hand knowledge and experience which is also set out below.

01

1. **RECORDING OF CRA INTERVIEW:**

Nothing in the proposed amendments set out in BPH RN 16-01 provide for a complete and faithful record to be maintained and which includes an audio recording of the psychological interview, upon the prisoners request. Counsel for the class has advised that audio recordings are opposed by you, however the basis for refusing to place this safeguard in the regulations defy logic and reason.

The interview with the clinician and the prisoner should be recorded, at the request of the prisoner, in order to safeguard both the prisoner and the clinician conducting the interview. The current practice fails to provide a sufficient record of the interview, what the clinician bases their report on, and fails to preserve the record for any challenge which may arise of a report containing alleged false information.

Recording, at the prisoner's request, the interview used to gather information regarding the risk the prisoner poses would ensure a faithful record of the colloquy; would allow for meaningful review nearly impossible to provide without such a recording; and ensures compliance with policies requiring every state agency to maintain a faithful and truthful record.

Additionally, any regulation adopted to provide for a review of the clinical assessments based on claims of inaccurate or false information cannot realistically be provided without a faithful record to base the review process on. Without such a record, at best the review process will amount to form without any substance.

Decisions by the courts of California have weighed in favor of the request to include language allowing for the audio recording of psychological interviews at the prisoners request. Courts have been reluctant to uphold a decision by an agency without an entire record. (Protect Our Water v. County of Meced (2003) 110 Cal.App.4th 362; Hothern v. City and County of San Francisco (1983) 142 Cal.App.3rd 444). Our courts have also encouraged the inclusion of all supporting documents or evidence supporting the decision of the agency. (County of Orange v. Superior Court (2003) 113 Cal.App.4th 1) Where, as here, the ability to perfect a complete record exists, but such complete record is not made, it can be held that if the support is not in the record then it did not happen. (Protect Our Water v. County of Merced, supra)

To ensure a full, complete, and correct record; and to ensure the factual basis exists to support the report by the psychologist; and to allow for a **meaningful** appeal of any false or fraudulent information, and correction of same, the regulations should be amended to allow for an audio recording to be made of the psychological interview upon request by the prisoner.

02

2. **FACTUAL ERROR DETERMINATIONS:**

BPH RN 16-01 propose to adopt changes to section 2240(e) of the California Code of Regulations, by limiting "factual errors" to items which are not related to the clinicians opinion, diagnosis, or clarification of statements attributed to the inmate.

This limitation on what constitutes a "factual error" and limiting the objections to such a narrow field, violates due process and fair hearing mandates. This is so because where there are factual errors in the clinicians opinion, diagnosis, or clarification of statements attributed to the inmate, which are not subject to challenge, the very real risk of denial of liberty based on a false or fraudulent record exists. Any decision based on such false or fraudulent information is clearly unlawful, and violates the mandates set out in Article I, section 7; Article III, sections 1 and 3.5, Constitution of California; Article of Amendment XIV, Constitution of the United States; People v. Ramirez (1979) 25 Cal.3d 260; Haas v. County of San Bernardino (2002) 27 Cal.App.4th 1017; Horn v. County of Ventura (1979) 24 Cal.3d 605; Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506; Alvisi v. County of Fresno (1959) 159 Cal.App.2d 803)

Additionally, the changes as proposed would render the prisoner silent on matters which "are attributed to" the prisoner without any safeguards or faithfulness to the fact the statement was actually said by the prisoner. The Board cannot be, or appear to be, fair where there is an obvious and clear conflict with the record. (Clark v. City of Hermosa Beach (1984) 150 Cal.App.3rd 1080; Haas, supra)

As an example, several prisoners have been asked by the clinician (and the Board Commissioners in several instances) what the difference is between the person they are today and the person they were at the time they committed the crime. When the prisoner states that they were an angry person, the statement "attributed to" the prisoner is that they **are** angry. This clear "factual error" of a statement not actually made by the prisoner is then used to justify a denial of parole. To limit the prisoner from raising such misrepresentations in their objections, as this amendment would do would clearly be contrary to law and reason.

The same result occurs by limiting the prisoner from raising an objection to the misdiagnosis of mental disorder where professional authority on the subject shows that no such diagnosis can be made.

A personal example of this will suffice to illustrate the point. In 2012 I met with a FAD psychologist who, in her report, admitted that I have no history of breaking the law as a juvenile, yet the psychologist made the diagnosis that I had antisocial personality disorder. This was, and remains, a false diagnosis as the Diagnostic and Statistical Manual (DSM) IV and DSM V both set out that the professional authority on this diagnosis **requires** that there be some juvenile history of law breaking to make the diagnosis of antisocial personality disorder, and that absent this prerequisite, the diagnosis of antisocial personality disorder cannot be made. The proposed amendments would bar me, or others in similar situations, from raising these factual errors, and allow liberty to be denied on false or fraudulent premises.

The law is clear on this point, no public entity or agency may knowingly create, retain, or fail to correct erroneous entries in their records. This is so because the public entity and public agency is entrusted by the public they serve to maintain true, correct, and complete records of the public's business.

As the amendments proposed by BPH RN 16-01 permit the creation, retention and maintenance of records which contain factual errors, but the regulations do not allow for correction of said records, the amendments to section 2240(e) do not comport with law and should be omitted from any amendments to this regulation.

03

3. **DUTIES ASSIGNED TO CHIEF COUNSEL ARE UNLAWFUL**

The language being proposed to be added to section 2240(f) cannot lawfully be made. The proposed amendments seek to rest authority to review a claim of factual error upon the "Chief Counsel" where the regulation currently in place provides the review will be conducted by the chief psychologist or their designee.

This proposed regulation change seeks to vest review authority of a clinical assessment upon an agent of the Board who is neither properly trained to review or assess such clinical assessments; and who is without the specialized expertise necessary to perform this function.

Further, as the Chief Counsel lacks the requisite training to make a proper and accurate assessment of the accuracy of the content of any psychological assessment; it is axiomatic that the Chief Counsel also lacks the ability to identify the subtle nuances which will severely impact the veracity of the assessment. The personal example provided in Objection #2, above, is also illustrative here. Any agent not trained in the diagnostic requirements of the various mental disorders a clinician may assert are attributed to an individual will be incapable of properly identifying these misdiagnosis.

In addition to the above, section 2052 of the California Government Code appears to forbid such shifting of review responsibility from the chief psychologist to Chief Counsel, making the proposed amendment unlawful on its face. (see Article III, section 3.5, Constitution of California)

04

4. INEQUITABLE TREATMENT and IMPOSSIBILITY

The proposed amendments to section 2240(e) creates inequitable treatment in violation of the lawful mandates that equal protection of the law shall be observed by all public employees. (Article I, section 7, and Article III, section 1 of the Constitution of California; Article of Amendment XIV, Constitution of the United States)

The amendments proposed by BPH RN 16-01 seek to limit the prisoner, or their attorney, to thirty (30) days prior to the parole consideration meeting in which to make their objections to factual errors contained in the psychological evaluation. In the event this deadline is missed, section 2240(h) provides the discretion, without qualification, to the Chief Counsel to determine if there is "sufficient time" to complete the review process. Section 2240(h) suggests that Chief Counsel is not even required to respond, leaving the prisoner and their counsel unaware if in fact any correction has been made. Section 2240(i) permits the Board panel to "overrule" the objection, and presumably ignore the factual basis of the objection for a failure to make objections within the thirty (30) day time limitation. However, no such penalties exist for when agents of the Board, District Attorneys, or other parties fail to comply to the time limitations imposed upon them. This is prima facie violative of equal protection mandates.

However, given the other time management concerns explained below, any objections made after the thirty (30) day cut off limitation will not be considered, and as Chief Counsel is not required to respond, the amendments seek to avoid legal scrutiny and violates Article III, Section 3.5 of the Constitution of California. To ensure equality, and to avoid the time management concerns explained below, all amendments permitting review by Chief Counsel should be removed, and the current review by the Chief Psychologist should be retained; the discretionary language should be removed; and where the time limitations for review of the challenges is not completed by the Chief Psychologist "no later than 10 days prior to the hearing" consideration of the report should be barred from the parole consideration meeting, and current dangerousness should be limited to being

established by matter in the record only. Anything less than these changes renders the parole consideration meeting potentially plagued by false or inaccurate information in violation of the duty of a government agency to maintain faithful records of its public business, and the duty to protect individuals from potential harm by government agents.

As noted above, there are time management concerns within the proposed changes to section 2240(f) and (g). Subsection (f)(2)(A) provides that Chief Counsel shall review the risk assessment and take action on it no less than "10 days prior to the hearing." However, subsection (g)(2) provides the Chief Psychologist is to review the assessment, provide a determination to Chief Counsel, who will then either overrule the objection or issue a miscellaneous decision. Either action is to be made no "less than 10 days prior" to the parole consideration meeting.

The fact the amendments do no require the Chief Counsel to make a review of the objections received beyond ten (10) days of the parole meeting; compounded by the fact the amended changes do not set any time limitations upon the review by the Chief Psychologist, and does not require Chief Counsel to take action on the determination by the Chief Psychologist prior to ten (10) days before the parole meeting, the amendments create an impossibility in the regulations.

This is so because, by 2240(f)(2)(A), if Chief Counsel does not complete their review and make their determination of need for review by the Chief Psychologist, prior to ten (10) days before the parole meeting, the requirements under section 2240(g) cannot be complied with. Equally, if Chief Counsel refers the objections to the Chief Psychologist for review, the lack of time requirements upon this review is problematic to the time requirement for the action the Chief Counsel is to take. The fact that there are no penalties for failing to meet these time requirements is also legally problematic, as set out in Objection 3, above, as it violates equal protection mandates.

To comply with these regulations as amended, either the objections will be determined to be immaterial pro forma, in order for Chief Counsel to meet the regulatory deadline, or the review will be curt and incomplete, denying to the prisoner the process to which they are due. In either case, the objection and appeal processes required by the stipulation between the parties is violated, and Defendants stand in contempt of the courts order.

The amendments should be changed to remove the review process by Chief Counsel as they are not properly trained to make any meaningful review of specialized matters specific to psychology; and require the Chief Psychologist to make their written response not less than ten (10) days prior to the parole consideration meeting, which is not unreasonable as receipt of the objections from the prisoner or their counsel will be specific and direct review to specific content as opposed to requiring a full reading and review of the report.

05

5. HEARING PANEL DETERMINATION REGARDING ASSESSMENTS.

BPH RN 16-01 seeks to amend Section 2240(i)(4) to allow the "hearing panel" the authority to determine the veracity of the risk assessment. However, no member of the panel is trained in the field of psychology, and for the same reasons set out above, as relate to the disability of Chief Counsel to make any determinations regarding the psychological assessment, no member of the panel can properly make any determination of the veracity of an assesment sue sponte. For these reasons, this section of the amendment should be sticken.

06

6. HOBSON'S CHOICE IS UNAUTHORIZED

BPH RN 16-01 proposes the addition of section 2240(j) to the existing regulations. This section appears to provide a prisoner with "the opportunity at a hearing to object to or clarify any statements a risk assessment attributed to the inmate." However, the inclusion of this language is misleading for several reasons.

First, to bar the prisoner from making written objections to this same subject matter to allow for a meaningful review of the objection by a trained professional is a denial of due process, as well as a denial of fairness, in the administrative proceedings, which this section can not cure. (see Objection #2, above)

Second, as the commissioners of the board lack all professional and specialized training, and are not psychologists, any objections or responses made by section 2240(j) are both meaningless and violative of section 2052 of the California Business and Professions Code.

Third, this amendment appears, on its face, to force a waiver by the prisoner to the violation of section 2052 of the California Business and Professions Code by creating an impermissible Hobson's Choice: either waive the violation of section 2052 and raise the objection to an unlicensed and untrained lay person; or forgo any objections or review of any errors or misdiagnosis.

For the reasons set out above, the proposed adoption of section 2240(j) is unconstitutional and should be stricken along with the changes suggested in Objection #2, above.

07

7. COST OR SAVINGS FALSE CLAIM

On page "5 of 7" of BPH RN 16-01 NOPA the claim is made that there are no non-discretionary costs or savings; and no cost or savings in federal funding to the state. However, this is not accurate.

Should the proposed changes be made, there will, in fact, be a financial impact in these areas. This is so because the proposed regulations, as drafted, violate state laws, violate the Constitution of California, and violate the Constitution of the United States. As such, each prisoner barred by section 2240(e) from

raising objections to misdiagnosis made by FAD psychologists, clinical observations not supported by evidence, or to misinformation will be forced to raise these objections in a pre-emptory suit which will impact local and federal court, resulting in cost incurred by the state in appearing, responding to, and defending such administrative records practices.

CONCLUSION

For the reasons set forth herein and above, I respectfully **OBJECT** to the proposed rule changes to section 2240 of the California Code of Regulations as the proposed amendments run afoul of established law governing the conduct of public administrative agencies.

Executed this seventh day of November, 2016.

By: Shawn Hawk

cc: Personal File
Keith Wattley, Uncommon Law

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Heather McCray, Senior Staff Attorney
Board of Parole Hearings
1515 'K' Street
Post Office Box 4036
Sacramento, California
94812-4036

RECEIVED
NOV 16 2016
BY:

Shaun Hawke (J99681)
F.S.P. (5/C1-11)
Post office Box 950
Folsom, California (95763)

LEGAL MAIL

16-01-03

BPH RN
16-01-03
Public
Comment

John W. Zenc. B-89092
D-2-137-L. Box 931
Centinela State Prison
Imperial. Calif. 92251

2016-17890

(Original of 3)

CDCR: B89092
Hrg Date: 1
Inst: CEN

Re: Sam Johnson V. Jennifer Shaffer, (Public Comment For OFFICE of Administrative Law. The B.P.H. will be accepting written comments From Nov. 4-2016, —Dec, 19/2016.

Copies to; original B.P.H - copies to Attorney Keith Wattley, un-Common law, JW3 ([redacted]) JW3 JW3 JW3 JW3 JW3 JW3 JW3

** Attn: Heather McCray. B.P.H. senior staff Attorney. (The inmate's must have a Fair Appeal process, against some lieing F.A.D. psychologists) For Public Comment on the Board proposed regulations, in Johnson V. Shaffer.

I John W. Zenc, Fully request that the B.P.H's F.A.D. unit tape record inmate's F.A.D. psychological evaluations so that the inmate (s) can Fully identify Factual error (s) and out right lie's, by some F.A.D.

psychologist's - such as Dr. Clarizio Phd. Psychologist. As she outright lied, in her NOV-20-2013 F.A.D. eval

#1. Explanation of 100% Facts, before the NOV-20-2013 F.A.D. eval. I Fully verbally informed the psychologist that I was suffering From memory problems, due to two back to back concussions sustained a Few months earlyer, And I Fully informed the psychologist that the doctor's diagnosis and medical reports were contained in my Files - Dr. Clarizio, lied in her eval. she said my memory was intacted, and that I understood everything. Dr. Clarizio wrote in her eval that my memory was intacted, and their was no problems. she lied. she then Fully ignored the medical diagnosis.

#2. Dr. Clarizio lied in the

eval by claiming that she did not read the previous parole transcripts of 2011. She lied, I ask her why she was reading the un-redacted 2011 transcript. court ordered re-dacted case # RIC533941. by superior court Judge C. Riemer, date of order Aug. 23-2013. Dr. Clarrio is less then honest, and an out right liar. She was Bent on giveing me the worst eval in my entire prison history I Am targeted by the B.P.H. and, it's F.A.D. to Always get the worst F.A.D evals to purposely Keep me in prison on 1-15-2015 I recieved a 100% positive parole board eval. that Fully supports parole. But the Board. And, it's F.A.D. reject C.D.C.R's own psychological eval and replaces it with the most unfavorable evals, to purposely Keep me in prison due to

the terrible nature of my offense. Dr. Clarivio should be ashamed of herself. For her dishonest reporting, And totally ignoring the 100% positive eval of 1-15-2005.

#3. Dr. clarivio also read a totally unreliable F.A.D. eval by Dr. Donna Robinson of the date 2010. Dr. Robinsons eval was not supposed to be read also. The F.A.D.s own chief psychologist discredited Dr. Robinsons eval. due to Robinson utilizing False. - And Fabricated eval's. And tainted parole hearing's. The court in case RIC533941. Judge Riemer order's Robinsons eval out of the files as well. Dr. Clarivio lied claiming she did not read it, or the 2011 transcripts. she outright lied, she did this to ensure I would never be found suitable. I, John W. Zenc, under penalty of perjury have told the truth. on 11-14-2016 at Centinela state Prison.

B-99092

John W. ZENC -4- END.

John W. Zenc B-89092
D-2-137-L, Box 931
Centinela State Prison
Imperial, Calif. 92251

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Attn: Heather McCray. B.P.H.T. 2016
→ Senior Staff Attorney
P.O. Box 4036,
Sacramento, California.
94812-4036

16-01-04

2016-17844

RECEIVED
NOV 22 2016
BOARD OF PAROLE HEARINGS

Thomas M. Colt, #E-63137
S.Q. State Prison, 4W6
San Quentin, CA 94974

11/15/2016

XPHRN
10-01-04
Public Comment

Heather McCray
BPH Senior Staff Attorney
P.O.Box 4036
Sacramento, CA 94812-4036

CDCR: E63137
Hrg Date: —
Inst: SQ

SUBJECT: Proposed BPH Regulations

Dear Ms. McCray,

It has come to my attention that the Board has disregarded letters (such as mine) critical of proposed regulations pertaining to Comprehensive Risk Assessments (CRAs). I therefore wish to resubmit my objections to these proposals as follows:

01 1. The proposed rules do not make allowances for recorded interviews for those who want them recorded (such as myself). The last last CRA I received from BPH Psychologist Michael Venard was fraudulent in the extreme, putting words in my mouth to questions he never asked. Pure character assasination.

02 2. The proposed regulations have a very narrow definition of what counts as a "factual error" that I can object to.

03 3. The proposed regulations impose strict deadlines on prisoners making objections, but do not require Board officials to promptly address those objections. That is unfair.

04 4. The proposed regulations allow error-filled CRA reports to remain in my Central File, infecting the minds of those who read it. Again, very unfair.

05 5. The proposed regulations fail to ensure proper accommodations for prisoners with disabilities and language barriers.

06 On a side note, I'd like to know why BPH psychologists are not subject to oversight and discipline by the Board of Psychology. If I had the time and money, I'd sue Dr. Venard for libel and have his license to practice taken.

I hope you'll give this letter the attention it deserves.

Sincerely,

Thomas Colt

RECEIVED
NOV 22 2016
BY:

THOMAS COLT, E63137
S.Q. State Prison, 4 W 6
San Quentin, CA 94974

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HEATHER McCRAY
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-
4036

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BOARD OF PAROLE HEARINGS

CDCR E-02059

Hrg Date: NLT 4/13/23

Inst: CHCF

November 16, 2016

BPH
RN
16-01-05
Public
Comment

Ms. Jennifer Shaffer
Executive Director BPH
P.O. Box 4036
Sacramento, CA 95812-4036

Enclosures:
a) The 9/11/16 letter, 2 pgs.;
b) The Rebuttal of Jan. 27, 16.

RE: OPPOSITION TO PROPOSED DRAFT REGULATIONS.

RECEIVED

NOV 22 2016

BPH

Dear Ms. Shaffer:

As a member of the plaintiff class in JOHNSON vs. SHAFFER, I write to oppose the proposed regulations regarding Comprehensive Risk Assessments (CRAs), where my factual objections the Board/BPH must receive before Dec. 19, 2016.

General Only

Noted, that in a previous notification from (both) the BPH and the UNCOMMON LAW, I turned in a two page objections-letter opposing the extremely bias towards prisoners proposed regulations by the FAD along with my one page Rebuttal to the psych evaluation by the FAD's psychologist, Dr. K. Smith, PSY #19314 on 12/28/2015. But apparently, nothing came of my writing you, as I was told that you received my mail late for to be included. For that, I am now resubmitting the copies of the above mentioned two documents for your perusal, the UNCOMMON LAW's and OAL's perusal.

Furthermore, I'd like to reiterate the lack of open mindness, extreme bias, and thus ineptness, by the FAD's psychologist Dr. K. Smith, who she interviewed me on 12/28/15 for the Borad's psych evaluation report: First, one of the issues that I raised in my BPH Form 1045(A) petition was that of the psychological report's "factual error" that was originally committed by the FAD's psychologist Dr. C. Taylor on his Sept. 2010 psych eval report, where he used a non-existant CDC-115 (supposedly in 2008) and he raised my risk assessment from a Low risk to a Moderate one, and I brought it up to her attention. Though, she instead to take that into consideration--she used it to bolster the lack of negative facts against me, plus, she repeated the use of historical documentations, suppositions and inuendos. Therefore, the perpetuation of the "factual error" was used extensivelly by the parole Board, on my April 13, 2016 parole consideration hearing, whereby it affected me significantly & materially with multiple years of denial.

Secondly, in another example where Dr. Smith's lack of experience is evident, is the fact, that the W. European countries the brothels are legally accessed by a youth who attains the age of 18 yrs. Thus, for me having accessed the brothels it makes me promiscuous and not a good person--according to her.

For the record, I am a 68 years old man, disabled after having served Honorably in the U.S. Air Force. I am a calm, cool, collected compassionate, understanding, humble, and respecting others. And, in spite my advanced age and physical disabilities, I spend my time in prison programming, praising the Lord God, and part of my amends is helping other inmates to reform and to change their lives around for the better, so they won't reoffend.

For that, I request the BPH/FAD to invalidate the 12/28/15 CRA by Dr. Smith, and to offer me another CRA by another psychologist.

Sincerely, George J. Boures, CDCR #E-02059 at CHCF

cc: UNCOMMON LAW

OPPOSITION TO PROPOSED DRAFT REGS.

September 11, 2016

From: Mr. George J Boures, CDCR #E02059. UNIT. Stockton, CA 95213.

TO: Ms. Jennifer Shaffer, Executive Officer of BPH. CDCR.
PO Box 4036. Sacramento, CA 95812-4036. USA

RE: George J Boures, E02059. A Member of the Plaintiff Class in the case: Johnson Vs. Shaffer.

Dear Ms. Shaffer:

As a member of the plaintiff class in Johnson vs. Shaffer, I write to oppose the proposed regulations requiring comprehensive CSRA assessments (CSRA), scheduled for discussion on Monday, Sept. 12, 2016.

First, I believe these regulations should provide for recording and transcription of clinical interviews--not for all prisoners, but at least for those who voluntarily choose to have their interviews recorded. This is vital to ensure that the CSRA process is transparent & fair.

Second, I believe these regs should allow prisoners to address all of their real "factual errors" that appear in these reports, as drafted, the regulations would screen out too many legitimate & important objections - in particular, objections to a clinician's errors in reporting or stating facts that a prisoner has made in an interview.

Furthermore, I believe these regs should provide a reasonable timeline for the appeals process, as written, the regs would permit a prisoner's appeal of a case if not raised at least 30 days before a hearing. However, the Board is not held to any deadline for providing a CSRA in the first place. Nor is the Board required to act on a timely appeal until 10 days before the hearing. This is unfair and unacceptable, as it could delay appeal responses for many months and then allow no time to go to court or request a waiver in advance of the hearing. In most cases class members would also have no meeting with their attorneys after receiving the Board's appeal response except on the day of the hearing.

F.Y.I., and for the record, in my case, starting on Dec. 28, 2015 I was interviewed by the CDCR-BPH's psychologist Dr. Kimberly Smith, Psy.D, CA License #PsY 19314, for my then upcoming parole hearing on 4/12/2016. Noted: That one of my raised issues in my petition to advance my parole suitability hearing, was the erroneous entry of a 3000-115 (on 2009) by the previous psychologist of RJD-EAL Dr. C. Taylor on Sept. 2010, whereby he had illegally used that significant factual error in his clinical assessment and thus materially impacted me for he raised my risk of violence to a moderate one from the Low risk. Thus, instead for Smith to take that factual error into consideration, not only she completely ignored that significant Issue, but she used it to bolster her own psych eval report to moderate risk assessment, that is, without any evidentiary basis to support it. Furthermore., Smith not only did not let me answer or finish answering the questions she was asking me during the interview, but instead, as afterwards I read in her prepared report--she accused me that I was the one changing the subject(!). Nonetheless, her demeanor towards me was very unconventional the least, if not at all

(cont.)

impartial, for not only she was not looking me in the eyes when she was talking to me cut--in fleeting moments--and striking was the fact that her body language towards me was like "I'm here to settle old scores with you now" and/or "Now I have got you type of thing(!)."

And as a result of the above just described only few Egregious violations because there were more, the BPH Board panel used Smith's psych evaluation report, that is, while the panel refused to take into consideration my Rebuttal to Smith's psych report, and the panel denied me parole for multiple years.

Furthermore, during my parole hearing on April 13, 2016, the concerted consiracy continued with the BPH's appointed attorney Mr. Daniel Iyayi, who he not only did not read for the hearing record my support letters, laudatory chronos, certificates, but also he did not read or not made the objections that I had mailed to him and also I gave him copies before the hearing. Also, that just before the hearing, as I was talking with him, we were interrupted by Comm. Mr. John Peck, where he spent most of my time talking to Iyayi. And subsequently, Iyayi was "openly" advocating for his employer (BPH) at my hearing.

Additionally, regarding the transcript from my parole hearing of 4/13/16, I have already made an official request to the BPH's Executive Officer, Ms. Jennifer Shaffer, where I requested from her that I need her to provide me an original copy from the "voice recording" because, the BPH's official transcriber, Ms. [illegible] Bishop, who has completely distorted, sanitized, and doctored my parole hearing transcript by illegally she has inserted her own incriminatory accusations, she has made [illegible] comments, and in the [illegible] of my responses she has not printed my responses, thus [illegible] my parole hearing's transcript not legally binding.

For all the above mentioned reasons, among many others, like for example, if the prison system (prison, BPH, CDCR) they do not like an inmate any due to his either race, faith, [illegible], beliefs, or anything that the system has manufactured-fabricated in the prisoner's Confidential file--that, the BPH-FAD's psychologist is utilizing "illegally" to prepare his/her psych eval report, and in the case of mine (both) due to my Greek ethnicity and the fraudulent confidential file, where they have used to deny me parole for seven (7) years, that is, without any evidentiary basis. Therefore, it is Imperative for fairness, accountability and transparency, to have our CRA interviews "tape recorded," as a safety net, for to avoid bias, prejudice, vindictiveness, and arbitrariness.

For these reasons, I strongly oppose the proposed draft regulations. I urge you to take these regulations OFF the agenda and to address all the problems noted before voting on any revisions.

Sincerely,

George J. Bouras
George J. Bouras
CDCR #E-02059

Cc: Keith Wattley, UnCOMMON LAW Director/Attorney
To whom it May Concern

REBUTTAL To CRA EVALUATION

RE: CRA. Authored by Kimberly SMITH, CA Lic.# 19314. Dated: 12/28/15.
Approved by Emily Wisniewski, ABPP, CA Lic.: 20817. Dated: 1/19/16.

F/M: George John BOURAS, CDCR #E-02059, at C-5A-108-B
P.O. Box 32200. CHCF. Stockton, CA 95213 (prison).

S/J: Rebuttal to CRA Evaluation of December 28, 2015.

TO: FAD Chief of Board of Parole Hearings:

The purpose of my Rebuttal to the Comprehensive Risk Assessment (CRA) evaluation contracted by Dr. K. Smith, PSY #19314 on 12/28/2015, here at CHCF's Hearing Room, is to bring to your attention that it was a "selective prosecution" with bias, prejudism, vengeance, and arbitrariness--in other words, a premeditated "agenda" for to settle old score(s) with this life-to-term prisoner.

First, her questions were calculated--and, in the responses that I gave her she has stated the "opposite" of what I answered to her.

Second, she has gathered bits and pieces of negative entries from previous psych evals--starting from 1988--she exaggerated them and has present them like it is happening now.

Third, she has completely ignored all the gains that I have made on myself the last three decades of my incarceration (and especially the last decade), all the amends that I make to my victim Ms. Nancy Nelson, and am still making, whereby I have transformed and changed myself to a new person from the person that I was three decades ago.

Fourth, she has not mentioned the fact, that the previous psych evaluator, Dr. C. Tayler, in his evaluation with me in 2010, he inserted an erroneous CDC 115 (of 2008) against me, and he used the language to increase my then Low risk assessment to a moderate one. But instead, she did mention that Tayler's CDC 115 against me was due to "as it relates to his relationships with women," see page 5 of 13 in the CRA.

Fifth, I tried to talk specifically about my Remorse, my Responsibility, my Regret, my Amends about this grave tragedy, as well as the impact my heinous crime had had in Ms. Nelson's family, and in our society as a whole, for to express my Insight into this tragedy, but she not only interrupted me and changed the question so I won't be able to express myself, but now we see in her "selective" report stating that I've no remorse, no responsibility, no regret for my actions, and I am on denial, among other negative adjectives. Clearly, she specifically came to interview me with an "agenda" as I compare my CRA to other inmates' CRAs in here.

For the record, as a Rehabilitated man--thanks to CDCR's programs--I am now a person of respect, I am understanding, compassionate, tolerant, and helping others for my goal is to at least if I change the life of one person for the better, so I'll prove that Ms. Nelson did not loose her life in vain.

For the above stated misleading, biased, and arbitrary vilations against my person, I request you to provide me with another CRA evaluation by another psychologist for the interest of justice.

Respectfully submitted: George J. Bouras Dated: JAN. 27, 2016

George J. Bouras

George John Bouras
CDCR #E-02059
CMCF. C-5B-118-L
P.O. Box 32200
Stockton, CA 95213

SACRAMENTO
CA 957
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CDCR
CA DEPARTMENT
OF CORRECTIONS
AND REHABILITATION

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11/17/2016
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BPH CORRESPONDENCE UNIT

RECEIVED
NOV 22 2016

LEGAL MAIL

Ms. Heather McCray, Esq.
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 95812-4036

LEGAL MAIL

95812#4036

16-01-06

BPH KN
16-01-06
2016-17970

 Public Comment

TEMPLATE LETTER

[Provide your name and CDC number here] Ronald Glover
[Provide your contact information here] H32746

CDCR: H32746
Hrg Date: 2/14/17
Inst: CMF

Jennifer Shaffer
Executive Officer
PO Box 4036
Sacramento, CA 94812-4036

Dear Ms. Shaffer:

As a member of the plaintiff class in *Johnson vs. Shaffer*, I write to oppose the proposed regulations regarding Comprehensive Risk Assessments (CRAs), scheduled for discussion on Monday, [redacted]. December 19, 2016

01 First, I believe these regulations should provide for recording and transcription of clinical interviews – not for all prisoners, but at least for those who voluntarily choose to have their interviews recorded. This is vital to ensure that the CRA process is transparent and fair.

Second, I believe these regulations should allow prisoners to address all of the real "factual errors" that appear in these reports. As drafted, the regulations would screen out too many legitimate and important objections – in particular, objections to a clinician's errors in reporting on statements that a prisoner has made in an interview.

03 Furthermore, I believe these regulations should provide a meaningful timeline for the appeals process. As drafted, the regulations would screen out a prisoner's appeal of a CRA if not raised at least 30 days before a hearing. However, the Board is not held to any deadline for providing a CRA in the first place. Nor is the Board required to act on a timely appeal until 10 days before the hearing. This is unfair and unacceptable, as it could delay appeal responses for many months and then allow no time to go to court or request a waiver in advance of the hearing. In most cases, class members would also

04 have no meeting with their attorneys after receiving the Board's appeal response except on the day of the hearing.

[If possible, explain how each issue you've identified has specifically affected *your case*, providing relevant facts and dates as appropriate.]

[Also, feel free to discuss any other concerns you have about the proposed regulations, in addition to or instead of the concerns listed in this template.]

For these reasons, I strongly oppose the proposed draft regulations. I urge you to take these regulations off the agenda and to address all the problems noted before voting on any revisions.

Sincerely,

[Your signature] Ronald Glover
[Your name and CDC number] H32746

(7) (7)

PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. ~~Psychological~~ Comprehensive Risk Assessments ~~for Life Inmates~~.

(a) ~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. The psychologists shall consider the current relevance of any identified risk factors impacting an inmate's risk of violence. The psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence.
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c) ~~In the five year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three year reviews of a five year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court~~

~~order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case. The 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. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case. A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d) ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, 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.~~(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) Psychologists shall not prepare a risk assessment for inmates housed outside of California unless the inmate exercises his or her right under Penal Code sections 11190 and 11193 to be returned to California six months prior to the hearing.

(e) ~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing.
(2) For the purposes of this section, "factual error" is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.

(f) ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors~~

(9) (9)

~~invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.~~(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and determine whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly notify the inmate or attorney of record when a decision is made, but in no case less than 10 days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g) ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment to determine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. The Chief Psychologist shall notify the Chief Counsel of the determination.
(2) Upon receipt of the Chief Psychologist's determination, the Chief Counsel shall promptly, but in no case less than 10 days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist determined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and notify the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist determined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, order a new or revised risk assessment, postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and notify the inmate or attorney of record. Impacted risk assessments shall be permanently removed from the inmate's central file.

(h) ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist may complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel may refer the

(07)

objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (3) or (4) of this subdivision.
(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.
(3) If the hearing panel determines the risk assessment may contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(4) If the hearing panel determines the risk assessment does not contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object to or clarify any statements a risk assessment attributed to the inmate, or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 11190, and 11193, Penal Code; In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A.

(11)

((Continued)) ((From Text Page 3 of 4))

01 (cont'd) (1) I suggest that each Risk ~~A~~Assessment Be Tape Recorded Because My previous Risk Assessments By two diffrat psychologists Have Contened many outright lies ad fabricatio By the Dators.

05

(2) I Suggest the Risk Assessment "e put on exact timer as previous Doctors Have lied about the time Spent in Risk ASSessMent with me.

do

(3) I Suggest the Doctors performing the Risk ASSessment explane How the Qustions and ~~Answers~~ ANSwers pertain to Negtive AValuations. Such Qustions Should Be Made Cleare to the

Interviewed Inmate. So his/her answers would Be given in a concise manner Rather than a general manner.

the above Seggestions I have just given to the B.P.H are set forth in good faith.

Ron Sloan

#-32746

California Medical Facility
P.O. Box 2000
Vacaville, CA 95696-2000
Name: Ronald Cleaver
CDCR #: H32746
Housing: C-133

Jennifer Shaffer
PO Box 4036
Sacramento CA 94812-4036

California Department of Corrections
and Rehabilitation

INDIGENT MAIL

ADDRESS TO:
P.O. Box 2000 – All Mail
P.O. Box 2500 – Money Orders / Legal Mail

16-01-07

CDCR C90391
2016779741 Hrg Date: NLT 10/4/17
Inst: COR

11-9-16

BPH RN 16-01-07 Public Comment

RE: Request For Changes Of Title 15 Division 2 Board Rules and Request For Public Hearing - comments.

Dear Board:

I am requesting to be placed on the mailing list for notice of all changes to the Board's Title 15 Division 2 regulations.

01 I am also requesting a Public Hearing on BPH RN 16-01 Notice of Proposed Action. I believe the proposed regulations are insufficient to comply with the cases and law cited by the Board.

02 In addition, the proposed rules remain vague and ambiguous as they relate to the CRAs.

Thank you, for your time and anticipated cooperation.

Sincerely,

Michael Clark C90391
3B05-211
Corcoran State Prison
PO Box 3466
Corcoran CA 93212-3466

Michael Clark C90391
3B05-211
Corcoran State Prison
PO Box 3466
Corcoran CA 93212-3466

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Confidential

Board of Prison Hearings
Chief Staff Counsel
P.O. Box 4036
Sacramento CA 95814-4036

16-01-08

2016-18041

11/17/2016

BP TT RN 16-01-08 Public Comment

HEATHER McCRAY
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

CDCR E69926
Hrg Date: NLT 2/14/19
Inst: FOL

Ms. McCray;

I read the up-date from Keith Wattley at UnCommon Law and was quite disappointed in the BPH's actions.

I think all of you have missed the mark on these audio recordings. In the first place an audio recording is already being made, or is everyone not aware of that? (at the BPH hearings at least).

01 My suggestion, and all the lifers I have spoke with agree, is to make VIDEO recordings of the CRA and the BPH hearing. This in itself will eliminate many of the problems. You already know about the CRA's (he said she said or I never said), but the BPH hearings themselves have a habit of being edited before they are even transcribed, and many things in print do not relate well to what actually happened at the hearing, a video recording would provide EVERYONE with the proper tool to evaluate complaints.

02 I think you can do better on what counts as an error in the CRA's and you need to make a provision to have these error filled reports removed from our files so they do not come back years later and bite us in the ass.

03 Your help in this would be greatly appreciated.

Respectfully Submitted,

Lee Robbins

Lee Robbins E69926
FSP/1-C5-06
PO Box 715071
Represa, CA 95671-5071

Copy To:

Keith Wattley
UnCommon Law
220 4th St., Suite #103
Oakland, CA 94607

LEE ROBBINS E-69926
FOLSOM STATE PRISON
1-C5-06
P.O. BOX 950
FOLSOM, CA 95763

FOLSOM STATE PRISON
LEGAL MAIL
PRISONER GENERATED
MAIL

HEATHER McCRAY
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA

94812-4036

CONFIDENTIAL**

16-01-09

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NOV 23 2016
BOARD OF PAROLE HEARINGS

BPH RN
16-01-09

FOLSOM STATE PRISON
ALEJANDRO GONZALEZ, #C-47744
1 BLDG. C1-6 LOW
P.O. BOX 950
FOLSOM, CA 95763

CDCH: C47744
Hrg Date: NLT 7/9/18
Inst: FCL

NOVEMBER 21ST, 2016

BOARD OF PAROLE HEARINGS
ATTN: HEATHER L. MCCRATY, SSA

I AM HEREBY RESPECTFULLY RESUBMITTING MY SUGGESTION FOR THE BPH-CRA PROPOSED REGULATIONS. PERHAPS THIS TIME TO BE CONSIDER.

PLEASE TAKE NOTICE THAT, MY COMMENTS ARE IN GOOD FAITH AND WITH THE EXPECTATION OF BPH CONSIDERATION INTO ACCOUNT.

CORDIALLY

RECEIVED
NOV 23 2016

November 18th, 2016

BPH RN 16-01-09
Public Comment

TO: Jennifer Shaffer, Executive Officer

In re: BPH Regulations

There could be no justifiable reason to deny the public live look at the BPH-CRA task and performance to ensure their assessment in a Lifer Evaluation is accurate, fair and most of all within the law.

Welcome to the new era "VIDEO RECORDED"

01

With today techonology the process to present detailed information is extraordinary possible and simple and muchless expense than the transcribe system currently employed by today BPH contract with an independant transcribing agency.

The first admonishment the Phychologist present to the Inmate is: "EVERYTHING YOU SAID IS NOT CONFIDENTIAL". Therefore, the BPH may classify the CRA as confidential on a need basis and/or by the I/M request in writing.

PLEASE TAKE NOTICE, the benefit in Video-Recording open a window which ensure the BPH is indeed working to keep communities free from those convicted felon that don't deserve to be free and that such decision rest in part within the BPH Phychologist evaluation which are by objective standards the best and thoughest professionals psych evaluators stopping all the negative publicity that the BPH only concern is to safe-gusrd their wicked agenda. A videotape can support the psych evaluation is not a devious tactic of relentles torturous unmerciful experience to fatigue the I/M until delirium sets and the dasic feeling of sheer terror, so that the evaluator can manipulate and misquote the I/M statement, etc. etc. etc.

Therefore, in short the BPH should fear no eveil and should open a window to the taxpayer and most of all to all those that are righteously clinging to the drama as something to enliven and otherwise bleak existence of profound disappointment in the present redious, strangest most unsettling BPH-Psych CRA's behavior of Hide-N-Seek.

In closing, BPH need to have "BALLS" and let everybody see under your sleeve.

The Unhappy Convict

STATE OF CALIFORNIA

EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

September 20, 2016

Alejandro Gonzalez, C47744
FSP-ASU
P.O. Box 950
Folsom, CA 95763

RE: Your Comments on the Proposed Regulations Governing Comprehensive Risk Assessments

Dear Mr. Gonzalez:

This letter is to acknowledge that the Board of Parole Hearings (board) received your correspondence in which you expressed your concerns with the proposed regulatory amendments to the California Code of Regulations, Title 15, Division 2, section 2240, governing comprehensive risk assessments (CRAs). These amendments are intended to implement the settlement agreement reached in the *Johnson v. Shaffer* class action case.

The board did not receive your comments in time to consider them in making additional amendments to the proposed regulations previously distributed at the board's Executive Board Meeting on August 15, 2016. The new amended draft was publically distributed and discussed at the board's Executive Board Meeting on September 19, 2016.

However, please note that these proposed regulations have not yet been filed with the Office of Administrative Law (OAL). Once the proposed amendments are filed with OAL, the public will have an additional 45-day public comment period to offer comments and suggestions on these regulations.

Thank you for your submission.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

Folsom State Prison
P.O. Box 715071
Represa, CA 95671
Name: ALEJANDRO GONZALEZ
CDCR#: C-47741 Bldg/Bed: 1 - C1 - 6L

FOLSOM STATE PRISON
LEGAL MAIL
PRISONER GENERATED

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NOV 23 2016
BOARD OF PAROLE HEARINGS

California Dept. of Corrections
and Rehabilitation
INDIGENT MAIL

LEGAL
&
CONFIDENTIAL MAIL

BOARD OF PAROLE HEARINGS
ATTN: HEATHER L. MCCRAY, SSA
P.O. BOX 4036
SACRAMENTO, CA
95812-4036

95812#4036

16-01-10

2016-18096 RECEIVED
NOV 29 2016
BOARD OF PAROLE HEARINGS

CDCR: F70946
Hrg Date: NLT 11/26/18
Inst: CTF

11/20/16

BPH RN 16-01-10 Public Comment

To: Heather McCray
BPH Senior Staff Attorney
PO Box 4036
Sacramento, CA 94812-4036

From: Maury O'Brien F70946
CTF North LA 338L
PO Box 705
Soledad CA 93960

RE: OBJECTIONS TO PROPOSED REGULATIONS; CRA

01 I personally haven't received a CRA psych. eval. yet as my initial BPH is 2018. However, I have concerns that they are not tape recorded interviews. I would like them recorded so that my attorney's would be able to guide me to any possible needs (therapy) I may have. Also this would help with clarifying any "factual errors" that may occur through the process.

02 The time line for proposed objections is too stringent and needs to apply for both party's represented. I don't forsee any personal problems with CRA, but having formal safeguards is a necessity to ensure public safety and fair hearings. Thank you for your consideration of my objections

Sincerely,

Maury O'Brien

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NOV 29 2016

Maury O'Brien F70946
CTF North LA 3382
Po Box 705
Solidad, CA 93960

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NOV 28 2016
BOARD OF PAROLE HEARINGS

RECEIVED
NOV 28 2016
BY:

Heather McCray
BPH Senior Staff Attorney
Po Box 4036
Sacramento, CA
94812-4036

95812-403636

11-10-91

2016-18089

BPH RN 16-01-11 Public Comment

CSATF/SP
Darnell D. Bing D-65215
Fac.Bl-pod 10-6 low
P.O.Box 7100
Corcoran,CA.93212

November 21,2016

CDCR: D65215
Hrg Date: 3/10/17
Inst: SATF

Heather McCray
BPH Senior Staff Attorney
P.O.Box 4036
Sacramento,CA.94812-4036

RE: Proposed BPH Regulations

Dear Ms. McCray:

As a member of the plaintiff class in **Sam Johnson vs. Jennifer Shaffer,** I write to oppose the proposed regulations regarding Comperhensive Risk Assessments (CRAs), scheduled for discussion on Monday December 19, 2016.

01 **First,** I believe these regulations should provide for recording and transcription of clinical interviews-not for all prisoners, but at least for those who voluntarily choose to have their interviews recorded. This is vital to ensure that the CRA process is transparent and fair.

02 **Second,** I believe these regulations should allow prisoners to address all of the real **"FACTUAL ERRORS"** THAT APPEAR IN THESE REPORTS. As drafted, the regulations would screen out too many legitimate and important objections-in particular, objections to a clinician's error in reporting on statements that a prisoner has made in an interview.

03 **Furthermore,** I believe these regulations should provide a meaningful timeline for the appeals process. As drafted, the regulations would screen out a prisoner's appeal of a CRA if not raised at least 30 days before a hearing. However, the Board is not held to any deadline for providing a CRA in the first place. Nor is the Board required to act on a timely appeal until 10 days before the hearing. This is unfair and unacceptable, as it could delay appeal responses for many months and then allow no time to go to court or request a waiver in advance of the hearing. In most cases, class members would also have no meeting with their attorneys after receiving the Board's appeal response except on the day of the hearing.

04

For these reasons, I strongly opposed the proposed draft regulations. I urge you to take these regulations off the agenda and to adress all the problems noted before voting on any revisions.

Sincerely,
Darnell D Bing
Darnell D. Bing D-65215

CSATF/STATE PRISON AT CORCORAN
P.O. 7100
CORCORAN, CA 93212
NAME Darnell D. Bing
NUMBER D-65215
HOUSING fac. B1-pad 10-6 low

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BOARD OF PAROLE HEARINGS

STATE PRISON
GENERATED MAIL

Heather McCray
BPH Senior Staff Attorney
P.O.Box 4036
Sacramento, CA. 94812-4036

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16-01-12

Rosenberg, D-36432
California Healthcare Facility
E-107-L/Box 32900
Stockton, Ca. 95213

CDCR: D36432
Hrg Date: NLT 1/8/18
Inst: CHCF

Date:16NOV2016

2016-18098

To. Heather McCray, BPH Senior Staff Attorney
P.O. Box 4036,
Sacremento, Ca. 94812-4036

Subject: Proposed Regulations. 01

Dear Heather McCray. I am opposed to the proposals as submitted to The Office of Administrative Law. As was stated and submitted to The Board of Prison Hearings in a prior letter. A CRA interview should be recorded and then transcribed into writting and a copy of the transcription be given to the subject of the CRA. (COMPREHENSIVE Risk Assessment.) The process that is currently in use does not offer a meaningfull process to challenge what the evaluator stated that a statement was made by the subject of the CRA and the subject of the CRA denies making the statement. When this happens, the person reading the CRA has to deside who to be belived. The tendency is to belive the evaluator.A transcript of the CRA interview will settle the dispute. It will also **LEVEL** the playing field . It will also give **TRANSPARENCY** to the CRA interview.It will also provide a source to feview if needed by whomever is reading the document.

I am also opposed to **ANY** regulation that requires a deadline for a time limit to file a appeal to a CRA without The Board being given a time limit to respond to the appeal of the CRA in time for the appellant to review and discuss the response, prior to the hearing that the CRA is to be relied on. If the appeal response is not given a due date and the appeallants attorney does not have time to discuss the response prior to the trial, then the appeal process will be **MEANINGLESS.**

02

Thank you for your consideration of my concerns.

BPH RN
16-01-12
Public
Comment

Roger Rosenberg
Roger Rosenberg, D-36432

Rosenberg, D-36432
California Healtycare Facility
E1B107-L/Box 32290
Stockton, Ca. 95213

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Heather McCray,
BPH Senior Staff Attorney
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Sacramento, Ca. 94812-4036

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16-01-13

2016-18094

CDCR: B70020
Hrg Date: 1/4/17
Inst: CTF

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BOARD OF PAROLE HEARINGS

BPH RN 16-01 Public Comment

Orrin Carr, B70020
P.O. Box 705, RB-351-U
Soledad, CA 93960-0705

November 20, 2016

Heather McCray, BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

Re: Comments concerning proposed regulations, CDCR, FAD, CRA's.
BPH RN 16-01, Amendment of § 2240 filed 10/24/2016 with OAL

Dear Ms. Heather McCray;

These are my comments regarding the proposed regulations effecting Comprehensive Risk Assessments (CRA) used by the Board of Prison Hearings (BPH).

01

1. The proposed regulations do not provide for the option of tape-recording the CRA interview.

   a. Tape-recordings will allow prisoners to object to misquotes.
   b. Recordings would allow staff to prove when a prisoner's claim of a misquote is false.
   c. The recordings could also be used as a tool by the psychologist to make a better evaluation of the prisoner. Presently psychologists use a large amount of time during the interview taking notes or typing on their laptops. If they could use a recording then it would free them up to spend the entire amount of time gathering information from the prisoner then later write their final report from the recording. This would result in more complete and accurate evaluations. Additionally, BPH commissioners could find it helpful to listen to the recording before the hearing. Even the Governor might find it helpful.
   d. Prisoners view the CRAs of having a consistent history of misquotes, incorrect facts, false assumptions and interpretations inconsistent with the record or what the prisoner has demonstrated. With the interview being recorded prisoners would feel safer and more likely to be open and candid during the interview.

In my last evaluation I was misquoted at least twice. It is funny how when there is a misquote or unsupported claim it always works to the negative for the prisoner. Not to allow recordings only serves to preserve unethical behavior and mistakes by everyone involved.

02

2. The BPH's definition of "factual error" is too narrow and restricts valid objections. Any error should be valid for objections. For instance, in my last evaluation the psychologist claimed because my "Christian elderly farming Couple" (3 years older than me) sends me packages "this demonstrates that Mr. Carr is still manipulative and exploitative of others." Had the psychologist talked to me about this then I could have proved that I furnish the money to pay for the packages and give them a little extra (10-20%) for helping This is the least of all the objections I have to the report but almost all of my objections would not be count as a "factual error" that I could object too.

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03 3. The proposed regulations impose strict deadlines on prisoners making objections, but they do not require Board officials to promptly address those objections. Why should the BPH not allow routine safeguards and time limits found throughout the judicial system and the California Codes of Regulations. The BPH is acting as a judicial body determining how long a prisoner will spend in prison but yet they do not want to hold themselves to standards to preserve Fair play.

04 4. The proposed regulations allow error-filled CRA reports to remain in records used to determine suitability for parole. In my last CRA the psychologist reported on three incidents of DISMISSED escape related charges in the late 1970's and 1980's. She repeated two of these incidents twice as though they were separate thus increasing the number of these incidents to five. According to Title 15, section 3326(a)(2&3) & (d) it is against the regulations to mention these dismissed charges in any reports/files pertaining to the inmate. If allowed to remain in my CRA then it will be used against me and this lie will eventually be treated as the truth. The psychologist used this information against me repeatedly in the CRA. Not only will the BPH use these incidents against me but also the Governor and the courts.

05 5. The proposed regulations fail to ensure proper consideration for prisoners with disabilities. My present CRA identified "many autistic traits directly endorsed by this evaluator". Some of these traits is being withdrawn and having difficulty expressing emotion or articulating myself in social situations. I am worried that these traits will be seen in a negative light if I am unable to do the "song and dance" other more social prisoners are able to do and which everyone reports is required by the BPH. It does not mean I do not have remorse or insight if I have problems with presenting them to the BPH commissioners at the hearing.

06 6. The BPH should require FAD to use assessments tools for the CRA which evaluate the present psychological state of the prisoner such as the MMPI-2. Requiring FAD psychologist to do an evaluation within the criminal justice system without interviewing the prisoner violates the ethical standards of their profession.

There is no justifiable reason why the BPH/FAD should not want to make the CRA process more reliable and ethical.

Sincerely,

Orrin Carr, B-70020

Cc: Keith Wattley
UnCommon Law
220 4th Street, Suite 103
Oakland, CA 94607

P.S. Dr. Schur, Ph.D., CA License #PSY-23998, who did my last CRA date approved 10/25/16 on October 04, 2016, claims to be a "forensic psychologist". She does not have specialty Board certification by the American Board of Professional Psychology (ABPP) in forensic psychology. Are any of the Psychologists hired by FAD to do CRAs are actual certified forensic psychologists?

O.C.

CARR, B 70020
P.O. Box 705, RB-351-U
Soledad, CA 93960-0705

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NOV 28 2016

Heather McCray, BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 95812-4036

"Confidential"

95812-403636

16-01-14

2016-18139

November 18, 2016

BPH RN 16-01-14 Public Comment

TO: Heather McCray,
BPH Senior staff Attorney
Sacramento, CA 94812-4036

From: Thomas Jo Heilman
H-76785 Cell # 6392
Calif. Mens Colony- East
San Luis Obispo, CA 93409

CDCR: H76785
Hrg Date: NLT 5/11/17
Inst: CMC

re: Proposed BPH Regulations / O.A.L. Approval

Dear Ms. McCray,

I am writing to you as a member of the class of life-term prisoners which must undergo "Comprehensive Risk Assessments" (CRA's) prior to seeking suitability from the BPH for parole consideration. I, and many other life-term inmates are concerned ~~that~~ about the Parole Board's Commissioners' recalcitrance in implementing meaningful changes to these psychological evaluations parole commissioners use when considering a life-term inmate's suitability for parole.

My own case is an example of why the BPH must implement the changes to CRA evaluations as found in the Johnson v. Shaffer class action lawsuit but to which the BPH now appears to be back-sliding on turning into meaningful changes. I previously wrote to Jennifer Shaffer, BPH Executive Officer on August 31, 2016 about my concerns with the Board's failure in determining that specific changes

in Board of Parole Regulations will not be implemented as agreed to in the Final settlement of the Johnson v. Shaffer, case.

Prior to my initial Parole Consideration Hearing in 2012, I underwent a CRA psychological evaluation by Dr Jatinder Singh. I found many factual errors in the CRA as well as objectionable comments placed in the CRA by Dr. Singh of the BPH's Forensic Assessment Division. Immediately Prior to conducting the evaluation, Dr. Singh assured me that the CRA is Not based on her subjective opinions but on objective-based criteria in the Risk Assessment Tools. However, Dr. Singh then stated the following disclaimer on page 12 ~~at the end~~ of the CRA:

> "It should be noted that insight and remorse are abstract concepts, which do not lend themselves to operationalized definition or measurement. Therefore, any opinions regarding insight and remorse are subjective (emphasis added) in nature, and should be interpreted with this caveat in mind."

In rendering her "opinions" concerning my psychological make up, risk of current dangerousness, etc, Dr. Singh stated many factual errors in the CRA and attributed such "facts" as ~~for~~ her opinions formed from the statements I gave at the psychological evalution, and to ~~which~~ such statements I denied as part of the evaluation. If the psychological evaluation

were recorded, there would then be no difficulty in ascertaining the validity of both the inmate's statements and the subjective opinions of the FAD interviewer based on statements made and compared against the Risk Assessment Tools. It appears the BPH is aware of the danger of implementing any changes where a Psychological evaluator's credibility is placed at risk.

01

Ms. McCray, let me just add this last thought. ~~I A~~ Upon receiving the CRA authored by Dr. Singh my attempts to appeal the opinions formulated therein were thwarted by the CDCR/BPH/FAD. I filed a writ of Habeas Corpus in the Calif. Supreme Court, Case # S195743 and which was denied because I could, and did, raise my concerns and disagreement with the CRA and its content ~~to~~ both verbally and in writing at my Board Hearing. Now the Board's agreement to implement meaningful changes to the appeals process of the content of the CRA is in jeopardy due to BPH holding on to the status quo that what is initially opined stays opined forever - good or bad - in and against a life-term inmate.

Please, offer alternatives to the Board's continued failure to implement the meaningful changes in life-term inmates' psychological evaluations or face future and costly challenges and court litigation.

Respectfully,
Thomas J. Heitmann

STATE OF CALIFORNIA

EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

September 13, 2016

Thomas J. Heilman (H76785)
California Men's Colony
P.O. Box 8101; Cell: 6392
San Luis Obispo, CA 93409-8101

RE: Your Comments on the Proposed Regulations Governing Comprehensive Risk Assessments

Dear Mr. Heilman:

This letter is to acknowledge that the Board of Parole Hearings (board) received and reviewed your correspondence in which you expressed your concerns with the proposed regulatory amendments to the California Code of Regulations, Title 15, Division 2, section 2240, governing comprehensive risk assessments (CRAs). These amendments are intended to implement the settlement agreement reached in the *Johnson v. Shaffer* class action case.

The board has considered your comments in making additional amendments to the proposed regulations previously distributed at the board's Executive Board Meeting on August 15, 2016. The new amended draft will be publically distributed and discussed at the board's upcoming Executive Board Meeting on September 19, 2016.

Please note that these proposed regulations have not yet been filed with the Office of Administrative Law (OAL). Once the proposed amendments are filed with OAL, the public will have an additional 45-day public comment period to offer comments and suggestions on these regulations.

Thank you for your submission.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

BOARD OF PAROLE HEARINGS
P.O. BOX 4036
SACRAMENTO, CA 95812-4036

May 19, 2010

Inmate: Heilman, Thomas
CDC#: H76785
Institution: CMF

The FAD reviewed correspondence received from Mr. Heilman (Dated April 1, 2010).

Mr. Heilman is advised that confidential raw data and interview notes associated with FAD psychological evaluations are not "public records" and are not subject to disclosure through the Freedom of Information Act.

Mr. Heilman's request is denied.

Respectfully,

Cliff Kusaj, Psy.D., Chief Psychologist
Board of Parole Hearings
Forensic Assessment Division
Department of Corrections and Rehabilitation

COPY

CORRESPONDENCE UNIT
Board of Parole Hearings

cc: CMF, Board Desk

CALIFORNIA MEN'S COLONY STATE PRISON
P.O. BOX 8101
SAN LUIS OBISPO, CA 93409-8101

Name: Thomas J. Heilman
CDCR #: H.76785 Cell #: 6392

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Ms. HEATHER McCRAY
BPH SENIOR STAFF ATTORNEY / CDCR
P.O. Box 4036
SACRAMENTO, CA 94812-4036

LEGAL MAIL

95812-403636

16-01-15

2016-18138

CONFIDENTIAL LEGAL MAIL

James Nivette, Ph.D.
V-08954 #RB-347L
C.T.F. P.O. Box 705
Soledad, Calif. 93960-0705

CDCR: V08954
Hrg Date: NLT 10/25/19
Inst: CTF

PHRN
2-01-15
Public
Comment

Heather McCray
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, Calif. 94812-4036

November 22, 2016

Re: Comments on Proposed BPH Regulatins

Dear Ms. McCray:

I was a licensed psychologist in California and Colorado for 25+ years and had a private practice and consulting firm in a small central California community during that time.

To be fair, I want you to know that I had my license suspended, then revoked for lack of a response, due to inappropriate behavior with my clients. You may decide to negate this entire commentary knowing this, but I would caution you that, even though I acted unprofessionally, I have a vast knowledge and information which, I believe, would be helpful in arriving at a correct decision regarding the new regulations you are now considering for appealing CRA's.

My professional history includes 10 years as a professor at Monterey Peninsula College where I taught psychology. I entered private practice in 1970 when I was licensed and practiced until 1995 when, in the process of retiring, I was accused of ethical violations.

I admitted patients as a member of the professional staff at the Community Hospital of the Monterey Peninsula starting in 1974, and continued to do so until 1992. I supervised and instructed volunteers at the Monterey Peninsula Suicide Prevention center, was a reserve police officer with the Seaside Police department for 10 years, consulted with law firms as an Executive Counselor throughout the State of California, did forensic psychological work with the Monterey and Seaside Police Departments as well as the Monterey Sherrif's Department who issued me a concealed carry permit which I held for 22 years without incident.

I consulted with school districts from Fairbanks, AK to Chula Vista, CA and developed and evaluated bilingual education programs for the U.S. Department of Education. I consulted with school districts from Hawaii to Washington, D.C., worked as a test development and research manager in psychological test development for CTB/McGraw-Hill. I have completed forensic and other psychological evaluations for MENSA, the APA and local law enforcement.

As you may have remarked, my experience is long-lived, broad and in depth.

I am opposed to the proposed regulations in several areas but most significantly opposed to the somewhat severe restrictions on:

01

1. What can be submitted to the BPH as errors in Forensic Assessments (FA), factual errors only.

02

2. the time restrictions in what can be submitted. Inmates cannot properly respond in this short time frame, and most cannot afford a lawyer to do this for them. This will lead to a two-class system, those with money to spend on a lawyer, and those who do not have this asset.

03

3. the highly likely potential for error-filled, biased and non-recoverable (changeable) reports to remain in inmate's files.

These problems are bad for both inmates and for psychologists alike, but for different reasons.

03 Cont'd

For inmates, there will be no provisions to request a "second opinion" (a new FA with a different evaluator. Thus, leaving potentially error-filled or biased reports without the potential for response or rebuttal. This makes inmates vulnerable to the psychologists who are either biased by prejudice towards an inmate. Currently, we have two inmates who openly claim that they were "coached." that their words were turned around into positive comments by their evaluator and several inmates who claim the opposite was true in their case.

01 Cont'd

Because these FA's have critical value to the release of a life-term inmate, no one report can be allowed to stand without response except for a very narrow definition of "factual error," and only then if it materially affects the BPH's panel against the release of the inmate.

I am sure that you are aware that no one is perfect, and even psychologists make mistakes, have prejudices and "feelings" about those they evaluate which can, subtly but definitively, influence the outcome.

Without the possibility of any response to their FA, the inmate or his attorney are powerless leaves the psychologist indemnified no matter how egregious the interpretation may be of the inmate's statement, or how this is used against him or her. Recently an inmate here received an overall "low" but the devil was in the details. His evaluator was a feminist with a male-hostile attitude according to her internet profile. The inmate's crime was against a woman. How could such an evaluator be equitable in such a case?

Remember, no one is perfect and I have seen many incidents of bias in the reports of two of my five interns I supervised (both as psychology interns, MFT interns, and Clinical Social Work interns), some of these biases remain today in their work.

For the psychologists, the issues in #1 and #3 above have potentially serious consequences for them as well. As a licensed professional for 25 years, I can attest to the disastrous consequences of complaints to the Board of psychology Examiners, the California Department of Consumer affairs, the local newspapers, the APA and the CPA, as well as law enforcement -**whether these complaints are true or not.**

02 Cont'd

By not accepting inmate's or their lawyers rebuttals, comments and corrections-except with very narrow restrictions, you will force inmates or their representatives to file complaints with all of the above agencies to make sure that their FA's do not remain a part of the inmate's permanent record without correction. Whether these myriad of complaints are adjudicated in favor of the inmate or the psychologist does not matter. I assure you that the damage will already be done on the credentials of the psychologist involved.

Please do not put these psychological professionals in the position where they have to defend themselves against the State of California or a professional organization's "machine." If this becomes the case, you will have a hard time recruiting good evaluators who are willing to take such a risk.

01 Cont'd

I suggest that the BPH, through its Forensic Division, can "buffer" these issues more effectively and fairly for all concerned by managing all of this within itself. I recommend that the BPH continue to accept and research all complaints in order to remain aware of those with potential biases in their evaluations and thus maintain control of its own work so that it does not become popularized to ruin the careers of good professionals.

I further suggest that all inmates still remain able to file a rebuttal to their FA which becomes a part of their permenent record and that they continue to be able to request another FA in the case of discrepancies.

By maintaining control of the appeals process for FA's, the BPH will be able to cope with its own workers and avoid the problem of social stigma attached to FA's which cannot, by definition, be considered 100% accurate.

Thank you for your consideration of this information.

James Nivette, Ph.D.

cc: Keith Wattley, Esq.
American Psychological Association
California Psychological Association
Board of psychology Examiners

James Nivette
V-08954 #RB-347L
C.T.F. P.O. Box 705
Soledad, Calif. 93960-0705

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CDCR# E70238
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Inst: SQ

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Mark Radke E70238
San Quentin State Prison
1-W-40
San Quentin, CA 94974

November 21, 2016

Heather McCray, BPH Senior Staff Attorney
PO Box 4036
Sacramento, CA 94812-4036

Dear Ms. McCray,

I am submitting this written public comment for RM 16-01 Comprehensive Risk Assessment. These comments are **not** to be construed as a written objection to any of my own CRAs or BPH parole consideration hearings. I have the following concerns with these regulations:

01

1: I believe using the term "factual error" is too narrowly defined as a an objectable claim against a risk assessment. Using the factual error definition will limit viable reasons for disallowing a badly performed risk assessment. Factual errors should include diagnoses and corrections of an inmate's misquoted statements when there is evidence of a material error.

02

2: These regulations do not include any provisions that would require FAD psychologist to record their interviews of inmates at the request of the inmate. This would immediately settle any disputed statements made by the inmate or the psychologist during the interview and provide transparency for the assessment process.

03

3: Inmates, their attorneys, and their retained private psychologist should be able to review the FAD psychologist's notes and related materials regarding the inmate's risk assessment interview.

04

4: The deadlines set by these regulations inhibits the inmate and his/her attorney's ability to properly file postponement requests with the BPH for FAD risk assessment reasons. There are no provisions that require the risk assessment be received in a timely matter. The written Board response deadline of 10 days before the scheduled hearing date is untimely as it does not provide the inmate and attorney a fair opportunity for parole hearing preparation. I suggest the risk assessment be received by the inmate and his/her attorney six months in advance of the hearing date. A 45 day period after the receipt of a risk assessment report to file an objection. After the BPH receives an objection they should have 45 days to return its written response. If the BPH fails to respond within 60 days before the scheduled hearing, the BPH must inform the inmate and attorney of the reason for the delay and grant a request for a postponement.

05

5: These regulations allow for CRA reports to remain in the inmate's file even though it has been determined to contain factual errors. These flawed reports can then be used by future Board panels, the Governor to reverse a parole grant, or by the courts to uphold a denial.

06

6: These regulations do not ensure that persons with disabilities or language barriers are able to process the questions givens to them. Persons who do not understand English should be able to have a certified in-person interpreter and receive their CRAs in their native language. These barriers should also be grounds for filing an objection to the CRA report.

07

7: These provisions do not discuss how risk assessment tools are considered appropriate for use in lifer populations. Is the FAD alone able to determine which tools it uses, or can there be an independent group of accredited psychologists and/or psychiatrists to review proposed assessment tools to their implementation? Perhaps the assessment tools should be incorporated by name in the CCR Title 15 and require a public comment period just as these regulations require.

08

8. Section 2240 (b) says the FAD psychologist should "...**take into consideration** the youth factors described in Penal Code 3051..." I believe section 2240 (b) should use the same **great weight** term described in Penal Code 3051 so the same legal standard applies to these regulations.

I respectfully submit these comments for the BPH and OAL's consideration.

Sincerely,

Mark Radke

Mark Radke

Mark Radke E70238
San Quentin State Prison
1-W-40
San Quentin, CA 94974

SAN FRANCISCO CA 941

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16-01-17

2016-18130

BPH RN 16-01
Public Comment

November 21, 2016

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Heather L. McCray
Senior Staff Attorney
Board of Parole Hearings
Post Office Box 4036
Sacramento, Calif. 95812-4036

Ref: OAL File No.
Z 2016-1024-02
BPH RN 16-01

CDCR E57901
Hrg Date: 3/7/17
Inst: SQ

Dear Mrs. McCray,

Enclosed herewith are my written STATEMENTS WITH ARGUMENTS AND CONTENTIONS for consideration and implementation where possible during the public comment period. I have done my very best to indicate things that are crucial to the delivery of a fair and ethically proper Comprehensive Risk Assessment preparation system by the Board's forensic psychologists. Parole hearings can be badly tainted and poisoned by exceptionally negative, egregious CRAs which only focus on negative factors for the most part with little or no mention of positive factors which tend to show that some deserving parole applicants are ready to be given another chance at a new life.

Finally, I will say that I am still healthy at 74 years of age,[1/] but would like you to know that I still have a 32-month 'THOMPSON TERM' to serve after I am discharged from my life term sentence. This is a painful burden, but mind you, I cannot afford to have the Board procrastinate or delay me any longer in finding me suitable so that I can complete my life sentence and begin serving my THOMPSON TERM which I look forward to starting as soon as possible. I pray that someone will put in a good word for me so that the Board will complete my 'TERM CALCULATION' with **adjusted base term calculation**, etc. consistent with In re Butler settlement agreement.

My next parole hearing is set for no later than 02/06/17. If you can pleae, let me know the actual date of my forthcoming hearing before the Board panel. I have excellent parole plans with ample support systems in place and I don't want to be left to die in prison.

Respectfully submitted,

PETER M. BERGNE, E-57901

(Enclosures 2 copies)

Note: Please s... a conformed copy of page 1 only in the S... envelope provided for my record. Thank you.

1/ I have already served 27 years on a 15 y. to life sentence as a 'first-termer'.

ORIGINAL

O A L Notice File No.
Z 2016 - 1024 - 02

November 21, 2016

Peter M. Bergne, E-57901
Housing Unit 4 - W - 45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Heather McCray, Esquire
Senior Staff Attorney
Board of Parole Hearings
Post Office Box 4036
Sacramento, Cal. 95812-4036

Reference is incorporated to Members of the Parole Board, Chief Counsel and Chief Psychologist. Also, the Office of Administrative Law
O A L

WRITTEN STATEMENTS WITH ARGUMENTS AND CONTENTIONS FOR CONSIDERATION BY B P H

It is a reasonable argument and contention that changes must be made to the Proposed Regulatory Amendments which are up for review in the current public comment period. (See **EXHIBIT B** herein at pages 7 - 8). The Forensic Psychologists employed by the FAD of the Board of Parole Hearings must adhere to the Rules of Professional Responsibility enunciated under Cal. Bus. & Prof. Code, §2960, subdivisions (i) and (n), inter alia. Moreover, it is essential that Forensic Psychologists that prepare Comprehensive Risk Assessments (CRAs) be required to abide by the following PRINCIPLES and ETHICAL STANDARDS of the American Psychological Association (APA):

1) The following changes or amendments should be included in Cal. Code of Regulations, Tit. 15, Div. 2, §2240;

A) The O A L (Office of Administrative Law) should not approve the Proposed Regulatory Amendments until PRINCIPLES 'A' and 'C' of the American Psychological Association are included and approved by the Board to assure compliance with basic rules of professional responsibility and ethics for the Forensic Psychologists. (See **EXHIBIT A** herein at pages 5 - 6).

A fortiori, there must be a fair system of checks and balances put in force to prevent forensic psychologists from saying virtually 'anything they want' in CRAs, while disregarding the welfare and rights of the inmate parole applicants who they are assigned to interview.

The aforesaid change to the Proposed Regulations may be implemented by rewriting and resubmitting the Proposed Regulations to the OAL pursuant to Cal. Gov. Code, Section **11349.4(a).**

The Office of Administrative Law is aware of this writer's suggestions, and will consider them for entry into the Rulemaking File. (See **EXHIBIT C** herein at page 9).

It is a REASONABLE CONTENTION AND ARGUMENT THAT APA PRINCIPLES 'A' AND 'C' SHOULD BE INCORPORATED INTO THE PROPOSED REGULATORY AMENDMENTS

03

APA Principle 'A'

In pertinent part Principle 'A' requires that psychologists, in their professional duties, must 'seek to safeguard the welfare and rights of those with whom they interact professionally'. This means that they must not just bash, demean and criticize parole applicants for past wrongs and misconduct of a criminal nature or antisocial nature, but also provide laudatory mention for the parole applicants' positive attributes, meritorious achievements in prison programming and past accomplishments while rehabilitating themselves in prison for many years. Details of any successfully completed programming including new programming within the past five years should be included in the CRAs in accordance with C.C.R., Tit. 15. Div. 2, §2240(c).

This writer vehemently objects to the FAD and the Board's overt lack of attention to this facet of CRA preparation.

04

APA Principle 'C'

It is a fair argument to state that forensic psychologists often fail to 'promote accuracy and honesty' in their professional interactions with parole applicants. Their extreme departure from this Principle is demonstrated by frequent 'subterfuge' and/or 'intentional misrepresentation of facts' by stating repeated 'factual errors' and gross exaggerations on past inmate conduct and characterological traits.

Both the Board and the OAL must realize that in order to promote con-

stitutionally adequate fundamental fairness and civil integrity, the Proposed Regulatory Amendments should include A P A Principles 'A' and 'C' because the current C R A assessment methods have most often had a materially serious negative impact on parole applicants' future chances of success if not regulated by valid rules of professional responsibility and ethics.

(Please note that this submittal of written comments and arguments is being timely submitted to the Board and O A L within the prescribed public comment period from 11-04-16 to 12-19-16. See **EXHIBIT B** herein at page 7).

05

IMPROPER RELIANCE UPON OBSOLETE, OUT OF DATE INFORMATION

It is an important contention and comment that the Board and forensic psychologists should be prohibited from relying on obsolete data or information of parole applicants' past conduct including any 'alleged' crimes or misconduct which did not result in any convictions, which occurred more than forty (40) years ago. Such misconduct or alleged crimes or police contact occurring more than 40 years ago are in no way a reliable indicator of inmates' potential for future violence or risk to the public. This also leads to 'factual error' when confusing the past with the present. This writer, for example, has not had any incidents of violence or sexual misconduct in the entire 27 years that he has been in custody in the State of California. He has also been disciplinary free for more than a decade.

It is essential that A P A Ethical Standard 9.08 of the American Psychological Association's Code of Principles and Conduct be included with the Proposed Regulatory Amendments. It is exceptionally petty and demeaning for the PAD or the Board to demean and ridicule parole applicants who are in their 60s or seventies for aberrant behavior and antisocial misconduct they may have engaged in more than 40 or fifty years ago during their schooling years.

Again, it must be stressed that misconduct occurring more than 40 years ago or a half-century ago has no genuine bearing on current dangerousness. (See **EXHIBIT A** herein at page 6 for A P A Standard 9.08).

FINALLY, this writer makes the reasonable contention that APA Ethical Standard 3.04 should be incorporated into the aforesaid Proposed Regulatory Amendments for good cause. Ethical Standard 3.04 states in pertinent part that

> "Psychologists take reasonable steps to avoid harming their clients or patients . . . and to minimize harm where it is foreseeable and unavoidable". (See EXHIBIT A herein at page 6).

(Reference is incorporated herein with regard to the OAL and California Gov. Code, Sections 11349.1(a), 11349.4(a), and 11346.8(a)).

WHEREFORE, and for good cause appearing herein, this writer respectfully requests that the Board and members of the Office of Administrative Law take the aforegoing arguments and contentions into serious consideration, and that any practical argument, contention or suggestion stated herein will be included into the Proposed Regulatory Amendments when they are submitted to the OAL for filing in the completed Rulemaking File. (See EXHIBIT B herein at page 7).

DATED: Nov. 21, 2016

Respectfully submitted,

PETER M. BERGNE, E-57901
Contributing Member of Class of Life-term Prisoners with comments to the BPH and OAL

cc: A reference copy of this document not for comment but for verification purposes only is being served upon the Office of Administrative Law.

PMB/for BPH/OAL (2016-01)
Legal Work Product

(Ref: Gov. Code, §12838.4)
BPH RN 16-01
cdcr.ca.gov

AMERICAN PSYCHOLOGICAL ASSOCIATION

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

Adopted August 21, 2002
Effective June 1, 2003

With the 2010 Amendments
Adopted February 20, 2010
Effective June 1, 2010

AMERICAN
PSYCHOLOGICAL
ASSOCIATION

750 First Street, NE
Washington, DC 20002-4242

Printed in the United States of America

EXHIBIT A

Principle A: Beneficence and Nonmaleficence

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence.

Principle C: Integrity

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques.

2.06 Personal Problems and Conflicts

(a) Psychologists refrain from initiating an activity when they know or should know that there is a substantial likelihood that their personal problems will prevent them from performing their work-related activities in a competent manner.

(b) When psychologists become aware of personal problems that may interfere with their performing work-related duties adequately, they take appropriate measures, such as obtaining professional consultation or assistance, and determine whether they should limit, suspend, or terminate their work-related duties. (See also Standard 10.10, Terminating Therapy.)

3.04 Avoiding Harm

Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

9.08 Obsolete Tests and Outdated Test Results

(a) Psychologists do not base their assessment or intervention decisions or recommendations on data or test results that are outdated for the current purpose.

(b) Psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose.

EXHIBIT A
CONTINUED

STATE OF CALIFORNIA
EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

November 15, 2016

Peter M. Bergne (E-57901)
San Quentin State Prison
West Block Center
Housing Unit 4-W-45
San Quentin, CA 94974

RE: RN 16-01 Proposed Regulations on 15 CCR 2240 Comprehensive Risk Assessments

Dear Mr. Bergne:

Our office received your correspondence dated November 5, 2016, in which you requested information regarding the filing date and public comment period of the proposed regulations to amend the California Code of Regulations, title 15, section 2240, governing Comprehensive Risk Assessments.

The Board of Parole Hearings (board) filed the proposed regulations with the Office of Administrative Law (OAL) on October 24, 2016, and they were officially published on Friday, November 4, 2016. Under the California Government Code, the public comment period runs for 45 calendar days from the date of publication. Thus, for these proposed regulations, the public comment period began on November 4, 2016, and will end on Monday, December 19, 2016 at 5:00 p.m.

Because your letter was received on November 10, 2016, during the public comment period, your letter has already been provided a public comment identification number and your comments in that letter will be reviewed by the board. If the board decides to amend the regulations following any public comments received, the regulations will be sent back out for notification and reopened for another 15-day public comment period. Once all public comment periods have closed, a copy of your letter, along with the board's determination regarding whether to take any action on your comments, will be included in the board's Final Statement of Reasons when the complete rulemaking file for these proposed regulations is filed with OAL.

I hope that I have answered your questions.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

EXHIBIT B

UnCommon Law

220 4th Street, Suite 103
Oakland, CA 94607
Tel: (510) 271-0310
Fax: (510) 271-0101
www.uncommonlaw.org

Keith Wattley
Executive Director

MEMORANDUM

TO: **Prisoners Facing the Board of Parole Hearings**
FROM: Keith Wattley
DATE: November 2016
RE: Proposed BPH Regulations

This is an important update about the regulations being proposed by the Board of Parole Hearings to address errors in "Comprehensive Risk Assessments," which are the psychological evaluations parole commissioners use when considering your case.

Background

As lawyers in ***Sam Johnson v. Jennifer Shaffer,*** representing the class of 10,000 lifers appearing before the Board, we reached a settlement this year intended to protect you from the Board's misuse of psychological evaluations when considering your suitability for parole. Among other things, that settlement required the Board to establish a *meaningful* appeals process through which prisoners and their attorneys may file objections to a Comprehensive Risk Assessment report and receive a written response before the hearing.

In order to make sure this appeal process is meaningful, the Board was required to draft regulations that define the kinds of errors you can object to, and set timelines for you to submit objections and receive a response from the Board. The Board had until July 1, 2016 to submit these regulations to the Office of Administrative Law (which analyzes and approves draft regulations in light of public comments). The Board failed to meet this July 1 deadline and – more importantly (as explained in our August 2016 update and summarized on the next page) – the Board has submitted regulations that completely fail to establish a *meaningful* pre-hearing appeals process.

On **September 19, 2016**, despite receiving complaints from you, us, and other advocates about serious problems with the proposed regulations, the Board's commissioners still voted to approve the regulations and send them on to the Office of Administrative Law (OAL).

On **October 24, 2016**, nearly four months past the July 1 deadline, the Board submitted its proposed regulations to the OAL. Their Official Notice of this action, along with the proposed regulatory text, should be posted in your housing units, law library and other places where you can see it.

From **November 4, 2016** to **December 19, 2016**, the Board will once again be accepting written comments from the public about the proposed regulations. Once all comments have been considered, the OAL will decide whether to approve the regulations. If the Board fails to properly address the written comments and objections, the OAL may reject the regulations, which is what we want to happen. (The address for sending your comments is below.)

NOTE: MY APPROACH IS MUCH MORE EFFECTIVE AND PRACTICAL, AND WILL RESOLVE THE CORE ISSUES AND FLAWS. MWB

EXHIBIT B
CONTINUED

OFFICE OF ADMINISTRATIVE LAW
00 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

October 18, 2016

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, California 94974

Dear Mr. Bergne:

Thank you for letting us know about your proposals. Please be sure to comment during the appropriate Administrative Procedure Act time frames as that is your opportunity to get your comments into the rulemaking file so that OAL may properly consider them. We are returning your originals.

The Legal Staff
Enclosure

CTU: mm

EXHIBIT C

COPY of ORIGINAL

O A L Notice File No.
Z 2016 - 1024 - 02

November 21, 2016

Peter M. Bergne, E-57901
Housing Unit 4 - W - 45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Heather McCray, Esquire
Senior Staff Attorney
Board of Parole Hearings
Post Office Box 4036
Sacramento, Cal. 95812-4036

Reference is incorporated to Members of the Parole Board, Chief Counsel and Chief Psychologist. Also, the Office of Administrative Law
O A L

WRITTEN STATEMENTS WITH ARGUMENTS AND CONTENTIONS FOR CONSIDERATION BY B P H

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Legal Work Product

(Ref: Gov. Code, §12838.4)
BPH RN 16-01
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STATE OF CALIFORNIA

EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

November 15, 2016

Peter M. Bergne (E-57901)
San Quentin State Prison
West Block Center
Housing Unit 4-W-45
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I hope that I have answered your questions.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

EXHIBIT B

UNCOMMON LAW

220 4th Street, Suite 103
Oakland, CA 94607
Tel: (510) 271-0310
Fax: (510) 271-0101
www.uncommonlaw.org

Keith Wattley
Executive Director

MEMORANDUM

TO: **Prisoners Facing the Board of Parole Hearings**
FROM: Keith Wattley
DATE: November 2016
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EXHIBIT B
CONTINUED

OFFICE OF ADMINISTRATIVE LAW
'00 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

October 18, 2016

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, California 94974

Dear Mr. Bergne:

Thank you for letting us know about your proposals. Please be sure to comment during the appropriate Administrative Procedure Act time frames as that is your opportunity to get your comments into the rulemaking file so that OAL may properly consider them. We are returning your originals.

The Legal Staff
Enclosure

CTU: mm

EXHIBIT C

16-01-18

RECEIVED

DEC 01 2016

BOARD OF PAROLE HEARINGS

2016-18202

3PH RN 16-01-18 Public Comment

Raymond Lambirth
B-83952 LA-126L
P.O. Box 705
Soledad, CA 93960

November 23, 2016

Heather McCray
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

CDCR: B83952
Hrg Date: NLT 12/28/17
Inst: CTF

Dear Ms. McCray:

As a member of the plaintiff class in Johnson v. Shaffer, I write to object to the proposed regulations in BPH RN 16-01.

01 The proposed regulations fail to provide for the tape recording of the psychologist's interview subsquently used for the purpose of creating the Comprehensive Risk Assessmemnt (CRA). This omission continues to leave the entire CRA process fundamentally flawed. I know from personal experience that the psychologist often stats things that simply are not true, including alleged quotes of things I purportedly said during the interview. I then have no way to challenge the misstatements, because the proposed regulations declare that such misstatements can never amount to "factual error." This is true even when the misstatements concern matters of critical importance, such as in-prison stabbings and/or gand activity. Allowing for the interview to be recorded upon my request will provide me with a means of showing such misstatements occurred, and having them corrected or deleted from the report. I believe that knowing the interview is being recorded likely will prevent the problem from happening in the first place, but if it does not, it is critical for the prisoner to have a means of correcting misstatements.

02 The definition of "factual error" is too narrow to protect the prisoner from incorrect factual assertions in the CRA. The regulations declare that factual errors "do not include disagreements with clinical observations, opinions, or diagnoses." Such limitation allows for opinions unsupported by evidence to be used as a basis for adding points to the prisoner's score in instruments used to determine that person's risk of future violence. Each and every factor used to determine the risk of violence should be based on tangible record evidence, and those factors should be subject to challenge and being stricken if they are not.

03 The proposed regulations allow error-filled CRAs to remain in the prisoner's file if it is determined that the error(s) somehow did not effect the ultimate question of dangerousness. The problem here is that, when the time comes for the next CRA, the erroneous information will be reused as a true fact. The prisoner's liberty is at stake, no significant errors should be permitted in the CRA.

LB

04

The proposed regulations provide that written objections to the CRA must be submitted no later than 30 days before the hearing. In order for this aspect of the regulation to be upheld there must be a corresponding requirement that the CRA be provided to the prisoner in time to allow a meaningful review of the report and preparation of the objections. There is no such requirement.

For the reasons stated above I believe that the proposed regulations are unfair, and they should not be adopted as they are written.

Sincerely:

Ray Lambirth

Raymond Lambirth

Ray Lambirth
B-83952 LA-126L
P.O. Box 705
Soledad, CA 93960

U.S. POSTAGE PITNEY BOWES
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BPH CORRESPONDENCE UNIT

RECEIVED
DEC 01 2016

Heather McCray
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

95812$4036 B900

16-01-19

BPH
RN
16-01-19
Public
Comment

Timothy Scott Adams H72199
D-2-81 Low
PO box 608
Tehachapi, Cal 93581

20161818B

CDCR: H72199
Hrg Date: 4-12-17
CCI
Inst: Nov 25, 2016

To: Heather McCray, BPH Senior Staff Attorney

Dear, Ms. Heather McCray:

As a member of the plaintiff class action civil suit in Johnson vs. Shaffer, I write to oppose the proposed regulations regarding Comprehensive Risk Assessments (CRA's) scheduled for discussion soon for its final adoption as the new guidelines for life term inmates' risk assessment and recidivism rate.

01 First I believe these regulations should provide for recordings and transcription of clinical interviews - not for all prisoners' but at least for those who voluntarily choose to have their interviews recorded. This is vital to ensure that the CRA's and senior psychologist review of them in thier process for a fair and unbias tribunal will be transparent and fair.

02 Second I believe these regulations should allow prisoner's to address all of the real "factual errors" that appear in CRA's reports. As drafted, these regulations would screen out too many legitimate and important objections in particular to a clinician's error in reporting on statements that a prisoner has made during an interview.

03 With the help of a 30 day grace period, tape recorded interviews, bi-lingual interpreters and psychological explanations that explain the psychodynamic factors of the risk assessment

Tools (CRA) evaluations with HCR Static 99 PCL would show the validity and importance to a Commissioner and Deputy Commissioner errors that an life term inmate his or her attorney at the B.P.H. suitability hearing or the United States judicial branch the kinds of factual erroneous statements that cannot be argued at a B.P.H.

At my 2015 B.P.H I did not get to explain why the forensic psychologist had supplements added either before or after my F.A.D. only one explanation on the first page makes me ask why cant we be given tape recorded interviews.

If my electronic mental health unit record was not on hand at the time of this inmate's interview then how many old bias remarks from years' old psychological evaluations became 21 pages of supplemental evaluations that added up to a three year denial?

These new court ordered regulations in the Johson vs Shaffer civil suit such as tape recordings and a 30 day grace period to comment on factual errors can explain the many lost years of therapy that went unaccounted for at my F.A.D. evaluation in 2015.

I am asking for an optional recording to improve the F.A.D. system and improve the accuracy and help resolve disputes about an inmates credibility. Furthermore, I believe these regulations should provide a meaningful time line for the appeals process. As drafted, the regulations would screen out a prisoners appeal if not raised 30 days before a hearing. Timothy Scott Adams H-72199 Timothy Scott Adams

04

California Correctional Institution
Name: Timothy Adams
CDC #: H72199
Facility D Building 2 Bed B-L
P.O. Box 608
Tehachapi, CA 93581

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION INDIGENT INMATE MAIL

Facility Post Office Boxes
Facility A - P.O. Box 1902
Facility B - P.O. Box 1906
Facility C - P.O. Box 1905
Facility D - P.O. Box 608
Facility E - P.O. Box 107
Administration - P.O. Box 1031

DEC 01 2016

U.S. POSTAGE PITNEY BOWES
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$ 000.46⁵
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Heather McCray
B.P.H. Senior Staff Attorney
P.O. box 4036 Sacramento
California, 94812-4036

16-01-20

2016-18288

Original Pages 1-5..
EX # 1..

RECEIVED
DEC 05 2016
BOARD OF PAROLE HEARINGS

Jimmie Stephen C56483
P.O. BOX 2500 J 141 L
Vacaville California 95696
and;
Attorney K. Wattley-Uncommon Law
220-4TH St # 103
Oakland Calif. 94607

CDCR C56483
Hrg Date: NLT 11/5/22
Inst: CMF

BPH
2N
e-01-20
Public
Comment

BOARD OF PRISON HEARING
STATE OF CALIFORNIA

for;
Heather McCray BPH Senior Attorney
(Due before 12-19-16.)at;P.O. Box 4036
Sacramento California 95812-4036

CASE # A714077

"OBJECTIONS"

"JOHNSON V SHAFFER"

Ms McCray

(EX # 1)

This is my Opposition to proposed BPH Regulations Due 12-19-16,as the proposed Regulations are Prejudicial,based on my 11-5-16, BPH Hearing whereas,Attorney Stringer at;259 Oak ST, San Francisco, Calif. 94102,came to visit on 9-24-15,and Psych Geco came up on 9-29-15,this is 5 days later,with 37 days to BPH Hearing of 11-5-16, Under Johnson v Shaffer all Rights Denied,Hindered..(CRA Received 10-23-15)

1..No Tape-Recorded Hearing of 11-5-15..

2..Psych Report was not timely with 12 days to Bph Hearing of 11-5-15 ,not timely for Attorney Stringer whom visited 5 days prior of 9-24-15,,as stringer did no Objections to Psych Report of 11-5-15..When CRA-Psych report received 10-23-15..

3..Plaintiff did about 24 Objections on date of BPH Hearing of 11-5-15 to BPH Montes and Starr,of the 24-3,stated were errors as One stricken by Montes to make total of 2 not enough for new Psych report.. When High Risk by Geco of 9-29-15..

4..Plaintiff Received Psych Report of 10-23-15,12- days before BPH Hearing of 11-5-15..(24 presented Errors Suppressed by Montes and Starr of 11-5-15)
(1ST,4TH,5TH,8TH & 14TH)

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DEC 05 2016

True against Fraud or Perjury

Date 11-29-16

Signature

Exhibit # 1

Copy of Ms MCCray's 9-15-16 as to response by CVRA Team as to Errors,of 11-5-15,as stated by Attorney Bakerjian of 10-4-16,Nothing was done as to plaintiff Allegations,with the 24, Errors,Factual,Substantive of 11-5-15,Denied,with Instructions to present errors prior to next hearing,or new psych report of 10-22-18..

When petition to Advance denied of 5-2-16,and witheld..

STATE OF CALIFORNIA

EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

September 15, 2016

Jimmie Stephen (C56483)
California Medical Facility
A J 1-000141L
P.O. Box 2000
Vacaville, CA 95696-2000

RE: Your Comments on the Proposed Regulations Governing Comprehensive Risk Assessments

Dear Mr. Stephen:

This letter is to acknowledge that the Board of Parole Hearings (board) received and reviewed your correspondence in which you expressed your concerns with the proposed regulatory amendments to the California Code of Regulations, Title 15, Division 2, section 2240, governing comprehensive risk assessments (CRAs). These amendments are intended to implement the settlement agreement reached in the *Johnson v. Shaffer* class action case.

The board has considered your comments in making additional amendments to the proposed regulations previously distributed at the board's Executive Board Meeting on August 15, 2016. The new amended draft will be publically distributed and discussed at the board's upcoming Executive Board Meeting on September 19, 2016.

Please note that these proposed regulations have not yet been filed with the Office of Administrative Law (OAL). Once the proposed amendments are filed with OAL, the public will have an additional 45-day public comment period to offer comments and suggestions on these regulations.

Additionally, we note that, in your letter, you raise some specific allegations of error regarding your own risk assessment. Those allegations have been forwarded to the board's Comprehensive Risk Assessment Appeal Team. They will review your allegations and respond separately.

Thank you for your submission.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

STATE OF CALIFORNIA
EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

October 4, 2016

Jimmie Stephen (C56483)
California Medical Facility
P.O. Box 2500
Vacaville, CA 95696

RE: CRA Objections

Dear Mr. Stephen,

This letter is in response to your correspondence received by the Board of Parole Hearings on September 7, 2016, in which you list several objections to your October 22, 2015, Comprehensive Risk Assessment (CRA). On November 5, 2015, you were denied parole for seven years.

You were given the opportunity to object to the CRA at your November 5, 2015, parole consideration hearing under the California Code of Regulations, Title 15, section 2240, subdivision (d). According to your transcript, you raised your objections during your hearing and the panel appropriately ruled on your objections. The opportunity to object to your CRA and allege errors concluded at your November 5, 2015, hearing. A CRA is valid for three years; therefore, you will receive a new CRA for any hearing scheduled to occur after October 22, 2018.

In the event your hearing is advanced and scheduled before October 22, 2018, you may resubmit your objections to the CRA once your hearing is scheduled.

Sincerely,

G. BAKERJIAN
Staff Attorney

Case Name: Stephen v BPH

Case Number: Johnson v Shaffer

Court: (A714077)

PROOF OF SERVICE BY MAIL

I, Khalid Qadir declare:

That I am over the age of eighteen years of age and am not a party to the above entitled cause of action. That I reside in Solano County, California at the California Medical Facility, at 1600 California Drive, P.O. Box 2500, Vacaville, California, 95696-2500.

That on 11-29-16 I served the attached: a true copy of the attached:

Objections

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal legal mail collection system at the California Medical Facility, Vacaville, California, addressed as follows:

Attorney H.McCray
P.O. Box 4036
Sacramento Calif. 95812-4036

Uncommon Law(K.Wattley)
220-4TH St # 103
Oakland Calif. 94607

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct. That this proof of service was executed on 11-29-16 at the California Medical Facility, Vacaville, California.

Khalid Qadir
Declarant

Declarant's Signature

California Medical Facility
P.O. Box 2000
Vacaville, CA 95696-2000
Name: Jimmie Stephen
CDCR #: C56483
Housing: J 141 L

California Department of Corrections
and Rehabilitation

INDIGENT MAIL

ADDRESS TO:
P.O. Box 2000 – All Mail
P.O. Box 2500 – Money Orders / Legal Mail

(LEGAL)
Attorney Haether McCray
P.O. BOX 4036
Sacramento California 95812-4036

16-01-21

RECEIVED
DEC 06 2016
BY: BPH

2016-18382

CDCR: P82196
Hrg Date: 4/6/17
Inst: CVSP

11/27/2016

BPH RN 16-01
Public Comment

Board of Parole Hearings
ATTN: Heather L. McCray, Senior Staff Attorney
PO Box 4036
Sacramento, CA 95812-4036

RE: BPH RN 16-01

WRITTEN COMMENT IS hereby submitted ON The proposed amendment TO Section 2240 of Cal. Code of Regs., Title 15, as NOTICED Above.

1. New subdivision (a) to amended Section 2240 states "The psychologists [sic] shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence." (Emphasis added)

01

Comment: The emphasized language is ~~very~~ VAGUE. First, who determines which/what approaches are standardized? Is it The BPH? The Forensic Assessment Division (FAD)? The American Psychological Community At Large? Second, what is "generally accepted in the psychological community"? This cannot possibly be The PCL-R, nor The HCR-20 that The BPH allowed The FAD to use in the past decade. As I recall, The BPH's Rule Making Record ON These Tools,

DEC 08 2016

as well as the Magistrate Judge in early 2015 (Johnson v. Shaffer, USDC E.D. Cal. #2:12-cv-1059) stated that the proposed tools were not meant to evaluate prisoners since they were NEVER DESIGNED to evaluate prisoners, especially when the creators/designers said as much.

2. New subdivision (e)(1) to amended section 2240 states: "... a risk assessment contains a factual error that materially imports the risk assessment's conclusions regarding the inmate's risk of violence, ..." (emphasis added, as this amendment also provides for means to contest, with new subdivision (g)(2) providing for disposition)

02 Comment: The emphasized language is vague. What determines material impact. Is it the error(s) standing alone, the risk assessment taken as a whole, some other means?

03 3. The amended language to section 2240, although providing a time frame for objections to be made (i.e., no less than 30 calendar days before parole suitability hearing - subdivision (e)(1), potential cause under subdivisions (h) & (i)), the amendment does NOTHING to require timely completion of risk assessments.

5,

Thomas W. ABNEY
P-72196, Chuckawalla Valley St. Prison
PO Box 2349, Blythe, CA 92226-2349
c: File

Tom Abney
P-82196
B3-243L
Chuckawalla Valley ST. PRISON
PO BOX 2349
Blythe, CA 92226-2349

CHUCKAWALLA VALLEY
STATE PRISON

ZIP 92225 $ 000.46[5]
02 4W
0001386317 DEC. 01. 2016

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DEC 01 2016

Board of Parole Hearings
ATTN: Heather L. McCray, Sr. Staff Attorney
PO Box 4036
Sacramento CA 95812-4036

RECEIVED
DEC 06 2016
BPH CORRESPONDENCE UNIT

95812$4036 B963

California Department of
Corrections and Rehabilitation

16-01-22

2016-18391

November 28, 2016

BPH
RN
10-01-22
Public
Comment

Heather McCray
Senior Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 94812-4036

CDCR: H29762
Hrg Date: NLT 5/12/20
Inst: CHCF

RE: **Comprehensive Risk Assessments**

Dear Ms. McCray;

Greetings! I am writing concerning any and all new rules and regulations pertaining to assessments made by the Fornsic Assessment Division (FAD) of the Board of Prison Hearings (BPH).

The previously-employed FAD guidelines for Risk Assessment are believed to have ultimately cost me my bid for parole on May 12, 2015. I otherwise qualified for "Parole Suitability," absent the erroneous Risk Assessment made by the FAD prior to the recent changes in how Risk Assessments using "less-than-accurate" testing criteria are performed.

There are at least five (5) rather outstanding reasons as to why the BPH's proposed regulations utterly fail to establish a truly "meaningful," and otherwise reliable process to correct the numerous errors encountered in Comprehensive Risk Assessments (CRAs).

01

1. The insistent refusal to record, by any means, the CRA interview itself. There is no rational reason whatsoever in denying such a request. By keeping this process far-from-transparent, it will only continue to invite improprieties and detract from transparency and accuracy. Moreover, the California Board of Psychology insists that we, the subjects of **any** psychological testing or evaluation, have the ultimate right to either "request" or "refuse" that encounters with psychologists be recorded.

02

2. Next, the regulations propsed by the BPH, have an unnecessarily "narrow" definition of what can be considered as "factual error." This also serves no legitimate purpose in that there is no societal or policy interest served by protecting **any** potential error -- no matter who such an error may ultimately favor. This clearly detracts from a Hearing that is both "fair in its conduct," and "reliable in its result."

3. The regulations impose what would often be "untenable" restrictions and deadlines as to where and

03

when "objections" may be submitted to the BPH, and fail to require a prompt response. As such, not only will a vast majority of inmates not have enough time to research and present their objections, the Board would be free to respond to those objections too close in time to the actual hearing itself.

04

4. Perhaps one of the most glaring injustices permitted by the proposed regulations is the fact that past error-filled CRA will be permitted to remain in inmate files, despite the improprieties of the FAD in creating them. They will not only just remain in inmate files, but the BPH will be free to rely on these error-laden reports, notwithstanding the reason behind the need for newly-implemented regulations to begin with. This is third-worldly in the manner North Korea might consent to.

05

5. The proposed regulations do absolutely **nothing** to remove barriers to effective communication or accommodate prisoners with language problems or disabilities. Again, this hearkens back to an era that is eeringly similar to East Germany at the height of the "Cold War." As Idi Amin Dada is credited as saying: "Where there is no complaint, there is no violation." No other explanation can be tendered for such a calculated omission.

Thank you for your time and consideration in this matter, and I look forward to a thorough review of these comments by your agency.

Sincerely,

Kerry L. Lathan

KERRY L. LATHAN, H-29762
CHCF: E-3B-117-L
P.O. Box 32290
Stockton, CA 95213

cc: file

November 29, 2016

SUPPLEMENT

The following examples illustrate errors that occurred in Petitioner's Risk Assessment evaluation.

1. A five year denial claiming to be a risk to society due to past riminal history is contrary to court decisions asserting that rimes committed long past do not apply to a parole denial.

2. The Comprehensive Risk Assessment refused to remove a libelous R Suffix' for rape where evidence proves innocense.

3. Petitioner's parole denial included accusations of criminal activity hat he was never convicted of.

4. There is no standard amount of time for any prisoner to serve per BPH guidelines especially when Petitioner has over 21 years of being disciplinary free. As well there is no mandate that any Petitioner have a GED but only marketable skills which Petitioner has.

5. Petitioner's firs risk assessment was high then reduced to moderate, his assessment was arbitrary at best when evidence proves to be in line with existing evidence.

KERRY L. LATHAN

UnCommon Law

220 4th Street, Suite 103
Oakland, CA 94607
Tel: (510) 271-0310
Fax: (510) 271-0101
www.uncommonlaw.org

Keith Wattley
Executive Director

MEMORANDUM

TO: **Prisoners Facing the Board of Parole Hearings**
FROM: Keith Wattley
DATE: November 2016
RE: Proposed BPH Regulations

This is an important update about the regulations being proposed by the Board of Parole Hearings to address errors in "Comprehensive Risk Assessments," which are the psychological evaluations parole commissioners use when considering your case.

Background

As lawyers in ***Sam Johnson v. Jennifer Shaffer,*** representing the class of 10,000 lifers appearing before the Board, we reached a settlement this year intended to protect you from the Board's misuse of psychological evaluations when considering your suitability for parole. Among other things, that settlement required the Board to establish a *meaningful* appeals process through which prisoners and their attorneys may file objections to a Comprehensive Risk Assessment report and receive a written response before the hearing.

In order to make sure this appeal process is meaningful, the Board was required to draft regulations that define the kinds of errors you can object to, and set timelines for you to submit objections and receive a response from the Board. The Board had until July 1, 2016 to submit these regulations to the Office of Administrative Law (which analyzes and approves draft regulations in light of public comments). The Board failed to meet this July 1 deadline and – more importantly (as explained in our August 2016 update and summarized on the next page) – the Board has submitted regulations that completely fail to establish a *meaningful* pre-hearing appeals process.

On **September 19, 2016**, despite receiving complaints from you, us, and other advocates about serious problems with the proposed regulations, the Board's commissioners still voted to approve the regulations and send them on to the Office of Administrative Law (OAL).

On **October 24, 2016**, nearly four months past the July 1 deadline, the Board submitted its proposed regulations to the OAL. Their Official Notice of this action, along with the proposed regulatory text, should be posted in your housing units, law library and other places where you can see it.

From **November 4, 2016** to **December 19, 2016**, the Board will once again be accepting written comments from the public about the proposed regulations. Once all comments have been considered, the OAL will decide whether to approve the regulations. If the Board fails to properly address the written comments and objections, the OAL may reject the regulations, which is what we want to happen. (The address for sending your comments is below.)

Your Action Is Needed

As noted above, the Board will accept comments from the public about the proposed regulations. The Board is required to consider any statements that identify "reasonable alternatives" to the changes it is proposing. After the comment period, before moving forward with the regulations, the Board must determine that "no reasonable alternative" would be more effective in achieving the purposes of the regulations, or would be less burdensome on persons affected while achieving those purposes equally well. ***If the Board cannot show this, the Office of Administrative Law will reject its proposed regulations.***

If you want to state any objections to the proposed regulations, the Board must receive them in written form **before 5:00 PM on December 19, 2016.**

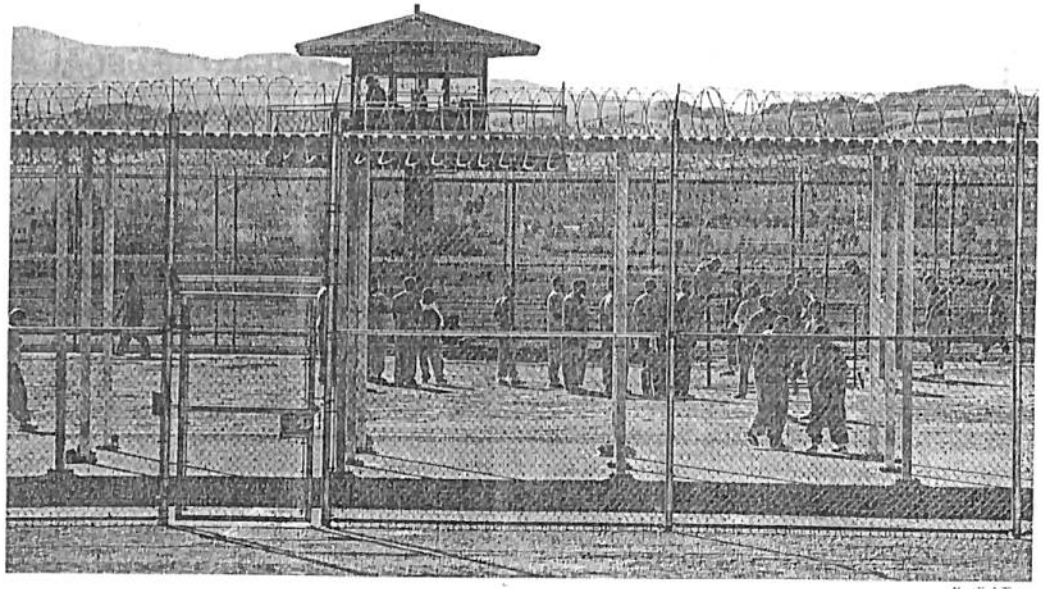
- Send your written comments to: **Heather McCray, BPH Senior Staff Attorney, P.O. Box 4036, Sacramento, CA 94812-4036**. Please include your name, CDC number, and signature at the bottom.
- Your family members and other supporters can also send their written comments by email to **BPH.Regulations@cdcr.ca.gov**, or by fax to **(916) 322-3475.**
- It would also be helpful to send a copy of your written comments to us at: **UnCommon Law, 220 4th Street, Suite 103, Oakland, CA 94607.**

Your efforts have really helped us get this far in improving the parole hearing process. We need to keep moving forward in order to make the CRA appeal process more meaningful. Thank you for your continued help.

Parole board is behind on base-term calculations

By Sharif E. Jacob
and Andrea Nill Sanchez

"[N]o inmate may be imprisoned beyond a period that is constitutionally proportionate to the commitment offense or offenses." *In re Dannenberg*, 34 Cal. 4th 1061, 1071 (2005). California's parole system offers inmates a critical but underutilized tool to ensure that their sentences are proportionate: the base term. The base term represents the sentence that is proportionate to a particular inmate's offense, taking into account the nature and circumstances surrounding the specific crime. Although the base term does not automatically trigger a release date, it serves as an important indicator of when an inmate's sentence may violate the constitutional bar against cruel and unusual punishment.



New York Times

Prisoners in a yard at the California Institution for Men in Chino, Calif., Jan. 14, 2013.

History of Base Terms

Base terms are rooted in the constitutional protection against cruel and unusual punishment. Most inmates in California know exactly when they will be released from prison because they are serving a fixed term of years pursuant to the Determinate Sentencing Law (DSL), passed in 1976. *See* Cal. Penal Code Sections 1170 et seq. However, a large group of inmates convicted of certain specified felonies are still given indeterminate sentences, which consist of a range starting at a minimum number of years to life. Like all forms of punishment, those sentences are subject to constitutional limits.

Shortly before the DSL was passed, the California Supreme Court held that the parole board's predecessor agency was constitutionally required to set terms for parole-eligible life term inmates that were proportionate to their offenses. *In re Rodriguez*, 14 Cal. 3d 639, 652 (1975). The board ultimately promulgated regulations requiring it to fix a "maximum period of time which is constitutionally proportionate to the individual's culpability for the crime." 15 Cal. Admin. Code Section 2100(a) (1976). Since then, the board has calculated what has come to be known as a "base term" for all indeterminately sentenced life term inmates. Yet, for a long time such calculations were not performed until an inmate was found suitable for parole. *See* Cal. Code Regs. Title 15, Section 2282(a). As a result, prisoners discovered that they had served sentences beyond their base terms only when it was too late to challenge them.

> Most inmates in California know exactly when they will be released from prison ... However, a large group of inmates convicted of certain specified felonies are still given indeterminate sentences, which consist of a range starting at a minimum number of years to life.

The Settlement Order

In 2014, Roy Butler was released from prison after being sentenced in 1998 to 15 years to life. Eight of the 25 years he served exceeded his base term of 17 years. Butler challenged his sentence as unconstitutional under the Eighth Amendment and Article I, Section 17 of the California Constitution.

Butler's challenge was a systemic one. At the time, there were 25,680 inmates with sentences of life with the possibility of parole — 19,995 who were assessed as "low risk" and over 9,000 past their minimum parole eligibility date.

Butler settled the litigation in exchange for the board's agreement to enter into a consent decree. On Dec. 13, 2013, the Court of Appeal entered a stipulated settlement order requiring the board to set base terms and adjusted base terms for life prisoners at their initial parole hearing, or at the next scheduled hearing — whether or not they are found suitable for parole. It also directs the board to amend its regulations to reflect the new policies and procedures set forth in the settlement order "as soon as reasonably practicable." The Court of Appeal retains jurisdiction over the case until those amended regulations become effective.

Board's Violations of the Settlement Order

The board never fully complied with the settlement order's requirements. Transcripts from parole hearings that took place between April 1, 2014 ,and Feb. 15, 2016, reveal that the board failed to conduct a base term calculation at over 1,600 hearings at which it was required to do so. Meanwhile, it has stalled the promulgation of regulations implementing the settlement order. After counsel for Butler notified the board that it appeared to be in contempt of the settlement order, the board filed a motion to modify it, citing the above statutory developments as constituting a change in the law that stripped it of its authority to implement its requirements. The Court of Appeal rejected the board's motion and reasoning. It ruled that there is no conflict between the statutory changes that have occurred and the settlement order's requirements, which are rooted in the California Constitution. *See* Cal. Ct. App. Order Denying Respondent's Motion to Modify, No. A139411 at 4 (July 27, 2016).

JACOB

SANCHEZ

Current State of Affairs

The board is presently challenging the Court of Appeal's unanimous decision, seeking review by the California Supreme Court where its petition for review is still pending. It will provide all eligible life-term inmates with base terms calculations until the appeal is decided.

Butler has opposed the board's petition for review. He has also filed a declaration charging the board and its executive officer, Jennifer Shaffer, with contempt of court for willfully violating a settlement order reforming California's parole system. He seeks a $1,000 penalty for each separate act in violation of the settlement order, which could potentially total over $1 million, payable to the court.

In the interim, attorneys representing inmates who have not received a base-term calculation should request that one be provided on the record at beginning of their client's next parole hearing pursuant to the Butler settlement order.

Had the settlement order been in place when Butler was serving his sentence, he might have avoided eight needless years in prison — time that he could have devoted to his friends and family and spent as a productive member of society. Butler continues his litigation to help other inmates to avoid the same fate.

Sharif E. Jacob, *a partner in the San Francisco office of Keker & Van Nest, focuses on intellectual property litigation, complex business disputes and representing individuals.* **Andrea Nill Sanchez** *is an associate in the San Francisco office.*

Lathan, Kerry H-29762
CHCF; P.O. Box 32290; E3B-123L
Stockton, CA 95213

Ms. Heather McCray, Esq.
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 94812-4036

LEGAL MAIL

16-01-23

BPHRN

2016-18549

16-01-23
Public
Comment

CDCR: E34112
Hrg Date: 1-5-17
Inst: SQ

Charles Truman
E-34112 2-W-75
SQSP 12-4-16

TO WHOM IT MAY CONCERN

I WANT TO OBJECT TO THE CRA'S NOT BEING RECORDED. IT IS A FACT THAT THE CRA BECOMES A LEGAL DOCUMENT ONCE IT IS ISSUED PROTECTED UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT, IT ALSO BECOMES A LEGAL DOCUMENT WHEN ATTACHED TO A HABEAS CORPUS WRIT. ①

01

THE CRA'S SHOULD BE AS ACCURATE AS POSSIBLE BECAUSE THEY ARE A LEGAL DOCUMENT, AND THEY BEAR ON A PERSONS LIFE AND WELL BEING, AS WELL AS THE JUSTICE SYSTEM.

THE LACK OF CONCERN AND THE LACK OF RESPECT FOR INMATES LEADS TO MISQUOTES OF IMPORTANT INFORMATION, AS WELL AS HIDDEN PREJUDICES AGAINST THE TYPE OF CRIME AN INMATE MIGHT BE IMPRISONED FOR, MIGHT LEAD TO INTENTIONAL MISQUOTES.

IT SHOULD BE MANDATORY THAT EACH AND EVERY CRA BE RECORDED.

02

IT SHOULD ALSO BE MANDATORY THAT ALL INMATES WHO NEED HELP EXPRESSING THEMSELVES, OR HAVE TROUBLE PROCESSING INFORMATION SHOULD BE GIVEN HELP FROM THE MENTAL HEALTH DEPARTMENT.

MY LAST TWO CRA'S SHOWS EVIDENCE OF THE NEED FOR REGULATIONS IN ALL THREE AREAS MENTIONED ABOVE.

CHARLES TRUMAN E34112
SQSP 2-W-75
SAN QUENTIN, CA. 94974

① COMPREHENSIVE RISK ASSESSMENTS

Charles Truman E34112
SQSP 2-W-75
San Quentin, Ca. 94974

RECEIVED
DEC 09 2016
BPH CORRESPONDENCE UNIT

Legal Mail

SAN QUENTIN NSF STATE PRISON

U.S. POSTAGE PITNEY BOWES
ZIP 94964 $ 000.46[5]
02 1W
0001397520 DEC. 08 2016

DEC 10 2016

Ms. Heather McCray
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, California
(94812-4036)

95812-403636

16-01-24

BPH RN
16-01-24
Public Comment

CDCH: P42825
Hrg Date: NLT 5/18/19
Inst: CHCF

12-4-2016

2016-18507

DEAR SENIOR STAFF ATTORNEY MS. HEATHER MCCRAY,

I AM AN INMATE AT C.H.C.F. (CA. HEALTH CARE FACILITY), I AM 69 AND A FIRST TERMER, MY RIME IS 2nd DEGREE HOMICIDE IN 1998 (MARIPOSA COUNTY). I AM WRITING ABOUT THE 5-DIFFERENT REGULATIONS YOU WANT COMMENT ON.

01

THE ONLY THING MYSELF IS I WOULD BE FOR THE TAPE RECORDING WHEN PSYCHE INTERVIEWS ME ON MY C.R.A. - I WOULD WANT A TAPE OF THIS ~~HEARING~~ INTERVIEW BECAUSE I MIGHT BE MISQUOTED BY PSYCHE ON HIS EVALUATION AND I WOULD NEED EVIDENCE TO PROVE I DIDN'T MAKE THE QUOTE HE SAID. I ALSO THINK THE PRISONER SHOULD GET A TAPE-RECORDING OF HIS BOARD HEARING AS WELL AS HEARING TRANSCRIPTS. I PUT ALL THE FORMS IN AT MY LAST BOARD AND MAY 18, 2016 IS MY LAST BOARD HEARING AND NO WORD ON MY RESPONSE AT ALL.

THANK YOU MS. MCCRAY FOR LETTING ME IN ON THIS ISSUE.

02

SINCERELY YOURS,
James E. Dull
JAMES E. DULL-P42825

JAMES E. DALL D.O.C.#B42825
FACILITY E-2B 120 LOW
P.O. BOX 32290
STOCKTON, CA 95213

Attention:
"Legal Mail Enclosed"

Ms. HEATHER McCRAY, SENIOR STAFF-ATTORNEY
P.O. Box 4036
SACRAMENTO, CA. 94812-4036

16-01-25

2016-18584

Dennis Ott
CDCR # J-78934, 23-24-1-L
CSP-Solano
P.O. Box 4000
Vacaville, California 95696-4000

3F
RN
r01-25
Public
comment

December 7, 2016

To: Heather McCray
Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, California 95812-4036

SUBJ: **OBJECTIONS TO PROPOSED REGULATORY TEXT, 15 CCR 2240 / BPH RN 16-01**
"Comprehensive Risk Assessments"

Dear Ms. McCray,

As a member of the plaintiff class in Johnson v. Shaffer (E.D. Cal.), and an interested party in the Sherman-Bey vs. Shaffer pending writ of mandate (CA 3; C077499), I present these objections to the recent amendment to Title 15 of California Code of Regulations ("15 CCR"), section 2240, Board of Parole Hearings Forensic Assessment Division Comprehensive Risk Assessments. The objections are based on historical data and first hand experience.

These objections/comments are due by close of business on December 19, 2016.

OBJECTION I

THIS IS THE FOURTH ATTEMPT BY THE BOARD OF PAROLE HEARINGS TO IMPLEMENT A REGULATION THAT HAS PREVIOUSLY BEEN DECLARED INVALID, VOID, AND LEGALLY DEFICIENT

This is the fourth attempt by the Board of Parole Hearings ("BPH") to implement a BPH Forensic Assessment Division (FAD) Comprehensive Risk Assessment ("CRA"). Each has met legal challenges, and each was subsequently held invalid.

The first attempt was by memorandum dated January 1, 2009, amending earlier versions by memorandums dating back to January 26, 2006. The January 1, 2009 memorandum was declared an "underground regulation" and therefore "invalid" by the Office of Administrative Law ("OAL") in OAL Determination No. 2010-27. (OAL petition no. CTU2010-0506-03; determination made November 2010.) [1]

Fn. 1 Additionally, on July 1, 2010 the Office of Inspector General ("OIG") issued a "SPECIAL REPORT" entitled "The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements" which was highly critical of the BPH FAD substantive lack of reliability and review (discussed shortly).

The second attempt was in response to OAL Determination no. 2010-27. The BPH authored 15 CCR 2240, held public hearings on or about January 31, 2011, and presented the file to the OAL. May 5, 2011, the OAL issued a DECISION OF DISAPPROVAL OF REGULATORY ACTION, pursuant to Government Code section 11349.3. Reasons for disapproval included the BPH's:

> "failure to meet the necessity and clarity standards of Government Code section 11349.1, failure to summarize and respond to public comments offered concerning the proposed regulation, and failure to submit a satisfactory fiscal impact statement for the proposed regulation." (OAL File No. 2011-0316-01 S, p. 1, "DECISION" section.)

Then, as now, a bulk of the objections pertain to using fraudulent psychological "risk" assessments, specifically the HCR-20, PCL-R, and LS/CMI, none of which have ever been validated for the affected long-term prisoner class, and all of which because of their highly subjective and biased techniques are likely to provide reports of clearly erroneous validity (to be discussed later).

The third attempt took place in July 2011, where the BPH once again promulgated 15 CCR 2240, with little public notice of the July 15, 2011 closure to respond. The undersigned stated in his written objections dated July 10, 2011:

> "The new attempt by the Board does not answer the substantive short-fallings noted by the OAL in the DECISION OF DISAPPROVAL, makes no substantive changes, and continues the smoke-and-mirrors subterfuge in an unfair manner, which will be taken up in turn" (ibid., p. 2).

In spite of objections from across the state, the OAL accepted the new 15 CCR 2240, and the regulation became part of the BPH FAD process.

Subsequent to the 2011 adoption of 15 CCR section 2240, with many complaints to the California Board of Psychology and many petitions for writ of habeas corpus, two successful court litigations found substantive problems with the BPH FAD CRA process and ordered changes: Johnson v. Shaffer, no. 2:12-cv-01059-KJM-AC (E.D. Cal.) and Sherman-Bey v. Shaffer (CA 3; no. C077499). In a May 27, 2016 order, Johnson v. Shaffer ordered the BPH to establish a **meaningful appeals process** where prisoners and/or their attorneys may file written objections to the CRA and receive a written response (not the "rubber-stamp" we normally receive). Sherman-Bey v. Shaffer found fault with 15 CCR 2240, subdivision (b) and the language included therein, specifically, "acturarily derived and structured professional judgment" as being without meaning to the affected class, and therefore in violation of California Code of Regulations, title 1, section 16.

01

02

And now, for the fourth time, the BPH FAD is once again promulgating the same subterfuge and smoke-and-mirrors in attempting to justify using psychological assessment tools for purposes that they were never designed for, on a population the tools were never validated on, which allows errors on the part of BPH FAD psychologists to survive with no meaningful review process in place by design. These CRAs, based upon neither science nor peer review studies, are often used to deny an unquestionable liberty interest to a class of people who have long since paid their debt to society and have established rehabilitation by any objective factors. Without meaningful review, the CRA process shelters abuses perpetuated by oath-beholden servants of the law who are charged with supporting those laws, while the defenseless prisoner who is left standing without a voice. This cannot be justice, and should not be allowed to continue.

OBJECTION II

THE PROPOSED REGULATION DOES NOT MEET THE ADMINISTRATIVE PROCEDURE ACT REQUIREMENT OF NECESSITY OR CLARITY STANDARDS

January 14, 2016, the Sherman-Bey vs. Shaffer court allowed the BPH eight months to correct the invalid section of 15 CCR section 2240, subdivision (b) ("actuarily derived and structured professional judgment"). The new 15 CCR 2240 deletes contested wording, but merely rewrites subdivision (a) to now state:

> "psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence." (New 15 CCR 2240(a).)

The new section 2240, subdivision (c) requires a senior psychologist to apply,

> "adequate scientific foundation, and reliable and valid principles and methods..." (proposed 15 CCR 2240, subdivision (c)).

The current 15 CCR 2240, subdivision (b), and the proposed BPH RN 16-01 15 CCR 2240, subdivision (a) and subdivision (c), all fail to identify what methods are to be used or their predictive value, if any. As such, the proposed 15 CCR 2240 does not meet requirements of the Administrative Procedure Act ("APA").

03

Lack of Clarity: The meaning of the proposed regulation cannot be "easily understood by those persons directly affected." (Govt. Code § 11349, subd. (c).)

04

Lack of Necessity: The record does not demonstrate **any** substantial evidence or need for this regulation to effectuate the purpose of any **statute, court decision, or provision of law.** Specifically, the BPH has **never** presented one fact, study, or expert opinion that has withstood the test of time to justify the use of the CRA assessment tools. It is therefore in violation of Government Code section 11346.2, subdivision (b) and California Code of Regulations, Title 1, section 10, subdivision (b), which states to meet a necessity standard, the record of the rulemaking procedure "shall" include:

> "(b) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion...."

05

The May 5, 2011 OAL DECISION OF DISAPPROVAL OF REGULATORY ACTION, page 2, states the APA requires "identification of each technical, theoretical, **and empirical study**, report, or similar document, **if any**, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation" (Govt. Code, § 11346.2, subd. (b)(2)), and "The Board prepared an Initial Statement of Reasons, but it does **not fulfill the above requirements**" (emphasis added). The BPH failed that requirement with the existing 15 CCR 2240 with its 2011 Revised Initial Statement of Reasons. **It completely lacks reference to any empirical study, report, peer review and/or publication in professional journals.** The BPH 2011 Revised Initial Statement of Reasons to implement 15 CCR section 2240, page 7, states "**future research**" is needed because their validity is "unknown."

06

The Board, **with this new amendment, seeks to continue its practice without any explanation or clarification of what it is intended to accomplish.** The proposed regulation provides color-of-law pretext for what the Sherman-Bey Court declared to be "invalid." On this basis alone, it should not be adopted.

OBJECTION III

THERE IS AN INHERENT LACK OF RELIABILITY IN THE FAD'S ASSESSMENTS

July 1, 2010, David Shaw, California Office of the Inspector General (OIG), issued a SPECIAL REPORT entitled "The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements." The report reviewed concerns expressed by the Senate Rules Committee for two particular issues: 1) factual errors that may exist in psychological evaluations, and 2) certain psychologists who give **elevated risk assessment conclusions when compared to conclusions made in prior evaluations.** (Ibid., including letters to Matthew L. Cate, Secretary, CDCR, from David R. Shaw, Inspector General, and **vice versa.**)

The Johnson v. Shaffer Court December 3, 2014 Findings and Recommendations also noted the 2010 OIG report. Doc. 62, p. 5:16-25.

In brief, the OIG found substantive flaws in the FAD process:

a) The Board "**lacks reliable data to determine the number of factual errors** contained in the psychological evaluations."

b) The Board "**lacks reliable data** to determine the number of low-, medium-, and high-risk assessment conclusions in evaluations."

c) There are "**weaknesses in the parole board's oversight** of the methods it uses to review psychological evaluations," and

d) "**the parole board failed to provide** most of its commissioners, deputy commissioners, and senior psychologists with **the sufficient number of mandatory training hours.**" (07/01/2010 OIG SPECIAL REPORT, p. 2 ["Findings in Brief"], emphasis added.)

Referencing the above OIG report, the December 3, 2014 Johnson v. Shaffer Court stated, "senior psychologists routinely rubberstamp staff psychologists' reports without verifying the validity of anything written." Doc. 62, p. 5:22-23. Thus, the concern expressed in 2010 by the OIG continued through to 2014. There is nothing to evidence any change since then or with this amendment.

In addition, it is noteworthy to observe that the California District Attorney's Association, Prosecutor's Notebook, Volume XVII, "Lifer Hearing Manual" 2007 Update, page 105 states:

> "The panel knows that it is virtually impossible to predict future dangerousness. Reports typically fail to go into any real depth and are often slanted in the prisoner's favor. Thus, a good report is usually of little use to an inmate in receiving a date. On the other hand, a report not totally supportive of release supplies the panel with additional reasons to find the prisoner unsuitable."

From an objective view, that is a stacked deck to a prisoner's detriment.

This proposed amendment to section 2240 does nothing to address problems inherent in the FAD's practices. In fact, it perpetuates the same concerns that have existed for years. Accord: In re Elkins (2006) 144 Cal.App.4th 475, 498, quoting In re Scott (2005) 133 Cal.App.4th 573, 595, fn. 9.

OBJECTION IIII

SPECIFIC JOHNSON vs. SHAFFER OBJECTIONS

First, these regulations should provide for recording and transcription of clinical interviews -- not for all prisoners, but for those who volunteer to have their interviews recorded. This is vital to ensure the CRA process is transparent. California Lifer Newsletter (link @ lifesupportalliance@gmail.com) quoted BPH Executive Director Jennifer Shaffer and Chief Legal Counsel Jennifer Neill are of the "opinion that inmates have no due process rights to have such interviews recorded" (CLN #71, p. 57; Oct. 2016). I counter that, at a minimum, California Constitution, article I, section 28, subdivision (f)(2) enforces a right to truth in evidence at post-conviction hearings. In the undersigned's example, Mr. Ott is able to document deliberate falsehoods in Dr. M. Geca's CRA as it applies to him, and such recording (if it were available) would be able to set the record true. Instead, affected prisoners continue to receive the same obfuscations of egregious wrongs, year after year, until now without redress.

08

Second, proposed 15 CCR 2240(e)(2) prevents **all** objections to "disagreements with clinical observations, opinions, or diagnoses or clarifications regarding the risk assessment attributed to the inmate" or assessments not supported by objective criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM) based upon an **ad hominem** perception toward FAD psychologists' "expertise." Such limitation is contrary to the review protected by Evidence Code sections 801 and 802, as noted by the California Courts in, e.g., People v. Gardeley (1996) 14 Cal.4th 605, 618 and People v. Dodd (2005) 133 Cal.App.4th 1564, 1569. "Experts" are not given **carte blanche** under law -- except here. 15 CCR 2240 should allow prisoners to address all errors that appear in these FAD reports. The proposed 15 CCR 2240 does not state how CRAs are to be done. The BPH must explain assessment tools to comply with the APA (Govt. Code, § 11346.9(a)(3)).

09

Third, proposed 2240, subdivisions (f)(1) and (i)(1) allow untrained laypersons (the "Chief Counsel" and "hearing panel," respectively) to make determinations on the validity of the CRA outside of their own expertise in a subject they have no education in. Such actions are the unlawful practicing psychology without a license, and may be in violation of Government Code section 2052.

10

Fourth, it is unclear which standards will be applied in any attempt at lodging an appeal under amended section 2240, subdivision (e) or (f). The STIPULATED SETTLEMENT, presented by the Office of Attorney General filed 09/10/2015, page 7, line 9 (Doc. 79), and the AMENDED STIPULATED SETTLEMENT filed 10/02/2015, page 7, line 9, both state, "This settlement shall be governed and construed according to California law." Doc. 83, p. 7:9. That specific wording is not in the final ORDER in Johnson vs. Shaffer, filed May 27, 2016. Doc. 167.

11

Assuming for the sake of argument that California law is to govern this action, then the Board's attempt at shielding itself from meaningful review by holding to such a narrow view of "factual error" in the proposed 15 CCR 2240(e)(2), **et sequence** is contrary to Evidence Code sections 801 and 802, and the decisional authorities that have interpreted psychological reviews. The undersigned's specific objections to his 2014 CRA prepared by M. Geca, Psy.D., follows. This writer received a "rubber-stamp" review by FAD Senior Staff Psychologist Cliff Kusaj (ltr. dtd 8/24/2015), a broken promise of review by Senior Staff Attorney Heather McCray (ltr. dtd 09/15/2016), and a contrary reply by BPH staff attorney Jim Logsdon (ltr. dtd. 10/10/2016). The FAD "appeal" is a sham.

12

OBJECTION V

THE UNDERSIGNED'S PERSONAL EXPERIENCE AT FALSE FAD REPORTS

In 2010 Dr. Geca wrote a FAD Report, and, using historical data, noted my 20-year Coast Guard career, an "exemplary" prison programming, and positive interaction with staff and prisoners. In 2011, joined by others across the state, my colleagues and I on the M.A.C. opposed implementing 15 CCR section 2240 which would have affected FAD employment. In an apparent retaliation, Dr. Geca's 2014 FAD CRA misquotes my family history, engages in speculation and deliberate falsehood, and alleges a "life-long" and "entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder misdiagnosis (2014 FAD CRA, 9, 11) without using **any** DSM-IV-TR and/or DSM-5 301.81 criteria. Documented in Objections to the FAD Report and exhibits mailed to your office January 8, 2015 and entered into my C-File, my life history does not reflect that DSM criteria. (In 2003 Dr. Mona Gupta wrote, "While diagnostic certainty...remains a philosophical problem in psychiatry, there are, at least, explicit diagnostic criteria for specific disorders," citing the DSM (165).)

As succinctly detailed in my Objections to the FAD Report and exhibits, Dr. Geca appears to simply compile lists of factors or symptoms that support a desired conclusion of unsuitability for parole, and writes that I either suffer from or possess them. The imaginative recreation of my personal and social history, and my inner life, would be entertaining if the consequences were not so serious. It is filled with contradictions, statements without foundation, and is contrary to objective criteria in the DSM-IV and 5. What she states is intentionally false, and at best is guesswork and speculation.

Dr. Geca fabricates an allegation of my "frustration and anger while having served in the Coast Guard" (FAD Rpt. 14). I served honorably for 20 years and have five (5) good conduct medals; my DD-214 documents numerous accolades and no "anger." She glosses over positive programming and evaluations by prison staff over the past twenty years, decades of Bible studies, a recent two-year college degree, scores of "self help" programs (including planning and facilitating some), and her own 2010 FAD Report--all of which contradict her 2014 FAD Report.

The FAD Report is little more than piling conjecture upon speculation and misrepresentations of my work and social history. It states I have a complete lack of insight, yet also says I present insightful information (7). It often refers to unspecified "life problems" (7, 8, 13, 14). It uses one Rules Violation Report I received in 2001 to find "manipulative schemes" (8, 9, 11). Without one factual basis, it says I have "a pervasive and inflexible pattern of overvaluation of self-worth," a "life history" alleged to be "egocentric and manipulative" with "an aura of arrogance" indicating a belief I "was above the conventions and struggles expressed by [my] peers" (7, 8) and "an entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder diagnosis (8, 9, 11, 13, 14). Here, Dr. Geca contradicts herself stating I do "not have a history of unstable growing up experiences" and "did not present with a documented history of behavioral dyscontrol prior to [my] involvement in the life crime" (14). She states unnamed "people say" I am "arrogant, glib, and smooth" and I "became indignant" when "confronted" with this (7, 8, 9, 12, 15). She never "confronted" me with this. She also accuses unnamed prison officals as my co-conspirators by stating I "search for prison staff who collude with" my undefined "pathology and through them" I "reaffirm[] the 'truth' about [my]self, as [I] know it" (13). She says I have a "seriously

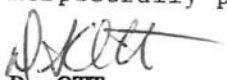
damaged" "character" based upon her interpretation of a few static facts now twenty years removed (9, 12, 13, 15). (One college text states, "character refers to value judgments of a person's moral and ethical behavior" (Cirrarelli & White, 494).) Burdening me with baggage of a "moderate" risk of reoffending (14), an "insidious" program (15), and "blaming others" (8) (all of which are willfully false), she concludes my "maladaptive" "diagnosis" "will" remain until I make inchoate changes, or until I can demonstrate the ability to live outside of prison (14-15) -- an impossible "Catch-22" circular condition to satisfy especially when at the mercy of such evaluations. Dr. Geca magnifies my risk of reoffending for "failing" (in her words) "to recognize and address critical factors which led to [my] relational problems" (which I disagree with; I did discuss them with Dr. Geca and am prepared to discuss with the Panel), and I have "yet to accept culpability for this crime" (14). That is a direct violation of Penal Code section 5011 and court decisions. (The crime's details are in the Sentencing Transcripts, page 10, the Court Minutes, and the Probation Officer Report's blank pages 14 to 19 in my C-File, available on SOMS.)

The 08/24/2015 "rubber-stamp" review by Senior Psychologist Cliff Kusaj is an abject failure of answering this serious charge of professional malfeasance by Dr. Geca. See, Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 307; Kelly v. Trunk (1998) 66 Cal.App.4th 519, 523-525. Without regulatory change, the proposed "review" and "appeal" process is now and will remain a sham, as is documented by my receipt of correspondence from Heather McCray, BPH Senior Staff Attorney dated 09/15/2016 stating my complaint would be sent to the CRA Appeals Team, and the subsequent correspondence from BPH staff attorney Jim Logsdon dated 10/10/2016 stating something entirely different.

CONCLUSION

The proposed regulation does not meet the necessity or clarity requirements of the APA, but seeks to legitimize a decades-long underground regulation. FAD reports are neither clinical nor individually based, but statistical, and based on flawed science. Steve Disharoon of the University of San Francisco writes they are viewed, however, by "the members of the Board, [who,] while experts in penology, lack the requisite psychological training to make the determinations called for by this factor" (197 & fn. 154). For these reasons, I strongly oppose the proposed draft regulations. I urge the BPH to take these regulations off the agenda and to address all problems noted herein.

Respectfully presented:



D. OTT

Works cited

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Disharoon, Steve. California's Broken Parole System. University of San Francisco Law Review, Summer 2009. 44:177-214.

Gupta, Mona. "All locked up and nowhere to go." 155-178. Involuntary Detention and Therapeutic Jurisprudence. Eds.: Kate Diesfeld & Ian Freckelton. 2003. Ashgate, Burlington, VT.

cc. CLN; POB 277, Rancho Cordova, CA 95741
Kieth Wattley, Att'y at Law (Uncommon Law); 220 4th St.; Oakland, CA 94607

BPH-CORRESPONDENCE: Assignment Tracking | ADD ACTIONS - EDIT - DELETE | VIEW ASSIGNMENTS

Assignment Details

ID	Mail Control	Material Date	Date Assigned	Date Due	Date Completed	From
2016-18804	J78934	12/19/2016	12/19/2016	1/9/2017		BPH Correspondence Unit

Action	Assigned To	Subject
Gillam, Hanna	Legal (McCray)	Dennis Ott, J78934 last hrg 9/24/15

Confidential

Assignment Actions

Date In	Date Out	Person	Notes
12/20/2016	12/20/2016	Sinclair, Sandy	Inmate sends his comments in opposition to the CRA regs.

Communication is the Door to Understanding Between Inmates and Staff

2016-18804

MEN'S ADVISORY COUNCIL

FACILITY D

Dennis Ott, J-78934, 23-24-1-L
CSP-Solano Facility D Men's Advisory Council ("MAC")
P.O. Box 4000
Vacaville, California 95696-4000

December 6, 2016

To: Heather McCray
Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, California 95812-4036

SUBJ: **OBJECTIONS TO PROPOSED REGULATORY TEXT, 15 CCR 2240 / BPH RN 16-01**
"Comprehensive Risk Assessments"

Dear Ms. McCray,

As a member of, and on behalf of, the plaintiff class in Johnson v. Shaffer (E.D. Cal.), and as interested parties in the Sherman-Bey vs. Shaffer pending writ of mandate (CA 3; C077499), pursuant to **DOM 53120.7.6** which encourages MAC participation in the regulatory process, CSP-Solano Facility D MAC tenders these objections to the latest amendment to Title 15 of California Code of Regulations ("15 CCR"), section 2240, Board of Parole Hearings Forensic Assessment Division Comprehensive Risk Assessments. Objections are due by December 19, 2016. MAC represents the voice of many hundreds of prisoners, not merely the signatory.

The reasons and documentation for opposition are as follows:

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Lack of Clarity: The meaning of the proposed regulation cannot be "easily understood by those persons directly affected." (Govt. Code § 11349, subd. (c).)

Lack of Necessity: The record does not demonstrate **any** substantial evidence or need for this regulation to effectuate the purpose of any **statute, court decision, or provision of law.** Specifically, the BPH has **never** presented one fact, study, or expert opinion that has withstood the test of time to justify the use of the CRA assessment tools. It is therefore in violation of Government Code section 11346.2, subdivision (b) and California Code of Regulations, Title 1, section 10, subdivision (b), which states to meet a necessity standard, the record of the rulemaking procedure "shall" include:

> "(b) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion...."

The May 5, 2011 OAL DECISION OF DISAPPROVAL OF REGULATORY ACTION, page 2, states the APA requires "identification of each technical, theoretical, **and empirical study**, report, or similar document, **if any**, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation" (Govt. Code, § 11346.2, subd. (b)(2)), and "The Board prepared an Initial Statement of Reasons, **but it does not fulfill the above requirements**" (emphasis added). The BPH failed that requirement with the existing 15 CCR 2240 with its 2011 Revised Initial Statement of Reasons. **It completely lacks reference to any empirical study, report, peer review and/or publication in professional journals.** The BPH 2011 Revised Initial Statement of Reasons to implement 15 CCR section 2240, page 7, states "**future research**" is needed because their validity is "unknown."

The Board, with this new amendment, seeks to continue its practice without any explanation or clarification of what it is intended to accomplish. The proposed regulation provides color-of-law pretext for what the Sherman-Bey Court declared to be "invalid." On this basis alone, it should not be adopted.

OBJECTION III

THERE IS AN INHERENT LACK OF RELIABILITY IN THE FAD'S ASSESSMENTS

July 1, 2010, David Shaw, California Office of the Inspector General (OIG), issued a SPECIAL REPORT entitled "The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements." The report reviewed concerns expressed by the Senate Rules Committee for two particular issues: 1) factual errors that may exist in psychological evaluations, and 2) certain psychologists who give **elevated risk assessment conclusions when compared to conclusions made in prior evaluations.** (Ibid., including letters to Matthew L. Cate, Secretary, CDCR, from David R. Shaw, Inspector General, and **vice versa.**)

The Johnson v. Shaffer Court December 3, 2014 Findings and Recommendations also noted the 2010 OIG report. Doc. 62, p. 5:16-25.

In brief, the OIG found substantive flaws in the FAD process:

a) The Board "**lacks reliable data to determine the number of factual errors** contained in the psychological evaluations."

b) The Board "**lacks reliable data** to determine the number of low-, medium-, and high-risk assessment conclusions in evaluations."

c) There are "**weaknesses in the parole board's oversight** of the methods it uses to review psychological evaluations," and

d) "**the parole board failed to provide** most of its commissioners, deputy commissioners, and senior psychologists with **the sufficient number of mandatory training hours.**" (07/01/2010 OIG SPECIAL REPORT, p. 2 ["Findings in Brief"], emphasis added.)

Referencing the above OIG report, the December 3, 2014 Johnson v. Shaffer Court stated, "senior psychologists routinely rubberstamp staff psychologists' reports without verifying the validity of anything written." Doc. 62, p. 5:22-23. Thus, the concern expressed in 2010 by the OIG continued through to 2014. There is nothing to evidence any change since then or with this amendment.

In addition, it is noteworthy to observe that the California District Attorney's Association, Prosecutor's Notebook, Volume XVII, "Lifer Hearing Manual" 2007 Update, page 105 states:

> "The panel knows that it is virtually impossible to predict future dangerousness. Reports typically fail to go into any real depth and are often slanted in the prisoner's favor. Thus, a good report is usually of little use to an inmate in receiving a date. On the other hand, a report not totally supportive of release supplies the panel with additional reasons to find the prisoner unsuitable."

From an objective view, that is a stacked deck to a prisoner's detriment.

This proposed amendment to section 2240 does nothing to address problems inherent in the FAD's practices. In fact, it perpetuates the same concerns that have existed for years. Accord: In re Elkins (2006) 144 Cal.App.4th 475, 498, quoting In re Scott (2005) 133 Cal.App.4th 573, 595, fn. 9.

OBJECTION IIII

SPECIFIC JOHNSON vs. SHAFFER OBJECTIONS

First, these regulations should provide for recording and transcription of clinical interviews -- not for all prisoners, but for those who volunteer to have their interviews recorded. This is vital to ensure the CRA process is transparent. California Lifer Newsletter (link @ lifesupportalliance@gmail.com) quoted BPH Executive Director Jennifer Shaffer and Chief Legal Counsel Jennifer Neill are of the "opinion that inmates have no due process rights to have such interviews recorded" (CLN #71, p. 57; Oct. 2016). I counter that, at a minimum, California Constitution, article I, section 28, subdivision (f)(2) enforces a right to truth in evidence at post-conviction hearings. In the undersigned's example, Mr. Ott is able to document deliberate falsehoods in Dr. M. Geca's CRA as it applies to him, and such recording (if it were available) would be able to set the record true. Instead, affected prisoners continue to receive the same obfuscations of egregious wrongs, year after year, until now without redress.

Second, proposed 15 CCR 2240(e)(2) prevents **all** objections to "disagreements with clinical observations, opinions, or diagnoses or clarifications regarding the risk assessment attributed to the inmate" or assessments not supported by objective criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM) based upon an **ad hominem** perception toward FAD psychologists' "expertise." Such limitation is contrary to the review protected by Evidence Code sections 801 and 802, as noted by the California Courts in, e.g., People v. Gardeley (1996) 14 Cal.4th 605, 618 and People v. Dodd (2005) 133 Cal.App.4th 1564, 1569. "Experts" are not given **carte blanche** under law -- except here. 15 CCR 2240 should allow prisoners to address all errors that appear in these FAD reports. The proposed 15 CCR 2240 does not state how CRAs are to be done. The BPH must explain assessment tools to comply with the APA (Govt. Code, § 11346.9(a)(3)).

Third, proposed 2240, subdivisions (f)(1) and (i)(1) allow untrained laypersons (the "Chief Counsel" and "hearing panel," respectively) to make determinations on the validity of the CRA outside of their own expertise in a subject they have no education in. Such actions are the unlawful practicing psychology without a license, and may be in violation of Government Code section 2052.

Fourth, it is unclear which standards will be applied in any attempt at lodging an appeal under amended section 2240, subdivision (e) or (f). The STIPULATED SETTLEMENT, presented by the Office of Attorney General filed 09/10/2015, page 7, line 9 (Doc. 79), and the AMENDED STIPULATED SETTLEMENT filed 10/02/2015, page 7, line 9, both state, "This settlement shall be governed and construed according to California law." Doc. 83, p. 7:9. That specific wording is not in the final ORDER in Johnson vs. Shaffer, filed May 27, 2016. Doc. 167.

Assuming for the sake of argument that California law is to govern this action, then the Board's attempt at shielding itself from meaningful review by holding to such a narrow view of "factual error" in the proposed 15 CCR 2240(e)(2), **et sequence** is contrary to Evidence Code sections 801 and 802, and the decisional authorities that have interpreted psychological reviews. The undersigned's specific objections to his 2014 CRA prepared by M. Geca, Psy.D., follows. This writer received a "rubber-stamp" review by FAD Senior Staff Psychologist Cliff Kusaj (ltr. dtd 8/24/2015), a broken promise of review by Senior Staff Attorney Heather McCray (ltr. dtd 09/15/2016), and a contrary reply by BPH staff attorney Jim Logsdon (ltr. dtd. 10/10/2016). The FAD "appeal" is a sham.

OBJECTION V

THE UNDERSIGNED'S PERSONAL EXPERIENCE AT FALSE FAD REPORTS

In 2010 Dr. Geca wrote a FAD Report, and, using historical data, noted my 20-year Coast Guard career, an "exemplary" prison programming, and positive interaction with staff and prisoners. In 2011, joined by others across the state, my colleagues and I on the M.A.C. opposed implementing 15 CCR section 2240 which would have affected FAD employment. In an apparent retaliation, Dr. Geca's 2014 FAD CRA misquotes my family history, engages in speculation and deliberate falsehood, and alleges a "life-long" and "entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder misdiagnosis (2014 FAD CRA, 9, 11) without using **any** DSM-IV-TR and/or DSM-5 301.81 criteria. Documented in Objections to the FAD Report and exhibits mailed to your office January 8, 2015 and entered into my C-File, my life history does not reflect that DSM criteria. (In 2003 Dr. Mona Gupta wrote, "While diagnostic certainty...remains a philosophical problem in psychiatry, there are, at least, explicit diagnostic criteria for specific disorders," citing the DSM (165).)

As succinctly detailed in my Objections to the FAD Report and exhibits, Dr. Geca appears to simply compile lists of factors or symptoms that support a desired conclusion of unsuitability for parole, and writes that I either suffer from or possess them. The imaginative recreation of my personal and social history, and my inner life, would be entertaining if the consequences were not so serious. It is filled with contradictions, statements without foundation, and is contrary to objective criteria in the DSM-IV and 5. What she states is intentionally false, and at best is guesswork and speculation.

Dr. Geca fabricates an allegation of my "frustration and anger while having served in the Coast Guard" (FAD Rpt. 14). I served honorably for 20 years and have five (5) good conduct medals; my DD-214 documents numerous accolades and no "anger." She glosses over positive programming and evaluations by prison staff over the past twenty years, decades of Bible studies, a recent two-year college degree, scores of "self help" programs (including planning and facilitating some), and her own 2010 FAD Report--all of which contradict her 2014 FAD Report.

The FAD Report is little more than piling conjecture upon speculation and misrepresentations of my work and social history. It states I have a complete lack of insight, yet also says I present insightful information (7). It often refers to unspecified "life problems" (7, 8, 13, 14). It uses one Rules Violation Report I received in 2001 to find "manipulative schemes" (8, 9, 11). Without one factual basis, it says I have "a pervasive and inflexible pattern of overvaluation of self-worth," a "life history" alleged to be "egocentric and manipulative" with "an aura of arrogance" indicating a belief I "was above the conventions and struggles expressed by [my] peers" (7, 8) and "an entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder diagnosis (8, 9, 11, 13, 14). Here, Dr. Geca contradicts herself stating I do "not have a history of unstable growing up experiences" and "did not present with a documented history of behavioral dyscontrol prior to [my] involvement in the life crime" (14). She states unnamed "people say" I am "arrogant, glib, and smooth" and I "became indignant" when "confronted" with this (7, 8, 9, 12, 15). She never "confronted" me with this. She also accuses unnamed prison officals as my co-conspirators by stating I "search for prison staff who collude with" my undefined "pathology and through them" I "reaffirm[] the 'truth' about [my]self, as [I] know it" (13). She says I have a "seriously

damaged" "character" based upon her interpretation of a few static facts now twenty years removed (9, 12, 13, 15). (One college text states, "character refers to value judgments of a person's moral and ethical behavior" (Cirrarelli & White, 494).) Burdening me with baggage of a "moderate" risk of reoffending (14), an "insidious" program (15), and "blaming others" (8) (all of which are willfully false), she concludes my "maladaptive" "diagnosis" "will" remain until I make inchoate changes, or until I can demonstrate the ability to live outside of prison (14-15) -- an impossible "Catch-22" circular condition to satisfy especially when at the mercy of such evaluations. Dr. Geca magnifies my risk of reoffending for "failing" (in her words) "to recognize and address critical factors which led to [my] relational problems" (which I disagree with; I did discuss them with Dr. Geca and am prepared to discuss with the Panel), and I have "yet to accept culpability for this crime" (14). That is a direct violation of Penal Code section 5011 and court decisions. (The crime's details are in the Sentencing Transcripts, page 10, the Court Minutes, and the Probation Officer Report's blank pages 14 to 19 in my C-File, available on SOMS.)

The 08/24/2015 "rubber-stamp" review by Senior Psychologist Cliff Kusaj is an abject failure of answering this serious charge of professional malfeasance by Dr. Geca. See, Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 307; Kelly v. Trunk (1998) 66 Cal.App.4th 519, 523-525. Without regulatory change, the proposed "review" and "appeal" process is now and will remain a sham.

CONCLUSION

The proposed regulation does not meet the necessity or clarity requirements of the APA, but seeks to legitimize a decades-long underground regulation. FAD reports are neither clinical nor individually based, but statistical, and based on flawed science. Steve Disharoon of the University of San Francisco writes they are viewed, however, by "the members of the Board, [who,] while experts in penology, lack the requisite psychological training to make the determinations called for by this factor" (197 & fn. 154). For these reasons, I strongly oppose the proposed draft regulations. I urge the BPH to take these regulations off the agenda and to address all problems noted herein.

Respectfully presented:

D. OTT
FAC. D MAC Parliamentarian
CSP-Solano

L. SALKELD
FAC. D MAC Vice-Chairman
CSP-Solano

G.D. REED
FAC. D. MAC Chairman
CSP-Solano

Works cited

Ciccarelli, Saundra K. and J. Noland White. Psychology. 3rd ed. 2012. Prentice Hall, Upper Saddle River, N.J.

Disharoon, Steve. California's Broken Parole System. University of San Francisco Law Review, Summer 2009. 44:177-214.

Gupta, Mona. "All locked up and nowhere to go." 155-178. Involuntary Detention and Therapeutic Jurisprudence. Eds.: Kate Diesfeld & Ian Freckelton. 2003. Ashgate, Burlington, VT.

cc. CLN; POB 277, Rancho Cordova, CA 95741
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California State Prison-Solano

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BOARD OF PAROLE HEARINGS

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15 CCR 2240 comments/objections 95812-403636

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16-01-26

* RECEIVED VIA EMAIL TO: BPH.REGULATIONS@CDCR.CA.GOV
ON 12/12/16

BPH RN 16-01-26 Public Comment

December 12, 2016

Heather McCray
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Re: Opposition to Proposed Draft Regulations Section 2240 Psychological Risk Assessments

I am a long-time friend of several lifers, having closely walked the path with them for years. Therefore, I appreciate the opportunity to comment on this subject. It is extremely critical that those involved in CRA's and the board both recognize the **responsibility** and **accountability** involved in such a process.

I am in agreement with suggestions made by Uncommon Law in their August 2016 update.

01

1. It is quite important to offer **tape recordings** of the CRA interview. I typed up a 31-page rebuttal for a friend in which what he said greatly differed from what was reported. The interviewer was having difficulty with her laptop, repeatedly stopping to catch up or asking my friend to slow down. **It is important to also record the interviewer's questions and comments, tone of voice, etc.**

02

2. The **narrow definition of "factual errors"** prohibits meaningful redress. My friend separated his rebuttal into "significant" and "incidental" errors, but none received any recognition or action.

03

3. It is critical that the **CRA report be conducted in time to allow the written objection to be considered, giving the Board reasonable time to respond before a hearing.** A response close to a hearing date is extremely injurious, for the inmate is not allowed time to consult with counsel. Their only option is a verbal objection on the actual hearing date. By that time commissioners have already reviewed and based opinions on the CRA.

04

4. **Error-filled CRA reports must not be allowed to remain in a file.** My friend has tried for years to get his corrections recognized. In his last evaluation the interviewer, instead of doing her own work, repeated the work of earlier interviewers, some of which was incorrect. It also appears that the Board pays no attention to the corrections. Therefore, any chance of recourse is denied.

05

5. **Proper accommodations for prisoners with disabilities and language barriers must be made.** It is critical to recognize the various physical, mental, and emotional limitations of the inmate population if a **fair evaluation** is to be received.

Again, I am grateful for the opportunity to give feedback on this critical issue.

Sincerely,

Lenona M. Carlburg

16-01-27

2016-18587

December 4, 2016

BPH RN
16-01-27
Public
Comment

CDCR: D21121
Hrg Date: 3/29/17
Inst: SQ

TO: BPH Regulations, Board of Parole Hearings

This letter is on behalf of Earl B. Wilson, D21121, detailing specific false facts and unverified facts that led to the denial of his parole. The psychologist who made the evaluation of my son declared and reported that he had had a previous violation of supervisory parole, and, had violated parole, and, a risk of violence in the community. The psych's report was totally INCORRECT and absolute lies. He was NEVER on parole. Based on her UNVERIFIED, FALSE, False facts, she caused Earl's unsuitability, as well as non-release despite challenges, calls and appeals to the Chief of Forensic Assessment Div.
A Reasonable Alternative to this travesty is a new psych report to be conducted by another person that is competent, facts oriented, and a seeker of truth.

01

Other Reasonable Alternatives must include the following: Psychologist directly observing subject inmate's interactions with others to determine social skills. A 2-3 hrs session with inmate is inadequate evaluating; It is unethical, biased and manipulative to repeatedly bash-over the-head of subject inmate with negative acts committed 20-30 years ago when no violations have occurred in 20 years.

Most Sincere,

Elizabeth B. Wilson

16-01-28

* RECEIVED VIA EMAIL FROM OAL ATTORNEY TO: DAL.REGULATIONS@DGS.CA.GOV
ON 12/16/16

3PH RN
16-01-28
Public
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November 28, 2016

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RE: OPPOSITION TO PROPOSED DRAFT REGULATIONS §2240 PSYCHOLOGICAL RISK ASSESSMENTS ("CRA")

Dear Ms. McCray and Office of Administrative Law:

The following points of comment are but some of the requested changes to the Proposed (Draft) Changes to CCR Section 2240 Regulations pertaining to the Board of Parole Hearings' Forensic Assessment Division (FAD) Comprehensive Risk Assessment (CRA) process and redress procedure. As proposed, the August 4, 2016 amendments leave much of the grievance process unchanged and therefore insufficient – preventing a fair, effective, and meaningful risk evaluation and grievance process in general.

I.

The Matter of Unfairness Regarding BPH Response to Factual Error Challenges Would be Perfectly Alleviated by Performing Optional Audio Recording and Transcribing of FAD Psychological Assessment Interviews:

01

In any other forensic, judicial, and/or quasi-judicial setting, interactions are recorded verbatim, as with formal deposition, the text of which can be more fairly reviewed in route to mutual accountability among interviewer, inmate interviewee, senior reviewing psychologist, and the BPH Chief Counsel alike. A transcript allows alleged errors to be examined and rectified. And the added benefit of reducing lengthy rebuttal paperwork could be anticipated.

II.

No Provision is Proposed Regarding the CRA Review Fact-Checking Process, and the BPH/FAD are Not Required to Investigate Nor Respond to the Legitimacy of Individual Objections to Factual Errors:

02

Therefore the longstanding FAD objection screening process which the proposed regulations outline continues to be unfair and without meaningful redress. Historically, real and significant factual errors have not been individually addressed by BPH when challenged. The presently proposed regulations do nothing to change that highly prejudiced screening method.

03

III.
The Proposed Regulations Do Not Encourage a Standard of Professional Conduct for FAD Psychologists Regarding Interviewing, Recordkeeping, and Thoroughness of Research:

Psychological forensic risk assessment is not a casual undertaking but has implications on public safety, the integrity of psychological profession, and individual civil liberties of inmates evaluated. Present proposed regulations offer only general guidelines to which information is reviewable prior to production the CRA. This practice condones irresponsible recordkeeping and reporting on behalf of FAD psychologists. The safety of the public an due process hinge any "comprehensive" evaluation including any and all possibly relevant information presented and available to FAD evaluators, as some have refused to consider other information, insisting on drawing from only a limited set of source materials in reaching inmates risk conclusions.

For example, language in §2240 (a) reads: "....The psychologists shall consider the current relevance of any identified risk factors impacting the inmate's risk of violence...." Yet there is no mandate for psychologists to also consider an inmate's positive factors mitigating risk of violence. The very opening subsection of the proposed regulations have already biased the psychological evaluation process to the exclusion of considering pro-social attributes of the inmate being assessed. Any errors and omissions would otherwise become permanent within file.

04

IV.
The Timeline for Processing Inmate CRA Appeals is Inadequate Per Proposed Regulations [See §§ 2240 (i) (1)]:

Frequently the risk assessment interview does not take place until several weeks before the inmate's parole suitability considerations hearing (and the inmate and/or counsel does not receive the CRA transcript until several weeks before the hearing). As is, the timing for appeal response prevents sufficient time for inmates to consult with counsel or the judicial process aside from the verbal objection on the actual hearing date – which then is often after commissioners have reviewed and based an opinion upon the CRA. This is gravely unfair if simply due to the significant weight commissioners afford psychological risk assessments in making parole suitability determinations. As proposed, the appellate time constraints are little more than perfunctory or random timeframes, giving only the appearance of a meaningful grievance procedure.

05

V.
The Drafted Regulations Make Provision for Attachment of Rebuttals as Addenda to the Risk Assessments Being Challenged, But Only After the Parole Hearing has Begun, Which Does Not Allow Sufficient Review Time During the Parole Hearing [See §§ 2240 (i)(j)]:

Commissioners having read a CRA report without the inmate's rebuttal addended is in violation of other regulations pertaining to Central File and Unit Health Record corrections (Inmate Records). Uncorrected errors tend to become permanently included in all subsequent records as a result.

06

VI.

In §2240 (a) of the Proposed Text, "....The Psychologists Shall Consider the Current Relevance of Any Identified Risk Factors Impacting the Inmate's Risk of Violence...." the Phrasing Does Not Provide for Consideration of All Relevant Available Information in Making Individual Assessment:

It has often occurred (and has been this writer's experience) that large portions of material available for review in evaluating inmate risk and safety have been ignored. When this takes place, it demonstrates bias in favor of certain types of (aggravating) evidence only, thus tainting what is intended to be an objective and open inquiry into an inmate's total social and psychological person and personal information.

07

VII.

In the Proposed Regulatory Text §2240 (b), Provision is Made for Consideration of Youth Factors in Assessment, But No Mention is Made for Consideration of Advanced Age and Other Possible Risk-Reduction Factors as Mitigating Risk Factors (such as Pro-Social Post-Incarceration Activities):

The FAD risk assessment process has been found to be biased in the direction of *static* factors such as the crime and pre-incarceration circumstances and behavior. With the limited language proposed, the process offers no protection of risk based solely on past and unchanging factors.

08

VIII.

Senior Psychologist or Chief Psychologist Review of CRA Itself is Not a Fact-Checking Process:

In proposed text §2240 (c), risk assessments are only finalized upon senior psychologist review of the CRA itself, "to ensure that the interviewing psychologist's opinions are based upon adequate scientific foundation, and that reliable and valid principles and methods have been appropriately applied to the facts of the case...." There is no language assuring analysis of exactly which evidentiary information has been utilized in psychologist's opinion. the Senior Psychologist should be required to review the totality of information available, to correct discrepancies, and to assure that those psychometric instruments employed were specifically normalized on Long-Term, Life-Inmate Populations (and that those instruments are not based on static factors alone).

09

IX.

Proposed Changes Do Not Establish a Fact-Checking Review of Error Claims:

In proposed text §2240 (e) (2), the inmate's challenge to factual errors materially impacting psychologist's risk conclusions should be actually looked into and investigated. No proposed language exists to mandate actual consideration of each individual claim and supporting sources and documentation. Errors continue to be perpetuated in subsequent records, in vicious cycle fashion.

10

X.

§2240 (f)(1) Does Not Require BPH Chief Counsel to Review Documentation Supporting the Asserted Correction(s), But Only Mentions Review of the CRA Itself:

It cannot usually be determined from review of the risk assessment alone whether a mistake has been made. This procedure makes no allowance whatsoever for comprehensive review of error claims, resulting in circular reasoning and arbitrary denial of legitimate requests for report detail correction or request for a new evaluation. No cross-referencing method exists.

»»»»»»»»» «««««««««

As proposed, and as in the past, no significant or meaningful consideration has been given to legitimate and specific inmate claims of material and incidental flaws contained within FAD CRAs. I have personally experienced the harmful bias through this risk report and appeal process. My most recent subsequent parole hearing relied almost exclusively on an evaluation report submitted by Dr. S. Hoyt, who did not comprehensively review my UHR Mental Health file. Thus, the CRA was greatly flawed with many factual and transcription errors. But when I submitted my rebuttal containing detailed corrections to the psychologist's recordkeeping, I received nothing more than a vague, "postcard" denial of my request for correction and new evaluation. ***Not a single assertion was addressed in the BPH Senior Counsel's response.***

Not one of my several valid corrections of disputed material were responded to in that (open) denial letter. Coincidentally, I received a 7-year denial at the subsequent hearing, after 25 years of nearly exemplary programming and extensive insight and preparation for safe community transition. The Panel cited from the flawed report almost exclusively. No weight was given to my many years of state and private therapy, nor was any of my psychological history aside from the Hoyt CRA was considered in the parole hearing. My positive psychological progress and recovery have been entirely ignored.

This FAD clinician's assertions of my lacking credibility, of insufficient parole plans, and of mental disorder were the very reasons given for the panel's 7-year denial of parole. Thus, the ultimate weight was given to the severely flawed report. Furthermore, no consideration was given to the rebuttal I requested be attached to the CRA. Nor was the rebuttal or its main points read into the hearing-proceedings transcript.

The finality of the potential mistakes remaining a permanent record in my Central File and Health Record seriously damages my prospects for success upon parole. The mislabeling and assertions resulting from the flawed raw information within the CRA has harmed me and harmed my family. It is with sober mind I ask you please consider the requested text input above.

Respectfully submitted,

Marko Rogowski

Marko Rogowski
#H-27508

cc: File
Counsel

2016-18761

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RE: OPPOSITION TO PROPOSED DRAFT REGULATIONS §2240 PSYCHOLOGICAL RISK ASSESSMENTS ("CRA")

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I.

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In any other forensic, judicial, and/or quasi-judicial setting, interactions are recorded verbatim, as with formal deposition, the text of which can be more fairly reviewed in route to mutual accountability among interviewer, inmate interviewee, senior reviewing psychologist, and the BPH Chief Counsel alike. A transcript allows alleged errors to be examined and rectified. And the added benefit of reducing lengthy rebuttal paperwork could be anticipated.

II.

No Provision is Proposed Regarding the CRA Review Fact-Checking Process, and the BPH/FAD are Not Required to Investigate Nor Respond to the Legitimacy of Individual Objections to Factual Errors:

Therefore the longstanding FAD objection screening process which the proposed regulations outline continues to be unfair and without meaningful redress. Historically, real and significant factual errors have not been individually addressed by BPH when challenged. The presently proposed regulations do nothing to change that highly prejudiced screening method.

LD

III.
The Proposed Regulations Do Not Encourage a Standard of Professional Conduct for FAD Psychologists Regarding Interviewing, Recordkeeping, and Thoroughness of Research:

Psychological forensic risk assessment is not a casual undertaking but has implications on public safety, the integrity of psychological profession, and individual civil liberties of inmates evaluated. Present proposed regulations offer only general guidelines to which information is reviewable prior to production the CRA. This practice condones irresponsible recordkeeping and reporting on behalf of FAD psychologists. The safety of the public an due process hinge any "comprehensive" evaluation including any and all possibly relevant information presented and available to FAD evaluators, as some have refused to consider other information, insisting on drawing from only a limited set of source materials in reaching inmates risk conclusions.

For example, language in §2240 (a) reads: "....The psychologists shall consider the current relevance of any identified risk factors impacting the inmate's risk of violence...." Yet there is no mandate for psychologists to also consider an inmate's positive factors mitigating risk of violence. The very opening subsection of the proposed regulations have already biased the psychological evaluation process to the exclusion of considering pro-social attributes of the inmate being assessed. Any errors and omissions would otherwise become permanent within file.

IV.
The Timeline for Processing Inmate CRA Appeals is Inadequate Per Proposed Regulations [See §§ 2240 (i) (1)]:

Frequently the risk assessment interview does not take place until several weeks before the inmate's parole suitability considerations hearing (and the inmate and/or counsel does not receive the CRA transcript until several weeks before the hearing). As is, the timing for appeal response prevents sufficient time for inmates to consult with counsel or the judicial process aside from the verbal objection on the actual hearing date – which then is often after commissioners have reviewed and based an opinion upon the CRA. This is gravely unfair if simply due to the significant weight commissioners afford psychological risk assessments in making parole suitability determinations. As proposed, the appellate time constraints are little more than perfunctory or random timeframes, giving only the appearance of a meaningful grievance procedure.

V.
The Drafted Regulations Make Provision for Attachment of Rebuttals as Addenda to the Risk Assessments Being Challenged, But Only After the Parole Hearing has Begun, Which Does Not Allow Sufficient Review Time During the Parole Hearing [See §§ 2240 (i)(j)]:

Commissioners having read a CRA report without the inmate's rebuttal addended is in violation of other regulations pertaining to Central File and Unit Health Record corrections (Inmate Records). Uncorrected errors tend to become permanently included in all subsequent records as a result.

VI.

In §2240 (a) of the Proposed Text, "....The Psychologists Shall Consider the Current Relevance of Any Identified Risk Factors Impacting the Inmate's Risk of Violence...." the Phrasing Does Not Provide for Consideration of All Relevant Available Information in Making Individual Assessment:

It has often occurred (and has been this writer's experience) that large portions of material available for review in evaluating inmate risk and safety have been ignored. When this takes place, it demonstrates bias in favor of certain types of (aggravating) evidence only, thus tainting what is intended to be an objective and open inquiry into an inmate's total social and psychological person and personal information.

VII.

In the Proposed Regulatory Text §2240 (b), Provision is Made for Consideration of Youth Factors in Assessment, But No Mention is Made for Consideration of Advanced Age and Other Possible Risk-Reduction Factors as Mitigating Risk Factors (such as Pro-Social Post-Incarceration Activities):

The FAD risk assessment process has been found to be biased in the direction of *static* factors such as the crime and pre-incarceration circumstances and behavior. With the limited language proposed, the process offers no protection of risk based solely on past and unchanging factors.

VIII.

Senior Psychologist or Chief Psychologist Review of CRA Itself is Not a Fact-Checking Process:

In proposed text §2240 (c), risk assessments are only finalized upon senior psychologist review of the CRA itself, "to ensure that the interviewing psychologist's opinions are based upon adequate scientific foundation, and that reliable and valid principles and methods have been appropriately applied to the facts of the case...." There is no language assuring analysis of exactly which evidentiary information has been utilized in psychologist's opinion. the Senior Psychologist should be required to review the totality of information available, to correct discrepancies, and to assure that those psychometric instruments employed were specifically normalized on Long-Term, Life-Inmate Populations (and that those instruments are not based on static factors alone).

IX.

Proposed Changes Do Not Establish a Fact-Checking Review of Error Claims:

In proposed text §2240 (e) (2), the inmate's challenge to factual errors materially impacting psychologist's risk conclusions should be actually looked into and investigated. No proposed language exists to mandate actual consideration of each individual claim and supporting sources and documentation. Errors continue to be perpetuated in subsequent records, in vicious cycle fashion.

X.

§2240 (f)(1) Does Not Require BPH Chief Counsel to Review Documentation Supporting the Asserted Correction(s), But Only Mentions Review of the CRA Itself:

It cannot usually be determined from review of the risk assessment alone whether a mistake has been made. This procedure makes no allowance whatsoever for comprehensive review of error claims, resulting in circular reasoning and arbitrary denial of legitimate requests for report detail correction or request for a new evaluation. No cross-referencing method exists.

»»»»»»»»»» ««««««««««

As proposed, and as in the past, no significant or meaningful consideration has been given to legitimate and specific inmate claims of material and incidental flaws contained within FAD CRAs. I have personally experienced the harmful bias through this risk report and appeal process. My most recent subsequent parole hearing relied almost exclusively on an evaluation report submitted by Dr. S. Hoyt, who did not comprehensively review my UHR Mental Health file. Thus, the CRA was greatly flawed with many factual and transcription errors. But when I submitted my rebuttal containing detailed corrections to the psychologist's recordkeeping, I received nothing more than a vague, "postcard" denial of my request for correction and new evaluation. ***Not a single assertion was addressed in the BPH Senior Counsel's response.***

Not one of my several valid corrections of disputed material were responded to in that (open) denial letter. Coincidentally, I received a 7-year denial at the subsequent hearing, after 25 years of nearly exemplary programming and extensive insight and preparation for safe community transition. The Panel cited from the flawed report almost exclusively. No weight was given to my many years of state and private therapy, nor was any of my psychological history aside from the Hoyt CRA was considered in the parole hearing. My positive psychological progress and recovery have been entirely ignored.

This FAD clinician's assertions of my lacking credibility, of insufficient parole plans, and of mental disorder were the very reasons given for the panel's 7-year denial of parole. Thus, the ultimate weight was given to the severely flawed report. Furthermore, no consideration was given to the rebuttal I requested be attached to the CRA. Nor was the rebuttal or its main points read into the hearing-proceedings transcript.

The finality of the potential mistakes remaining a permanent record in my Central File and Health Record seriously damages my prospects for success upon parole. The mislabeling and assertions resulting from the flawed raw information within the CRA has harmed me and harmed my family. It is with sober mind I ask you please consider the requested text input above.

Respectfully submitted,

Marko Rogowski

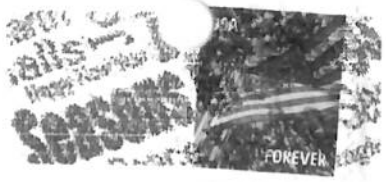
Marko Rogowski
#H-27508

cc: File
Counsel

Marko Rogowski
H27508 / EW-231L
PO Box 689 CTF-C
Soledad CA 93960-0689

SAN JOSE CA 950

13 DEC 2016 PM 4 L



RE: PROPOSED REGULATIONS
JOHNSON V. SHAFFER

* * * CONFIDENTIAL LEGAL MAIL * * *

RECEIVED
DEC 16 2016
BOARD OF PAROLE HEARINGS

HEATHER MCCRAY, BPH SENIOR STAFF ATTORNEY
PO BOX 4036
SACRAMENTO, CA 95812-4036

95812-403636

16-01-29

RECEIVED VIA EMAIL TO: BPH.REGULATIONS@CDCR.CA.GOV
ON 12/18/2016

BPH RN
16-01-29
Public Comment

JANICE THOMAS, PH.D.
CLINICAL PSYCHOLOGIST
JThomasPhD@gmail.com

December 18, 2016

Heather L. McCray, Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

Via email: BPH.Regulations@cdcr.ca.gov

Re: BPH RN 16-01

To the Board of Parole Hearings:

This is to comment on the proposed regulatory action to amend § 2240 of the California Code of Regulations (CCR), Title 15, Division 2, concerning Psychological Risk Assessment for Life Inmates[1]. Although there are some improvements, the proposed regulation continues to pose an ongoing threat to an inmate's liberty interests. Tests which have generally been accepted by the "psychological community[2]" and which are construct valid might still be lacking in validity with respect to the population for which the test is being used. Such is the case here. The standard of evidence represented in the proposed regulation is inadequate.

The population of California life-term inmates with possibility of parole is an exceptional population and differs substantially from the populations on which risk assessments have been validated. For example, many risk assessment instruments have been validated on white male Canadian prisoners who have been incarcerated for shorter periods of time than the length of time our California life-term inmates have been incarcerated. I know of no empirical study which has examined the validity of generally accepted risk assessments instruments in relation to the population of parolees who were life-term inmates and who were released through the Board of Parole Hearings. In the 1990's so few life-term inmates were released that the sample size of such a population would have been very small; the very low release rate was a trend that continued until developments in case law enabled the release of life-term inmates.

Anecdotal information suggests that parolees who were sentenced to life with the possibility of parole have very low rates of recidivism. If only 1% of these parolees reoffend, then the risk assessment tool must improve upon this very low base rate. Existing tools do not. In other words, to evaluate an individual's risk, it is not only essential to use risk assessment tools which have achieved a reasonable degree of scientific consensus. It is equally essential to evaluate the validity of the test with respect to the population represented by the individual being assessed.

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[1] http://www.cdcr.ca.gov/BOPH/reg_revisions.html
[2] Proposed Regulation Text, p. 1.

In addition to concerns about the extent to which tests have been validated for the population of California inmates sentenced to life with the possibility of parole, and whether the tests cause harm to individual inmates by needlessly overestimating risk of violence, another concern is whether the tests can be used for purposes of documenting progress towards parole suitability as is required in the proposed regulation. I know of no evidence which shows that the tests are sufficiently sensitive to detect changes in parole suitability. This is because risk assessment tests are heavily weighted on historical and static factors which do not change over time. Whether or not the tests are valid for assessing changes in parole suitability has not been empirically evaluated and therefore has no scientific basis.

My concerns are consistent with professional standards and guidelines developed for practicing psychologists in general and for forensic psychologists in particular. These standards and guidelines have been published by the American Psychological Association and are referenced below.

There are also guidelines regarding standards for psychological tests[3]. These guidelines are relevant to forensic psychologists preparing psychological evaluations on life-term inmates just as they were relevant, for example, to psychoeducational evaluations in the context of assessing for special education disabilities in *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

From the Ethical Principles of Psychologists and Code of Conduct, the relevant sections include but are not limited to the following:

2.04 Bases for Scientific and Professional Judgments
Psychologists' work is based upon established scientific and professional knowledge of the discipline.
3.04 Avoiding Harm
(a) Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.
9.01 Bases for Assessments
(a) Psychologists base the opinions contained in their recommendations, reports and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings.
(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions and appropriately limit the nature and extent of their conclusions or recommendations.
9.02 Use of Assessments
(a) Psychologists administer, adapt, score, interpret or use assessment techniques, interviews, tests or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques.
(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (emphasis added)
9.06 Interpreting Assessment Results
When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities and other characteristics of the person being assessed, such as situational, personal, linguistic and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations.

From the Specialty Guidelines for Forensic Psychologists, which "apply in all matters in which psychologists provide expertise to judicial, administrative, and educational systems..." (p. 7) (emphasis added), the relevant sections include but are not limited to the following:

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[3] Standards for Educational and Psychological Testing.

1.02 Impartiality and Fairness
...When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.

10.02 Selection and Use of Assessment Procedure
Forensic practitioners use assessment procedures in the manner and for the purposes that are appropriate in light of the research on or evidence of their usefulness and proper application...Forensic practitioners use assessment instruments whose validity and reliability have been established for use with members of the population assessed. When such validity and reliability have not been established, forensic practitioners consider and describe the strengths and limitations of their findings.

02

Finally, I would add that there are dangers inherent to administrative law regulating the psychological risk assessment process. There is the risk that the trier of fact will assume the risk assessment, by following the administrative law guidelines for "comprehensive risk assessments," is not only comprehensive but also valid for the population or person being assessed.

03

The proposed regulation spells out a process by which an inmate may correct alleged factual errors. At the very least, the proposed regulation should require examiners to state the limitations of their test instruments. This would include stating the base rate of recidivism for the affected population, and requiring examiners to reference the peer-reviewed, published study/ies which have validated the measure/s vis à vis the population being assessed.

In closing, although the intent of the proposed regulation is intended to "implement, interpret, and comply with the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement, the court order in *Sherman-Bey v. Shaffer*, and Penal Code Sections 3041, 3041.5, 3051, 11190, and 11193...", in fact the amendments fall short. Administrative law and regulations should be careful when stepping into the business of legislating the standards for a competent psychological evaluation whether for risk assessment purposes or otherwise. The proposed standard remains ripe for the picking from the fruit of the harmful error tree.

Yours sincerely,

Janice Thomas, Ph.D.
Clinical Psychologist
CA – PSY 10496

American Educational Research Association, American Psychological Association, & National Council on Measurement in Education. (2014). *Standards for Educational and Psychological Testing.* Washington, DC: American Educational Research Association.

American Psychological Association. (2002). Ethical Principles of Psychologists and Code of Conduct, *American Psychologist, 47*, 1597-1611.

American Psychological Association. (2010). Amendments to the 2002 "Ethical principles of psychologists and code of conduct." *American Psychologist, 65*, 493.

American Psychological Association. (2013). Specialty guidelines for forensic psychology. *American Psychologist, 68*, 7-19.

16-01-30

2016-18239

3PH RN
16-1-30
Public
Comment

Phillip G. Stephens, B-85483
P.O. Box 500 Alpine 219
Chino, CA 91708

November 26, 2016

CDCR: B85483
Hrg Date: 12-5-16
Inst: CIM

Heather McCray, BPT Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

I am writing to you about my complete dissatisfaction in the Board's obvious refusal to establish a "meaningful" appeals process through which prisoners and their attorneys may file objections to a Comprehensive Risk Assessment via the settlement that was reached under Sam Johnson v. Jennifer Shaffer.

It is clear that the Board has no respect for the legal and binding settlement that was reached under Sam Johnson v. Jennifer Shaffer by the proposed regulations that the Board submitted to the Office of Administrative Law on October 24, 2016.

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For example, the Board's proposed regulations to the OAL submitted on October 24, 2016, continue to allow "factual errors" to remain in the central file of a inmate, even though the error on its own clearly "impacts" the decision that is either being made by the Board panel, or the Governor.

In the case of inmate Phillip G. Stephens, B-85483, a judge made a comment/opinion on the record upon appeal that the inmate raped his victim, even though the PGM-Sub-Typing of the semen that was found on the victim turned out to be of another blood type than the inmate (Van Nuys Superior Court Case Number A-136800).

02

Another objection that this particular writer has to the Board's proposed regulations is that without the option of a tape-recording of the CRA interview there is no way to resolve the disputes that are likely to come up whenever the inmate knows that they have been misquoted by the interviewer in the CRA report.

This second objection is a vital issue that must eventually be dealt with when viewed from the reality that such "errors" will be relied upon by either the Board, or the Governor...and wouldn't one normally conclude that any "error" that the Board/Governor relies upon to make such a serious decision would have to be deemed as "material" by its mere impact upon the inmate?

03

I think that one of my most serious objections to the Board's CRA process is that I feel whenever I speak to the interviewer that I have some serious problems when it comes to expressing myself clearly.

After reading the CRA report it was as if I didn't have the ability to clearly comprehend just what was being asked of me.

Is it possible for the questions to be just a bit more easier to understand?

The psychologist in my most recent report asked me how I felt about "my crime now" and I thought that she was still talking about the steps of AA.

When I answered her question from the perspective of the 8th step in AA she wrote it up as if she had asked me how I felt about what I had done to my victim, which was another question that I answered, but never appeared in the report.

It is my hope that the Board will properly address these objections.

Sincerely,

Phillip G. Stephens

16-01-31

* RECEIVED VIA EMAIL FROM ROBERT HICKS
TO: BPH.REGULATIONS@CDCR.CA.GOV
ON 12/19/16

11-28-16
2017-24051

3f RN
16-01-31
Public
Comment

* AUTHOR = SONYA DANIELS (W75006)

BPH Comprehensive Risk Assessment Error Complaint

The first complaint is I sent in a two page list of actual factual errors in which Larmer made factual mistakes and statements of facts that were wrong/false and this she used to find deception and give me a risk factor of moderate instead of low. The higher risk factor is based off of her errors and there were alot of them. The Board claims none of her errors were factual errors. factual error is defined as follows:
"defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnosis or clarifications regarding statements the risk assessment attributed to the inmate."
I sent in a document refuting the FAD Psychologists Larmer's mistake that I was on AFDC for several years and her belief that I was lying that it was a short period. It is a factual error she used to claim I was deceptive and a higher risk and it was a factual error that documentation verified. I received a letter that it wasn't a factual error and it was along with several other factual errors.
This is a problem and I object.
I also believe the assessments should be audio-taped for the paraphrasing of the FAD psycologists or actual usage of her

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opinion versus what is actual said is a major problem. The point of the Assessment is to verify the inmate's actual Risk and not the opinion of the FAD psycologist who may be biased by case factors or dislike of inmate. It should be fair and objective. Right now it is not and it is a problem. I object. Plus in all legal situations inmate interviews are always audio-taped. For there is no question as to what is said. Legally it seems to be a standard and it should during these interviews. For a fair psych eval please allow factual errors | all errors to be corrected and for interviews to be audio-taped.

Sonya Daniels W75006

Send a copy to
Heather L. McClay, Senior staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento Ca 95812-4036

Regulation control Number BPH RN 16-01

16-01-32

* RECEIVED VIA EMAIL FROM ROBERT HICKS TO: BPH.REGULATIONS@CDCR.CA.GOV ON 12/19/16

3F 15 RN 16-01-32 Public Comment

Heather L. McCray, Senior Staff Attorney

Board of Parole Hearings

P.O. Box 4036

Sacramento, CA 95812-4036

Re: BPH RN 16-01: #2240 Comprehensive Risk Assessments and Factual Errors

Dear Ms. McCray:

Following are my comments about the proposed changes in the comprehensive risk assessment process and factual error determinations:

Now more than ever, citizens are demanding the very highest level of accountability from government officials for their stewardship of public resources. To be truly accountable, public-sector managers must use the resources committed to their care as effectively and efficiently as possible, in full accordance with all applicable legal requirements and restrictions. This objective can only be achieved within the framework of a sound and comprehensive system of internal controls.

Internal controls are the practical techniques employed by management to accomplish its objectives and meets its obligations.

The first goal listed by the Board of Parole Hearings (BPH) is: To maintain a high performing parole hearing system that protects California's communities and is fair to all adult offenders.

01 I would think that the objective is to have an accurate, error-less psych evaluation. It is my understanding that one of the biggest concerns is about the fairness of the psych evaluations and what was said during psych evaluation sessions. It seems that BPH is coming up with this convoluted, complicated process when there is a much more accurate, simpler procedure to obtain the objective: audio-tape the psych evaluation. Since they are not now audio-taped, no one except the FAD Psychologist and the inmate know if the psych evaluation is accurate and error-free. However, the inmate can't do anything about it, if it is inaccurate and harmful to him/her. If the sessions were audio-taped, anyone at any time could determine if what the Psychologist reports was said was accurate.

02 As I understand it, the proposed change in the definition of a factual error could allow a FAD psychologist to inaccurately quote someone and there would be no recourse to challenge this kind of negative statement in the psych eval. Psychologists are human and might have biases based on case factors or other reasons, although we would like to believe otherwise,

It seems to me that BPH management is forcing the process to be less effective and efficient by avoiding the ideal procedure to obtain the objective of an accurate, error-less psych evaluation-audio-tape the psych evaluation sessions, simply because the Psychologists object to this important internal control procedure. By going along with their objection, BPH

management is failing in its goal of establishing a "hearing system that protects California's communities and is fair to all adult offenders", and in its responsibility to the public to be effective.

03

The purpose of a control procedure is defeated if employees determine (or influence) which control procedures that they will accept and which ones they will reject. When internal controls are established, it doesn't mean that it is being done because the employees of the organization aren't trusted. The procedures are established because they are the best ones to assist management achieve its objectives and fulfill its obligations.

Abuses are more likely to occur when the focus is taken away from what procedures it takes to achieve the objective, and put on what procedures are acceptable or preferred by the employees that are affected by the internal control procedures, as I suspect happened at the CCWF and CIW prisons, where prison staff inflicted a massive amount of abuse on inmates there. I suspect that their identified goal was similar to yours of establishing systems that protect California's communities and are fair to adult offenders. Just changing wardens is not going to correct the abuses at those prisons either, unless those wardens implement and maintained internal control procedures that actually protect California communities and are fair to adult offenders. I think the starting point is recognizing and acting like the inmates are human beings worthy of respect and I don't believe that is the case now with a lot of prison staff, especially at CCWF and CIW.

If BPH is truly interested in protecting California's communities and being fair to all adult offenders, I would recommend that you give strong consideration to audio-taping the psych evaluation sessions.

04

Furthermore, BPH, itself, is denying things that are factual errors, even when they are documented. My daughter sent you a letter (attached) in which communicated several times to the FAD Psychologist about several factual errors, and that communication was considered by the FAD Psychologist as deception and a reason to give her a higher risk level. BPH Claimed that none of the instances were factual errors. However, I was involved in the effort to get the facts of the AFDC situation, so I know that it was a factual error.

I know that you won't appreciate me saying this, but when BPH rubberstamps inaccurate information provided (or relied on) by the FAD Psychologist, in the face of documentation proving it is inaccurate, BPH becomes part of the problem; and, in those instances, BPH defeats the purpose of the internal control procedures that were established to ensure that objectives were met and management's obligations were fulfilled (at least the part that relates to being fair to adult offenders is concerned). In these situations, BPH is biased in favor of the FAD Psychologist. My recommendation would be that someone independent of BPH and the FAD Psychologist make the determinations about factual errors.

05

Sincerely,

Robert Hicks

16-01-33

*RECEIVED VIA EMAIL TO: BPH.REGULATIONS@CDCR.CA.GOV
FROM ROBERT HICKS
ON 12/19/16

Heather L. McCray, Senior Staff Attorney

BPH RN 16-01-33 Public Comment

Board of Parole Hearings

P.O. Box 4036

Sacramento, CA 95812-4036

Re: BPH RN 16-01: #2240 Comprehensive Risk Assessments

Dear Ms. McCray:

Following are my comments about the proposed changes in the comprehensive risk assessment process and factual errors:

I think that there should be procedures established to eliminate the obvious bias that exists against the inmates, as much as possible. I recommend the following:

01

1. Have a person independent of the FAD Psychologist and the Board of Parole Hearings determine whether or not factual errors have occurred. My daughter has sent us copies of the documentation that the FAD Psychologist made factual errors. Yet the Board of Parole Hearings says that none of them were factual errors.; and,

02

2. Audio-tape the psych evaluation sessions, so what the inmate actually says is documented, and the public doesn't have to just rely on what the FAD Psychologist says the inmate said.

Sincerely,

Maxine Hicks

16-01-34

2016-18762

Heather McCray

BPH Senior Staff Attorney

P.O. Box 4036

Sacramento, CA 94812-4036

CDCR: J02967
Hrg Date: NLT 10/5/19
Inst: ASP

BPH
RN
e-01-34
Public Comment

This letter is in regards to the proposed regulation by BPH and the upcoming decision of implementing these proposed regulations in future hearings. Our son, Miguel Herrera (J-02967), has been to board on three occasions now, and has had crucial errors take place due to the mistakes that were documented in his CRA. In 2014, the psychiatrist who completed his evaluation did not provide all of the facts of the interview and included information that my son did not state. Although his attorney documented these errors and submitted the proper documentation, the CRA was still used in his hearing and based on this, he was found unsuitable for parole. We know that our son is not the only person that has experienced this, and if the ability to tape record the CRA interview, most of these errors would be eliminated.

01

The second proposed regulation that we would like to comment on is the removing of the error filled CRA in a prisoners file. To leave a report in the file that has been proven to be full of errors is completely ludicrous. These reports are used over and over with each hearing, and what one commissioner might have taken into consideration, another one hasn't based on the CRA. If it is proven to be full of errors, then it should be removed from the prisoners file. Our son has submitted the proper documentation to show that his last CRA is full of errors, however it is still being used in his hearings as fact. Which leads to the proposed regulation concerning "factual error". When there is proven factual error the document should be removed from the file as well as have the opportunity to be objected to in the hearing itself. The proposed regulation that BPH is attempting to impose do not help the person sitting in that hearing as a matter of fact it does not seem that there would be much change to what they are currently. Please consider all of the comments, letters, and emails that have been submitted and make the changes that are needed.

02

Thank you

Raul Herrera Sr.

Maria Herrera

SAN DIEGO CA 920

12 DEC 2016 PM 3 L

USA FOREVER

RECEIVED

DEC 16 2016

BOARD OF PAROLE HEARINGS

HEATHER McCRAM
BPH SENIOR STAFF ATTORNEY
P.O. BOX 4036
SACRAMENTO, CA 94812-4036

16-01-35

2016-18137

BPH RN

1-d-35

Re: comment

CDCR: K26537
Hrg Date: NLT 2/19/19
Inst: KVSP

December 8, 2016

Heather McCray, (now Senior Staff Attorney)

I submit these written comments regarding Comprehensive Risk Assessments (CRA) currently open for public comments and under review by the Office of Administrative Law.

01

I hold the position that these evaluations should be audio recorded and transcribed. At least for those prisoners who request it. I've had misquotes or rather inconsistencies presented in two reports so far (in 2013 & 2014), which fact screened, fact twisted and distorted my presentation. Ultimately, this had the effect of having one appear dishonest, shifty and self-serving. Resultingly, I'm now distrustful and reluctant to participate in these evaluations. The audio recording and accurate, verbatim transcription of these examinations will serve to promote the integrity, accuracy, transparency and fairness of this process. Particularly, by affording a record or factual base by which a prisoner can reference in support of his or her position that the report fails to accurately reflect their position.

02

Additionally, I'm of the position that these regulations should allow prisoners to address all the real "factual errors" in these reports. As drafted, these regulations screen out far too many legitimate and important objections. Particularly, objections made to a clinicians error in reporting on statements attributed to an examinee. This is super foul! In essence, if a prisoner is targetted (for whatever reason) not to be paroled/released, the examiner can just twist the prisoner's rehabilitative perspective; which would then later be charged against them, subjecting said prisoner to a never ending whac-a-mole process of denial after denial. This should not be tolerated. As it bears a scandalous and infectious appearance; further complicating an already complicated process such as a parole consideration hearing; which is saturated with far too much bureaucracy and political sway.

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Furthermore, out of all fairness, any containing three or more factual, administrative and/or substantive errors should be considered void and removed from the prisoners c-file. To not do so, demonstrates the innocent systemic bias against prisoners and against parole. As the maintenance of such info in the prisoners c-file can be used by later reviewers against the prisoner. This violates basic principles of fairness.

04

Finally, proper accommodations should be made for prisoners with disabilities and language barriers. Without which, a meaningful opportunity to be heard at a crucial phase of the parole consideration process is denied.

Respectfully, Submitted,

Barry Bosser #26537

LB

Return Address

Kern Valley State Prison

Name: Larry Rosser CDCR#: K26537

Facility: B Bldg.: 7 Cell: 118

P.O. Box: 5106

Delano, CA 93216

Inmate Indigent Mail

Confidential Mail

Kern Valley State Prison
Facility B, Building 7

SANTA CLARITA

RECEIVED

DEC 16 2016

BOARD OF PAROLE HEARINGS

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Board of Parole Hearings
ATTN: Heather McCray, BPH senior staff attorney
P.O. Box 4036
Sacramento, CA 95812-4036

95812-403636

16-01-36

* RECEIVED BY FAX ON 12/16/16

2016-18864

3PH RN 16-01-36 Public Comment

LSPC
Legal Services for Prisoners with Children

December 16, 2016

Heather McCray
BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

Re: Opposition to Proposed Regulations concerning Comprehensive Risk Assessments, BPH RN 16-01

Dear Ms. McCray:

Founded in 1978, LSPC enjoys a long history advocating for the civil and human rights of people in prison, their loved ones and the broader community. While we generally do not provide direct legal services, we work closely with prisoners and their families on a range of issues, including parole. As an attorney of record in the *Ashker v. Governor* federal class action lawsuit, I have been gratified to witness hundreds of prisoners being transferred out of Security Housing Units and into general population housing throughout the state. For those prisoners who have life sentences, this transfer has brought renewed hope for their eventual parole back into the community. It is with this lens in mind that I submit the following comments:

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1. **The proposed regulations do not provide for the option of tape-recording the CRA interview, which will limit a person's ability to challenge factual errors in reports, as required under the *Johnson v. Shaffer* settlement.**

Much rides on the opinion of the interviewing psychologist, and the interview is an important component in the forming of an opinion. Having a tape-recording of the interview would likely be of great benefit to the psychologist in writing the report, so that inaccuracies can be prevented in the first instance. It would also provide the prisoner with a fair method of resolving any disputes regarding the information provided in the interview. I have received second-hand reports of CRAs that unfavorably misstate the prisoners' comments.

These regulations are being promulgated in compliance with the settlement agreement in *Johnson v. Shaffer*. The settlement obliges the agency to adopt a mechanism to meaningfully challenge a factual error in a psychological report. See Cal. Government Code section 11349(b). The existence of a tape-recording of the interview helps make the review process meaningful. Therefore, a regulation providing for this option is fully authorized by the settlement. Indeed, the settlement can be said to compel such an option.

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2. **The proposed regulations erroneously define narrowly what "factual error" can be objected to before the hearing which is inconsistent with *Johnson*.**

Under the proposed regulations, the prisoner cannot object with "clarifications regarding" his or her own statements before the hearing. This limitation is unfair. While a prisoner can raise such an objection at the hearing itself, the hearing officer is in no position to resolve the "he said/she said" dispute. Therefore, there is no necessity to exclude this kind of factual error from pre-hearing review; in fact, its review is necessary for a meaningful appeals process as required by the settlement. Failure to provide this review is inconsistent with its purpose (to

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implement the *Johnson* settlement). Therefore it must be included. Cal. Government Code sections 11349 (b) & (d). Similarly, the requirement that the factual error "materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" is too limiting. Even if a falsehood in a report does not impact the current evaluation, there must be a meaningful way to delete that falsity from the official report. Otherwise, it could be relied upon by later decision-makers.

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3. **The proposed regulations allow falsehoods to remain in a prisoner's file, thereby failing to provide a meaningful remedy.**

Under the proposed regulations, a report containing a factual error will remain intact unless the error materially impacted the risk assessment. As described above, the factual error could be relied upon by other parole decision-makers in the future. Appeals require a remedy in order to be meaningful. Without creating this remedy, the regulations do not meet the requirements of *Johnson*. See Cal. Government Code sec. 11349 (b).

Our criminal court procedure offers a model of how to protect people from factual errors in official documentation. At sentencing hearings, defense attorneys can object to errors in probation reports. If the court agrees that there is an error in a report, the court will order the relevant section to be crossed out or redacted. A similar procedure could be employed here, with no need to rewrite the report. There is no need to retain false information in a prisoner's file.

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4. **The proposed regulations impose time limits that conflict with other time limits, thereby contravening Cal. Government Code sec. 11349 (d).**

The time limits here conflict with other provisions of law and/or with governmental practices. First, the requirement that a prisoner submit objections no later than 30 days before the hearing is inconsistent with the lack of a deadline by which the prisoner must receive the report. Second, the Board's pre-hearing ten day deadline to respond conflicts with Title 15's deadline to request a hearing waiver 45 days before the hearing. Title 15, sec. 2253(b)(2). These inconsistencies can undercut the settlement's requirement that the appeals process be meaningful.

Thank you for your consideration of these comments.

Sincerely,

Carol Strickman

Carol Strickman
Senior Staff Attorney

LSPC
Legal Services for Prisoners with Children

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Pages including cover sheet: 3

I can send you this document via email also if you prefer.

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BPH RN 2016-18151
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CDCR: C71995
Hrg Date: NLT 6/16/2
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Jerald C. Johns
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12 of December AD 2016

Dear Ms. McCray,

I am writing in regards to the Board of Parole Hearing's proposed regulations to address errors in the "Comprehensive Risk Assessments."

01 1. The regulations you have proposed do not provide for the option of tape-recording the CRA interview. Although there have been many requests, the Board has refused to include a provision that would allow an inamte to to choose to have his interview with the psychologist recorded. To the inmate who would later want to object to being misquoted in a CRA report, he would need the option of getting the recorded interview transcribed as a way to resolve the dispute.

02 2. It appears that these proposed and dangerous regulations have a very narrow definition of what counts as a "factual error" that one can object to. Under the proposed regulations, the Board will consider the inmate's written objection to a CRA report only if it finds that the inmate has identified a "factual error." I believe these regulations define "factual error" in a way that screens out too many valid objections.

03 3. The proposed regulations impose strict deadlines on prisoners making objections, but they do not require Board officials to promptly address those objections. Under the proposed regulations, an inmate must file his written objection to a CRA no later than 30 days before his hearing, but there is no guarantee that the Board will provide his report far enough in advance of that 30-day deadline for him to do that. Furthermore, even if one files his objection far in advance of the 30-day deadline, the Board is permitted to delay its written response to him until 10 days before the hearing.

04 4. Further, these proposed regulations allow error-filled CRA reports to remain in the inmates file. Under the proposed regulations, even if the Board agrees that my CRA report contains a "factual error," the report will not be removed from my file- unless the Board's Chief Psychologist decides that the error "materially impacted" the report's conclusions about your violence risk. As long as this report stays in my file, Board panels can rely on it, the Governor can rely on it in reversing a grant, and courts can rely on it in upholding a denial.

05 5. For prisoners with disabilities and language barriers, the proposed regulations fails to ensure proper accommodations. Under the proposed regulations, prisoners who have trouble processing information or who have trouble expressing themselves may still be required to answer questions that are beyond their capacities. In addition, the proposed regulations do nothing to ensure that inmates who speak limited English have access to certified in-person interpreters at their CRA interviews, and they do not require a written copy of the CRA to be provided in the inmate's native language. I believe the regulations should require these protections, and that failure to provide

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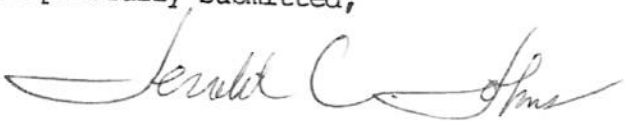
these protections should be grounds for an inmate to object to a CRA.

I thank you for taking time to read and seriously consider these objections to the regulations being proposed to address the errors in the CRA.

Respectfully submitted,



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BPH RN 16-01-38
Public Comment

CDCR: H37315
Hrg Date: NLT 5/16/19
Inst: CMC

Heather McCray, BPH
Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

Re: Opposition To The Board's proposed regulations regarding the adoption of fixing errors in the 'Comprehensive Risk Assessment.'

Dear Heather McCray, Senior Staff Attorney

In opposition to the Board's proposed regulations regarding The adoption of fixing errors in the 'Comprehensive Risk Assessment' is based on the following reasons and authorities cited herein.

01

1. The proposed regulations do not provide for the option of tape-recording the CRA Interview.

The proposed regulations would deprive a life inmate equal protection of the laws of the State of California. Specifically State Statute, Civil Code, § 1798.37. The Board's proposed regulations would not 'make available Copies of such individual's Statement . . .' Which would prevent

guarantees and Statutory law.

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2. The proposed regulations have a very narrow definition of what counts as a 'factual error' that you can object to.

The proposed regulations seeks to create a very narrow definition of whats counts as a 'factual error' which can be objected to and, eliminate any opportunity to challenge other disputed facts. The proposed regulations would allow the hearing panel during a 'determination of suitability for parole' hearing to use unreliable information contained within the 'Comprehensive Risk Assessment' report.

Every life inmate has a protected State Created liberty interest in having 'reliable' information considered by the panel in the determination of his/her suitability for parole. (Cal. Code Regs., Tit. 15, § 2402 (b).) Furthermore, Cal. Code Regs., Tit. 15, § 2249 states, a prisoner shall have the right to present relevant documents, . . . , such as disputed facts. Cal. Code Regs., Tit. 15, §§ 2249 and 2402 (b) is a regulations promulgated and adopted by the 'Board', and creates a liberty interest protected by the 14th Amendment to the U.S. Constitution. (Smith v. Sumner (9th cir. 1993) 994 F.2d 1401, 1405.)

The Boards' proposed regulation attempts to abrogate a clearly established administrative regulations and violate an life inmates' protected liberty interest.

any individual, with respect to any disclosure containing information about which the individual has filed a statement of disagreement, 'to make available copies of such individuals' statement . . .'.

Furthermore, the proposed regulations would also abrogate Cal. Code Regs., Tit. 15, § 3450 (a), (b), for life inmates who wants to resolve a dispute by denying him the opportunity to have supporting documents necessary to resolve a dispute.

As established by case law, the purpose of the equal protection clause of the 14th Amendment of the U.S. Constitution and its counterpart clause in Cal. Const., Art. 1, § 7 (a), is to secure every person against intentional and arbitrary discrimination by state officials. (See Cotton v. Municipal Court (1976) 59 C.A.3d 601, 605.) Also, an important limitation on the . . . [proposed regulations] . . . is that it may not conflict with constitutional or statutory law. (Gov. C., §§ 11342.1, 11342.2; Jeffries v. Olesen (1954) 121 F. Supp 463, 476 . . . [violation of valid administrative regulations, even by administrator himself, constitutes in legal effect a violation of the statute.]; See also Robin J. v. Superior Court (2004) 124 C.A.4th 414, 423.)

The Boards' proposed regulations thwarts the mandates of the legislature and attempts to limit the scope of the Departments' regulation. And conflicts with Constitutional

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3. The proposed regulations allows error-filled CRA reports to remain in your file.

The Board's proposed regulations would absolve the Board of its obligation to permit an individual to request in writing an amendment of a record, . . ., to make each correction in accordance with [an] individual's request, . . ., which the individual believes is not accurate, . . ., and inform the individual of the corrections made in accordance with their request, pursuant to: Civil Code, § 1798.35 (a); See Moghadan v. Regents of University of CA (2008) 169 C.A.4th 466, 475-476.)

California Civil Code, § 1798.35 (a), is a statute enacted by the California Legislature. The Board's proposed regulations is not consistent with the mandates of the Legislature. The proposed regulations exceeds the scope of the State Statute by eliminating any opportunity to have the CRA Amended in accordance with an individual's request, which the individual believes is not accurate and have an amendment to the record or (b) inform the individual of its refusal to amend the record in accordance with such individual's request.

Furthermore, the Board's proposed regulations would abrogate an individual's right, pursuant to Civil Code, § 1798.45, to bring a civil action against an agency whenever such agency does any of the following:

> (b) Fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual.
>
> (c) Fails to comply with any other provision of this chapter, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

A statute overrides any inconsistent provision in a regulation. (See Juarez v. 21st Century Ins Co. (2003) 105 C.A.4th 371, 376.) A regulation is impermissable if it exceeds the scope granted by relevant enacting legislation or if it conflicts with any act of the legislature. (Robin J. v. Superior Court (2004) 124 C.A.4th 414, 421.)

The Board's proposed regulations conflict with Civil Code, §§ 1798.35 and 1798.45. An important limitation on regulations is that they may not conflict with Statutory law. (Gov. C., §§ 11342.1, 11342.2; Harris v. Alcoholic Beverage Controls Appeals Bd (1964) 228 C.A.2d 1, 6-7 ...[administrative regulations in conflict with a statute are generally declared null or void.]; Nortel Networks Inc. v. Board of Equalization (2011) 191 C.A.4th 1259, 1276-1277.)

The Board's proposed regulations would also absolve the Board of its obligation to 'review a request for amendment and either amend the record or notify the person that the record will not be changed.' (Cal Code Regs. Tit. 15, § 2086 (b).) Violation of valid administrative regulations, even by administrator [herself] constitutes in legal effect a violation of the statute. (Jeffries v. Olesen (1954) 121 F.Supp. 463, 476.)

The Board's proposed regulations would clearly violate an established administrative regulation.

CONCLUSION

The Board's proposed regulations would violate an individuals' federal and State Constitutional right to equal protection of the law. And would allow errors to go uncorrected and deny an individual his / her protected

liberty interest in having the panel in determining whether a life prisoner is suitable for release on parole' consider 'all ... reliable information' pursuant to Cal. Code Regs, Tit. 15, § 2402 (b).)

Dated: December 12, 2016

Andre Sparks H37315
ANDRE SPARKS H37315

cc: A. Sparks
LSA, P.O. Box 277, Rancho Cordova, CA 95741
K. Wattley, Uncommon law

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December 14, 2016

TO: Heather McCray, BPH Senior Staff Atty
Board of Parole Hearings
Box 4036
Sacramento, CA 95812-4036

SUBJ: OBJECTIONS TO PROPOSED REGULATORY TEXT, 15 CCR 2240
Comprehensive Risk Assessments (CRA)

Dear Heather McCray,

Herein are objections to the proposed regulations under Title 15 of the California Code of Regulations (15 CCR) § 2240.

OBJECTION #1:

The proposed regulations do not provide for the option of audio recording the CRA. Without such an option there is no credible way for the inmate to contest being misquoted by the evaluator. Only transparency via recording (if needed/requested) ensures the FAD process is fair. The budgetary justifications offered to refuse offering recordings fail in light of the Three Strikes class of inmates that will overwhelm the Board's hearing recording efforts in less than 18 months. The BPH rebuttal, that the evaluator will "act differently" if they know they are being recorded also fails, unless the evaluators are not professionals.

01

OBJECTION #2:

The proposed regulations have a narrow definition of "factual error" which violates due process and fair hearing mandates under other sections of 15 CCR Div. 2 (§ 2250 Impartial hearing Panel; § 2042 Review Criteria).

02

OBJECTION #3:

The proposed regulations impose strict deadlines only on inmates making objections, but not the BPH in promptly addressing those objections. Specifically, an inmate's appeal challenging a CRA would be screened out if not submitted within 30 days before a hearing. Yet, the BPH is not held to any deadline for providing a CRA before a hearing or is the BPH required to act on a timely appeal until 10 days before the hearing. Without more procedurally meaningful regulations, inmates are deprived of the constitutional right to court to redress grievances, request a hearing waiver (which must be submitted at least 45 days in advance), or the opportunity to retain a private pschologist. Add to this the reality that many inmates are stuck with BPH-appointed attorneys who are not held to a standard for providing timely legal services, and the current regulations serve only the confuse and distort hearing due process.

03

OBJECTION #4:

There is nothing in the regulations that expunges factual/legal errors, even if the BPH agrees that the recent CRA contains such errors, unless the Chief Psychologist decides the error "materially impacted" the evaluation's conclusions about the inmate's risk of violence. The regulations also do

04

not address errors in past reports. Since the BPH and courts refer to previous evaluations in rendering decisions, the regulations are not fair to the totality of the FAD/jurisprudence continuum.

OBJECTION #5:

05

The proposed regulations fail to ensure proper accomodation of inmates with disabilities and language barriers. In-person interpreters, as provided during actual hearings, would make the evaluation process fairer. The proposed regulations also do not require a written copy of the CRA to be provided in the inmate's native language. Without such protections, the inmate should be allowed to refuse to participate in the evaluation and/or object to a written CRA. Note that 15 CCR § 3084.1(c) provides that "Department staff shall ensure that inmates...including those who have difficulty communicating are provided equal access to the appeals process and the timely assistance necessary to participate throughout the appeal process." See also 15 CCR § 2251 Assistance.

OBJECTION #6:

06

The proposed regulations do not meet Govt Code § 11349 requirements of necessity, authority, clarity, consistency and reference to law.

11349(a)No court decision or provision of law, Penal Code § 5068 notwithstanding mandates the existence of 15 CCR § 2240. § 5068 only requires a "diagnostic study" be performed prior to an inmate's release.

11349(b) No provision obligates the BPH to adopt § 2240.

11349(c) Based on the objections above and others submitted (incorporated by reference), the proposed regulations are not "easily understood by those persons directly affected."

11349(d) The proposed regulations are inconsistent with professional requirements/data and recent court decisions.

11349(e) No statute, court decision, or other provision is being implemented by the proposed regulations.

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OBJECTION #7:

The 2010 OIG report's finding regarding the FAD continue to not be remedied.

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OBJECTION #8:

Until such time as the the models used are consistent with state law holdings, major due process violations wil ensue and the regulations are not remedying this matter. See **People v. Stoll** (1989) 49 Cal.3d 1136, 1447 (MMPI and MCMI are considered acceptable and validated testing models).

09

OBJECTION #9:

Finally, none of the objections this submitter sent (rebuttal of his CRA) are addressed by the regulations and will not be until all of the objections above are substantively considered and remedied by the BPH.

Respectfully submitted,

Wendell Bigelow

Wendell Bigelow

:-wb2240

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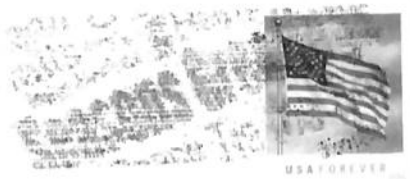

Board of Parole Hearings
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2016-18807

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December 14, 2016

TO: Heather McCray, BPH Senior Staff Atty
Board of Parole Hearings
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Sacramento, CA 95812-4036

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Chief Psychologist decides the error "materially impacted" the evaluation's conclusions about the inmate's risk of violence. The regulations also do not address errors in past reports. Since the BPH and courts refer to previous evaluations in rendering decisions, the regulations are not fair to the totality of the FAD/jurisprudence continuum.

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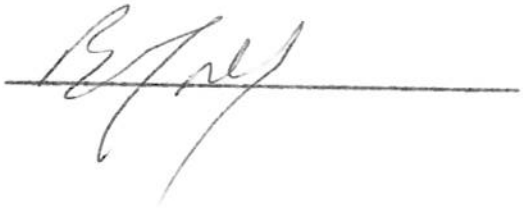
Respectfully submitted,



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California State Prison-Solano

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Board of Parole Hearings

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16-01-41

2016-18308

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6-9-41
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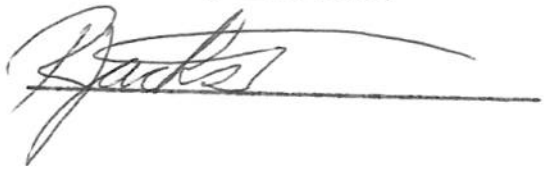
OBJECTION #5:

05

The proposed regulations fail to ensure proper accomodation of inmates with disabilities and language barriers. In-person interpreters, as provided during actual hearings, would make the evaluation process fairer. The proposed regulations also do not require a written copy of the CRA to be provided in the inmate's native language. Without such protections, the inmate should be allowed to refuse to participate in the evaluation and/or object to a written CRA. Note that 15 CCR § 3084.1(c) provides that "Department staff shall ensure that inmates...including those who have difficulty communicating are provided equal access to the appeals process and the timely assistance necessary to participate throughout the appeal process." See also 15 CCR § 2251 Assistance.

Respectfully submitted,



R. Jackson E-76458
CSP-SOLANO 23-2-12
BOX 4000
VACAVILLE, CA 95696-4000

SACRAMENTO CA 957
13 DEC 2016 PM 2 L
California State Prison-Solano

DEC 19 2016

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DEC 19 2016
BOARD OF PAROLE HEARINGS

Board of Parole Hearings
Attn: Heather McCray, Sr. Staff Atty
BOX 4036
Sacramento, CA 95812-4036

CONFIDENTIAL

95812-403636

16-01-42

BPH RN 2016-18012

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ik
omment

Name: Michael Victory
CDCR#: P07048
Address: CSP-SOLANO
P.O. BOX 4000
VACAVILLE, CA
95696

Dated: 12-14-2016

OBJECTIONS TO PROPOSED REGULATION CCR §2240.

CDCR: P07048
Hrg Date: 1-7-16
nst: SO2

To: Heather McCray
BPH Senior Staff Attorney
P.O. BOX 4036
SACRAMENTO, CA
94812-4036

Dear Ms. McCay:

As a member of the plaintiff class in Johnson-v-Shaffer Settlement, I write to present my objections to the proposed regulations regarding Comprehensive Risk Assessments (CRA) (CCR §2240), scheduled for consideration on December 19, 2016.

Objection #1:

01 The proposed regulations do not provide for the option of tape-recording the CRA interview. Without such an option there is no credible way for the inmate to contest being misquoted by the interviewer. Nor the ability to produce a transcription from a recording. The fiscal impact with be marginal at best if only 50% of inmates requested a recording; and only 10% of that group requested a transcript after receiving their CRA.

Objection #2:

02 The proposed regulations have a very narrow definition of what counts as a "factual error" that an inmate can object to. Under the proposed regulations, the Board will consider an inmate's written objections to a CRA report only if it finds the inmate has identified a "factual error". I believe these regulations define "factual error" in a way that screens out too many valid objections. Nor does the proposed regulation address "legal errors" the likes of which prohibits the use of and/or entry of specific information. Whether the "legal error" is identified by the inmate and/or by a senior staff member.

Objection #3:

03 The proposed regulations impose strict deadlines on inmates making objections, but they do not require Board officials to promptly address those objections. As proposed, the regulations would screen out an

inmate's appeal of a CRA if not raised at least 30-days before a hearing. However, the Board is not held to any deadline for providing a CRA in the first place. Nor is the Board required to act on a timely appeal until 10-days before the hearing. This is unacceptable, as it could delay appeal responses for many months and then allow no time to go to court, request a waiver in advance (45-days) of the hearing or possible retaining the services of a private psychologist to counter and/or provide a more accurate CRA. In most cases, inmates would have no meeting with their attorneys after receiving the Board's appeal response, except on the day of the hearing. Nor is it sufficient to send a copy of the "addendum to the inmate or attorney of record." The regulations must serve both parties simultaneously to avoid confusion and unnecessary delays associated with serving only one of the parties.

Objection #4:

The proposed regulations allow for past and/or recent "factual or legal errors" within CRA reports to remain in the inmate's file. Even if the Board agrees that the recent CRA report contains a "factual/legal" error, the report will not be expunged from the file unless the Board's Chief Psychologist decides that the error "materially impacted" the report's conclusions about the inmate's risk of violence. The regulation fails to address a "retroactive" application to address errors in past reports prior to any enactment of this regulation. As long as past or present reports stay in the file, it is common for Board panels or the Governor to rely on them to support a denial and/or a reversal. The same is equally applicable in allowing the courts to rely on them to uphold a denial of parole.

04

Objection #5:

The proposed regulations fail to ensure proper accommodations for inmates with disabilities and language barriers. Inmates who have trouble processing information or trouble expressing themselves would be required to answer questions that are beyond their capacities. The regulations do not ensure that inmates who speak limited English have access to certified in-person interpreters at their CRA interviews. Nor does the regulation require a written copy of the CRA to be provided in the inmate's native language. Without such protections, the inmate should be allowed to refuse to participate in the interview and/or object to a written CRA.

05

Respectfully submitted,

Michael Vitoy

MICHAEL VICTORY P-07048
CSP-SOLANO
BLDG.# 14-13-4-LOW
POB 4000
VACAVILLE, CA 95696

CSP SOLANO
STATE PRISON

LEGAL MAIL

U.S. POSTAGE PITNEY BOWES
ZIP 95687 $ 000.46[5]
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BOARD OF PAROLE HEARINGS
ATTN: HEATHER MCCRAY, SR. STAFF ATTY
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SACRAMENTO, CA 95812-4036

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DEC 19 2016
BOARD OF PAROLE HEARINGS

DEC 19 2016

95812#4036

16-01-43

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BPH
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1-01-43
Public
Comment

Folsom State Prison
Carlos Z. Montes D81378
P.O. Box 715071
Represa, Ca 95671

November 17, 2016

Jennifer Shaffer
Executive Officer
P.o. Box 4036
Sacramento, Ca 94812-4036

CDCR: D81378
Hrg Date: 12-6-24-18
Inst: FOL

Dear Ms. Shaffer,

As a member of the plaintiff class in Johnson vs. Shaffer, I write to oppose the proposed regulations regarding comprehensive risk assessments (CRA's) and submitted October 24, 2016 to the OAL.

01 1.) **The proposed regulations do not provide for options of tape recording the (CRA) Interview**

In case I wish to object being misquoted in a CRA report, having transcript of the (CRA's) report will enable me to appropriately object to any misquote.

02 2.) **The proposed regulations have a very narrow definition of what counts as a "factual error"**

That I can object to "factual error" is defined in a way that screens out to many valid objections.

03 3.) **The proposed regulations impose strict deadlines on prisoners making objections, but they do not require board officials to promptly address those objections.**

I am to file my written objections no later than 30 days before my hearing, but there is no guarantee that the board will provide me with the CRA report far enough in advance of the 30-days deadline so that I can do that (Meaning to file my objections).

04 4.) **The propose regulations allow error filed CRA reports to remain in my file.**

This can be misleading to the reader, for the board panels and or the governor can rely on the CRA even if the board agrees that the CRA contains "factual error"

05 5.) **The proposed regulations fail to ensure proper accommodations for prisoners with disabilities and language barriers.**

The proposed regulation do nothing to ensure that prisoners who speak limited English have access to certified in-person interpreters at their CRA interviews, and they do not require a written copy of the CRA to be provided in the prisoners native language. I believe the regulations should require these protections, and failure to provide these protections should be grounds for prisoners to object to a CRA report.

For these reasons, I strongly oppose the proposed regulations of October 24, 2016 and I respectfully urge you to take these regulations of the agenda, and please address all problems noted before voting on any revisions.

Sincerely, Carlos Z. Montes

FOLSOM STATE PRISON
CARLOS Z. MONTES D-81378
P.O. BOX 715071
REPRESA, CA 95671

OAKLAND CA 945
14 DEC 2016 PM 5 L

RECEIVED
DEC 19 2016
BOARD OF PAROLE HEARINGS

DEC 19 2016

JENNIFER SHAFFER
EXECUTIVE OFFICER
P.O. BOX 4036
SACRAMENTO, CA 94812-4036

95812-403636

16-01-44

December, 12, 2016

2016-18844

CDCR: P14415
Hrg Date: 1-5-17
Inst: SATF

BPH RN
1-01-44
Public Comment

Heather McCray, BPH Senior Staff Attorney

Ms. McCray, my name is David Helms P-14415. I recently received an unfavorable Comprehensive Risk Assessment (CRA), that was full of errors and misquotes.

I understand I'm allowed to state my objections to the proposed regulations that the BPH submitted to the Office of Administrative Law, regarding CRAs.

01 1. The proposed regulations do not provide for the option of tape-recording the CRA interview.

02 2. The proposed regulations have a very narrow definition of what counts as a "factual error" that you can object to.

03 3. The proposed regulations impose strict deadlines on prisoners making objections, but they do not require Board officials to promptly address those objections.

04 4. The proposed regulations allow error-filled CRA reports to remain in your file.

05 5. The proposed regulations fail to ensure proper accomodations for prisoners with disabilities and language barriers.

Thank you for your time and consideration

respectfully D. Helms

RECEIVED
DEC 19 2016
BPH CORRESPONDENCE

RECEIVED
DEC 19 2016

David Helms P-14415
E-4-205U S.A.T.F.S.P.
P.O.b. 5242 Corcoran, CA
93212-5242

CSATF/STATE PRISON AT CORCORAN
P.O. 5242
CORCORAN, CA 93212
NAME David Helms
NUMBER P-14415
HOUSING E-4-205U

LEGAL MAIL

Heather McCray, BPH Senior Staff Attorney
P.O. Box 4036
Sacramento, CA 94812-4036

STATE PRISON
GENERATED MAIL

16-01-45

2017-24050

BPH RN 6-01-45 Pub. Comment Received by email 12/19/16)

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Keith Wattley
Executive Director

December 19, 2016

Heather L. McCray
Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

VIA Electronic Mail to BPH.Regulations@cdcr.ca.gov

Re: Draft Regulations on Comprehensive Risk Assessments
Regulation Control Number: BPH RN 16-01

Dear Ms. McCray:

I am writing to reaffirm my strong objections to the draft regulations filed with the Office of Administrative Law on October 24, 2016. As a preliminary matter, we must object to the claimed necessity for this regulation. It is true that the *Johnson v. Shaffer* settlement requires a meaningful appeal process regarding the Board's use of Comprehensive Risk Assessments ("CRAs"); however, this requirement is only necessary because the Board has unlawfully determined that it should conduct psychological risk assessments for all prisoners appearing for parole suitability hearings. This has never been required and is, instead, an administrative preference on the Board's part. For this reason alone, the OAL should reject these regulations as unnecessary.[1]

---

[1] With this letter, I also urge you to explain to the Office of Administrative Law why the Board lied to that office when initially promulgating Section 2240 – by falsely claiming that the litigation in *In re Rutherford* (Marin Superior Court, No. SC 135399A) required the development of psychological risk assessments, and that there was a consensus among convened experts that the risk assessment tools should be used to evaluate life prisoners. As the Board was forced to concede in the *Johnson* litigation, there was no such consensus, and the *Rutherford* case did not create the necessity for these regulations; rather, the "necessity" was fabricated by the Board.

See Magistrate Judge's Order and Findings and Recommendations, dated October 31, 2013, attached as **Exhibit A**, at 18-19 ("Review of the record in *Rutherford* confirms that the substance of the FAD protocols was neither ordered nor approved by the *Rutherford* court, and that the issues presented in plaintiff Johnson's complaint fall outside the scope of the *Rutherford* litigation"); *see also* Magistrate Judge's Findings and Recommendations, dated December 2, 2014, attached as **Exhibit B**, at 4-5 (setting forth plaintiffs' allegations that "[BPH's] experts advised against use of these [risk assessment] tools," that "BPH mandated the use of these tools despite this expert advice," and that "BPH officials lied to the public and to the state's regulatory agency about the advice they had received from their expert consultants"), 19-22, 26 (finding that plaintiffs have

In any case, as counsel for the plaintiff class in *Johnson v. Shaffer*, I write both to object to the substance of the draft regulation and to reiterate my dismay about the way in which the Board has inexplicably disregarded many of the most serious objections already lodged and then lobbied the Board's Commissioners to approve the regulation without first providing them with adequate information about the concerns and interests of the class of 10,000 prisoners impacted by this regulation.

02

While the *Johnson v. Shaffer* settlement requires the Board to provide a "meaningful appeals process," the current draft is meaning*less*, as it expressly declines to address the most serious concerns prisoners routinely raise regarding the CRAs. Indeed, since setting forth its first draft of these regulations in late July 2016, the Board has refused to address the concerns repeatedly raised by plaintiff class members and other advocates as well as myself. These concerns, which I have made known to the Board many times, are outlined below.

OUR CONCERNS AND REQUESTS

1. The regulations should provide for *optional* audio recording of the CRA interview. We are not requesting that *all* CRA interviews be recorded, nor that they *all* be transcribed. We ask only that prisoners have the ***option*** of having their CRA interviews recorded; the recordings would then be transcribed in cases where disputes arise and an objective record would help resolve it. Prisoners would be free to decline the option of recording, and those who decline would not be able to request a transcript if they later dispute the CRA report.

03

We believe that the Board's refusal to create an objective record of CRA interviews, combined with its refusal to even *consider* objections based on false reports of inmates' statements (discussed below in #2), make the proposed appeals process practically meaningless. Further, we believe that optional audio recording would not only promote transparency and facilitate the resolution of factual disputes, but also deter factually groundless or frivolous objections.

Given that this is – by far – the most prominent concern among class members, your failure to justify your decision to not include this option is both baffling and completely unacceptable.

2. The regulations should define "factual error" to allow a broader range of meaningful objections, including those based on erroneous quotations. The proposed

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"sufficiently alleged the existence and knowing use by defendants of unreliable evidence"); see also District Court Order, dated May 14, 2015, attached as **Exhibit C**, at 2 (fully adopting Magistrate Judge's findings and rejecting the Board's objection to the findings, in which the Board did not deny – and thus officially conceded – all the uncontested allegations cited above).

definition would screen out too many important objections, including several frequently recurring issues that significantly undermine the quality and efficiency of parole hearings.

First, objectionable "factual errors" should include misquoted statements attributed to prisoners. These kinds of errors, which occur frequently, cause Commissioners to rely on an inaccurate record of a prisoner's insight and testimony. In many cases, these errors require Commissioners to engage in time-consuming and ultimately fruitless discussions with prisoners at parole hearings about what they did or did not say during their CRA interviews. As stated above, the availability of a recording and transcript would facilitate quick and decisive resolution of such disputes.

Second, "clinical diagnoses" and "expert opinions" should not be categorically shielded from objections. In cases where an evaluator's diagnoses or opinions in a CRA are *directly based on* obviously erroneous information, a prisoner should be able to object in writing to these diagnoses and opinions and get these objections resolved prehearing, sparing Commissioners the task of disentangling reliable from unreliable statements in the CRA.[2]

3. The regulations should apply reasonable deadlines to Board officials tasked with addressing pre-hearing objections. Under the proposed regulations, a prisoner must file written objections to a CRA report no later than 30 days before the upcoming hearing, or else he or she loses his right to raise those objections. Yet there is no guarantee that Board officials will provide the report far enough in advance of that 30-day deadline for him or her to do that.

Furthermore, under the proposed regulations, even if a prisoner files the objection far in advance of the 30-day deadline, Board officials are permitted to delay their written response until 10 days before the hearing. This is unfair and unacceptable, especially for prisoners who need to see how the Board will handle their objections before deciding whether to waive their hearings. The Board often rejects waivers not submitted at least 45 days before the hearing, which in many cases might be before a prisoner has received the CRA report or had objections addressed.

The regulations should require Board officials to respond to timely objections within a specified reasonable time frame. Stating that they should act "promptly," without specifying a clear deadline, does nothing to ensure this will happen. This deficiency undermines the core purpose of providing a pre-hearing process, which is to ensure objections are adequately resolved prior to the hearing so that Commissioners can rely with greater confidence on the record before them and focus on other substantive issues.

4. The regulations should ensure that erroneous CRA reports do not remain uncorrected in a prisoner's file. Under the proposed regulations, even if a Board panel agrees

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[2] As noted by the Board's Executive Officer: "An opinion is only as good as the facts and reasons on which it is based." Memorandum to Commissioners, dated January 26, 2006.

that a prisoner's CRA report contains factual errors, *the erroneous report will remain uncorrected* in the prisoner's file – *unless* the Board's Chief Psychologist finds that those errors "materially impacted" the report's conclusions about violence risk. In other words, if the Chief Psychologist believes the report's conclusions would be the same regardless of *acknowledged* errors, no action will be taken either to correct those errors or to remove the report from the prisoner's file.

08

Also, if a prisoner has "good cause" for raising his or her objection for the first time on the date of the parole hearing (instead of by the 30-day deadline), and the Board panel agrees that the CRA report contains factual errors, the panel is supposed to disregard the errors and complete the hearing – however, there is still *no requirement* to correct those errors or to remove the erroneous report.

09

Given that the prisoner and his/her attorney can address the error in person at the hearing (under subdivision (j) of the proposed regulations), one might wonder why this is an issue. Here is the problem: Even if one particular Board panel recognizes the errors and avoids relying on them, nothing prevents the Governor from relying on those errors to reverse the panel's decision. And nothing prevents *future* Board panels from being influenced by the same uncorrected errors – or from having to devote time during future parole hearings to clear up disputes around the same errors. To prevent this prejudicial and wasteful chain of events, the regulations should ensure that erroneous CRA reports are promptly removed – or, at the very least, purged of errors. The Board has never provided any reason not to modify or replace reports upon acknowledging they contain errors.

5. The regulations should ensure proper accommodations for prisoners with cognitive disabilities and language barriers. Under the proposed regulations, there are no provisions ensuring that CRA evaluation processes will be fair, accessible, and *reliable* for cognitively impaired prisoners and those with limited English.

At minimum, the regulations should establish that cognitively-impaired prisoners must not be assessed based on their ability to discuss issues beyond their cognitive capacities (e.g. insight, which is an abstract concept). Likewise, the regulations should establish that limited-English-speaking prisoners must have access to certified in-person interpreters at their CRA interviews, and to CRA reports translated into their native languages. These are bare minimum conditions for the CRA process to yield clinically sound and reliable reports.

10

We do not claim that the regulations should exhaustively define the accommodations to be provided, as these are governed in part by at least one other class action. We ask simply that these regulations, which will govern *all* CRA processes, recognize that *glaring* failures of accommodation during a CRA interview – no less than "factual errors" contained in a CRA report – are proper grounds for objection, and prisoners should be able to get these issues resolved prior to their parole hearings. Failures of accommodation result in unreliable evaluations, which serve no one's interests.

THE BOARD'S UNSATISFACTORY RESPONSES

Since receiving the Board's original draft of proposed regulations, I have repeatedly communicated to the Board my concerns about these issues, and I have found the Board's responses unsatisfactory – even disturbing. For your consideration, I am attaching as **Exhibit D** copies of my correspondence to and from the Board regarding the proposed regulations.

In response to the Board's original draft regulations, dated June 14, 2016, I provided extensive critical input in a letter dated July 14, 2016. Without acknowledging its receipt of my input, the Board then amended the draft in a way that completely failed to address – and, on some points, even aggravated – the central concerns outlined in this letter. The Board then scheduled this new draft, dated August 4, 2016, for approval by the Commissioners at its Executive Meeting on August 15, 2016 – neither notifying me of its decision to amend the draft regulations, nor alerting me of its intent to present them publicly for approval.[3]

In both meetings and written correspondence with me, the Board's officers refused to address my concerns and to remove the proposed regulations from the Executive Meeting agenda. Given the extremely short notice, I had no time to alert members of the plaintiff class about the proposed regulations, let alone to gather their input, prior to the Executive Meeting.

At the Executive Meeting on August 15, 2016, I publicly voiced my objections and concerns. Notably, several other advocates echoed my concerns at this meeting, both in person and through written comments; and the Commissioners raised their own concerns as well, stating that they needed more time and information to consider all the objections presented. To that end, the Commissioners voted to postpone discussion and approval of the proposed regulations until its next Executive Meeting on September 19, 2016.

In a letter dated August 15, 2016, counsel for the Board reiterated the Board's refusal to consider the issue of recording CRA interviews. Counsel correctly noted that the Amended Stipulated Settlement, which is binding on the parties, required a "*meaningful appeal process*" that would allow prisoners to object to factual errors in their CRA reports and require the Board to respond prior to the prisoners' parole hearings. Counsel also opined that the recording issue had already been presented to the Court and that, therefore, there was "no reason" to return to Court or reopen the issue. Counsel failed to recognize, however, that the process created by the proposed regulations – as drafted – would be far from "meaningful." Moreover, in refusing to consider the recording issue further, counsel contradicted the position she took before the Court at last year's fairness hearing.[4]

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[3] While the Board's conduct is not perceived as a personal affront, it was both offensive and unprofessional in light of my role as counsel for the class of 10,000 prisoners in the *Johnson* litigation, with whom they'd agreed to establish a meaningful appeal process.

[4] "MS. BLONIEN: I think the appeals process, our hope is also, can address any record problems … which is why it is important, I believe, to leave open the possibility of a recording. If we get into the appeals process, and there is a repeated problem of 'I didn't say this at the [CRA interview],' … the Board would be able to reconsider. THE COURT: It appears that would eliminate

At the Executive Meeting on September 19, 2016, despite numerous objections submitted by plaintiff class members, myself, and other advocates, the Board voted to approve the regulations as drafted and file them with the Office of Administrative Law.

SPECIFIC EXAMPLES AND OBJECTIONS TO REGULATION

12

To demonstrate the difficulty of appealing and correcting errors in CRA reports without an objective record of the clinical interview, I am attaching letters we previously sent to the Board regarding individual clients we represent (generically identified in **Exhibit F** as Clients A, B, C, and D). Since these letters contain client-specific information, and since I expect this correspondence to be included in your submission to the OAL along with all other comments and objections you have received, I have redacted all confidential or identifying information.

I am also aware that, in the period since the Board presented its draft regulations to the Commissioners on August 15 and September 19, 2016 and filed the draft with the OAL, *Johnson* plaintiff class members and many other interested parties have submitted scores of comments echoing the concerns I have repeatedly conveyed to the Board. Most significantly, there is a clear consensus among class members that the proposed definition of "factual error" is inadequate, that Board officers must be held to reasonable deadlines in responding to objections, and that optional recording of CRA interviews would play a vital role in ensuring the CRA process is fair and reliable.[5] My expectation is that you are considering and addressing each of these comments/objections, as well. We have received copies of objections sent to you by the following 29 individuals, all of whom expect their objections to be taken seriously: Mark Gardner (F-88030, Ironwood), Lenona Carlburg (El Cajon), Andre Sparks (H-37315, CMC), Shawn Hawk (J-99681, Folsom), Charles Jordan (B-54540, MCSP), Carlos Montes (D-81378, Folsom), Lee Robbins (E-69926, Folsom), Roger Rosenberg (D-36432, CHCF), Thomas Colt (E-63137, SQ), Ruben Radillo (H-25594, CSP-LAC), Jerald Johns (C-71995, SQ), Charles Truman (E-34112, SQ), Timothy Adams (H-72199, CCI), James Nivette, Ph.D. (V-08954, CTF), Mark Radke (E-70238, SQ), Phillip Stephens (B-85483, CIM), Orrin Carr (B-70020, CTF), George Bouras (E-02059, CHCF), Thomas Heilman (H-76785, CMC), Raymond Lambirth (B-83952, CTF), Maury O'Brien (F-70946, CTF), Marko Rogowski (H-27508, CTF), Kerry Lathan (H-29762, CHCF), Jimmie Stephen (C-56483, CMF), Elizabeth Wilson (re: Earl Wilson, D-21121, SQ), David Helms (P-14415, COR), Larry Rosser (K-26537, KVSP), Wendell Bigelow (K-66059), and Dennis Ott (J-78934).

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a lot of litigation." (*Johnson* Fairness Hearing Transcript, dated December 18, 2015, attached as **Exhibit E**, at 6.)

[5] Notably, in a 2010 report, the Office of the Inspector General found that the Board lacked reliable data to track factual errors in its psychological evaluations, and that further review was warranted to assess both the occurrence of factual errors and the soundness of clinical opinions in these evaluations. (See Office of the Inspector General, *Special Report: The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements*, July 2010.) To our knowledge, no such review has been conducted.

CONCLUSION

In the Notice of Proposed Action ("NOPA") regarding the Board's filing of these regulations with the Office of Administrative Law, the Board misrepresents the nature and effects of its proposed pre-hearing appeals process. Specifically, the Board asserts that these regulations "retain[] an inmate's right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician's observations, opinions, or diagnoses" – when, in fact, the proposed regulations define this "right" so narrowly as to be meaningless, shielding entire categories of commonly occurring errors from the pre-hearing appeals process. (NOPA, at p. 4.) As a result, contrary to the Board's assertions, the proposed regulations completely fail to ensure "greater accuracy" of risk assessments, fail to ensure that hearing panels will rely on "the most accurate information possible" when making parole decisions, and ultimately fail to "promote both inmate rehabilitation and better protection of public safety." (NOPA, at p. 4, 6.)

13

In light of the concerns I have outlined above, it is clear that the proposed regulations fail to discharge the Board's obligations under the *Johnson* settlement to establish a meaningful appeal process. Yet, despite my repeated objections, and despite the abundant comments submitted by plaintiff class members and other interested parties, the Board has refused to consider modifications to the regulations that would be essential to establishing a truly fair and effective pre-hearing appeals process. I remain hopeful that you will heed the input you have received and work with us to amend these regulations.

Sincerely,

Keith Wattley,
Counsel for *Johnson* Plaintiff Class

LIST OF EXHIBITS

Exhibit A	Magistrate Judge's Order and Findings and Recommendations, dated October 31, 2013, Pages 18-19
Exhibit B	Magistrate Judge's Findings and Recommendations, dated December 2, 2014, Pages 4-5, 19-22, 26
Exhibit C	District Court Order, dated May 14, 2015
Exhibit D	BPH/UnCommon Law Correspondence re: Draft Regulations
Exhibit E	*Johnson v. Shaffer* Fairness Hearing Transcript, dated December 18, 2015
Exhibit F	Four Individual Client Letters re: CRA Errors

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM JOHNSON,

Plaintiff,

v.

JENNIFER SHAFFER, et al.,

Defendants.

No. 2:12-cv-1059 KJM AC

ORDER AND FINDINGS AND RECOMMENDATIONS

On October 16, 2013, the court held a hearing on the following matters: (1) plaintiff's motion to compel discovery responses (ECF No. 25); (2) plaintiff's motion for class certification (ECF No. 29); and (3) defendants' motion for summary judgment (ECF No. 30). Keith A. Wattley appeared for plaintiff. Megan R. O'Carroll and Heather M. Heckler, California Deputies Attorney General, appeared for defendants. On review of the motions, the documents filed in support, upon hearing the argument of counsel and considering the subsequently-filed letter briefs, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Allegations of the Complaint

This action proceeds on the basis of the First Amended Complaint filed November 15, 2012 (ECF No. 18). Plaintiff Sam Johnson is a California inmate serving an indeterminate life sentence, who seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Plaintiff

contrary.

4. Adequacy of Representation

Adequacy of representation requires that "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In order for plaintiffs to adequately represent the putative class members, they must demonstrate, first, that they do not possess any conflicts of interest with the class members and, second, that both plaintiffs and their counsel will work to "prosecute the action vigorously" with respect to the entire class. Stanton, 327 F.3d at 957.

Defendants contend that plaintiff Johnson is not an adequate class representative because he was member of the petitioner class in In re Rutherford, No. SC13599A (Superior Court for Marin County). The Rutherford case preceded BPH's adoption of the FAD protocol, and challenged the BPH's backlog of delayed and overdue hearings. Those delays were caused in part by the failure of CDCR clinicians to produce timely psychological assessments for suitability hearings. According to defendants, the FAD assessment process was developed and adopted as part of the remedy ordered by the Rutherford court, and therefore cannot be challenged by a Rutherford class member under principles of judicial estoppel.

Plaintiff has provided excerpts of the Rutherford record to counter this argument, together with a declaration of counsel. Plaintiff Johnson's attorney in this case, Keith Wattley, also represented the petitioner class in Rutherford. Plaintiff Johnson argues first that he was not a member of the Rutherford class, as he was not yet eligible for parole at the time that class was certified and therefore did not come within the class definition. Plaintiff's supporting documents confirm this representation. Even if plaintiff had been a Rutherford class member, however, that fact would not defeat his adequacy as a class representative in this action because there is no conflict between the interests or obligations of the two classes.

Review of the record in Rutherford[8] confirms that the substance of the FAD protocols was neither ordered by nor approved by the Rutherford court, and that the issues presented in plaintiff

[8] See ECF Nos. 36-1 through 36-7 (submitted by plaintiff) and ECF No. 30-3 (submitted by defendants).

Johnson's complaint fall outside the scope of the Rutherford litigation. Rutherford was certified as a class action on November 29, 2004, six months after the individual habeas petition was filed. On February 15, 2006, the court granted the petition and the parties entered into negotiations regarding a remedial plan to eliminate the parole hearing backlog. The keystone of the remedial plan was the Lifer Scheduling and Tracking System ("LSTS"), which was created and implemented by stipulation. At the same time that the LSTS was being developed, the Board explored creation of a lifer psychological evaluation program that would facilitate the effort to provide timely hearings. Respondents committed themselves as part of the remedial plan to develop such a program, but actual program development proceeded unilaterally rather than by agreement with petitioners. Indeed, respondents denied any obligation to meet and confer regarding the new psychological assessment protocol. ECF No. 36-6 at 3. Petitioners objected during the course of the Rutherford litigation to various aspects of the new regime as it was developed and implemented. The Rutherford court agreed with respondents that the particulars of the new program did not require plaintiffs' input or court approval. At a hearing on May 10, 2007, the judge specifically ruled that respondents' selection of a particular risk assessment tool was beyond the scope of the remedial plan. She noted, "Obviously, if a risk assessment tool is used that denies procedural or substantive due process to any prisoner, that's going to be the subject of a separate application or proceeding, but the purview of this one is the timeliness of parole hearings." ECF No. 36-7 at 23.

The instant action is clearly the successor to Rutherford. Nothing about the positions taken by the Rutherford petitioners in that action, nor any stipulation or ruling binding on the Rutherford class, conflicts with the claims in this case or the interests of putative class members. To the contrary, the interests of the two classes are closely aligned. Moreover, the fact that plaintiff's counsel in this case represented the Rutherford class supports a finding that he will "prosecute th[is] action vigorously" with respect to the entire class. Stanton, 327 F.3d at 957 (noting counsel's successful prior advocacy on behalf of class members). Counsel's familiarity with parole issues generally, and more specifically with the history leading to the development of the FAD, suggests that he is in an excellent position to prosecute this action in the interests of the

EXHIBIT B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM JOHNSON,

Plaintiff,

v.

JENNIFER SHAFFER, et al.,

Defendants.

No. 2:12-cv-1059 KJM AC P

FINDINGS AND RECOMMENDATIONS

On November 12, 2014, the court held a hearing on defendants' motion for judgment on the pleadings. Keith Wattley appeared for the plaintiff class and Heather Heckler appeared for defendants. On review of the motion, the documents filed in support and opposition, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

I. PROCEDURAL HISTORY

Plaintiff Sam Johnson is a California inmate serving an indeterminate life sentence, who seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Defendants are the Governor of California, the Executive Officer of the Board of Parole Hearings ("BPH"), and other officials of the California Department of Corrections and Rehabilitation ("CDCR"). Plaintiff challenges the constitutionality of the protocol adopted by the Board of Parole Hearings' Forensic Assessment Division ("the FAD protocol") for the preparation of psychological

Board of Parole Hearings ("BPH"), and BPH Forensic Assessment Division ("FAD"), all of whom are sued in their official capacities only, deliberately adopted a protocol requiring inter alia the use of three risk assessment tools that they knew to be unreliable. According to plaintiff, "The primary purpose of establishing the FAD and implementing the new protocol was to prejudice lifers appearing before the Board by making it harder for them to obtain a favorable psychological evaluation, harder to obtain a favorable parole determination and harder to establish a favorable administrative record for challenging parole decisions in court." ECF No. 18 ¶ 29.

A. General Allegations

The BPH has long considered psychological evaluations when evaluating prisoners' suitability for parole, but prior to 2007 those evaluations were routinely conducted by mental health professionals on staff at the various institutions. In the spring of 2007, BPH issued a memo forbidding prison-based staff psychologists from conducting lifer evaluations and requiring a newly constituted FAD team to handle all of them. BPH hired its own FAD psychologists to prepare evaluations because evaluations prepared by prison-based clinicians were too often favorable to prisoners and too frequently supported judicial rejections of BPH decisions denying parole.

The FAD protocol requires the use of three specific risk assessment tools to predict future violence: the Psychopathy Checklist–Revised ("PCL–R"); the 20–item Historical, Clinical, Risk Management tool ("HCR–20"); and the Level of Service/Case Management Inventory ("LS/CMI"). In August 2006, BPH convened a panel of forensic psychologists and other experts to assess the validity of these tools for use in California's parole consideration process. The invited experts advised against use of these tools, on grounds they are scientifically unreliable and have not been validated for predicting violence among long-term prisoners like California lifers. BPH mandated the use of these tools despite this expert advice, knowing and intending that the tools would result in unreliable findings of dangerousness and thus provide a basis for denial of parole. BPH officials lied to the public and to the state's regulatory agency about the advice they had received from their expert consultants.

In late 2005 and early 2006, prior to the imposition of centralized FAD evaluations, the BPH had sought to limit the focus of prison-based psychological reports to the presence or absence of mental illness. The Board discouraged assessment of "remorse" and "insight" into the commitment offenses, on grounds these were matters for the commissioners to assess rather than proper subjects of psychological reports. However, Board findings regarding lack of insight were frequently criticized in judicial opinions, particularly where they were at odds with the reports of psychologists working in the institutions. The FAD protocol places renewed emphasis on the "clinical" evaluation of remorse and insight, despite BPH knowledge that these factors do not statistically correlate with risk in the lifer population and that clinicians are incapable of assessing such matters. The emphasis on remorse and insight in the FAD evaluations is intended to support parole denials and insulate them from judicial review.

Plaintiffs also allege that BPH established the FAD before attempting to promulgate regulations to authorize it. When BPH did attempt to promulgate such regulations, it lied about the opinions of its expert consultants to the state agency responsible for certifying compliance with the applicable rule-making procedures. BPH has continued to shield the FAD's systematic deficiencies and biases from public scrutiny. In July 2010, California's Office of the Inspector General ("OIG") issued a Special Report on BPH's Psychological Evaluations. The OIG determined that BPH has no system for tracking or otherwise monitoring the number of errors in psychological evaluations, no system for determining whether FAD psychologists are assessing higher levels of risk than were found in previous evaluations of the same prisoners, an inadequate oversight system for senior FAD psychologists to review the reports of FAD staff psychologists, and inadequate training of its psychologists. In essence, senior psychologists routinely rubberstamp staff psychologists' reports without verifying the validity of anything written. Due to these deficiencies, the OIG was unable to conduct the kind of review requested by the California Legislature, which provides oversight for BPH appointments and operations.

B. Specific Allegations

The named plaintiff, Sam Johnson, sets forth the facts of his own case to illustrate the impact of the FAD protocol on California parole-eligible life prisoners. Johnson is an inmate at

requirement of an unbiased decision-maker, and neither considered events outside the hearing room that had impermissibly influenced the decision-makers and the outcome. This court is not aware of any Supreme Court or Ninth Circuit authority holding that Due Process is satisfied by notice and an opportunity to be heard before a tribunal whose decisions are substantially determined by a biased process, nor have defendants cited any such cases to the court. Accordingly, this court does not conclude that Swarthout or Greenholtz overruled, sub rosa, well-settled authority requiring that in *any* hearing required by the Due Process clause, the opportunity to be heard must afforded before an unbiased adjudicator in an unbiased process. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (if parole revocation procedure includes a hearing, Due Process requires it occur before "a 'neutral and detached' hearing body"); In re Murchison, 349 U.S. at 136 (criminal contempt trial requires a judge who is not biased, and is free from the appearance of bias); O'Bremski, 915 F.2d at 422 (plaintiff "is correct in his contention that" under the Due Process Clause, "he was entitled to have his release date considered by a parole board that was free from bias or prejudice"); Sellars, 641 F.2d at 1303 (task of parole board officials is to render impartial decisions).

Even a decision-maker who harbors no personal biases cannot be considered "free from bias or prejudice," O'Bremski, 915 F.2d at 422, if her decision is pre-determined (or substantially influenced) by systematically biased inputs. What matters constitutionally is that the decisions are impartially rendered. Any source of bias that distorts the decision-making process – whether that bias arises in the minds of individual decision-makers or is generated by a psychological evaluation protocol skewed to support a particular outcome – is equally offensive to fundamental fairness. Parole decisions cannot reasonably be considered "impartial" if they are products of a biased protocol that favors a particular outcome. For these reasons, the undersigned concludes that plaintiffs state a Due Process claim by alleging that they were deprived of their liberty interest in parole by the state's use of an unfair and systemically biased parole determination process.

b. Sufficiency of the allegations

Defendants argue that even if a systemic bias claim were legally viable, the complaint

here does not sufficiently allege facts that would support it. The court concludes to the contrary that plaintiffs have sufficiently alleged the existence and knowing use by defendants of unreliable evidence, designed to implement their bias against parole.

Plaintiffs allege that the board itself "convened a panel of forensic psychologists and other experts to assess the validity of three risk assessment tools for use in California's parole consideration process." Complaint ¶ 25. That panel "argued *against* the BPH's use of" the protocol. Complaint ¶ 25 (emphasis added). The panel criticized the protocol because it "had never been validated for predicting violence among long-term prisoners like California's lifers." Complaint ¶ 25. Notwithstanding the panning the protocol received from the board's own experts, the board adopted the protocol. Complaint ¶ 32.

Plaintiffs further have alleged several ways in which the risk assessment tools are invalid. Among them, plaintiffs allege that the "PCL-R" is used recklessly "by inadequately-trained and inexperienced psychologists to predict violence." Complaint ¶ 22. They allege that "HCR-20" is "not a formal measurement instrument," even though defendants, knowing of this limitation, use it as a measurement instrument, and in any event, its use is not governed by any scientific standards or norms. Complaint ¶ 23. They allege that the "LS/CMI" is not a valid predictor of violence, yet that is what defendants use it for, knowing of its invalidity. Complaint ¶ 24. This sufficiently alleges a failure of due process, inasmuch as plaintiffs allege that this "knowing" reliance on invalid instruments that overstate inmates' risks of future violence, deprives them of a fair and unbiased hearing.

Defendants argue that plaintiffs "admit" that the PCL-R tool is "'only moderately predictive of future violence,'" and therefore that plaintiffs are conceding that the tool is valid because it provides "some measure of predicting an inmate's future violence." Motion at 19. Defendants' argument does not undermine plaintiffs' allegation that the tool is invalid. A tool that wildly overstates a risk of future violence for a hypothetical inmate with a miniscule, or statistically zero chance of future violence, provides "some" measure of prediction, but it is an *invalid* measure.

Defendants argue that plaintiffs concede that the HCR-20 tool is left to the psychologists'

"clinical judgment," and therefore fail to allege that its use is invalid. However, plaintiff alleges that these psychologists are "relatively inexperienced," and "untrained," such that their "clinical judgment" is no more accurate "than flipping a coin."

Defendants argue that plaintiffs concede that the LS/CMI tool "only moderately predicts general recidivism," even though it "has not been established to predict violence." They argue that plaintiffs are therefore conceding that the tool is valid. Plaintiffs are not conceding any such thing. Plaintiffs allege that the tool is invalid as a predictor of violence, and that it is nevertheless used as a predictor of violence.

Plaintiff has adequately alleged that these three tools are invalid. They further allege that defendants use these tools against them, knowing that they are invalid and that because of their invalidity, they over-predict risk. This, they allege, evidences defendants' systemic bias against parole.

Plaintiffs further allege that defendants rely on FAD reports that they know contain substantial errors. To the degree (if any) that plaintiffs claim a Due Process right to have only error-free consideration of their parole hearing, the claim is precluded because "there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." Greenholtz, 442 U.S. at 7. Once again, however, plaintiffs do not merely claim a right to error-free parole decisions. Rather, they allege that defendants know of the substantial errors contained in the FAD reports, but rely on them anyway in order to deny parole. This adequately alleges that defendants have a systemic bias against granting parole even when the inmate is entitled to it.[12]

In sum, these allegations are sufficient to allege that the board knowingly infected the

[12] Defendants repeatedly misread plaintiffs' allegations. They argue that the Complaint alleges that the panel of experts "did not reach *any* consensus concerning the appropriateness of the risk assessment instruments." ECF No. 55 at 20 (emphasis added). The Complaint does not allege that. It alleges, rather, that the board "lied" to the public by stating that the panel *had* reached a consensus "that these tools were appropriate." It then alleges that a member of the panel then stated that "the panel reached no *such* consensus." Complaint ¶ 26 (emphasis added). A statement that no "such" consensus – of the purported suitability of the protocol – was reached, is quite different than an admission that the panel "did not reach *any* consensus."

parole hearing process with a protocol that would over-predict the risk of future violence, thus skewing the entire process toward the denial of parole, even in cases where parole was warranted.

2. The right to a fair and unbiased parole panel

Named plaintiff Johnson alleges that in considering his individual parole application, the hearing panel relied upon a report created by Dr. Hayward. Complaint ¶ 39. That report contained nine substantial errors, with each error tending to support a conclusion that parole should be denied. Complaint ¶ 38. For example, the report claims that plaintiff "'had significant problems with previous violence, psychopathy (sic) and Antisocial Personality Disorder' prior to the commitment offense," even though none of that is true. Complaint ¶ 38(c).

Plaintiff further alleges that the board withheld from the deciding parole panel his correspondence pointing out the substantial errors. Complaint ¶¶ 40 & 74. The panel eventually learned of the communication "after the hearing had already begun," when plaintiff provided it to the "presiding commissioner." Complaint ¶ 40. Thereupon, the panel "actually agreed with Plaintiff that Dr. Hayward's report contained substantial errors." Complaint ¶¶ 39 & 74. Neither the panel nor the board itself sought a delay to consider the errors, nor required submission of a new or revised report, although the FAD protocol itself required it. Complaint ¶¶ 39, 74 & 80. Instead, the panel, knowing of the FAD report's substantial, uncorrected errors – all supporting the denial of parole – "simply overlooked" them, and relied on that report to deny plaintiff parole. Complaint ¶¶ 39, 74 & 80.

These allegations raise a strong inference that the panel itself was biased toward a denial of parole. It is reasonable to conclude that a neutral panel would have insisted upon revisions or a new report that was not plagued with substantial errors, all slanted toward the denial of parole. If no such report or revision was forthcoming, it is reasonable to believe that a neutral panel would not have relied on the flawed report it did receive -- or at least would have noted the panelists' objection, even if they felt compelled to rely on it. Since an inference of actual bias is reasonable from plaintiff's allegations, the court is obliged to draw it on this Rule 12(c) motion.

Defendants argue that plaintiff "does not allege that his 2009 Board panel was specifically biased against him," or that they "prejudged his case." ECF No. 55 at 17. It is true that plaintiff

VI. CONCLUSION

In summary, plaintiffs' complaint consists of two basic claims that survive the motion for judgment on the pleadings: (1) a Due Process violation predicated upon the denial of a fair and unbiased parole procedure (the "systemic bias" claim), as principally embodied in the First and Eleventh Claims; and (2) a Due Process violation predicated upon the denial of fair and unbiased parole panels, as principally embodied in the Tenth Claim. Claims Two, Three, Six, Seven, and Eight are construed not as independent causes of action but as additional factual predicates for the overarching bias claims.

For the reasons set forth above, the undersigned RECOMMENDS as follows:

(1) That defendants' motion for judgment on the pleadings be GRANTED as to Claims Four, Five, Nine and Twelve, and otherwise DENIED;

(2) That plaintiffs be granted 30 days of the date of this order to file an amended complaint alleging only the two remaining claims, or to file a statement that it will stand on the surviving claims of the current complaint s construed by the court; and

(3) That defendants' motion to dismiss defendants be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within twenty-eight days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 2, 2014

Allison Claire

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM JOHNSON, on behalf of himself and all others similarly situated,

Plaintiffs,[1]

v.

JENNIFER SHAFFER, et al.,

Defendants.

No. 2:12-cv-1059 KJM AC P

ORDER

Plaintiffs are a class of state prisoners represented by named plaintiff Sam Johnson proceeding through counsel with this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 3, 2014, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one days. Defendants have filed objections to the findings and recommendations and plaintiffs have filed a reply to

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[1] The class in this action was certified by order filed March 31, 2014. ECF No. 44. The caption in this action is hereby amended accordingly.

defendants' objections. In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case.

Defendants' sole objection is to the magistrate judge's finding that plaintiffs' tenth claim is sufficiently pled as to the entire class. The challenge contained in the tenth claim is to alleged systemic tribunal bias caused by defendants' practice of "routinely overlook[ing] or discount[ing] errors and omissions contained in negative psychological evaluations [while] emphasiz[ing] errors and omissions found in otherwise positive psychological evaluations in order to discredit their conclusions." ECF No. 18 at 22. Citing *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2552 (2011) and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009), defendants contend plaintiffs must "allege facts establishing significant proof of a general practice of bias" and that they have not done so. ECF No. 63. This objection is a variation on defendants' contention in opposition to plaintiffs' motion for class certification that plaintiffs had not satisfied the commonality requirement of Federal Rule of Civil Procedure 23(a)(2). *See* ECF No. 40 at 16-17. That argument was considered and rejected by the court when it certified the class in this action. *See* ECF No. 44 (adopting in full ECF No. 40). It is equally without merit here.

In sum, having carefully reviewed the file, the court finds the findings and recommendations to be supported by the record and by proper analysis. They will be adopted in full.

On April 15, 2015, the parties filed a joint request to modify the pretrial scheduling order filed in this action and to set a case management conference for August 7, 2015, to reschedule this action if they have not reached a settlement agreement. Good cause appearing, the motion will be granted. The court will set a further scheduling conference for August 13, 2015, which is the court's regular day for such conferences.

In accordance with the above, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed December 3, 2014 (ECF No. 62), are adopted in full;

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2. Defendants' motion for judgment on the pleadings (ECF No. 55) is granted as to Claims Four, Five, Nine and Twelve, and otherwise denied;

3. Plaintiffs are granted 30 days from the date of this order to file an amended complaint alleging only the two remaining claims, or to file a statement that they will stand on the surviving claims of the current complaint as construed by the court;

4. Defendants' motion to dismiss all defendants other than the Governor and the Executive Officer of the Board of Parole Hearings, is denied;

5. The parties' joint request to modify the pretrial scheduling order and set a case management conference (ECF No. 66) is granted;

6. The dates set in the pretrial scheduling order filed May 22, 2014 (ECF No. 51) are vacated; and

7. This matter is set for further status conference on August 13, 2015 at 2:30 p.m. in Courtroom # 3.

DATED: May 14, 2015.

UNITED STATES DISTRICT JUDGE

EXHIBIT D

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Keith Wattley
Executive Director

July 14, 2016

Jessica Blonien
Supervising Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 94244

VIA ELECTRONIC MAIL

Re: *Johnson v. Shaffer* Draft Regulations

Dear Ms. Blonien:

I am writing to comment on and request certain modifications to the draft regulations you provided to me on June 14, 2016, pursuant to the *Johnson* settlement agreement.[1]

First: A provision should be added to give each prisoner the option of having his or her interview with the psychologist audio recorded. In the event of an objection that challenges statements in the resulting report, the recording would be transcribed to assist in the resolution of the appeal. Inmates who decline to have their interviews recorded would also lose the ability to utilize the transcript to support their objections. As Judge Mueller has observed, the recording of these interviews provides the most critical piece of the appeals process. Furthermore, Dr. Kusaj acknowledged that there is no clinical reason to *not* record these interviews. He actually recognizes that it improves BPH transparency, which is exactly what we are seeking: "I'm not really opposed to it from a clinical perspective. In some ways, I think it would help us gain transparency because I really feel like we have nothing to hide in terms of the work that we do. So to some extent to make that more transparent would make it easier for me, I think, to defend our work." (See Jan. 12, 2015, Deposition Transcript, page 113.)

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[1] These comments should not be construed as endorsing the Board's use of risk assessment tools in the parole consideration process. Rather, these comments recognize that, at the time of its settlement, the *Johnson* litigation had not yet produced sufficient evidence of the type of systemic bias that would undisputably support the due process claims of the plaintiff class. Instead of pursuing that litigation to an uncertain outcome, the settlement reflects the parties' interest in ensuring as much fairness as possible in the use of the existing tools.

Second: The draft provides, "(a) Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. The psychologists shall consider the current relevance of any identified risk factors impacting an inmate's risk of violence. The psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence." However, an additional sentence should direct psychologists utilizing standardized risk assessment instruments to accommodate inmates with disabilities in order to ensure accuracy and reliability. Currently, a developmentally disabled or mentally ill inmate may be incapable of demonstrating the kinds of abstract thinking required to score well on certain instruments.

Third: The draft provides: "(b) When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in Penal Code section 3015, subdivision (f)(1)." This subdivision should be revised to clarify that the psychologist shall consider the *mitigating* effects of the enumerated "youth factors" – that is: ways in which a person's diminished culpability at a young age, and his or her subsequent growth and maturity over time, may operate to *diminish* the current risk of violence. This would help ensure that the regulations uphold the legislative intent of SB 260 and 261. Currently, psychologists sometimes use evidence of rule violations occurring at or after age 23 to override and negate the hallmarks of youth. This is not consistent with the spirit of these laws, particularly in light of the long-lasting effects of early incarceration on developing minds.

Fourth: The draft provides: "(e) (1) If an inmate, the inmate's attorney of record, or the prosecuting agency believes that a risk assessment contains a factual error that materially impacts the risk assessment's conclusions regarding the inmate's potential risk of violence, the inmate, attorney of record, or prosecuting agency may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing.

This provision should be revised to omit mention of "the prosecuting agency." Pursuant to the *Johnson* settlement, parole-eligible prisoners are to have a fair and reliable mechanism for challenging erroneous risk assessments that may adversely impact their liberty interests. These regulations are designed to protect the interests of parole-eligible prisoners, not the prosecuting agencies. By design, prosecuting agencies have a very limited role in these non-adversarial proceedings. Their role should not be improperly elevated by affording them rights to impact the underlying record or to potentially delay a previously-scheduled parole hearing.

In addition, the text should be revised so that a prisoner or prisoner's attorney may object based on the belief that "a risk assessment contains a factual error that ***bears material relevance to conclusions*** regarding the inmate's potential risk of violence." In turn, language should be added to clarify that a factual error is held to *bear material relevance* to such

conclusions if ***its existence would tend to influence a decision maker's findings regarding the presence or absence of one or more suitability factors***. That is, even if the risk assessment's author did not explicitly draw a faulty conclusion about risk based on the factual error, that factual error should still be treated as *bearing material relevance* – i.e., as problematic and requiring correction – if it is likely to influence a Board panel's reasoning about one or more suitability factors. These revisions would help to preserve the liberty interests at the heart of the *Johnson* litigation.

Further, requiring postmark or electronic receipt at least 30 days prior to the scheduled hearing only works if the Comprehensive Risk Assessment is received by the inmate and his/her counsel sufficiently in advance of that 30-day deadline to review the report, confer with each other and draft objections, as necessary. For example, the regulation should include a requirement that reports be received by inmates and counsel at least 65 days before the scheduled hearing. This would allow sufficient time for the review and meeting by inmates and counsel.

Fifth: The draft provides: "[(e) (1)] (A) For the purposes of this section, 'factual' is defined as information pertaining to the existence or nonexistence of a circumstance or event described in the risk assessment and does not include clinical diagnoses or the psychologist's expert opinions, findings, or conclusions.

"(B) For the purposes of this section, 'error' is defined as information for which there is no reliable source documentation or which is overwhelmingly refuted by other source documentation."

Here, it is not helpful to define "factual" and "error" as distinct terms. For all relevant practical purposes, subdivision (e) simply needs to make clear what constitutes a "factual error." A "factual error" should be defined as "an explicit or implicit finding as to the existence or nonexistence of a circumstance or event, for which there is no identified reliable source documentation or which is overwhelmingly refuted by other reliable evidence." Unlike the originally proposed text, this definition properly encompasses *errors of omission* as well as explicit errors, and it allows the existence of a factual error to be judged in light of the full range of reliable evidence that is available, not limited to "source documents."[2] Further, while the originally proposed text categorically shields clinical diagnoses and expert opinions from objections – even if they are clearly erroneous, this definition allows a prisoner to object specifically to those clinical diagnoses or expert conclusions that clearly and directly rely on factual errors.

Sixth: The draft provides: "(f) (1) Upon receipt of a written objection to an alleged factual error in the risk assessment, the Chief Counsel shall review the risk assessment and determine whether the risk assessment contains a factual error as alleged.

---

[2] This aspect of this concern could perhaps be addressed by properly defining "source documentation" in the regulation.

"(2) Following the Chief Counsel's review under paragraph (1) of this subdivision, the Chief Counsel shall take one of the following actions no less than 20 calendar days prior to the hearing:

"(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and notify the inmate, attorney of record, or prosecuting agency prior to the hearing.

"(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist."

The Chief Counsel's deadline to act (as set forth under paragraph (2)) should be set with reference to the date he or she receives the objection, *not* with reference to the hearing date. Subdivision (e) above, by requiring parties to submit objections no later than 30 days before the hearing, already ensures that the objection review process will not ordinarily be initiated unduly close to the hearing date. Thus, it would make most sense, and best promote efficiency, to require that the Chief Counsel review the objection and act on his or her determination "no later than 10 calendar days after receipt of the objection."

Reframing the expectation as such would create no new obligation for the Chief Counsel, and yet it would better ensure expedient processing even in cases where a prisoner has filed an objection well before the minimum 30-day window. Moreover, this framing ensures a clear understanding of the expected timeline in cases where the review process is initiated by the hearing panel under subdivision (i) after the hearing, rather than by a prisoner or prisoner's attorney prior to the hearing.

In addition, subparagraph (A) should be revised to clarify that, if the Chief Counsel finds no factual error, he or she must notify the objecting prisoner or prisoner's attorney by the same deadline (i.e., within 10 calendar days of receiving the objection). Under the current proposed text, it would be permissible for the Chief Counsel to make such a finding and issue a miscellaneous decision by the deadline, but then neglect to notify the prisoner or prisoner's attorney until five minutes prior to the hearing – which would be unacceptable.

Seventh: The draft provides: "(g) (1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment to determine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's potential risk of violence. The Chief Psychologist shall notify the Chief Counsel in writing of the determination.

Here, for reasons discussed under the fourth point above, paragraph (1) should be revised so that the Chief Psychologist is required to determine whether the factual error "*bears material relevance* to conclusions regarding the inmate's potential risk of violence." Also, the Chief Psychologist should be given a deadline to act. Five calendar days seems reasonable, given the 10-day period contemplated by subdivision (g) to encompass both the

Chief Psychologist's review (described in paragraph (1)) and the Chief Counsel's next steps (described in paragraph (2)). The text should be revised accordingly.

Eighth: "[(g)] (2) Upon receipt of the Chief Psychologist's determination, the Chief Counsel shall take one of the following actions no less than 10 calendar days prior to the hearing:

"(A) If the Chief Psychologist determined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and notify the inmate, attorney of record, or prosecuting agency prior to the hearing.

"(B) If the Chief Psychologist determined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, order a new or revised risk assessment, postpone the hearing if appropriate, and notify the inmate, attorney of record, or prosecuting agency."

The Chief Counsel's deadline to act should be set with reference to the date he or she receives the determination, not with reference to the hearing date. Five calendar days seems reasonable. Thus, subdivision (f) should be revised so that the Chief Counsel shall act "no later than 5 calendar days after receipt of the Chief Psychologist's determination."

Also, subparagraphs (A) and (B) should be revised to clarify the dates by which the Chief Counsel must take the actions described (including notification to objecting parties). For both, it makes sense to apply the same limit of 5 calendar days.

Further, for reasons discussed under the fourth point above, subparagraphs (A) and (B) should be revised to reflect that the Chief Psychologist's task is to determine whether the factual error "bore material relevance to conclusions" regarding risk of violence. In addition, references to the prosecuting agency should be removed.

Finally, subparagraph (B) should be revised to clarify: (1) the grounds on which the Chief Counsel shall decide whether to order a new or revised risk assessment; (2) in what circumstances it would be "appropriate" to postpone the hearing; (3) that a new or revised assessment should be prepared by a psychologist other than the one who prepared the erroneous report; and (4) that an objectionable risk assessment, once determined to contain a factual error that bears material relevance to conclusions regarding a prisoner's risk of violence, will be permanently removed from the prisoner's central file.

Ninth: The draft provides: "(i) (1) If an inmate raises an objection to an alleged factual error in a risk assessment for the first time at the hearing, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit the written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If

the inmate establishes good cause, the hearing panel shall proceed with either paragraph (3) or (4) of this subdivision.

"(2) For the purpose of this subdivision, good cause is defined as when an inmate did not and could not have known about the need to raise the objection earlier than when he or she did."

The definition of "good cause" should be revised to encompass situations where a prisoner, despite his or her best efforts, lacked an adequate opportunity to consult with competent counsel regarding the risk assessment and any necessary objections sufficiently in advance to meet the 30-day deadline. It should also account for situations in which, despite the prisoner's clear instructions, the prisoner's attorney failed to act on his or her behalf in raising the objection. In addition, rather than allowing for the automatic overruling of an otherwise worthwhile but untimely objection, the regulation should encourage the presiding commissioner to consider how close the appeal was to meeting the 30-day deadline, whether there was still sufficient time for a response from the Chief Counsel and Chief Psychologist, and whether the severity of the alleged error requires a full review notwithstanding its untimely submission.

Tenth: The draft provides: "[(i)] (3) If the hearing panel determines the risk assessment does not contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall overrule the objection and the hearing panel shall conduct the hearing."

"(4) If the hearing panel determines the risk assessment may contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section."

For reasons discussed under the fourth concern above, both paragraphs (3) and (4) should be revised so that the panel is required to determine whether the factual error "*bears material relevance* to conclusions regarding the inmate's risk of violence." Also, in paragraph (4), the panel should be given a clear deadline by which to make the referral. Five days seems reasonable. The text should be revised accordingly.

Eleventh: "[(4)] [(A)] If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the comprehensive risk assessment containing the alleged factual error and shall complete the hearing."

"[(B)] If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing pending the review process described in subdivisions (f) and (g) of this section."

Subparagraph (A) should be revised to clarify that the risk assessment will not be retained in the prisoner's central file or considered by future hearing panels without first

undergoing the review process initiated by the Board panel's referral. Subparagraph (B) should be revised to clarify that the hearing will be postponed to a date that would enable the review process described in subdivisions (f) and (g) to run its course.

Thank you for your consideration of these comments, and I look forward to discussing them with you in the near future.

Sincerely,

Keith Wattley

STATE OF CALIFORNIA EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

August 9, 2016

Keith Wattley, Esq.
Executive Director
UnCommon Law
220 4th Street, Suite 103
Oakland, CA 94607

Sent via post mail and email to: kwattley@uncommonlaw.org

RE: Response to *Johnson v. Shaffer* Plaintiff's Comments on Draft Regulations for Risk Assessments

Dear Mr. Wattley:

On July 14, 2016, the Board of Parole Hearings (board) received the comments that you provided regarding the board's draft regulations governing comprehensive risk assessments, following the settlement in *Johnson v. Shaffer*. We completed our review of your comments and suggested amendments.

The board accepted the following requests:

Third request: The board amended subdivision (b) to add "and their mitigating effects" to the requirement that clinicians consider youth offenders.

Fourth request: The board deleted "the prosecuting agency" from the parties able to use the pre-hearing process to challenge risk assessments.

Fifth request: The board combined the definitions of "factual" and "error" into a single definition for "factual error."

Sixth request: The board added requirements in subdivisions (f) and (g) that board responses to inmate risk assessments be transmitted to the inmate "promptly . . . but in no case less than 10 days prior to the hearing."

Eighth request: The board added language in subdivision (g) to clarify that the Chief Counsel shall postpone hearings "if appropriate under section 2253, subdivision (d) of these regulations." The board also added language in subdivision (g) stating: "Impacted risk assessments shall be permanently removed from the inmate's central file."

Ninth request: The board expanded the definition of good cause.

The board declined the following requests:

First request (declined in part): The board declines to audio record risk assessment interviews with the clinicians. This requirement would place a substantial burden on the board of having to purchase new recording equipment, catalog and store the audio recordings, and transcribe the recordings when issues arose. However, in an attempt to partially remedy plaintiff's underlying concerns, the board added subdivision (j) to retain an inmate's ability at a hearing to object to or clarify any statements attributed to the inmate or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

Second request (declined at this time): The board acknowledges its responsibility to accommodate inmates with disabilities during all portions of an inmate's hearing. However, the accommodation of disabilities is currently governed by a different class action law suit. The board intends to work with plaintiff's counsel in that suit in developing any regulations regarding disability accommodations.

Fourth request (declined in part): The board declines to adopt plaintiff's suggested language "bears material relevance to conclusions" regarding the inmate's risk of violence as well as plaintiff's suggested definition for "bears material relevance." The board finds this standard to be confusing and difficult to implement. Additionally, the board declines to extend the review of alleged errors to include "errors of omission" as this would provide essentially limitless bases on which to challenge risk assessments. The purpose of the pre-hearing review process is to correct risk assessments that contain actual errors that actually had a material impact on the clinician's conclusions, such that correction is necessary. However, as noted above, in an attempt to partially remedy plaintiff's underlying concerns, the board added subdivision (j) to retain an inmate's ability at a hearing to object to or clarify any statements attributed to the inmate or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

Fifth request (declined in part): The board declines to adopt plaintiff's suggested definition for factual error to include both "implicit and explicit" findings and delete the omission of clinical diagnoses and expert opinions. As noted above, the board declines to extend the review of alleged errors to include "errors of omission" because the purpose of the pre-hearing review process is to correct risk assessments that contain actual errors that actually had a material impact on the clinician's conclusions, such that correction is necessary. However, as noted above, in an attempt to partially remedy plaintiff's underlying concerns, the board added subdivision (j).

Sixth request (declined in part): The board declines to set deadlines based on when the board receives objections to risk assessments. However, as noted above, the board in part accepted this request by adding a requirement that board responses be transmitted promptly.

Seventh request (declined in full): For reasons stated above, the board declines to adopt plaintiff's language "bears material relevance to the conclusions." The board further declines to impose internal deadlines for the actions of the Chief Counsel and Chief Psychologist. Internal deadlines would have no impact on when an inmate would receive a response to risk

assessment objections; however, the internal deadlines restrict the board's flexibility to properly respond.

Eighth request (declined in part): For reasons stated above, the board declines to impose internal deadlines for the actions of the Chief Counsel and Chief Psychologist or to adopt plaintiff's language "bears material relevance to the conclusions." The board further declines to regulate the grounds on which the Chief Counsel must decide whether to order a new versus a revised risk assessment as this is a determination that must be individually made on a case by case basis, depending on the errors alleged and the impact of those errors.

Tenth request (declined in full): For reasons stated above, the board declines to adopt plaintiff's language "bears material relevance to the conclusions." The board also declines to regulate the deadline by which a panel must complete a referral to the Chief Counsel as this will generally be completed at the end of the hearing, but may occasionally be postponed to the following day due to unforeseen complications, such as equipment failure.

Eleventh request (declined in part): The board declines to adopt plaintiff's request to remove from the central file any risk assessments referred by panels to the Chief Counsel. Until the risk assessment has completed the review process following the panel's review, the allegations of error remain allegations only. Before a panel may continue with a hearing following a determination that the risk assessment may contain factual errors materially impacting the assessment's conclusions, the panel is required to disregard the alleged errors and any conclusions affected by the errors. This requirement provides the necessary protection to the inmate, while still resulting in a review of the risk assessment. However, as noted above, the board added language in subdivision (g) stating: "Impacted risk assessments shall be permanently removed from the inmate's central file." This provision clarifies that, when a panel refers a risk assessment and the board finds it contains factual errors that materially impacted the conclusions, the risk assessment will, at that time, be removed.

The board also declines to regulate scheduling deadlines in this regulation package as schedulers are already required to schedule hearings in manner that allows for completion of necessary pre-hearing requirements.

The board appreciates your comments as well as the opportunity to further improve the clarity and accuracy of our regulations for comprehensive risk assessments.

Sincerely,

HEATHER L. MCCRAY
Senior Staff Attorney
Board of Parole Hearings

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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August 15, 2016

Keith Wattley, Esq.
UnCommon Law
220 4th Street, Suite 103
Oakland, CA 94607

RE: *Sam Johnson v. Jennifer Shaffer, et al.*
United States District Court, Eastern District of California, Case No. 2:12-cv-01059-KJM

Dear Mr. Wattley:

On August 12, 2016, you emailed the Board asking that the proposed regulations in response to the *Johnson* settlement agreement not be presented to the full Board for consideration. You also suggested that we return to the Court to address Plaintiffs' request that interviews with psychologists for comprehensive risk assessments be recorded. There is, however, no reason to return to Court as this issue has already been presented to the Court under an Amended Stipulated Settlement which does not contain a recording requirement. The Amended Stipulated Settlement was given final approval by the Court and is binding on the parties. Plaintiffs agreed to the Amended Stipulated Settlement and jointly moved the Court for approval, without requiring that interviews with psychologists be recorded. There is no reason to reopen negotiations on this final settlement.

As you know, we discussed this proposal for recordings several times in negotiating the Amended Stipulated Settlement but never agreed to a recording. You also raised concerns about recording psychologist interviews at the final fairness hearing before the Court. After further discussions and negotiations, we jointly filed a Proposed Finding of Fact in Response to Objections to the Amended Stipulated Settlement. In the Proposed Findings, the parties *jointly* stated:

> Inmate class members raised concerns about factual errors in comprehensive risk assessments and requested that psychologist interviews be recorded. Defendants do not currently have a practice of creating audio recordings of psychological interviews, and the parties have not agreed to make such recordings a component of the Amended Stipulated Settlement. However, the proposed Settlement requires a meaningful appeal process (to be established by regulations) through which individual prisoners who find factual errors in the Board's risk assessments may

submit timely written objections, to which the Board must respond in a timely manner in advance of that prisoner's parole consideration hearing. Further, Defendants are not prevented from allowing recording of risk assessment interviews in the future.

The recording issue was again discussed last week when the parties met regarding the proposed regulations, and while the Board has given serious consideration to the issue, the Board maintains that the meaningful appeal process is sufficient to allow prisoners to address any factual errors in their risk assessments, and a recording is unnecessary at this time. Because this issue has already been presented to the Court, and the parties agreed that the Amended Stipulated Settlement should be granted final approval without a recording requirement, there is no reason to return to court. Defendants intend to move forward in their efforts to comply with the Amended Stipulated Settlement.

Sincerely,

JESSICA N. BLONIEN
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

JNB:

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32560794.doc

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Keith Wattley
Executive Director

September 16, 2016

Jennifer Shaffer
Executive Officer
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

VIA Electronic Mail

Re: *Johnson v. Shaffer* Draft Regulations

Dear Ms. Shaffer:

As counsel for the plaintiff class in *Johnson v. Shaffer*, I am writing to reiterate my objections to the draft regulations presented at the Board's Executive Meeting on August 15, 2016. In addition, I write to express profound dismay about the non-transparent way in which these draft regulations have been developed without stakeholder input, scheduled for a vote without proper notice to the plaintiff class, and presented to the Commissioners without providing them with any information at all about the interests of plaintiff class members.

To date, the Board has refused to acknowledge the longstanding and pervasive issues I have raised in my repeated requests for modification – in my letter dated July 14, 2016, in my meeting with you on August 9, 2016, and at the Board's Executive Meeting on August 15, 2016. It is my hope that you will reconsider your position, heed the abundant critical input from plaintiffs and advocates, and work with us to develop a fair and meaningful draft of the regulations – a draft that would better promote the transparency and legitimacy of the Board's Comprehensive Risk Assessment procedures and would be consistent with the letter and spirit of the *Johnson* Settlement.

As you are well aware, any system or procedure that lacks legitimacy is guaranteed to invite resistance and spawn objections, giving rise to costly delays and further litigation. This being so, we believe it is not only in the interests of fairness, but also in the Board's own interest to address the issues we have repeatedly raised and now restate in this letter.[1]

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[1] With this letter, I am attaching 62 letters I received from class members stating their objections to the draft regulation. There is a striking amount of agreement about the most disturbing aspects of the proposal – none of which have you sought to address in the latest revision.

OUR CONCERNS AND REQUESTS

1. The regulations should provide for audio recording of the CRA interview. We have requested that *some* CRA interviews be recorded, and only that *some* of those be transcribed. Prisoners would have the ***option*** of having their CRA interviews recorded, with transcription only in cases where disputes arise and an objective record would help resolve it. Prisoners would be free to decline the option of recording, and those who decline would not be able to request a transcript if they later choose to dispute the CRA.

We believe that the Board's refusal to create an objective record of CRA interviews, combined with its refusal to consider objections based on misattributed statements (discussed below in #2), make the proposed appeals process practically meaningless. Further, we believe that optional audio recording would not only promote transparency and facilitate the resolution of factual disputes, but also deter factually groundless or frivolous objections.

In light of your rejection of this proposal, I have offered another alternative, which is discussed in a separate letter written this date. (See my other letter dated September 16, 2016.) That alternative involves transcribing only those interviews for which the Presiding Commissioner or the Chief Counsel finds that a transcription will aid them in determining the existence of a factual error.

2. The regulations should redefine "factual error" to allow a broader range of meaningful objections, including those based on erroneous quotations. The proposed definition would screen out too many important objections – including commonly recurring issues that, if adequately addressed, could significantly expedite parole hearings.

First and foremost, objectionable "factual errors" should encompass misquoted statements. These kinds of errors, which occur frequently, require Commissioners to engage in time-consuming and ultimately fruitless discussions with prisoners at parole hearings about what they did or did not say in their CRA interviews. As stated above, the availability of a recording and transcript would facilitate quick and decisive resolution of such disputes.

Second, "clinical diagnoses" and "expert opinions" should not be categorically shielded from objections. In cases where an evaluator's diagnoses or opinions in a CRA are *directly based on* obviously erroneous information, a prisoner should be able to object in writing to these diagnoses and opinions and get these objections resolved prehearing, sparing Commissioners the task of disentangling reliable from unreliable statements in the CRA.[2]

3. The regulations should apply reasonable deadlines for Board officials tasked with addressing pre-hearing objections. Under the proposed regulations, a prisoner must file written objections to a CRA no later than 30 days before his upcoming hearing, or else he/she loses the right to raise those objections. Yet there is no guarantee that Board officials will provide the CRA report far enough in advance of that 30-day deadline for him to do that.

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[2] As a previous Executive Officer noted, "An opinion is only as good as the facts and reasons on which it is based." (Memorandum to Commissioners, dated January 26, 2006.)

Furthermore, under the proposed regulations, even if a prisoner manages to file the objection months in advance of the 30-day deadline, Board officials are permitted to delay their written response until 10 days before the hearing. This is unfair and unacceptable, as it provides no time for prisoners to meet and confer with counsel after receiving the BPH response to consider a waiver or alternative action.[3] The Board often rejects waivers not submitted at least 45 days before the hearing, which in many cases would be before a prisoner has received the CRA or had his/her objections addressed.

The regulations should explicitly require Board officials to respond to timely objections within a reasonable time frame. Stating that they should act "promptly," without specifying a clear deadline, does nothing to ensure this will happen. This deficiency undermines the core purpose of providing a prehearing process, which is to ensure objections are adequately resolved prior to the hearing so that Commissioners can rely with greater confidence on the record before them and focus on other substantive issues.

4. The regulations should ensure that erroneous CRA reports do not remain uncorrected in a prisoner's file. Under the proposed regulations, even if a Board panel agrees that a prisoner's CRA report contains factual errors, *the erroneous report will remain uncorrected* in the prisoner's file – *unless* the Board's Chief Psychologist finds that those errors "materially impacted" the report's conclusions about violence risk. In other words, if the Chief Psychologist believes the report's conclusions would be the same regardless of those acknowledged errors, no action will be taken either to correct those errors or to remove the report from the central file.

Further, if a prisoner has "good cause" for raising his objection for the first time on the date of his parole hearing (instead of by the 30-day deadline), and the Board panel agrees that there the CRA report contains factual errors, the panel is supposed to disregard the errors and complete the hearing – however, there is still *no requirement* to correct those errors or to remove the erroneous report.

You may wonder why this is an issue, given that the prisoner and counsel can address the error in person at the hearing (under subdivision (j) of the proposed regulations). Here is the problem: Even if one particular Board panel recognizes the errors and avoids relying on them, nothing prevents the Governor from relying on those errors to reverse the panel's decision. Further, nothing prevents future Board panels from being misled by the same uncorrected errors – or from having to devote time during future parole hearings to clear up disputes about the same errors. To prevent this wasteful and prejudicial chain of events, the regulations should ensure that erroneous CRA reports are promptly removed – or, at the very least, purged of inaccuracies.

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[3] Appointed counsel, and most privately-retained counsel, do not meet with their clients in the last ten days prior to a hearing.

5. The regulations should ensure proper accommodations for prisoners with cognitive impairments and language barriers. Under the proposed regulations, there are no provisions ensuring that CRA evaluation processes will be fair, accessible, and *reliable* for cognitively impaired prisoners and those who speak limited English.

At minimum, the regulations should establish that cognitively impaired prisoners must not be assessed based on their ability to discuss issues beyond their cognitive capacities (e.g. insight, which is an abstract concept). Likewise, the regulations should establish that limited-English prisoners must have access to certified in-person interpreters at their CRA interviews, and to CRA reports translated into their native languages. These are bare minimum conditions for the CRA process to yield clinically sound and reliable reports.

We do not claim that the regulations should exhaustively define the accommodations to be provided, as these are governed in part by other class action suits. We ask simply that these regulations, which will govern *all* CRA processes, recognize that *glaring* failures of accommodation during a CRA interview – no less than "factual errors" contained in a CRA report – are proper grounds for objection, and prisoners should be able to get these issues resolved prior to their parole hearings. Failures of accommodation result in unreliable evaluations, which serve no one's interests.

THE BOARD'S UNSATISFACTORY RESPONSES

Since receiving the Board's original draft of proposed regulations, we have repeatedly communicated to the Board our concerns about these issues, and we have found the Board's responses unsatisfactory – even disturbing.

In response to the Board's original draft regulations, dated June 14, 2016, I provided extensive critical input in a letter dated July 14, 2016. The Board then amended the draft in a way that partly addressed some of my minor requests, but completely failed to address – and, on some points, even *aggravated* – the central concerns outlined in this letter. The Board then scheduled this new draft, dated August 4, 2016, for approval by the Commissioners at its Executive Meeting on August 15, 2016 – neither notifying me of its decision to amend the draft regulations, nor alerting me of its intent to present them publicly for approval. To be clear, the decision not to inform me would be insignificant if I were not counsel for the class of 10,000+ parole-eligible prisoners, whom you have not adequately considered in this process.

After seeing the Board's publicly posted Executive Meeting agenda and its new draft regulations, I met with you and Jennifer Neill on August 9, 2016 to discuss my concerns in detail. Both at this meeting and in a letter also dated August 9, 2016, you refused to address my concerns or to remove the proposed regulations from the Executive Meeting agenda. Given the extremely short notice, I had no time to obtain input from members of the *Johnson* plaintiff class about the proposed regulations prior to the Executive Meeting. On August 12, 2016, I once again requested that the regulations be removed from the Executive Meeting agenda, and I suggested that we revisit the issue of audio recording CRA interviews, even if it required filing a joint request that the District Court afford more time for promulgation of the regulations.

At the Executive Meeting on August 15, 2016, I publicly voiced my objections and concerns. Notably, several other advocates echoed my concerns at this meeting, both in person and through written comments; and the Commissioners raised their own concerns as well, stating that they needed more time and information to consider all the objections presented, as you had not provided the Commissioners with any information regarding the disputes underlying the draft regulations. To that end, your draft regulations failed to get the requisite votes to proceed. Instead, the Commissioners voted on a separate motion to postpone discussion and approval of the proposed regulations until its next Executive Meeting on September 19, 2016.

In a letter dated August 15, 2016, counsel for the Board reiterated that the Board refuses to reconsider the issue of recording CRA interviews. Counsel correctly notes that the Amended Stipulated Settlement, which is binding on the parties, requires a "*meaningful appeal process*" through which prisoners can object to factual errors in their CRA reports and the Board must respond prior to the prisoners' parole hearings. Curiously, counsel also opined that the recording issue was already presented to the Court and, therefore, there is "no reason" to return to Court or reopen the issue. Counsel failed to recognize, however, that the process created by the proposed draft regulations – in their current form – would be far from "meaningful." Moreover, in refusing to consider the recording issue further, counsel contradicts the position the Board's counsel stated in Court at last year's fairness hearing.[4]

INPUT FROM PLAINTIFF CLASS MEMBERS

Since the Commissioners' decision to postpone consideration of the regulations, dozens of class members have submitted comments that reinforce the concerns I have repeatedly communicated to the Board. Most significantly, there is an overwhelming consensus among class members that the proposed definition of "factual error" is inadequate, that Board officers should be held to reasonable deadlines in responding to objections, and that some recording of CRA interviews would play a vital role in ensuring the CRA process is fair and reliable.[5]

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[4] "MS. BLONIEN: I think the appeals process, our hope is also, can address any record problems or anything, which is why it is important, I believe, to leave open the possibility of a recording. If we get into the appeals process, and there is a repeated problem of 'I didn't say this at the [interview],' … the Board would be able to reconsider. THE COURT: It appears that would eliminate a lot of litigation." (Fairness Hearing Transcript, dated December 18, 2015, at 6.)

[5] It bears noting that, in a 2010 report, the Office of the Inspector General found that the Board lacked reliable data to track factual errors in its psychological evaluations, and that further review was warranted to assess both the occurrence of factual errors and the soundness of clinical opinions in these evaluations. (See Office of the Inspector General, *Special Report: The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements*, July 2010.) To our knowledge, no such review has been conducted.

CONCLUSION

In light of the concerns I have outlined here, as well as the comments provided to you by plaintiff class members and other advocates, it is clear that the proposed regulations are unacceptable in their current form. As drafted, they fail to discharge the Board's obligation under the Amended Stipulated Settlement to establish a *meaningful* appeal process.

As noted above, I hope you will heed the input you have received from the public, particularly from plaintiff class members, and work with us to amend the proposed regulations before presenting them for the Commissioners' approval. In addition to the due process rights of plaintiff class members, the efficacy and legitimacy of the Board's procedures are at stake.

Sincerely,

Keith Wattley,
Counsel for Plaintiff Class

Attachments:
Copies of Class Member Objections
Received by UnCommon Law

UnCommon Law

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Keith Wattley
Executive Director

September 16, 2016

Jennifer Shaffer
Executive Officer
Board of Parole Hearings
1515 K Street
Sacramento, CA 95812

Re: Draft CRA Regulations and a Recording Alternative

Dear Ms. Shaffer:

We have received more than 60 objections from class members to the proposed CRA regulations, and I know you have received even more than we have. In many ways, those objections echo those we have raised with you directly over the past couple of months, and I have submitted written objections and comments about those in a separate letter today. All the comments we received strongly urge some version of a recording requirement to improve the reliability of the risk assessments. For this reason, I am writing to you separately now to address this issue and propose what I believe is a reasonable compromise.

As I understand it, your position is that recording and transcribing the interviews would be an unnecessary expense and would cause unnecessary delays because it would not substantially aid the process of assessing prisoners' risk.[1] However, in light of the concern – deeply held by others –that recording could be the single most important element of an effective process for correcting certain errors, failing to find a way to address this concern seriously jeopardizes the chances the proposed regulation will survive review by the Office of Administrative Law. In an attempt to find a way forward on this issue, I propose the following compromise:

> The regulation should provide that all the CRA interviews will be recorded; however, a recording would only be transcribed in cases where the presiding commissioner or Chief Counsel finds it necessary in determining whether or not a factual error exists. This way, it would be left to the hearing commissioner to decide whether a transcript would help him or her assess someone's risk.

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[1] I will reiterate that we have never advocated for transcribing ***all*** the recordings. Reference to such a huge number of transcripts is a straw man argument that unnecessarily exaggerates the potential costs of recording.

The benefits of this option are several:

- Commissioners retain discretion to weigh CRAs and assess credibility without a transcript.
- No automatic transcribing of interviews, but still empowering Commissioners to use the most reliable information if they think it would aid in their assessment of risk.
- No back-and-forth before the hearing about whether or not it should be transcribed (prisoners could still allege errors in their reports and the Board could still correct such errors prior to the hearing, but there wouldn't be the back-and-forth that might delay the hearings).
- No exorbitant costs (digital recorders cost $30 or $40 apiece; digital storage of the files costs virtually nothing).
- The CRA appeals process becomes more meaningful and more consistent with the letter and spirit of the *Johnson* Settlement.

Lastly, I must emphasize that all class members strongly object to your decision to *define out* of "factual error" the scenario in which a psychologist falsely reports a prisoner's statement. In addition to basic logic and common sense precluding such defining out, this decision drastically reduces the chances that this regulation will pass muster with the Office of Administrative Law. Furthermore, it is almost certain that the *Johnson* Court will find that such a provision completely frustrates the Settlement in that case. For this reason, I strongly urge you to reconsider that decision.

Notwithstanding the other concerns we have with the draft regulations, I believe that correcting these two items will substantially improve this draft. **Accordingly, BPH Commissioners are strongly urged to make a MOTION to modify your draft CRA regulation in the following way:**

1. **Include in the definition of "factual error" a psychologist's false reporting of a prisoner's statement.**
2. **Require recording of CRA interviews and give Commissioners and Chief Counsel the discretion to transcribe the recordings if they find it necessary to determine the existence of a factual error.**

Thank you for your consideration.

Sincerely,

Keith Wattley

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE KIMBERLY J. MUELLER, JUDGE

---o0o---

SAM JOHNSON, on behalf of himself and all others similarly situated,

Plaintiffs,

Vs. CASE NO. 2:12-CV-1059 KJM

JENNIFER SHAFFER, et al.,

Defendants.
_____/

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: FAIRNESS HEARING
FRIDAY, DECEMBER 18TH, 2015 - 10:00 A.M.

For the Plaintiffs: UNCOMMON LAW
220 4th Street, Suite 103
Oakland, California 94607
BY: KEITH ALLEN WATTLEY,
ATTORNEY AT LAW

For the Defendants: STATE OF CALIFORNIA,
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 125
Sacramento, California 95814
BY: JESSICA NICOLE BLONIEN,
DEPUTY AG

Reported by: CATHERINE E.F. BODENE, CSR #6926, RPR
Official Court Reporter USDC, 916-446-6360
501 I Street, Room 4-200
Sacramento, California 95814

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

SACRAMENTO, CALIFORNIA - FRIDAY, DECEMBER 18, 2015 - 10:00 A.M.

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THE CLERK: Calling Civil Case 12-1059, Johnson versus Shaffer, et al. On for Final Fairness Hearing.

MR. WATTLEY: Good morning, Your Honor. Keith Wattley for Sam Johnson and plaintiff class.

THE COURT: Good morning, Mr. Wattley.

MS. BLONIEN: Good morning, Your Honor. Jessica Blonien for defendants.

THE COURT: Good morning, Ms. Blonien.

I have really just a few questions, and they all relate to the risk assessment.

First, just on this issue of whether or not that session should be recorded, I note that the parties appear to leave that possibility open. The State says that could happen at some point in the future.

So that I'm clear, pending any decision by the State, what record is created that allows an inmate to challenge anything that occurred?

If he thinks there were errors during that session, what kind of record does he have?

MR. WATTLEY: The only record is the report written by the psychologist.

THE COURT: So no transcription?

MR. WATTLEY: No transcription. It used to be the

practice that the psychologist would record these, but apparently they're not allowed to anymore.

THE COURT: That's by virtue of regulation?

MS. BLONIEN: I wasn't aware of that. No. What I think originally happened was the risk assessments used to be done by corrections employees -- Department of Corrections employees, and then through the Rutherford Class Action, they moved to the Board. And my belief is -- Keith, you can correct me -- is that since they have been done by the Board, they have never been recorded.

MR. WATTLEY: My understanding is it has been basically up to the individual clinician. There is no regulation prohibiting it, which is why, you know, we contemplated in the settlement that it is something that could be revisited fairly easily with the parties, if that seemed to be an appropriate way to resolve within the context of the appeals process we're establishing here.

MS. BLONIEN: The clinicians do take notes also as they're conducting the interview.

THE COURT: What some of the objectors appear to be asking for is just -- I mean, whatever, just pushing a button or hitting an icon to start an audio recording.

MS. BLONIEN: I think what they really want, and some of them, I think, were more clear, is they want a recording and transcription.

Especially for the inmates, you know, a recording isn't necessarily so helpful because they're limited in the property they can possess, so making use of a recording is difficult.

THE COURT: But a recording is, at least, a starting point.

MR. WATTLEY: In fact, you know, some of the discussions that we've had with the class members and with the defendants played out several different scenarios and ways that recordings could be requested.

There could be an option of a recording. The prisoner could elect not to have it recorded. Some may not want that. But a lot of those details, we weren't able to reach agreement before now, and we drafted the settlement in a way that leaves that as a possibility out there. But in considering whether as a matter of constitutional law we could succeed in obtaining an order to that effect, we thought it best to not pursue that at this time.

THE COURT: All right. And I'm not questioning the arm's length nature of the negotiations. I'm just trying to take account of what the objectors have said, and there are a significant number of objectors.

So then with regard to the assessments as well, is there anything in the record before me that rebuts the showing that experts advised the Board in 2007 that the risk assessment instruments were not effective for lifers?

MR. WATTLEY: Actually, what the record shows is that they did not agree that these had been found to be valid, which is not exactly the same as saying that they've been found to be invalid.

And they also were clear, the ones who have spoken up and expressed to the Board and to counsel in this case, that they didn't reach a consensus, as had been represented by defendants, as to use of these tools.

MS. BLONIEN: Really what I believe happened there, it was just a misuse of a word, that they said we reached a consensus, and this is our agreement on what tests will be used, when in actuality it was a rank vote that was taken.

So everybody ranked the tests. Like this is number one, this will be number two, this will be my number three. And from that ranking then they pulled the tests. So it wasn't a unanimous consensus. It was, you know, from the rank vote we took the top.

MR. WATTLEY: What I anticipate within the context of the appeals process that we establish here is that any individual class member could raise a concern or an objection to the way the tools have been used to reach a factual determination in his or her individual case. If that's an error, the appeals process provides a means for resolving that.

THE COURT: That's why they care about the record?

MR. WATTLEY: Yes. Exactly.

MS. BLONIEN: I think the appeals process, our hope is also, can address any record problems or anything, which is why it is important, I believe, to leave open the possibility of a recording.

If we get into the appeals process, and there is a repeated problem of "I didn't say this at the hearing," or whatever, the Board would be able to reconsider.

THE COURT: It appears that would eliminate a lot of litigation.

MR. WATTLEY: I agree.

THE COURT: Potentially.

MR. WATTLEY: I agree.

THE COURT: So just so I'm clear on the assessments, you're not saying that the instruments have been validated or found reliable or proper for use in predicting potential recidivism?

MR. WATTLEY: That's right. Plaintiff's counsel is not saying that.

THE COURT: You're not saying that either?

MS. BLONIEN: Well, we do agree. We do believe that.

THE COURT: That they have been validated?

MS. BLONIEN: Yes.

THE COURT: Through this ranking process?

MS. BLONIEN: No. There have been studies done, and

they haven't been done specifically on California life inmates, but they have been done on long-term inmates. And there has been quite a few studies and quite a few journal articles that discuss the tests and the reliability and validity of them.

But for purposes of filing joint papers, we instead focused on the intent element of the claim, which was that the tests were intentionally selected because they were biased and intended to reduce the parole grant rates.

THE COURT: There is nothing the plaintiffs found?

MR. WATTLEY: There's been nothing produced so far to that effect.

THE COURT: All right. But nothing to bar settlement on the terms presented to the court?

MR. WATTLEY: That's right.

THE COURT: Well, so is any of this in the record before me currently?

MS. BLONIEN: It is not.

THE COURT: All right.

MS. BLONIEN: We could file supplemental briefing.

THE COURT: My inclination is to ask for some focused supplemental briefing. It could even be a joint statement to further clarify the record on this point. To clarify -- you know, it could be almost proposed findings of fact to clarify exactly what the posture was before the Board, this ranking. Just clarifying the point you just made, Mr. Wattley, that it

is not that the instruments were not effective, but that there wasn't consensus that they were.

Isn't that the language that you used?

MR. WATTLEY: Right. I think the experts who were convened did not recommend that they be used. And their concerns were that they had not been found to be valid predictors of future violence in a population of California's lifers.

And they had different preferences of different tests that should be used. There really wasn't an agreement. But ultimately the defendants chose the three that we have been talking about for the last couple of years. But there is strong disagreement about whether they should be used.

THE COURT: Right. That's where a process is contemplated to work through that --

MR. WATTLEY: Yes.

THE COURT: -- given the authority of the State. And I understand that.

I would be most comfortable with a little more in the record on that issue for me to consider before I make a final decision regarding approving.

So I can either provide for briefing or a joint statement or findings of fact.

I do want to at least understand some of what the State is pointing to in terms of the studies that it believes show the

tests have been found reliable for use with this population.

So what would be your preference given what you are hearing from me? Separate briefing or some kind of joint statement or proposed findings of fact?

MR. WATTLEY: Well, you know, the preference would be to agree on some joint briefing. The nature of the dispute might make that -- it will make it very difficult, frankly.

THE COURT: What I understand you to be saying is that given the lack of clarity, that that actually argues for the settlement, but there is more of a record to be created, and that's why the process is contemplated to flush out?

MR. WATTLEY: I think that's exactly right.

THE COURT: So if that's what's going on, I think -- I accept that as a general matter. But, again, given the objections, I would like to review the way you would articulate that in writing. That would ultimately be available to the objectors for them to see what the court has relied on if I do follow through and approve the settlement.

MR. WATTLEY: I think we can do that in a joint statement.

MS. BLONIEN: Yes, I agree.

THE COURT: All right.

I guess my only other question, I think it may be touched on with my prior questions and your answers, there is a procedure for objecting to factual errors?

MR. WATTLEY: Yes.

THE COURT: So factual errors. What about conclusions?

MR. WATTLEY: Well, the way we drafted the amended stipulation is that the factual errors are to be defined by the regulation that we establish. Because we had difficulty agreeing on what that language should be, and felt like as we work out regulations in a meaningful way can establish an appeals process so that we can define what those errors may be.

But clearly if the psychologist makes a finding that is not supported anywhere in the record, that would be -- in our opinion that would be considered a factual error.

THE COURT: So factual errors would encompass conclusions?

MS. BLONIEN: I think if there were any factual errors found, the conclusion would necessarily have to be reconsidered.

THE COURT: All right.

MS. BLONIEN: If the basis of it is lacking. It might change. If it's an inconsequential factual error, the conclusion might remain the same, but it would at least have to be considered.

THE COURT: All right. So the assumption is that agreement that you are articulating here would be reflected in a regulation?

MR. WATTLEY: Yes.

THE COURT: All right. I have no other questions. Anything else you want me to know?

Mr. Wattley?

MR. WATTLEY: I don't think so. I think we have covered it in the brief and today's discussion.

THE COURT: Miss Blonien?

MS. BLONIEN: No. Nothing further.

THE COURT: How much time would you need to present the joint briefing that we just discussed?

MS. BLONIEN: Three weeks with the holidays? I'm going to be around. Four weeks?

MR. WATTLEY: Three weeks would be plenty. We're going to try to do it --

THE COURT: So then within 21 days you'll file that joint briefing. There will be a minute -- the minutes will reflect that you are doing that. I'll not issue an order. I'll wait for that. If I have further questions after reviewing it, I'll let you know.

MS. BLONIEN: All right. Thank you.

MR. WATTLEY: Thank you.

THE COURT: Thank you very much.

THE CLERK: Court is in recess.

(Off the record at 10:26 a.m.)

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REPORTER'S CERTIFICATE

---o0o---

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

IN WITNESS WHEREOF, I subscribe this certificate at Sacramento, California.

/S/ Catherine E.F. Bodene
CATHERINE E.F. BODENE, CSR NO. 6926
Official United States District Court Reporter

EXHIBIT F

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Keith Wattley
Executive Director

November 23, 2016

Jennifer Shaffer
Executive Officer
Board of Parole Hearings
P.O. Box 4036
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VIA Electronic Mail

Re: BPH Response to CRA Appeal for [redacted]

Dear Ms. Shaffer:

I write regarding the Board's response to my CRA appeal letter dated October 18, 2016, (attached as **Exhibit A**), written on behalf of [redacted]). In that letter, I outlined eight objections to factual errors in Dr. [redacted]'s September 26, 2016 Comprehensive Risk Assessment (CRA) report. The Board's response was inadequate.

The Board did replace Dr. [redacted]'s original CRA report with a revised CRA report (attached as **Exhibit B**) and issued a miscellaneous decision (attached as **Exhibit C**) supposedly documenting its remedial actions. However, in its miscellaneous decision, the Board failed to acknowledge the multiple errors it corrected when revising the report, and it misstated the number and nature of those errors it admitted to correcting. Further, in its letter explaining its response to each of my eight objections (attached as **Exhibit D**), the Board provided no lawful explanation for refusing to correct all the other factual errors identified in my appeal letter.

Since the Board's official response to my CRA appeal has been inadequate and inaccurate, I respectfully request a new response that includes: (1) a revised CRA report that fully remedies all the factual errors identified in my letter, and (2) a new miscellaneous decision that accurately documents all the factual errors I identified in the original report and all the corrections the Board has made in fixing some of those errors, as well as all the new corrections it will make to remedy the defects remaining in the revised report.

These requested actions are necessary not only to ensure that all parole decision makers (the Board, the Governor, and the courts) have before them a reliable record in Mr. [redacted] case, but also to establish an accurate written record of all the errors and corrections that have affected both the original and the revised versions of Dr. [redacted]'s CRA report.

SUMMARY OF ISSUES

In my October 18, 2016 letter to the Board, I set forth eight objections to various errors in Dr. [redacted]'s September 26, 2016 CRA report. Below is a summary of these objections and the Board's different responses to each set of objections.

Objections 1, 2, and 3 concerned Dr. [redacted]'s *erroneous reporting of Mr.* [redacted] *statements about his social and emotional history* (namely his early education, childhood development, and sibling relationship). These errors resulted in factually inaccurate claims about past and recent events in Mr. [redacted] life. The revised CRA reflects a correction of *one* of these errors: a claim about how old he was when he stopped throwing temper tantrums. (See Ex. B, at 4.) However, in its official response, the Board has neither documented the fact that it made this one correction, nor explained its failure to make the other two corrections.[1] Instead, the Board simply opines, despite common sense and without legal authority, that each of Dr. [redacted]'s false claims about Mr. [redacted] statements "is not a factual error." (See Ex. D, at 1.) To justify this position, the Board simply declares that objections to a psychologist's errors in quoting an interviewee "do not rise to the level of identifying factual errors in the CRA *absent additional evidence* as to which statements were discussed during the interview." (See Ex. D, at 1 [my emphasis].) But unless and until the Board allows audio recording of CRA interviews, this position essentially means that its psychologists may misquote interviewees with impunity.

Objections 5, 7, and 8 concerned Dr. [redacted]'s *erroneous reporting of Mr.* [redacted] *statements about his current state of mind* (namely his expressed attitude toward recovery and self-help, his attitude toward violence, and his acceptance of responsibility). These errors involved numerous inaccurate quotes and paraphrases throughout the report that were completely unsupported by the record and were contradicted by other statements in the same report. (See Ex. A, at 3-5.) In its official response, the Board simply claims – again, without legal authority – that these errors by Dr. [redacted] constitute expert opinions and therefore "do not rise to the level" of factual errors that warrant correction. (See Ex. D, at 2.) The Board gives no real explanation of its refusal to address the *factual* grounds of my objections – despite the documentation I provided – and these errors remain uncorrected in the revised CRA. The Board's response suggests an unlawful policy of insulating its psychologists' conclusions from *any* objections, even when those conclusions are based on a flawed, incomplete, or irresponsible reading of the record.

Objection 6 concerned Dr. [redacted]'s *erroneous reporting of Mr.* [redacted] *statements about his parole plans*, which she supposedly relied on to conclude he has no such plans and therefore has a "poor" prognosis on parole. The revised CRA report duly reflects the documentation I submitted with my appeal letter, verifying that Mr. [redacted] does have parole plans and therefore has a "favorable" prognosis on parole. Significantly, the revised CRA report also acknowledges that, upon release, Mr. [redacted] will have access to services provided through the Parole Outpatient Clinic as well as SSI benefits – facts that were true at the time of Dr. [redacted]'s original report. (Ex. B, at 14-15.) Yet, in its official response, the Board has not acknowledged the erroneous omission of these facts in the original report, which – combined with Dr. [redacted]'s erroneous reporting of Mr. [redacted] statements – led to an unduly negative assessment of his post-release prospects. Neither the miscellaneous decision nor the Board's response letter admits that these omissions constituted errors, nor that they bore significant impact on Mr. [redacted] estimated risk. (See Ex. C, Ex. D at 2.)

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[1] Oddly, although the Board has refused to correct Dr. [redacted]'s erroneous claims denying that Mr. [redacted] has a good relationship with his brother, the revised CRA reflects consideration of evidence sent with my appeal that his brother is fully supportive of him. (See Ex. B, at 20.)

Objection 4 concerned Dr. [redacted]'s *erroneous reporting of the facts surrounding Mr. [redacted] life crime*, including: (1) the replication of a clerical error in the Probation Officer's Report (POR); (2) the confusing omission of different crime partners' names in summarizing the life crime as described in the Probation Officer's Report; and, as a result, (3), the critical misattribution of one crime partner's conduct to Mr. [redacted]

The first of these issues, the clerical error, was based on a typing mistake in the POR that affected a single word: that is, mistakenly replacing the word "wallet" with "rifle." This error had the important, but limited, impact of mischaracterizing one piece of evidence found at the crime scene. The revised CRA report duly corrects this error (Ex. B, at 6), and the miscellaneous decision properly states that Dr. [redacted] "referenced an inaccurate statement in the Probation Officer's Report." However, the miscellaneous decision improperly claims that "as a result" of *this* clerical error, the psychologist "mischaracterized Mr. [redacted] involvement in the life crime." (Ex. C.) ***This is false***. This clerical error, and the evidence it referred to, had zero bearing on Mr. [redacted]'s role in the life crime. Dr. [redacted]'s report misrepresented [redacted] [redacted] role in the life crime <u>*not*</u> because of any error in the POR, but because of Dr. [redacted]'s own careless approach to describing facts that were clearly and accurately outlined in the POR.

Indeed, while the POR and underlying police reports clearly state that it was Mr. [redacted] crime partner [redacted] – not Mr. [redacted] – who directly killed the victim, Dr. [redacted] *removed* all the names that repeatedly appear in the official account, constructing a version of the crime that raised groundless doubts as to whether Mr. [redacted] directly engaged in violence. Thus, it was not *because of* the POR, but rather *in spite of* it, that Dr. [redacted] depicted the crime as a series of unattributed actions by mostly unidentified actors. Unlike the discrete (and unrelated) clerical mistake acknowledged in the miscellaneous decision, Dr. [redacted]'s careless manner of describing the crime originated with *Dr.* [redacted], and it had the pervasive effect of creating needless ambiguity about who did what at the crime scene. Significantly, Dr. [redacted] became confused by her own careless accounting of the facts, and at one point in the original report she actually swapped Mr. [redacted] role in the crime with that of his crime partner [redacted], leading to the false attribution of Mr. [redacted] violent acts to Mr. [redacted] (See Ex. A, at 2-3.)

Although the revised CRA report contains a prefatory note claiming that this problem was fixed – i.e., that "[m]ore identifying specific information was integrated in various sections of the report" – the revised report still contains *numerous* references to unidentified actors committing different acts at the crime scene, so that it is still far from clear who did what. (See Ex. B, at 7-8 [repeatedly replacing specific names provided in the POR with generic descriptors such as: "one of the perpetrators," "one person," "the identified person," "one of the assailants," "another offender," "an assailant," "the perpetrator," "one of the other men," "two of the assailants"].) Meanwhile, the Board's miscellaneous decision mischaracterizes and minimizes this problem by conflating it with a separate clerical error, and by suggesting that Dr. [redacted]'s errors arose as a result of her *reliance* on the POR, as opposed to her *distortion* of it. (See Ex. C.)

Finally, the pervasive and highly prejudicial nature of Dr. [redacted]'s approach in describing the life crime, by definition, *must* have impacted her "clinical" findings about Mr. [redacted] remorse for the crime, his full acceptance of responsibility for his role in the crime, his overall "proclivity" for violence, and his overall credibility in testifying about the crime. Yet, in addition to failing to fully clarify Dr. [redacted]'s muddled description of the life crime, the revised CRA report fails to modify any of these impacted findings about Mr. [redacted]

CONCLUSION

For the reasons outlined above, the revised CRA report reflects the Board's failure to address all the errors identified in my appeal. The Board's response further reflects a failure to document all the errors and corrections that have affected both the original and revised reports. In its miscellaneous decision, the Board stated that it found "one" factual error in the original report: "Specifically, the clinician referenced an inaccurate statement in the Probation Officer's Report and, *as a result*, mischaracterized Mr. [redacted] involvement in the crime" [my emphasis]. This statement falsely conflates a minor clerical error (which originated from a typo in the POR) with Dr. [redacted]'s pervasively erroneous account of the crime (which resulted from muddling facts that were clearly set forth in the POR). This statement also fails to account for all the errors that the Board found worthy of correcting, as reflected by multiple edits made in revising the report.

Therefore, I respectfully request (1) a revised CRA report that fully remedies all the factual errors I have identified, and (2) a new miscellaneous decision that accurately reflects the history of this appeal and all subsequent revisions.

Thanks for your attention to these matters. I look forward to your prompt response.

Sincerely,

Kony Kim,
Attorney for Mr. [redacted]

cc: [redacted]

LIST OF EXHIBITS

Exhibit A	CRA Appeal Letter for [redacted], dated 10/18/2016
Exhibit B	Revised CRA Report for [redacted], by Dr. [redacted], dated 11/8/2016
Exhibit C	BPH Miscellaneous Decision, dated 11/15/2016
Exhibit D	BPH Letter re: CRA Appeal for [redacted], dated 11/15/2016
Exhibit E	Letter by BPH Chief Psychologist Dr. [redacted], dated 11/8/2016

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Executive Director

October 18, 2016

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VIA Electronic Mail

Re: Appeal of Comprehensive Risk Assessment for [redacted]

Dear Ms. Shaffer:

I write regarding Dr. [redacted]'s September 26, 2016 Comprehensive Risk Assessment (CRA) report, prepared for [redacted], who is housed at [redacted]. Dr. [redacted]'s report (attached as **Exhibit A**) contains several errors, some of which are significant and have clearly had a material impact on Dr. [redacted]'s clinical analysis and conclusions.

These errors warrant remedial action prior to Mr. [redacted] next parole suitability hearing, currently scheduled for November 30, 2016. Specifically, I request that Dr. [redacted]'s erroneous CRA report be removed from Mr. [redacted] central file and replaced with a new, error-free report. At the very least, the report should be accompanied by an addendum that clearly identifies all errors, explains their material importance, and cautions readers against relying on the report's materially impacted conclusions.

FACTUAL ERRORS

1. **Early education.** On page 3, Dr. [redacted] writes that Mr. [redacted] "sometimes had a private tutor" *as a child*. This is false. Mr. [redacted] never made such a claim, and nothing in the record substantiates it. As Dr. [redacted] correctly notes on pages 2 and 15, Mr. [redacted] family was extremely poor, and they never had the resources to hire a private tutor for him. Since the record does show that Mr. [redacted] received individual tutoring *as an adult* in prison, it is likely that Dr. [redacted] was confused about the timing of this event and erroneously reported Mr. [redacted] statements about it. (See Parole Hearing Transcript Decision Pages, dated 5/1/2014, attached as **Exhibit B**, at 104-105 [referring to tutoring received in prison].)

2. **Childhood development.** Dr. [redacted] erroneously reports the timing of at least two specific occurrences in Mr. [redacted] youth, as related by Mr. [redacted] First, on page 3, Dr. [redacted] writes that he was "seven years old" when he began to run away from his group home

placement. This is false. Mr. [redacted] told Dr. [redacted] he was nine when this happened, based on his knowledge that at least a year had passed between his arrest and the incidents in question.

Second, on page 4, Dr. [redacted] writes: "Mr. [redacted] related that he didn't stop exhibiting temper tantrums until he was approximately 15 years old. At that time, he began expressing his anger and rage in other ways, including drinking large amounts of alcohol." This is false. Mr. [redacted] told Dr. [redacted] that he stopped his tantrums soon after he was committed to [redacted] State Hospital, when he was about 12 years old. At that time he shut off his emotions. Then, upon returning home at age 15, he began to express anger through drinking.

3. Relationship with his [redacted] On page 5, Dr. [redacted] writes that Mr. [redacted] "relationship with his [redacted] is on 'shaky' ground." This is incorrect. Mr. [redacted] told Dr. [redacted] that their *pattern of correspondence* has been "shaky," since [redacted] cannot accept collect calls and is able to write only occasionally. However, their *relationship* is and has been stable and positive, and Mr. [redacted] did not state otherwise to Dr. [redacted]

The record indeed confirms that, as conveyed by [redacted] documented letter to the Board and correspondence with Mr. [redacted] attorney, [redacted] fully supports his brother and is ready to provide him with emotional support upon parole. (See Ex. B, at 107-108, 127 [referring to [redacted] letter to Board, multiple phone calls with counsel, and demonstrated commitment]; Support Letter by [redacted], dated 4/30/2014, attached as **Exhibit C**.)

4. Record of the commitment offense. On pages 6 through 8, under the heading of "Prior Violence," Dr. [redacted] purports to summarize Mr. [redacted] life crime as documented in official records. Her summary contains at least two outright factual errors – and, moreover, it conflates the actions of Mr. [redacted] and his crime partners, creating needless ambiguity about essential facts that the underlying record has made crystal clear.

First, on page 6, Dr. [redacted] writes that a "rifle was found" in the victim's house. This statement is false, replicating what is evidently a clerical error in the Probation Officer's Report ("POR"). The POR states: "A rifle was found which had been rifled containing no money." (See Probation Officer's Report, dated [redacted], attached as **Exhibit D**, at 6.) On its face, this statement makes no sense. Had Dr. [redacted] read the underlying police reports attached to the POR, she would have seen that it was an empty *wallet*, not a rifle, that had been "rifled" through and that police found in the victim's house. (See Police Reports, dated [redacted], attached as **Exhibit E**, at 12, 16, 21 [references to empty wallet].)

Second, on page 7, Dr. [redacted] writes that after the victim had been assaulted and tied up, "Mr. [redacted] [sic] two co-offenders then reportedly began searching the bedroom and the rest of the house." This is false. According to the POR and all the underlying police reports, it was Mr. [redacted] and his crime partner [redacted] who searched the house for money while the other crime partner [redacted] held the victim down on a bed and fatally assaulted him. (See Ex. D at 8, 10-14; Ex. E at 2, 5, 7, 21, 23-24.) This is a *crucial* detail because it establishes that Mr. [redacted] is not the person who directly killed the victim, and that he has testified truthfully on this point over the years. Unfortunately, in addition to getting this essential fact wrong, Dr. [redacted] further muddies the record by writing: "Before leaving the bedroom, *one crime partner* observed *a fellow assailant* punch the victim's head, push him

into the mattress, and place a pillow over his head" (emphases added). Taken together with the previous false statement, this latter statement leads to the false conclusion that Mr. [redacted] was the "assailant" who stayed in the bedroom to fatally punch and suffocate the victim. The record clearly shows he was not. (See also Sentencing Court Transcript, dated [redacted], attached as **Exhibit F**, at 5 [counsel confirming that "Mr. [redacted] did not personally inflict the serious bodily harm" and was not the one "who actually [did] the killing"].)

Indeed, as a whole, Dr. [redacted]'s account of the life crime creates needless factual confusion about who did what during the commission of the crime. The POR and all the underlying police reports clearly identify [redacted] as the person who assaulted and directly killed the victim, [redacted] as the person who tied up the victim with a cord, and Mr. [redacted] and [redacted] as the ones who searched the house for money. (See Ex. D at 8, 10-14; Ex. E at 2, 5, 7, 21, 23-24.) Yet Dr. [redacted] *removes* the names and identities that repeatedly appear in the official account, constructing a version of the crime that raises groundless doubts as to whether Mr. [redacted] engaged in physical violence. Combined with the two outright factual errors identified above, this characteristic of Dr. [redacted]'s account makes her assessment of Mr. [redacted] violence risk misleading and unreliable.

5. Attitude toward addiction recovery and self-help. On page 12, Dr. [redacted] writes that Mr. [redacted] "does not see himself continuing" with AA/NA and the other self-help groups he has been attending, and that "the 12 Steps … 'mean nothing' to him." Similarly, on page 16, Dr. [redacted] writes that he is "not interested" in maintaining "positive relationships with substance abuse professionals"; and on page 20, she writes that he expressed to her a "lack of interest in participating in substance abuse recovery treatment and in internalizing the 12 Steps." These claims are incorrect: Mr. [redacted] did not make such statements or express such sentiments to Dr. [redacted], and she is in error about his attitude on these matters.

Since before his 2014 hearing, Mr. [redacted] has voluntarily attended AA and other self-help groups, has never planned to stop attending, and has never stated otherwise. During the past year, he has voluntarily written to numerous reentry and transitional housing programs that are focused on substance abuse recovery, including many that encourage or *require* AA attendance, to express his interest in enrolling upon his release. Several programs have responded with letters recognizing his interest and providing him guidelines for enrollment. (See Service Provider Letters, dated 5/16/2016 to 10/4/2016, attached as **Exhibit G**.)

6. Existence of parole plans. On page 14, Dr. [redacted] writes that Mr. [redacted] "has no plans for parole," and that he "candidly related" this to her. Specifically, she writes that he has "no plans" to secure housing, sources of income, substance abuse recovery support, or health services. On pages 19-20, Dr. [redacted] repeats these claims. These claims are in error.

As noted under point 4 above, for the past year Mr. [redacted] has been researching and writing to transitional housing programs and other reentry service providers across California. Although he received *firm* offers of housing and services just weeks after Dr. [redacted] interviewed him, for at least a year prior to the interview he had already been communicating with service providers in order to plan for his parole. (See Ex. G, particularly the letters dated 9/21/2016 [confirming housing in a Sober Living Environment]; 10/3/2016

[confirming access to a full slate of reentry services]; and 10/4/2016 [confirming housing in a transitional program that requires AA attendance.) Accordingly, Mr. [redacted] did tell Dr. [redacted] that he had yet to receive a *firm* offer of housing or program enrollment, but he never made the false statement that he had "*no* plans" for parole.

7. Allegedly "violent" attitudes and associations. On page 16, Dr. [redacted] writes that Mr. [redacted] has "violent attitudes," that he "has been consistently involved with violent peers," and that his alleged involvement in violence began "early in life." On page 21, Dr. [redacted] reiterates twice that Mr. [redacted] has a "proclivity for violence." These attributions contradict all the available evidence and are unsubstantiated by any statement of Mr. [redacted] They reflect major errors by Dr. [redacted] in accounting for the relevant facts in the record.

First, the record contains no evidence that Mr. [redacted] has *ever* had a "proclivity for violence." Dr. [redacted] notes that Mr. [redacted] was arrested at age seven for a fire that resulted in a death – but, as the Board found in 2014, the record does not suggest that *any* malicious intent or violence was involved. (See Ex. B at 113-114.) Further, as Dr. [redacted] acknowledges on page 16, Mr. [redacted] has remained largely violence-free during his 34 years in prison; his only two "violence-related" rule violations are from the 1980s. (One of these incidents involved throwing water on an officer; the other incident involved possessing a sharp tool he used to carve soap, and did not involve any fighting or injuries. See CDC-115 Report dated 11/29/1986 and related Memoranda dated 12/3/1986, attached as **Exhibit H**.) In fact, the record also shows that, on at least two more recent occasions, Mr. [redacted] was the victim of unprovoked violent attacks by other prisoners and yet he did *not* respond with violence. (See CDC-128B Chronos, dated 12/11/2015 and 4/27/2015, attached as **Exhibit I**.)

Second, the claim that Mr. [redacted] "has been *consistently* involved with violent peers" (emphasis added) is both unsubstantiated by the record and contradicted by Dr. [redacted]'s own report. On page 4, Dr. [redacted] cites Mr. [redacted] statement that he was "mostly a loner" at the time of his life crime; she also notes that currently, aside from "three or four friends" in prison who are positive influences, "he still prefers to spend the majority of his time alone." She observes that his leisure activities include playing dominoes, making arts and crafts, attending self-help groups, and creative writing. Nothing in this account remotely suggests that Mr. [redacted] has been "involved with violent peers," consistently or otherwise. Rather, it establishes that he has consistently *limited* his involvement with peers – previously because of adjustment problems, and currently because he is focusing on a select number of positive relationships, self-help groups, and constructive hobbies. Indeed, as Dr. [redacted] correctly states on page 4, "*no information*" in Mr. [redacted] file suggests any "recent problems with his peers or staff," violent or otherwise (emphasis added). This being so, Dr. [redacted]'s claim that Mr. [redacted] "has been consistently involved with violent peers" is clearly in error.

8. Acceptance of responsibility for the life crime. On page 19, Dr. [redacted] writes that Mr. [redacted] "lacks full awareness and understanding of his role in the commitment offense" and "has placed little blame on himself for the victim's death." Similarly, on page 13, Dr. [redacted] attributes to Mr. [redacted] a "lack of remorse for having hurt or mistreated another." These statements are in error: they are unsupported by any statement of Mr. [redacted] contradicted by the record, and contradicted by Dr. [redacted]'s own statements in her report.

Indeed, on pages 17 and 18, Dr. [redacted] cites statements by Mr. [redacted] expressing his profound regret for the crime and his acknowledgement that he deserves a life sentence for it. On page 18, Dr. [redacted] further indicates that Mr. [redacted] "takes full responsibility for his role in the crime," feels "remorseful" for the crime, wishes he could go back and prevent it from happening, and understands that by committing the crime he "traumatized the victim's family" and "caused so much pain." Dr. [redacted] presents all these statements by Mr. [redacted] without impugning their sincerity. These statements of Mr. [redacted] as cited by Dr. [redacted] are consistent with the testimony accepted by the Board at Mr. [redacted] last parole hearing – and they contradict Dr. [redacted]'s claims that Mr. [redacted] minimizes his responsibility and lacks remorse for his crime. (See Ex. B at 114-115.) These claims, therefore, are clearly in error.

GOVERNING STANDARDS

Under the Board's proposed regulatory amendment (dated 9/9/2016, attached as **Exhibit J**), if a CRA report contains even one "factual error" that "materially impacts" the report's conclusions about a prisoner's violence risk, the Board must order a new or revised report. "Factual" is defined as information pertaining to the existence or nonexistence of a circumstance or event described in the report; further, it is defined as not including clinical diagnoses or expert opinions. "Error" is defined as information for which there is no reliable source documentation or which is overwhelmingly refuted by other documentation.

For reasons our office has conveyed to the Board, we find these proposed standards problematic. But even under these standards, the errors identified in Dr. [redacted]'s report must trigger remedial action. All of these errors concern the "existence or nonexistence" of circumstances or events described in Dr. [redacted]'s report. In each case, Dr. [redacted]'s erroneous claims lack support by any "reliable source documentation" and are "overwhelmingly refuted" by the record. Most importantly, a number of these errors concern facts that are central to any risk assessment, such that there is no doubt that they "materially impact" Dr. [redacted]'s conclusions about Mr. [redacted] violence risk.

Although the proposed regulations do not define what it means for an error to "materially impact" the CRA report's conclusions, any reasonable definition *must* encompass unsupportable claims indicating that a prisoner (1) violently assaulted a victim, and then falsely testified over the years that his crime partner did it; (2) has a "lack of interest" in addiction recovery, especially when addiction was a factor that led to the life crime; (3) has absolutely "no parole plans"; (4) "has been consistently involved with violent peers"; (5) has had a "proclivity for violence" since "early in life"; and (6) fails to express any responsibility or remorse for his life crime. It is almost too obvious to bear mention, but such errors are highly prejudicial to a prisoner facing a parole suitability hearing. To the extent that these errors contradict the record and cannot be traced to anything a prisoner said, they cannot be the basis of a reliable clinical risk analysis.

CONCLUSION

In light of the numerous and significant errors discussed above, I ask that Dr. [redacted]'s CRA report be removed from Mr. [redacted] file and replaced with an error-free report. Taken together, the identified errors undermine the reliability of Dr. [redacted]'s report, including her ultimate finding that Mr. [redacted] poses a "high" risk of violence. Thus, to protect Mr. [redacted] due process rights and the integrity of the parole process, Dr. [redacted]'s erroneous report must be removed from the record on which the Board is required to rely.

Thanks for your attention to these matters. I look forward to your prompt response.

Sincerely,

Kony Kim,
Attorney for Mr. [redacted]

cc: [redacted]

LIST OF EXHIBITS

Exhibit A	Comprehensive Risk Assessment by Dr. [redacted], Ph.D., dated 9/26/2016
Exhibit B	Parole Hearing Transcript Decision Pages, dated [redacted]
Exhibit C	Support Letter by [redacted], dated 4/30/2014
Exhibit D	Probation Officer's Report, dated [redacted]
Exhibit E	Police Reports, dated [redacted]
Exhibit F	Sentencing Court Transcript, dated [redacted]
Exhibit G	Service Provider Letters, dated 5/16/2016 to 9/21/2016
Exhibit H	CDC-115 Report dated 11/29/1986 and Memoranda dated 12/3/1986
Exhibit I	CDC-128B Chronos, dated 12/11/2015 and 4/27/2015
Exhibit J	BPH Proposed Regulatory Text, section 2240, dated 9/9/2016

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Managing Attorney

December 6, 2016

Cliff Kusaj, Ph. D.
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Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95814
VIA Electronic Mail

Re: Error-filled Comprehensive Risk Assessment for [redacted]

Dear Dr. Kusaj:

I write with strong objections to the severely flawed Comprehensive Risk Assessment prepared for Mr. [redacted] by Dr. [redacted] on September [redacted] 2016. (CRA Attached hereto as Exhibit A.) I understand that the panel considering Mr. [redacted] suitability for parole in his [redacted] hearing will have to determine how much weight to give this report, the errors outlined herein will unduly prejudice Mr. [redacted] if the report is not removed from his file and replaced with one without such substantial errors.[1]

When the Board convened a parole hearing for Mr. [redacted] on June [redacted] 2016, I objected that the prior Comprehensive Risk Assessment, prepared by Dr. [redacted] in 2014, contained several errors. Specifically, the report found Mr. [redacted] to present a high risk of violence, even though he has shown no violence whatsoever for many years (no rule violations at all for 14 years), and the report inappropriately claimed that Mr. [redacted] was ambivalent about whether or not he raped the victim in this case, even though the record showed that the semen on the victim was not his and, in fact, he was not convicted of rape. I was also concerned that such a high risk prediction did not adequately account for the youthful factors as required by Senate Bill 260. The hearing panel postponed the hearing and referred the matter for your review regarding both the youthful factors and the rape-related error.

Your initial response was to defend Dr. [redacted]'s CRA, which was revised, but you then ordered a completely new CRA, done in September by Dr. [redacted]. Unfortunately, several substantial errors in Dr. [redacted]'s CRA materially impacted the risk assessment and make the report invalid and unreliable. Indeed, the errors identified herein completely

[1] For example, if the hearing panel voted to grant Mr. [redacted] parole without obtaining a corrected CRA, the Governor and any future panel could still rely on the erroneous report to deny Mr. [redacted] parole.

undermine the foundation for Dr. [redacted]'s prediction that Mr. [redacted] presents a high risk of future violence. Specifically, the findings that Mr. [redacted] engaged in recent substance abuse and that he lacks a Relapse Prevention Plan demonstrating a commitment to AA/NA programming are directly contradicted by evidence provided by Mr. [redacted] and present in his file since at least June 2016 – more than three months prior to Dr. [redacted]'s evaluation. Oddly, Dr. [redacted] also exacerbated the rape-related error by not only concluding that Mr. [redacted] *did* rape the victim but also by erroneously finding that the rape was "adult in nature" and committed against a "stranger," thereby warranting both administering the Static-99 and a high risk prediction on that test.

The CRA must be corrected and the risk prediction modified downward.

Erroneous Report of Recent Substance Abuse

Dr. [redacted] erroneously reported that Mr. [redacted] last used alcohol and drugs in prison in 2011. (Exhibit A, at 7, 15.) Dr. [redacted] wrote, "During the current evaluation, Mr. [redacted] was vague regarding the frequency and duration of his alcohol and marijuana use in prison; however, he did report, 'I haven't drank or smoked since I saw the Board at CMC east," which took place in 2011, per the records." Dr. [redacted] incorrectly reported Mr. [redacted] statement. In fact, Mr. [redacted] explained that, during his July 2011 hearing at the [redacted], the District Attorney's representative asked him why he had used drugs (blotter acid) one time at [redacted] in the 1980s. (See July 26, 2011, Hearing Transcript, attached hereto as Exhibit B, at 77; see also *id.* at 32-33, 37.) At the time of that 2011 hearing, he answered that he was just being stupid, following the crowd, etc. (Exhibit B, at 77.)

After the 2011 hearing, Mr. [redacted] reflected and realized that the circumstances surrounding that blotter acid incident in prison were similar to those surrounding the commitment offense – he used serious drugs with friends without considering the consequences or knowing exactly what he was taking, contributing to the commitment offense. (See *id.*, at 32-33.) The thought that he'd potentially put himself in the same situation that previously led to murder made him swear off of drugs thereafter. In other words, he did *not* tell Dr. [redacted] that he used drugs in prison around the time of the 2011 hearing; rather, he explained that the hearing helped him reflect on just how problematic drugs were for him *in the past*.[2]

Dr. [redacted]'s attempt to synthesize this description into a statement that Mr. [redacted] used drugs in 2011 resulted in a factual error that materially and substantially impacted the risk assessment here. And this particular error is made by Dr. [redacted] multiple times in this report, including in explaining why Mr. [redacted] presents an elevated risk. This error

[2] Mr. [redacted] has only one substance-related 115 – in 1978 – throughout his 40 years of incarceration.

exemplifies the risk of not having a recording of the interview available for review. Listening to such a recording would conclusively prove that Dr. [redacted]'s report was erroneous.

Patently False Claim that Mr. [redacted] lacks a Relapse Prevention Plan

Dr. [redacted] erroneously reports that Mr. [redacted] does not have a Relapse Prevention Plan (RPP) to address his historical substance abuse issues: "Although Mr. [redacted] has been attending Alcoholics Anonymous (AA) for many years, he has yet to develop a comprehensive relapse prevention plan." (Exhibit A at 8.) In fact, Mr. [redacted] has long possessed a written Relapse Prevention Plan that directly addresses the role drugs and alcohol played in his life and sets forth his deep understanding of the continuing need to actively engage in recovery groups and activities. (RPP attached hereto as Exhibit C.) Most significantly, this RPP was not only in Mr. [redacted] file, but a copy was provided directly to the hearing panel back on [redacted], 2016. Commissioner [redacted] explicitly identifies it and acknowledges its receipt. (See [redacted], 2016, Hearing Transcript, attached hereto as Exhibit D.) As discussed more fully below, this RPP reflects Mr. [redacted] successful philosophy to maintain his sobriety. Significantly, Dr. [redacted] repeats ***some version of the erroneous claim that Mr. [redacted] lacks an RPP at least eleven times*** throughout the report, and the error clearly formed the primary basis for Dr. [redacted]'s conclusion that Mr. [redacted] presents a high risk for violence. (See Exhibit A, at 6, 7, 10, 11, 12, 15 [three times], 16, and 18 [three times].)

In the Relapse Prevention Plan, Mr. [redacted] wrote, "In that my personal triggers of betrayal, rejection, and feelings of less than are so entrenched, I will have to attend a support group, in addition to my regular AA meetings, so that I can talk about just what is going on in my life." (See Exhibit C.) He adds that he has "also learned to enhance my emotional stability and security by remaining productive in my studies of astrology, as well as remaining involved in my AA group, which is the very root that has finally given birth to my ability to refrain from self-defeating behavior that caused me to get into trouble for so many decades." (*Id.*)

In addition, his parole plans include placement at [redacted]. Their letter of acceptance, dated [redacted] 2016 (in his file since before the [redacted] 2016 meeting), expressly provides, "Residents must attend house and group meetings weekly, which include 12-step and personal/spiritual growth meetings." (Letter attached hereto as Exhibit E.) He has even made arrangements for the facility to "support Mr. [redacted] in attending additional regular AA or NA meetings in the neighborhood" beyond the ones residents are required to attend in-house. (*Id.*)

Additional evidence of Mr. [redacted] understanding of the importance of AA/NA is found in some of his essays, which were also provided to the Board at his [redacted] 2016 hearing. (See Exhibit D at 6; see also Essays attached hereto as Exhibit F.) One such essay, entitled

"Powerless + Unmanageability = Insanity" includes the following passage, on page two, after he describes the kinds of people "who have learned the secret that they could overcome their alcohol problem" and after he explains the need to turn his life over to these kind of people, which gave him a chance to turn his life around: "Therein lies the secret to 'Gods Will' for us…providing that we have the courage, strength, and belief that AA really does work when one finally walks in the steps that many before them have traveled." (Exhibit F, at 2.)

There is more. The clinician treating Mr. [redacted] as part of the CCCMS program noted in [redacted] 2016 that Mr. [redacted] "continues to report less depression this past year. He feels supported in AA and group treatment. [Patient Inmate] has demonstrated a great deal of insight into his childhood issues and what led to his crime." (Mental Health Treatment Plan, dated [redacted], 2016, attached hereto as Exhibit G.) This, too, was provided to the Board at the [redacted], 2016 hearing that was postponed.

In short, the record shows that Mr. [redacted] has internalized his understanding of potential relapse triggers and the need to remain involved in a supportive sober community. Not only has he clearly expressed his intention to continue with AA/NA upon release, but he has made specific arrangements with a specific transitional program that *requires* regular AA/NA attendance. As his RPP reflects, participation in these groups is central to Mr. [redacted] sobriety for many years in prison and to his long-term continued sobriety going forward. Again, all of this information was presented to the Board in [redacted] 2016 and it directly and completely contradicts Dr. [redacted]'s conclusion that Mr. [redacted] does not have a relapse prevention plan. Dr. [redacted]'s conclusion simply cannot be reconciled with this evidence, which has been in Mr. [redacted] file for more than six months. This is a substantial factual error that materially impacts the risk assessment.[3]

Erroneous Administration of Static-99

As a preliminary matter, the Static-99 should not have been used. Although Dr. [redacted] asserts that the test was proper because there was "reason to believe" a sexual offense occurred (Exhibit A, at 15), Mr. [redacted] was *not convicted* of raping the victim (jury convicted him only of murder) and the semen found on the victim was not his. Similarly, Dr. [redacted]'s reference (at 5) to the Court of Appeal's statement that Mr. [redacted] raped the

[3] Oddly, Dr. [redacted] actually acknowledges Mr. [redacted] acceptance into residential facilities with in-house 12-Step meetings and concludes that Mr. [redacted] recognized the benefit of utilizing these professional AA and transitional services, and that he "expressed his intention to continue with AA and 'get a sponsor' upon his release." (See Exhibit A at 10.) This, too, cannot be reconciled with Dr. [redacted]'s finding that Mr. [redacted] lacks a comprehensive relapse prevention plan.

victim is improper, as he was not convicted of rape and there was no finding in the trial court that he committed such crime.

Even if Mr. [redacted] *had* committed the rape, the Board's mandate to give great weight to youthful factors in considering parole suitability should have militated against administering the Static-99 to a 57 year-old man whose only offense was against a similar-age girl back when he was 17 years old. You have stated the position that there are situations that would justify administering the Static-99 for a teenager; however, you told BPH Commissioners on November 21, 2016, that it would be appropriate "When a prisoner committed a sexual offense as a sixteen or seventeen year-old and the offense appears "adult" in nature (preferential or targeted rape or sexual assault of children)." (See your slide presentation.) Your notes on that slide indicated a weaker correlation between test scores and actual risk for teenagers compared to adults because there may have been no juveniles in the original normative sample that "committed sexual offenses" and "served long prison sentences." (*Id.*)

In fact, the literature indicates that the Static-99 should not be used on antisocial youth who sexually victimize a peer because juveniles are different from adult sexual offenders. This is especially true when the sexual activity was "juvenile" in nature, such as when the subject was a participant in anti-social behavior with peers, where there was a lack of planning and where there were no indicators of deviant sexual interests. (See www.static99.org.) Here, Mr. [redacted] had been drinking and using drugs with same-age peers; he and the victim were both teenagers who snuck away to a secluded area of the school campus to make out and have sex. At one point, the school's dean saw them and told them to return to the dance. When it began to rain and the victim said they should stop and go to his car, he admitted that he'd lied about having a car. She told him to stop. He still wanted to have sex with her, but admitted that his "thing wouldn't work." (See Exhibit A at 13; see also [redacted] 2014 CRA by Dr. [redacted], at 12.)

This fits the textbook definition of a sex offense that would be considered "juvenile" in nature. Yet, Dr. [redacted] offered the conclusory statement – without explanation – that, "in light of the adult-like nature of the sexual **offenses** committed at age 17, administration of the Static-99 was warranted." (Exhibit A, at 15, emphases added.) Not only did Dr. [redacted] err in stating there were multiple sexual offenses, but Dr. White also erred in making an unsubstantiated conclusion that this behavior was "adult-like." Indeed, as you have noted, the literature identifies sexual offenses as "adult-like" when they involve preferential sexual assault of a child and preferential rape type activities. These simply do not fit the instant scenario, where there was no planning and no deviant sexual interests.

Dr. [redacted] also erroneously elevated Mr. [redacted] risk on the Static-99 on the grounds that the victim was a "stranger." (Exhibit A, at 15-16.) However, the victim was not a stranger. In fact, Mr. [redacted] and the victim went to high school together and knew

each other through mutual friends. The literature on Static-99 directs that even a slight degree of knowing is enough for a victim not to be a stranger. (See www.static99.org.) If the victim knows the offender *at all* for more than 24 hours, the victim is not a stranger. (*Id.*) Clearly, the victim here was not a stranger. This item was incorrectly scored, and Dr. [redacted] admitted that this particular item elevated Mr. [redacted] risk on the Static-99. (Exhibit A, at 15-16.)

Erroneous Statement about Medication

Dr. [redacted] reports that Mr. [redacted] said he had been "off psychotropic medications for approximately six months." (Exhibit A, at 8.) This is a factual error. Mr. [redacted] informed Dr. [redacted] that he stopped taking Prozac roughly two years ago.[4]

These Errors Substantially and Materially Impacted the Risk Assessment

The errors outlined above had a material impact on Dr. [redacted]'s risk assessment, particularly because they directly undermine Mr. [redacted] success in addressing all the factors Dr. [redacted] previously indicated would reduce his risk: continuing to abide by institutional rules; participating in activities to help him gain insight into his personal risk factors; developing verifiable parole plans; genuine engagement in 12 step programs; and developing a relapse prevention plan.

Mr. [redacted] did every single one of these things. All of them. Yet, Dr. [redacted] falsely reported that Mr. [redacted] committed rule violations for which he was not caught (erroneous characterization of his last substance use), falsely reported that he had not developed a relapse prevention plan, improperly administered the Static-99 for actions that were "juvenile" in nature and elevated the risk by falsely stating the victim was a stranger, and falsely reported that Mr. [redacted] was taking psychotropic medication as recently as six months ago. These errors materially impacted the assessment of a high risk, particularly as they relate to *dynamic*, as opposed to *static*, factors: Dr. [redacted] found that the "key risk factors" of "negative/violent attitudes, substance abuse, and a lack of effective coping skills" were found to "remain relevant in understanding possible impediments to his future psychosocial adjustment and management." (Exhibit A at 18.)

At least ***eleven different times*** in the CRA, Dr. [redacted] indicated that Mr. [redacted] risk was elevated due to his historical substance abuse but ignored his RPP or its essential components geared toward mitigating that risk factor. This includes ***five points*** at which Dr. [redacted] explicitly and falsely states that Mr. [redacted] does not have an RPP. (See Exhibit A at 6, 7, 15 and 18.) Dr. [redacted]'s erroneous factual findings thus directly led to the unreliable prediction that Mr. [redacted] presents a "High risk for violence." (*Id.* at 18.)

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[4] This is another instance in which the error could be identified and corrected by reference to a recording of the interview, had one been made.

Conclusion

The information provided herein provides substantial grounds to postpone this week's hearing in order to correct these significant errors. Proper consideration of all the information in Mr. [redacted] file and correct reporting of his statements to the psychologist will lead to a much lower risk prediction.

Thank you for your consideration.

Sincerely,

Keith Wattley

cc: [redacted]
Presiding Commissioner

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Keith Wattley
Executive Director

July 12, 2016

Jennifer Shaffer
Executive Officer
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

VIA Electronic Mail

Re: Appeal of Comprehensive Risk Assessment and *Clark* Screening Referral for [redacted]

Dear Ms. Shaffer:

I write regarding Dr. [redacted]'s [redacted], 2016 Comprehensive Risk Assessment, prepared for [redacted], at the [redacted]. Dr. [redacted]'s report (attached as Exhibit A) contains significant errors – both outright contradictions and errors of omission – that stem from Dr. [redacted]'s failure to recognize Mr. [redacted] documented cognitive deficits, as well as the functional limitations and adaptive needs that flow from those deficits. This failure, in fact, replicates the failures of prior FAD psychologists to fully recognize and account for the same deficits over a span of some two decades.[1]

Given the significant errors in Dr. [redacted]'s report, I make several requests. **First**, I request that this report be removed from Mr. [redacted] file and that a new report be prepared for his next parole hearing. **Second**, I request that the FAD psychologist tasked with preparing the new report be directed to consider documentation in Mr. [redacted] file that establishes the nature and implications of his cognitive deficits – and, unlike prior evaluators, to apply risk assessment tools in ways that properly account for these deficits. **Third**, I request that, pursuant to the *Clark* Remedial Plan, Mr. [redacted] be promptly referred for screening as a prospective Developmental Disabilities Program participant entitled to adaptive support services. **Fourth**, given the gravity of these issues, and the need for a thorough response from both BPH and CDCR officials, I request that Mr. [redacted], 2016, hearing be postponed until after these matters are resolved.

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[1] Of great concern is the fact that many of these errors repeat those that we tried to address in connection with Mr. [redacted] *2011* parole hearing; however, it does not appear Dr. [redacted] considered the transcript from that hearing or any of the correspondence spanning nearly a year prior to that hearing.

BACKGROUND

As detailed in my March 11, 2011 letter to then-Assistant Secretary [redacted] (attached as Exhibit B), three FAD psychologists over the past 25 years have made note of Mr. [redacted] cognitive deficits to varying degrees, and two evaluators in the 1990s diagnosed him as Borderline Intellectual Functioning. (See 1991 and 1993 reports, attached as Exhibit C.) However, none of these evaluators has provided a detailed clinical account of his cognitive deficits, and none has provided an analysis of how these deficits impact the validity of risk assessment tools when administered to him.

In 2010, FAD psychologist Dr. [redacted] dismissed earlier evaluators' diagnosis of Mr. [redacted] as Borderline Intellectual Functioning, despite having no valid basis for doing so, and despite detailing in her report various symptoms and deficiencies that tend to substantiate that diagnosis. (See 2010 report, attached as Exhibit D, at 4 [poor memory and concentration following head injuries]; 6 ["simplistic" thinking]; 7 [inability to grasp fine distinctions]; 9-10 [difficulty formulating strategic plans and anticipating situations]; 10 ["limited" capacity to understand his conduct]; 10-11 [difficulty recalling and retaining information]; 11 ["less developed" abstract reasoning; impaired social judgment; "restricted" range of emotional expressions]; 14 [difficulty planning ahead; deficits in short-term memory and abstract reasoning]; 17-18 [inability to grasp the abstract concepts "remorse" and "insight"; inability to provide "cogent explanations" of his motives and "personality structure"].) As grounds for dismissing the diagnosis, Dr. [redacted] cited Mr. [redacted] GED completion and TABE scores, despite evidence in the record that these credentials are not legitimate and do not accurately reflect his actual capacities.[2] (See Ex. D at 14.) Further, in refusing to recognize Mr. [redacted] disability, Dr. [redacted] misconstrued several of his functional limitations as indicators of elevated risk – an error that Dr. [redacted] replicates.

Notably, Dr. [redacted] also stated that "[f]ormal neuropsychological tests would be required to determine the extent of Mr. [redacted] relative cognitive deficits." (See Ex. D at 15.) Yet, the FAD refused to arrange for such testing, despite the Board's agreement with Dr. [redacted] that it was needed. (See Parsons memorandum, attached as Exhibit E.)

In November 2011, Dr. Johnny [redacted], an independent expert, conducted a neuropsychological evaluation at my request. (See 2011 report, attached as Exhibit F.) Based on extensive in-person testing and a review of the record, Dr. [redacted] found clear and convincing evidence that **Mr. [redacted] suffers from a developmental disability**, as well as from frontal lobe dysfunction and dementia, likely related to his multiple traumatic head injuries. Dr. [redacted] found that, as a result of Mr. [redacted] condition, he suffers "major impairment" in cognitive and social functions. Further, in Dr. [redacted]'s view, he lacks the capacity to develop higher level reasoning and concept formation skills, and as such will "never be able to articulate the sophisticated level of 'insight' other inmates have." Accordingly, Dr. [redacted] noted, the validity of "forensic instruments" as applied to Mr. [redacted] by Dr. [redacted] "may be questionable given [Mr. [redacted] cognitive

[2] As discussed below, the error in these conclusions was firmly established in the 2011 parole hearing, yet Dr. [redacted] perpetuates the error in the most recent psychological report.

capacity." In sum, Dr. [redacted]'s report establishes that, since Mr. [redacted] developmental disability severely impairs his cognitive and social functions, the application of standardized risk assessment tools is highly inappropriate.

Completely ignoring Dr. [redacted]'s detailed 18-page report, Dr. [redacted] has replicated Dr. [redacted]'s error of failing to recognize Mr. [redacted] cognitive deficits and, as a result, reaching unreliable conclusions about his risk level. In addition, as elaborated below, Dr. [redacted]'s report contains other significant errors and contradictions that further destroy its validity as a clinical document that should guide the Board's decision making.

FACTUAL ERRORS

1. On pages 2-3, Dr. [redacted] purports to summarize Mr. [redacted] psychosocial development from childhood through adulthood, yet she omits any mention of his multiple traumatic head injuries, which span from infancy to his adult years in prison. It is possible that Mr. [redacted] did not mention these events in the interview; however, as Dr. [redacted] should have seen, these head traumas are documented in prior psychological reports, and their clinical significance is made clear in Dr. [redacted]'s report. Dr. [redacted]'s silence about these traumas in describing Mr. [redacted] psychosocial development constitutes a serious error of omission.

2. On page 2, Dr. [redacted] reports that Mr. [redacted] "received his high school diploma as an adult while in prison." This statement is false, as Mr. [redacted] never earned a high school diploma. As the record indicates, Mr. [redacted] did take the GED test in prison, but he passed only with illicit help from a peer. (See 2011 Hearing Transcript, attached as Exhibit G, at 7-8, 56-57, 139, 141.)

3. On page 7, Dr. [redacted] reports that "Mr. [redacted] performance on the Test of Adult Basic Education (TABE) reflected a score of 12.9 (as of 11/18/09)." However, the record indicates that, as with the GED, Mr. [redacted] did not achieve this TABE score of his own accord. (See Ex. G at 56-57, 60, 62, 103-104, 141, 144. See also Interdisciplinary Progress Notes, attached as Exhibit H [noting that the 12.9 TABE score is invalid].) In addition to erroneously presenting the 12.9 TABE score as legitimate, Dr. [redacted] fails to observe telling discrepancies between this extremely high score and Mr. [redacted]'s prior extremely low TABE scores in the record. (See Ex. G at 103-104, 120-122, 141, 144.)

4. On page 5, Dr. [redacted] states that Mr. [redacted] "general fund of information was adequate for the demands of the evaluation and it was commensurate with his education." This statement undermines the credibility of Dr. [redacted]'s evaluation in two ways: (1) it demonstrates her failure to consider evidence in the record that the TABE score and GED in Mr. [redacted] file are not valid measures of his capacities; and (2) it suggests that her assessment of Mr. [redacted] capacities is tinged by erroneous assumptions about his academic attainment.

5. On page 6, Dr. [redacted] states that Mr. [redacted] "presented a relapse prevention plan that did not include substances," and on page 8 she states that he "presented no written plans" for maintaining sobriety in the community. It is unclear whether Dr. [redacted] believes that Mr. [redacted] has *defective* relapse prevention plans or that he simply

has *no* such plans. In either case, Dr. [redacted] is wrong. The record indicates that Mr. [redacted] has worked hard with his supporters to develop and write a detailed relapse prevention plan, updated March 20, 2016 (before Dr. [redacted]'s interview), which includes strategies to avoid substance abuse as well as contact information for 12-step programs near the locations where he plans to parole. (See Relapse Prevention Plan, attached as Exhibit I.)

SUBSTANTIAL ERRORS

1. On page 1, Dr. [redacted] asserts: "No disabilities or limitations were noted in the records pursuant to *Clark* and *Armstrong*." She further reports that "it was not necessary to use … adaptive services to achieve effective communication," and that "At no time did [Mr. [redacted] indicate that he did not understand" her questions. These assertions are evidently false, as Dr. [redacted] contradicts them a few pages later. On page 5, she states:

> "**Slow and simple language** was used when speaking with him. It was noticed that he would not necessarily reveal **when he did not understand** something; rather, observations indicated when **[Mr. [redacted] needed to be asked if he understood**. He was **encouraged several times** throughout the evaluation that if he did not understand something, to interrupt and relate that to the evaluator, which **he did, at times**." (Emphasis added.)

Apparently, then, Dr. [redacted] used "slow and simple language" because she perceived that Mr. [redacted] had difficulty understanding her, which contradicts her earlier statement that she perceived no need for adaptive services to achieve effective communication with him. Further, Dr. [redacted] indicates here that there were "several times" when she observed that Mr. [redacted] did not understand what she was saying, and that "at times" he did make this known to her, contrary to her earlier claim that "at no time did he indicate that he did not understand."

2. On page 5, Dr. [redacted] reports that Mr. [redacted] "displayed relatively clear and unimpaired cognitive functions," citing "his ability to attend, concentrate, and recall information both immediately and following a brief delay." This statement contradicts, without explanation, the observations of multiple prior FAD evaluators who found that Mr. [redacted] has evident cognitive limitations. This statement also contradicts Dr. [redacted]'s own admissions, discussed directly above, that Mr. [redacted] had difficulty understanding her questions even when she intentionally used "slow and simple language."

3. On page 7, Dr. [redacted] reports: "The prison psychology staff determined NDD on 3/25/11." However, the *Clark* screening document to which she refers was superseded by a *Clark* screening document dated 7/12/11 on which prison psychology staff (erroneously) designated Mr. [redacted] "NCF" rather than "NDD."[3]

[3] Pursuant to the *Clark* Remedial Plan (attached as Exhibit K), the "NCF" designation is appropriate where a prisoner "has Adequate Cognitive Functions (based on cognitive test scores) and therefore does not require adaptive functioning evaluation." The designation "NDD" applies

Incidentally, the 3/25/11 screening document to which Dr. [redacted] refers is missing from the record. The record does contain a chrono dated 3/2/11 (attached as Exhibit J) bearing information that apparently corresponds to the missing 3/25/11 document. This chrono, in turn, reflects a critical procedural error that Dr. [redacted] has failed to note. The chrono states that Mr. [redacted] "did not have a passing score" on the "Toni-3 test," and that "No further testing is required." This is incorrect: if Mr. [redacted] failed to receive a passing score in this first phase of testing, a second phase of testing *was* required under the *Clark* Remedial Plan. Thus, as Dr. [redacted] should have observed, Mr. [redacted] should never have been designated as "NDD," and *Clark* screening procedures should not have been terminated.

INAPPROPRIATE ANALYSIS

Because Dr. [redacted] failed to recognize Mr. [redacted] cognitive deficits and the likelihood that he has a developmental disability, she (like Dr. [redacted]) improperly applied risk assessment tools in ways that unduly inflated his estimated risk level. Further, because Dr. [redacted] failed to understand the implications of these cognitive deficits, she provided an inappropriate analysis of what Mr. [redacted] can and should be expected to do to reduce his risk level.

On pages 9-10, in discussing clinical risk factors, Dr. [redacted] pointed to Mr. [redacted] perceived failure to express remorse and empathy, as well as his perceived failure to articulate "insight" into the causative factors of his life crime. On pages 11-12, Dr. [redacted] opined that, in order to reduce his risk level, Mr. [redacted] should develop a "comprehensive understanding" of his triggers; "increase his insight" through further self-help; "become able to articulate the causative factors of the Life Crime comprehensively"; develop "restraint" and "adher[e] to *all* of the rules of the institution"; develop "independent living" skills; and develop "increased insight into his personality dynamics."

In fact, as Dr. [redacted]'s report has established, Mr. [redacted] functional limitations make the imposition of these expectations highly inappropriate and prone to produce falsely inflated risk estimates. This is *not* to say that Mr. [redacted] inability to meet such expectations on his own – i.e., without adaptive support services – makes him dangerous, but rather that his condition warrants a modified clinical approach to identifying and assessing his risk factors. Because Dr. [redacted] has failed to recognize these basic facts about Mr. [redacted] condition, her evaluation is fundamentally flawed and her conclusions invalid.

INVALID *CLARK* SCREENING

As Dr. [redacted]'s report has also made clear, Mr. [redacted] cognitive deficits entitle him to a Developmental Disabilities Program ("DDP") screening pursuant to the *Clark* Remedial Plan, in order to confirm the nature of his functional limitations as well as to identify adaptive support services he needs to maintain a low risk level.

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to prisoners "evaluated at a mainline … who may have low cognitive functioning but [are] determined not to have adaptive support needs." (Ex. K at 3.)

Under the *Clark* Remedial Plan, a prisoner should be referred for a DDP screening if any of the following occur: (1) staff observes behavior or receives information indicating the prisoner may have a developmental disability; (2) the prisoner claims to have a developmental disability; (3) the prisoner's health care or C-File contains documentation of a developmental disability; or (4) a third party (such as a family member) requests testing for an alleged developmental disability. (See Ex. K at 15.)

The DDP screening entails four phases. Phase I should occur within seven days after staff receives a referral; Phase II should occur within seven days after a prisoner fails a Phase I test; Phase III should commence within seven days after a prisoner fails a Phase II test. (Ex. K at 4.) The *Clark* Adaptive Support Evaluation (CASE), used in Phases III and IV, involves an interview with the prisoner and, if he or she refuses to be interviewed, review of collateral information to assess adaptive deficits and needs for adaptive support services. (Ex. K at 5-9.) Upon completion of the CASE, if staff determines that a prisoner has low cognitive functioning but no adaptive needs, then staff may designate him or her "NDD." (Ex. K at 3, 18, 20.) However, such a prisoner "should be reevaluated for DDP placement if [his or her] behavior indicates the need for reevaluation" or "if problems with adaptive functioning arise." (Ex. K at 18, 21.)

Mr. [redacted] received a non-passing score on a Phase I test on [redacted], 2011, as documented on [redacted], 2011. Staff then concluded, erroneously, that "No further testing is required" and that Mr. [redacted] "needed no substantial adaptive needs from cognitive deficit [sic]." (See Ex. J.) Further, according to a document that was cited by Dr. [redacted] but is missing from the record, staff evidently designated Mr. [redacted] "NDD" on March 25, 2011. In fact, at that point, staff had *no* authority to discontinue testing, to assess whether Mr. [redacted] has adaptive needs, or to designate him as "NDD."

Under the *Clark* Remedial Plan, staff was required to administer a Phase II test within *seven days* after Mr. [redacted] failed a Phase I test on February 9, 2011 – and, in the event that Mr. [redacted] failed (or refused to take) the Phase II test, staff would *then* be required to assess his adaptive needs in Phases III and IV. Instead, for some reason, staff allowed the invalid "NDD" designation to stand for *five months*, failed to proceed with Phase II testing, and then re-administered a Phase I test on July 12, 2011.

Given the procedural errors that have plagued Mr. [redacted] prior DDP screening, and given ample documentation in Mr. [redacted] file indicating that he has a developmental disability, I request a reevaluation of Mr. [redacted] for DDP placement pursuant to *Clark*. Please make a referral to the appropriate CDCR official responsible for conducting such an evaluation.

CONCLUSION

For reasons set forth above, Dr. [redacted]'s report must be removed from Mr. [redacted] file and a new evaluation must be conducted. The five factual errors identified in this letter, taken together, invalidate Dr. [redacted]'s professional conclusions regarding Mr. [redacted] mental state. (Cal. Code Regs., tit. 15, § 2240, subd. (f).) Similarly, the three substantial errors identified in this letter, all contributing to Dr. [redacted]'s inappropriate

analysis of Mr. [redacted] risk level, would each independently justify a new evaluation even under the existing regulations. (Cal. Code Regs., tit. 15, § 2240, subd. (e).) Thus, in order to protect Mr. [redacted] right to due process in his next parole hearing, the Board must order a new psychological evaluation.

Moreover, to avoid replicating Dr. [redacted]'s factual and substantial errors, the Board must direct Mr. [redacted] next evaluator not only to consider the nature and implications of his cognitive deficits, but moreover to evaluate his risk level in ways that properly account for these deficits. Specifically, Mr. [redacted] should not be subjected to the standardized application of risk assessment tools that are inappropriate for persons suffering from cognitive deficits. Future reports should also account for (and distinguish, if necessary) Dr. [redacted]'s extensive neuropsychological evaluation – the need for which was explicitly recognized, albeit never accommodated, by Dr. [redacted] and by the Board.

Furthermore, Mr. [redacted] must be immediately referred for a new DDP screening pursuant to the *Clark* Remedial Plan. The screenings previously administered were procedurally defective, invalidating Mr. [redacted] prior classifications. Moreover, the Plan provides that a third-party request is sufficient to trigger referral for DDP screening, and also that any prisoner designated "NDD" should be reevaluated if adaptive needs become apparent. (See Ex. K at 15, 18, 21.) In light of the documented deficits that prevent Mr. [redacted] from meeting expectations typically imposed on prisoners in the context of risk assessments, it is clear that he has adaptive needs that have been neglected for far too long.

Finally, Mr. [redacted] hearing scheduled for August [redacted], 2016, should be postponed until the matters raised herein can be addressed.

Thank you for your attention to these matters. I look forward to your prompt response.

Sincerely,

Keith Wattley,
Attorney for [redacted]

Enclosures:

cc: [redacted]
[redacted], Prison Law Office
[redacted], Prison Law Office

Client D

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Keith Wattley
Managing Attorney

December 8, 2015

Jennifer Shaffer
Executive Officer
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95814

Re: Attachment to Waiver Request for [redacted]

Dear Ms. Shaffer:

This letter serves as an attachment to the waiver request being submitted today on behalf of my client, [redacted]. This is a one-year waiver request based on statements contained in the Comprehensive Risk Assessment (CRA) by Dr. [redacted], which was just provided last week, even though Mr. [redacted] parole hearing is *this* week.[1] Several statements in the report require more time to address than this short window provides.

Dr. [redacted]'s CRA was not received until [redacted] 2015. I immediately scheduled another meeting with Mr. [redacted] to discuss the report. (Two other scheduled meetings for this purpose did not give us an opportunity to review the CRA because it remained unavailable until last week.) Today was the first day I could schedule the meeting.

The CRA contains some substantial errors and other issues that need to be addressed prior to the hearing. For example, Dr. [redacted] writes, at page 3: "According to the 1992 Psychiatric Evaluation, Mr. [redacted] informed that his 'sexual orientation has always basically been homosexual, though he has had interest in females at a younger age…'" There are at least two problems with this statement. First, Mr. [redacted] has never identified as homosexual. Second, Mr. [redacted] was sentenced to prison in January 1988 to serve 16 years, plus 25 years to life, resulting in a Minimum Eligible Parole Date in November 2010. Accordingly, he would not have even had a psychiatric evaluation eighteen years earlier in 1992. Mr. [redacted] and I need time to investigate the source of this information, which suggests a substantially different psychosexual profile than has heretofore been discussed.

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[1] The Board postponed Mr. [redacted] hearing scheduled for several months ago because the CRA had not yet been completed.

In addition, Dr. [redacted] cites (on page 9) a "concern" about Mr. [redacted] "lack of initiative to consistently attend substance abuse treatment given the details of the life crime." (The life crime involved Mr. [redacted] committing robberies and a murder seeking money to support his drug addiction.) Dr. [redacted]'s concern is based on his erroneous finding that Mr. [redacted] had only participated in substance abuse treatment programs in 2009 and 2010. Dr. [redacted] repeats this concern several times in the report and even asserts that this alleged gap in Mr. [redacted] programming is a highly relevant factor in his risk for future violence because, among other things, it reflects a lack of insight into his crime and his addiction to drugs. (See pages 14, 15 and 17.) However, Mr. [redacted] has actually been participating in AA and NA consistently since approximately 2004, which could be verified by reviewing his participation chronos. Given that Dr. [redacted]'s erroneous finding about the extent of Mr. [redacted] substance abuse treatment is repeated multiple times throughout his report and is cited as a significant factor in elevating Mr. [redacted] risk of future violence, this substantial error should be corrected. There simply is not enough time for me to conduct another review of Mr. [redacted] Central File and to address/correct this error prior to this Friday's hearing.

There are other statements in Dr. [redacted]'s report that Mr. [redacted] and I need to address or clarify before his parole hearing. Unfortunately, we require more than three days to do this.

Since I did not receive the CRA until last week and could not have discovered the errors and other issues prior to today's meeting with Mr. [redacted] the waiver request should be granted even though it is not being made at least 45 days before the hearing. I am confident that the one-year waiver will afford us plenty of time to address the issues raised by the late-arriving CRA.

Sincerely,

Keith Wattley,
Attorney for Mr. [redacted]

16-01-46

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8/2017
- Public
Hearing)

DIANE T. LETARTE, M.B.A., LL.M.

ATTORNEY AT LAW

ADMITTED IN CALIFORNIA, FLORIDA AND IN WASHINGTON D.C.

Jennifer Shaffer BPHEXE.BRDMEETING@cdcr.ca.gov January 17, 2017
BPH - Executive Officer
PO Box 4036
Sacramento, CA 94812-4036
Fax: (916) 322-2475

Re: **OBJECTIONS** to Amendment Regs. for **CRAs** (15 CCR 2240): **January 18, 2017**

Dear Ms. Shaffer:

I have been representing inmates and term-to-life inmates at parole hearings before the Board of Parole Hearings (BPH) for over 15 years, both as a state-appointed attorney and privately. The following comments are based on my observations of the implementation of Parole Suitability Hearings, the associated Regulations and more recently BPH Directives. I applaud the transformation of the Parole Hearings, guided by the BPH directives in general. On the other hand, **I renew my strong opposition to the Proposed Amendments** to 15 CCR 2240 - Comprehensive Risk Assessments for the reasons stated below.

01

ISSUE 1: We believe these regulations should provide for recording and transcription of clinical interviews. For many years I have been a proponent of recording the Psychological interviews. In the 100's of clients I have represented - I have heard horror stories[1] on how some of the Psychological interview processes are executed. This included Psychologists that do NOT take notes because they "remember it all" or others that uses "templates" for their evaluations and actually "cut-n-paste" whole sections of facts that are taken from the wrong Inmate's background, etc.. Other inmates were cut down to a 15-20 minute interview because the Psychologist was running behind in the numerous interviews scheduled that day. One inmate "believed" the Psychologist "recorded" the interview via his laptop, proving "doable", if true.

OBJECTION: Recording the session is vital to ensure that the CRA process is transparent and fair. Since the current proposed draft does not include such a provision, we find it inadequate. We believe these regulations should provide for recording and transcription of clinical interviews – if not for all prisoners, at least for those who opt to have their interviews recorded.

TECH NOTE SOLUTION: Blue Microphones Snowball is a USB Microphone that can be used directly into a laptop to record a session. Given Today's technology and the non-confidential aspect of a *Forensic Psychological Evaluation* there is no reason to refuse a recording. Like WatchDox can deliver electronic attorney packet, it can also deliver a .wav file (or other audio type file) to the Attorneys requesting the recorded session.

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[1] As state appointed attorney (10 years ago) I was ordered by a Commissioners to take 10 minutes to read & review a 15-page psychological report with my client *the day of the hearing* (which is when I was handed the report). The commissioner refused to postpone the hearing for such an important review. We have come a long way, but more improvements are needed in making the Psychological evaluation process fair and impartial.

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ATTORNEY AT LAW
ADMITTED IN CALIFORNIA, FLORIDA AND IN WASHINGTON D.C.

ISSUE 2: As drafted, the regulations would screen out a prisoner's appeal of a CRA if not raised at least 30 days before a hearing. However, the Board is not held to any timeline for providing a CRA. Nor is the Board required to act on a timely appeal until 10 days before the hearing.

02

OBJECTION: This is unacceptable and violates Due Process of the law. Under both the Fifth and Fourteenth Amendments to the U.S. Constitution, neither the federal government nor state governments may deprive any person "of life, liberty, or property without due process of law." Since 2008 (Shaputis) Psychological evaluations carry a lot of weigh. The violation of Due Process is a right held by the inmates NOT by the State. Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.

SOLUTION: The psychological evaluation must be received to the inmate and/or his attorney, minimally 60 days before the hearing for a meaningful review time. There is no 10-day rule for the prisoners, thus they can present "any" evidence up to the day of the hearing. This includes the right to present a rebuttal letter of the FAD psychological evaluation (CRAs) (or a private evaluation) up to the day of the hearing.

ISSUE 3: As drafted, the regulations would screen out too many legitimate and important objections – in particular, objections to a clinician's errors in reporting on statements that a prisoner has made in an interview. The proposed appeal process does not apply to an omission of relevant information.

03

OBJECTION: We believe these regulations should allow prisoners to address a far broader range of "factual errors." It offers no meaningful appeal process and purposefully omits the ability to appeal factual errors based on disagreements over that was communicated during a risk assessment, a gross violation of due process. This has been a main issue for many years.

SOLUTION: The review by the Chief or Senior Psychologist should include a statement of reasons why s/he approves or disapproves of each section of the CRA absent the reasoning it is merely a rubber stamp. Any factual error should be allowed to be stricken (or objected to at the hearing), whether or not the Chief Psychologist finds that it materially impacted the risk assessment's conclusions. On too many occasions "errors" are propagated from one report to another over a number of subsequent hearings and relied upon by the subsequent Board or eventually the Governor. Redress needs to be available in a fair and meaningful way.

For the above stated reasons, we strongly oppose the amendments to the regulations. We urge you to not adopt the amendments of these regulations and to address all the problems noted.

Sincerely,

D Letarte

Diane T. Letarte, MBA, LLM
M.S. Forensic Psychology

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Public Hearing
1/18/2017

Commenters

16-01-47
16-01-48
16-01-49

CALIFORNIA BOARD OF PAROLE HEARINGS

EXECUTIVE BOARD MEETING

JANUARY 18, 2017

1:00 P.M.

COMMISSIONERS PRESENT:

ARTHUR ANDERSON
PATRICIA CASSADY
KEVIN CHAPPELL
CYNTHIA FRITZ
JACK GARNER
RANDY GROUNDS
PETER LABAHN
MICHELE MINOR
MARISELA MONTES
JOHN PECK
BRIAN ROBERTS
TROY TAIRA
TERRI TURNER

STAFF PRESENT:

JENNIFER SHAFFER

Open Comment Period: Ellen Yates, Koni Kim, Vanessa Nelson-Sloane

P R O C E E D I N G S

COMMISSIONER ANDERSON: Uh, the time is now one o'clock. Uh, today's date is, uh, January, uh, 18th, 2017. And, uh, I will now take the roll for this, uh, Special Hearing. Uh, chairperson's present, Commissioner Cassady?

COMMISSIONER CASSADY: Present.

COMMISSIONER ANDERSON: Commissioner Chappell?

COMMISSIONER CHAPPELL: Here.

COMMISSIONER ANDERSON: Commissioner Fritz?

COMMISSIONER FRITZ: Here.

COMMISSIONER ANDERSON: Commissioner Garner?

COMMISSIONER GARNER: Here.

COMMISSIONER ANDERSON: Commissioner Grounds?

COMMISSIONER GROUNDS: Here.

COMMISSIONER ANDERSON: Commissioner Labahn?

COMMISSIONER LABAHN: Here.

COMMISSIONER ANDERSON: Commissioner Minor?

COMMISSIONER MINOR: Here.

COMMISSIONER ANDERSON: Commissioner Montes?

COMMISSIONER MONTES: Present.

COMMISSIONER ANDERSON: Commissioner Peck?

COMMISSIONER PECK: Here.

COMMISSIONER ANDERSON: Commissioner Roberts?

COMMISSIONER ROBERTS: Present.

COMMISSIONER ANDERSON: Commissioner Taira.

COMMISSIONER TAIRA: Here.

COMMISSIONER ANDERSON: Commissioner Turner.

COMMISSIONER TURNER: Here.

COMMISSIONER ANDERSON: And I will now turn this over to the Executive Officer, Ms. Schaffer.

MS. SHAFFER: All right. Good afternoon. I am Jennifer Schaffer, the Executive Offic -- Executive Officer of the Board of Parole Hearings. It is 1 p.m. on Wednesday, January 18th, 2017 and we are gathered here today in the Executive Boardroom at 1515 K Street, Sacramento, California, to receive public comments on the proposed rulemaking action identified as BPH Regulation Number 16-01 governing the Board's use of Comprehensive Risk Assessments. This regulation package we are concerned with today contains amendments to the California Code of Regulations, Title 15, Division 2, Section 2240, titled Comprehensive Risk Assessments. The rulemaking record for BPH Regulation Number 16-01 currently consists of five items. Number one. The first is a noti -- the Notice of Proposed Action which was published in the California Regulatory Notice Register on November 4th, 2016, number 45-Z, pages 1968 to 1972. The second is the Express Terms of the Proposed Action using underlined to indicate additions

to and strike out to indicate deletions from Section 2240 of Title 15 of the California Code of Regulations. The third is the Initial Statement of Reasons for the Proposed Rules. The fourth is the Board's Form 399 Fiscal and Economic Impact Statement. These first four items are all available for review -- well, were available for review on the table. My understanding is that, uh, all those copies have been taken, and so more copies are being made right now. If anybody did not receive a packet, it -- they will be here shortly. The fifth item includes all of the written comments received during the 45-day public comment period which ran from November 4th, 2016, through December 19th, 2016. All of these comments will be addressed in the Board's Final Statement of Reasons for this regulation packet. These regulations were duly noticed more than 45 days prior to today's hearing. Copies of the notice together with the proposed regulations were mailed to all interested parties who had requested rulemaking notices. Under the rulemaking provisions, the California Administrative Procedure Act, this is the time and place set for the presentation of statements, arguments, and contentions orally or in writing for or against changes in the Board's Proposed Regulations Package 16-01, notice of which has previously been both published in the Board's

Executive Monthly Board Meeting Agenda and sent by mail, fax, or e-mail as requested to all interested parties. This is a quasi-Legislative Hearing in which the Board carries out a rulemaking function delegated to it by the Legislature. Witnesses presenting testimony at this hearing will not be sworn in, nor will we engage in cross examination of witnesses. We will take under submission all written and oral statements submitted or made during this hearing. We will respond to these comments in writing in the Final Statement of Reasons along with all written comments received during the public comment period. The -- this entire APA Rulemaking Hearing is being recorded by recording equipment and will be transcribed word for word. The transcript of the hearing and all exhibits and evidence presented during the hearing will be made part of the rulemaking record. This hearing is also being documented in minutes which will serve as the official record only in case of equipment failure. The record for this hearing is being kept open today until all comments have been received. If you have brought written comments with you to submit during the hearing today, please place them in the basket on the front table that has been desig -- designated for written statements. Sorry. I'm looking for a different kind of

basket. Excuse me. All right. Excuse me. As you entered the room today, you were all offered the attendance sheet to sign your name. The sheet also contained a space to mark -- to indicate that you wanted to stand up and make oral comments on the Proposed Regulations or alternatively, a space to mark if you wished to attend the hearing. We ask that everyone enter his or her name on the attendance sheet even if you do not wish to speak. Please also note that if you additionally provide your complete address in the available space on the attendance sheet, we will prov -- we will notify you before final adoption of any changes to this proposal or about any new material relied upon in proposing these regulations. Such a notice shall be sent first of all to anyone who submitted written comments during the -- during the 45-day public comment period, which closed on December 19th, or while today's hearing is open. Second, notice will be sent to everyone who testifies today, and third, to everyone who requests such notification. While no one may be excluded from participation in these proceedings for failure to identify themselves, the names and addresses on the attendance sheet shall be used to provide the notice. If you have not yet signed the attendance sheet and you now wish to do so, please raise your hand. All

right. We will now hear your oral comments in the order you signed the attendance sheet. After we hear from everyone who signed in, we will ask whether any additional persons wish to be heard. Once all comments have been received, the hearing will close. When you come up to speak to the podium, we ask that you do each of the following to ensure that the audience may hear you and so that your comments may be properly captured for the record. First, we ask that you come up to the podium where you are called to speak -- when you are called to speak. Second, please begin by stating your full name and identifying the organization you re -- represent, if any. Third, if you have comments regarding a specific subdivision of this Proposed Regulation section, please state the letter of the subdivision you wish to discuss. Finally, please be sure to speak into the microphone so that our recording device can accurately record your comments. Please note that all comments will be limited to five minutes. For anyone who has not previously spoken at a Board hearing -- Board meeting -- we will display the amount of time you have remaining on that black box. May I have the attendance sheet, please? We will now take oral comments on the Proposed Regulations. In the interest of time, if you agree with comments made by a prior

speaker, please simply state that fact and only add new information you feel is pertinent to the issue. Additionally, if you have submitted written comments today, please do not repeat your wri -- written statements in oral testimony. The first person who signed in was -- Mona Manley. Oh, I apologize. Cracked (sic) -- I need to look at the other column. Okay. The first person who signed up to provide testimony today is Ellen Yates.

PH RN -01-47 Public Hearing

DR. ELLEN YATES: Good afternoon Commissioners, and thank you for this opportunity. Uh, name's Dr. Ellen Yates, retired psychologist from CDCR, former forensic psychologist, volunteer at LSA. Um, the main things I wanted to focus on -- and I've continued to review CRAs, and I think gradually we're gonna see improvements, especially when the youth offender factors in those sections are more carefully studied and implemented in -- into the reports after the recent trainings last fall. But the main thing I'd like to plea for today is an increased, uh, transparency -- or a -- a continuing trend toward greater transparency -- in the trainings for FAD psychologists -- that they be made open to the public, and especially in view of yesterday's presentation, I just wanted to highlight under 2240A -- the phrase, "Psychologists shall

47-01

47-02

incorporate standardized approaches, uh, generally accepted in the psychological community." I think we heard yesterday in the -- in the meeting that occurred was -- now what many years ago with this panel of psychologists. These are ongoing controversies in the field, and -- I would have to say over, mm, my 30-plus years, um -- especially once I got into forensic work -- I realized that -- all of our striving within the field of psychology towards standardization -- being able to quantify various aspects to human behavior -- while necessary and laudable -- and will continue -- is fraught with messiness because human behavior's messy. And all of our instruments are limited. And as was pointed out yesterday and in other arenas, um, they all have their strengths and their weaknesses -- and very few instruments have been adequately normed on the population that you folks are having to interview and determine, uh, whether they may be suitable for parole. Um, that's a fundamental -- fundamental problem. So I was hoping to suggest that perhaps, um, it might be time to reconvene a panel of experts for an additional review of so-called state-of-the-art opinions on these various tests that are being used or proposed for use. Static 99 was particularly, you know, mentioned yesterday as very problematic, um, among others. So I'd like to

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propose that -- I'd like to continue to suggest that the section, um, under -- I think it's B -- be amended to say, "The psychologist shall give great weight" -- a little stronger language than, "take into consideration," -- "the, uh, youth factors," and I think that pretty much covers what I wanted to say. Thank you. 47-06

MS. SHAFFER: Thank you. The next person on the list to provide oral testimony is Miss Koni (phonetic) Kim (phonetic).

PHRN 0-01-48 ublic er ng

MS. KONI KIM: Good afternoon. I'm Koni Kim speaking on behalf of Uncommon Law, uh, and Keith Watley, counsel for Sam Johnson and the plaintiff class in Johnson versus Schaffer (phonetic). Um, and I want to clarify because we have sent copious written comments, uh, to the Board regarding these regulations -- um, I am not planning to rehash those, but rather to provide a comment about just how this whole process has gone. Um, so, we are very disappointed by the Board's continued nonresponsiveness to our concerns, um, and the concerns of the plaintiff class throughout this process. Um, since the Board drafted the first version of the amended regulations in June 2016, uh, we've sent at least five letters detailing our concerns and requesting that the Board take seriously the numerous objections 48-01

pouring in from the plaintiff class members. Uh, the concerns we've been raising and that the plaintiff class members have raised are not new. Um, the two biggest issues being first, the need for a recording option to create an objective record of the Risk Assessment Interviews, and the second, the need to define Factual Error in a way that does not automatically screen out large categories of problems that are frequently occurring. Um, in particular, um, including but not limited to errors in reporting was actually said during a Risk Assessment Interview. Um, both of these issues were discussed, um, during the settlement negotiations over several months, um, and at the Final Fairness Hearing before the Court on December 18th, 2015, and also, um, set forth in the Proposed Findings of Fact that we jointly filed with the Board on January 8th, 2016. The Johnson court did finally approve our settlement agreement based specifically on the understanding that both of these issues -- the recording issue and the definition of Factual Error -- were to be left open -- and based on the understanding that the articulated intent of both parties to revisit these issues and work them out together in the process of establishing these regulations. Um, unfortunately, that is not how things played out over the past several

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months. Um, we have written to the Board about our concerns in letters dated July 14th, August 12th, two on September 16th, and December 19th, 2016. Um, we have publicly communicated our concerns at every Executive Meeting during which the Proposed Regulations were discussed, and we are also aware that numerous class members, um, have written to the Board about the Proposed Regulations raising the exact same concerns. Um, and in response, the Board has just refused to revisit these two issues -- um, that were supposed to be left open under the settlement agreement and productively worked out between the parties. Um, in a letter dated August 9th, 2016, the Board declined most of our suggested changes to the draft regulations, and in rejecting our request to make the definition of Factual Error less unreasonably restrictive, actually made it more restrictive. Um, in a letter dated August 15th, 2016, um, counsel for the Board Jessica Malonian (phonetic) said that there is, "No reason to revisit the recording issue." Um, essentially a flat contradiction of what Ms. Malonian said before the court on December 18th, 2015 -- um, that -- um, that quote, "It is important to leave open the possibility of recording," especially if these issues with he said/she said were to recur. So beyond these letters that I just quoted, um,

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the Board has really given us no substantive response to our central concerns. Um, we find this lack of response extremely disappointing and wish it had gone differently, um, and we believe that this level of response will not be found acceptable by the Office of Administrative Law. Thank you.

COMMISSIONER ANDERSON: Thank you.

MS. SHAFFER: The next, um, person on the list for oral testimony is Miss Vanessa Nelson-Sloane.

SPH RN 0-01-49 Public Hearing

MS. VANESSA NELSON-SLOANE: Good afternoon. Vanessa Nelson Sloane, Director of Life Support Alliance. First of all, I would like to thank the Panel members for actually being here at the hearing today. I have been in this process on these regulations since 2011, and I can tell you at the Public Hearings in 2011, not a single commissioner showed up. So this is a great improvement, and we thank you for that. As requested, we will not repeat every one of the several objections we've made over the course of the last several years -- not to say month -- on two of the Proposed Regulations on the CRA process. However, there are a couple of things that we believe need to be emphasized, one of which Miss Kim just addressed, which is in Section E2. We believe the Recording Interview process is critical -- and it would be a way to lay -- cl -- lay a final, uh,

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decision to an issue that comes up repeatedly. Secondly, in Section B, we believe more structure is needed on how to address the YOPH factors and should be included in these regulations. Currently, CRAs are in no way standardized as to how these factors are addressed and what weight is given to the hallmarks of youth, and certainly the intent of the authors of SB-260 and 261 (inaudible)the great weight standard would apply to all portions of the parole process, including CRAs. Section D. The current Proposed Regulations do not in fact clarify how the FAD will deal with out-of-state housed inmates -- nothing -- noting that only those inmates, "may receive a psychological evaluation whereas inmates housed in California are required to receive those evaluations." This is hardly equal treatment under the law. And lastly, and perhaps most importantly, the current regulations do not provide for any oversight or accountability. The FAD is accountable virtually to no one other than themselves -- certainly not a confidence or trust-inspiring situation given what we know of the history of this organization -- and our past experience with th -- with CRAs. Training and actions remain largely hidden from the public with no independent oversight absent court action, and this is perhaps the most brazen deficiency in these regulations.

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We continue to oppose the adoption of these regulations as presented, but we do thank you for listening to our concerns. Thank you.

COMMISSIONER ANDERSON: Thank you, ma'am.

MS. SHAFFER: All persons who signed in on our attendance sheet to speak have now been called. Is there anyone else who wishes to speak concerning the Board's Proposed Regulations? No additional requests have been made. Is there anyone else who wishes to submit written comments? Hearing no further requests, I hereby close this hearing. Thank you to everyone for attending today. We appreciate your assistance in developing these regulations. Finally, if you would like to be added to the Board's Rulemaking Notification Registry to receive notifications of all future Proposed Rulemaking by the Board, please be sure that your full name and address are entered onto the Board's attendance sheet. The time is 1:19 p.m., and this hearing is now adjourned. Thank you.

---HEARING ADJOURNED---

CERTIFICATE AND

DECLARATION OF TRANSCRIBER

I, DEBRA S. BEHUNIAK, a duly designated transcriber, DICTATE EXPRESS, do hereby declare and certify under penalty of perjury that I have transcribed the digital audio recording which covers a total of pages numbered 1-15, and which recording was duly recorded at SACRAMENTO, CALIFORNIA, in the matter of the EXECUTIVE BOARD MEETING FOR THE CALIFORNIA BOARD OF PAROLE HEARINGS on JANUARY 18, 2017, and that the foregoing pages constitute a true, complete and accurate transcription of the aforementioned audio recording to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated January 20, 2017 at Sacramento, California.

Debra S. Behuniak

Debra S. Behuniak
Dictate Express

BPH RN 16-01 COMPREHENSIVE RISK ASSESSMENTS
PUBLIC HEARING ATTENDANCE SHEET

January 18, 2017

Please print your name in the box below and write the name of the agency you represent, if any. Additionally, please check the appropriate box to indicate whether you plan to present oral comments during the hearing, submit written comments during the hearing, or only wish to attend the hearing.

If you also wish to be added to the board's notification registry to receive notice of all future board regulations, please also include your address, fax number, or email address, whichever is your preferred method to receive notifications. Please note that, if you include the additional contact information, the board will add you to the notification registry using the contact information you provide. If at any point you wish to be removed from the registry, you must contact the board's Regulation Contact Person on the board's public website.

	Print Your Name	Agency Representing (if any)	Purpose of Attendance	Contact Information (Only if you wish to be added to the Notification Registry).
1.	Mona Manley	LSA	☐ Provide Oral Testimony ☐ Submit Written Comments ☑ Observe Only	no contact P.O. Box 221533 Sac. CA 95822 PRU@12009 PRU@12009@ AOL.com
2.	Ellen Yates ✓	LSA	☑ Oral Testimony ☐ Submit Written Comments ☐ Observe Only	Docyates@gmail.com
3.	Robin Gilmore	LSA	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	no contact
4.	Kip Way (way)	LSA	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	no contact
5.	Thai Nguyen	Board	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	Board Employee

	Print Your Name	Agency Representing (if any)	Purpose of Attendance	Contact Information (Only if you wish to be added to the Notification Registry).
6.	Mina Sevmanu	Board	☐ Oral Testimony ☐ Submit Written Comments ☑ Observe Only	Board Employee
7.	Kony Kim	Uncommon Law	☑ Oral Testimony ☐ Submit Written Comments ☐ Observe Only	kkim@uncommonlaw.org
8.	Marcus Bole	Board	☐ Oral Testimony ☐ Submit Written Comments ☑ Observe Only	Board Employee
9.	Vanessa Nelson-Stone	LSA	☑ Oral Testimony ☐ Submit Written Comments ☐ Observe Only	no contact
10.	Dean Archilald	SAC D.A.'s OFFICE	☐ Oral Testimony ☐ Submit Written Comments ☑ Observe Only	916-874-6773 901 "G" Street Sacramento, CA 95814
11.	Cliff Kusaj	Board	☐ Oral Testimony ☐ Submit Written Comments ☑ Observe Only	Board Employee
12.	Heather McCrae	Board	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	Board Employee
13.	Sandra Maciel	Board	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	Board Employee
14.	Jeremy Isard	Public Member	☐ Oral Testimony ☐ Submit Written Comments ☒ Observe Only	917-833-2051

County Sacramento District Attorney's Office

BPH RN 16-01 (CRA) PUBLIC COMMENT TRACKING LIST

FOR COMMENTS RECEIVED DURING THE 15-DAY PUBLIC COMMENT RE-NOTICE PERIOD

Reg Package	Comment ID#	Name of Author /Commenter	Date Received	How received?	Within Public Comment Period?
BPH RN 16-01	16-01-50-01	Vogel, William (P88353)	1/3/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-50-02	Vogel, William (P88353)	1/3/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-50-03	Vogel, William (P88353)	1/3/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-01	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-02	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-03	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-04	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-05	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-51-06	Bergne, Peter (E57901)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-01	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-02	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-03	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-04	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-05	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-06	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-07	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-08	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-52-09	Ott, Dennis (J78934)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-53-01	Kralovetz, Rodney (F79317)	1/5/2018	Mailed Letter	YES: During 15-Day

BPH RN 16-01	16-01-53-02	Kralovetz, Rodney (F79317)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-53-03	Kralovetz, Rodney (F79317)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-53-04	Kralovetz, Rodney (F79317)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-53-05	Kralovetz, Rodney (F79317)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-01	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-02	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-03	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-04	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-05	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-54-06	Bouras, George (E02509)	1/5/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-55 (duplicate to 16-01-51)	Bergne, Peter (E57901)	1/8/2018	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-01	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-02	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-03	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-04	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-05	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-56-06	Bigelow, Wendell (K66059)	1/8/2016	Mailed Letter	YES: During 15-Day
BPH RN 16-01	16-01-57-01	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-02	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-03	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-04	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-05	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-06	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day

BPH RN 16-01	16-01-57-07	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-57-08	Thomas, Janice Ph.D.	1/7/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-01	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-02	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-03	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-04	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-05	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-06	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-07	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-08	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-09	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-10	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-11	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-12	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-13	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-14	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day

BPH RN 16-01	16-01-58-15	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-16	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-17	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-18	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-19	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-58-20	UnCommon Law Keith Wattley Koni Kim	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-01	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-02	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-03	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-04	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-05	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-06	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-59-07	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15-Day

BPH RN 16-01	16-01-59-08	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-59-09	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-59-10	Gay Crosthwait Grunfeld Rosen Bien, Galvan & Grunfield	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-01	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-02	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-03	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-04	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-05	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-06	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-07	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day
BPH RN 16-01	16-01-60-08	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15- Day

BPH RN 16-01	16-01-60-09	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-10	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-11	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-12	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-13	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-14	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-15	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day
BPH RN 16-01	16-01-60-16	Lynn Wu-PLO Heidi Rummel, USC Bikila Ochoa, ARC Sam Lewis, ARC	1/8/2018	Email	YES: During 15-Day

16-01-50

-Copy-

BPH RN
6-01-50
NOTICE
PUBLIC
COMMENT

Public Comment to BPH RN 16-01 Modified Text

Re: Proposed §2240, Comprehensive Risk Assessments

To: Heather L. McCray, Ass't Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

From: William Vogel P88353
Correctional Training Facility
P.O. Box 705
Soledad, CA 93960--705

As an interested person I make the following comment regarding the modified text of proposed regulation §2240, Comprehensive Risk Assessments, in BPH RN 16-01:

Subdivision (g)(3) begins "The board shall request that the department permanently remove any risk assessments that...." This "request" alone is not adequate protection to ensure that the affected risk assessment is actually removed and not viewed by any hearing panel member.

01 Although I do not know if the Board maintains inmate files for parole proceedings that are separate from the inmate's central file, I suggest that the Board must have a copy of the "request" document that was sent

02 to the department and a process to verify that the affected risk assessment was in fact removed prior to the central file being seen by a hearing member.

Therefore, subdivision (g)(3) should state to the effect "The board shall request <u>and verify</u> that the department permanently removed any

03 risk assessments...from the inmate's central file <u>prior to it being presented to any hearing member</u>." (Any additional information needed to explain this safeguard process should be assessed and added.)

Dated:

Respectfully,

William Vogel

Vegel P88353 CTF
PO Box 705 RA331
Soledad CA 93960

$ 000.46°

JAN 03 2018

Jennifer Neill, Chief Counsel
Board of Parole Hearings
PO Box 4036
Sacramento CA 95812-4036

CONFIDENTIAL

9581234036 B900

16-01-51

January 2nd, 2018

BPH RN 16-51 NOTICE PUBLIC COMMENT

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Heather L. McCray, Asst. Chief Counsel
and Jennifer Neill, Chief Counsel
California Board of Parole Hearings
Post Office Box 4036
Sacramento, Calif. 95812-4036

Control No: BPH RN - 16 - 01
O A L Notice File Number:
(Related ref: z 2016-1024-02)
Ref: Bus. & Prof Code, §2936

Dear Mrs. McCray and Mrs. Neill,

COMMENTS REGARDING PROPOSED CHANGES

Pursuant to page 2 of your NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS dated 12-22-17, I am propounding the following comments and objections. There exists a serious anomaly and problem legally with Item 4 and 'Information regarding the APA ethics code governance only of its own members and not all California psychologist licensees'. 01

No record or valid information is provided and should be indicated in the regulations exactly who the qualified licensing authority is for forensic psychologists if not the Board of Psychology. The Board of Parole Hearings itself as a public entity has no medical certification or professional authority to license any psychologists in the state. A fortiori, what professionally qualified organization are BPH forensic psychologists members of if not the Board of Psychology???

Moreover, due to the professional nature of their employment and work product, BPH forensic psychologists must be obligated by law and regulation to comply with a clear and transparent code of professional ethics and conduct of some kind similar to the APA Ethical Principles and Code of Conduct, but in a simplified version. (Please refer to Cal. Bus. & Prof. Code, §2936). Such a code of ethical principles and conduct needs to be drafted and presented to the public and the Office of Administrative Law before Section 2240 of the Board's regulations can be modified. See Cal. Gov. Code, §§11346.4(a), 11346.8(a), 11346.8(d), and 11346.9(a)(1). 02

Under the current penological regime and administration the BPH forensic psychologists are virtually accountable to no one other than themselves and their immediate supervisors who coddle and shield them under color of law. It is the truth, and no one should try to contradict or downplay this reality. 03

HERE ARE THE MOST BASIC ETHICAL PRINCIPLES AND STANDARDS THAT NEED TO BE DRAFTED AND INCORPORATED INTO THE MODIFIED TEXT OF SECTION 2240:

Pursuant to Comprehensive Risk Assessments (CRAs) [1]

A) The proposed regulation text under C.C.Regs., Title 15, Div. 2, Sect. 2240(c)(1), should include 'a risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to assure that the psychologist's opinions are based upon A) adequate scientific foundation **which is not obsolete**, or based upon an obsolete record, and B) the opinions and allegations stated by any psychologist shall have conformed to the basic professional principles of accuracy, truthfulness and integrity without engaging in fraud, subterfuge and/or intentional misrepresentation of fact which would jeopardize the future welfare and rights of prisoners who are eligible for parole.

B) BPH forensic psychologists shall seek to safeguard the welfare and rights of all those with whom they interact professionally, and take care to do no harm. Also, forensic psychologists when preparing CRA work product shall give sufficient credit to prisoners they evaluate for their positive post-conviction achievements and laudatory accomplishments including chronos and certificates earned.

C) BPH forensic psychologists shall not refer to any prisoner misconduct in their CRA evaluations which is obsolete and more than 50 (fifty) years out of date unless it resulted in a criminal conviction for murder, armed robbery or kidnapping.

D) BPH forensic psychologists shall refrain from preparing any CRAs in cases where there is a substantial likelihood that their personal problems or prejudices will prevent them from being impartial in the course of their work-related activity. In such cases they shall recuse themselves, and the Chief Psychologist will appoint a substitute psychologist.

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1. Reference is incorporated herein with regard to the APA (American Psychological Association's ETHICAL PRINCIPLES, STANDARDS AND CODE OF CONDUCT; Cal. Bus. & Prof. Code, §2936 and §2960; Cal. C.C.Regs., Tit. 15, Div.2, §2240(c)(1); and Cal. Gov. Code, §§11346.4(a), 11346.8 (a), 11346.8(d) and 11346.9(a)(1).

I sincerely hope and do request that the aforegoing COMMENTS REGARDING PROPOSED CHANGES herein will be carefully reviewed and incorporated wherever possible and appropriate according to law. I stipulate that this letter may be included to the record. PLEASE RESPOND AND LET ME KNOW WHAT CAN BE DONE.

DATED: JAN. 2ND, 2018

DUE DATE: JAN. 8TH, 2018

Respectfully submitted,

Peter M Bergne

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Paraprofessional-Emeritus in
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BPHRN 16-01-52 PUBLIC COMMENT

Dennis Ott
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January 1, 2018

To: Heather L. McCray
Assistant Chief Counsel
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Sacramento, California 95812-4036

SUBJ: **OBJECTIONS TO PROPOSED REGULATORY TEXT, 15 CCR 2240 / BPH RN 16-01**
"Comprehensive Risk Assessments"

Dear Ms. McCray,

As a member in the Johnson v. Shaffer (E.D. Cal.) No. 2:12-cv-1059 and the Sherman-Bey vs. Shaffer (CA 3; C077499) plaintiff class, I present objections to the December 22, 2017 proposed amendments to Title 15 of California Code of Regulations ("15 CCR"), section 2240, Board of Parole Hearings (BPH) Forensic Assessment Division (FAD) Comprehensive Risk Assessments (CRA), which are based on historical data and first hand experience.

OBJECTION I

THIS IS THE FIFTH ATTEMPT BY THE BOARD OF PAROLE HEARINGS TO IMPLEMENT A REGULATION THAT HAS PREVIOUSLY BEEN DECLARED INVALID, VOID, AND LEGALLY DEFICIENT

01 This is the fifth attempt by the Board of Parole Hearings ("BPH") to implement a BPH Forensic Assessment Division (FAD) Comprehensive Risk Assessment ("CRA"). Each has met legal challenges, and each was subsequently held invalid.

The first attempt was by memorandum dated January 1, 2009, which was declared an "underground regulation" and therefore "invalid" by the Office of Administrative Law (OAL) in OAL Determination No. 2010-27 on November 2010.

Additionally, on July 1, 2010 the Office of Inspector General ("OIG") issued a "SPECIAL REPORT" entitled "The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements" which was highly critical of the BPH FAD substantive lack of reliability and review (discussed shortly).

The second attempt was in response to OAL Determination no. 2010-27. The BPH authored 15 CCR 2240, held public hearings on or about January 31, 2011, and presented the file to the OAL. May 5, 2011, the OAL issued a DECISION OF DISAPPROVAL OF REGULATORY ACTION, pursuant to Government Code section 11349.3. Reasons for disapproval included the BPH's:

> "failure to meet the necessity and clarity standards of Government Code section 11349.1, failure to summarize and respond to public comments offered concerning the proposed regulation, and failure to submit a satisfactory fiscal impact statement for the proposed regulation." (OAL File No. 2011-0316-01 S, p. 1, "DECISION" section.)

Then, as now, a bulk of the objections pertain to using fraudulent psychological "risk" assessments, specifically the HCR-20, PCL-R, and LS/CMI, none of which have ever been validated for the affected long-term prisoner class, and all of which because of their highly subjective and biased techniques are likely to provide reports of clearly erroneous validity (to be discussed later).

The third attempt took place in July 2011, where the BPH once again promulgated 15 CCR 2240, with little public notice of the July 15, 2011 closure to respond. The undersigned stated in his written objections dated July 10, 2011:

> "The new attempt by the Board does not answer the substantive shortfallings noted by the OAL in the DECISION OF DISAPPROVAL, makes no substantive changes, and continues the smoke-and-mirrors subterfuge in an unfair manner, which will be taken up in turn" (ibid., p. 2).

In spite of objections from across the state, the OAL accepted the new 15 CCR 2240, and the regulation became part of the BPH FAD process.

Subsequent to the 2011 adoption of 15 CCR section 2240, with many complaints to the California Board of Psychology and many petitions for writ of habeas corpus, two successful court litigations found substantive problems with the BPH FAD CRA process and ordered changes: Johnson v. Shaffer, no. 2:12-cv-01059-KJM-AC (E.D. Cal.) and Sherman-Bey v. Shaffer (CA 3; no. C077499). In a May 27, 2016 order, Johnson v. Shaffer ordered the BPH to establish a **meaningful appeals process** where prisoners and/or their attorneys may file written objections to the CRA and receive a written response (not the "rubber-stamp" we normally receive). Sherman-Bey v. Shaffer found fault with 15 CCR 2240, subdivision (b) and the language included therein, specifically, "acturarily derived and structured professional judgment" as being without meaning to the affected class, and therefore in violation of California Code of Regulations, title 1, section 16.

The fourth time, in January 2017, the BPH once again promulgated the same smoke-and-mirrors in attempting to justify using psychological assessment tools for purposes that they were never designed for, on a population the tools were never validated on, which therefore allows errors on the part of BPH FAD psychologists to survive with no meaningful review process in place by design. These CRAs, based upon neither science nor peer review studies (except perhaps the self-serving studies by BPH FAD Chief Psychologist Cliff Kusaj), are often used to deny an unquestionable liberty interest to a class of people who long ago established rehabilitation by any objective factors, but remain without meaningful review for errors by BPH staff psychologists when performing "comprehensive risk assessments." As a result, litigation continued.

Upon court order issued on October 6, 2017 in Johnson v. Shaffer (Doc. no. 186), the BPH was ordered to amend the proposed 15 CCR 2240, siding with plaintiff class attorney Keith Wattley's assertion that provisions in the regulations detailing how inmates may challenge the CRA's were overly narrow in defining what constituted an error in the CRA.

And now, in this fifth attempt, the BPH proposes in answer to the Court that Board FAD psychologists should be given **carte blanche** to write whatever they want to because, "'For the purposes of this section, "factual error" is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not factual error'" (newly proposed 15 CCR 2240, subd. (c)(2)). **There is no other profession that enjoys such absolute immunity from error.**

02

OBJECTION II

THE PROPOSED REGULATION DOES NOT MEET THE ADMINISTRATIVE PROCEDURE ACT REQUIREMENT OF NECESSITY OR CLARITY STANDARDS

The January 18, 2017 proposed amendment rewrote 15 CCR 2240 subdivision (a) to state: "psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence." (15 CCR 2240(a).)

Section 2240, subdivision (c) was to require a senior psychologist to apply, "adequate scientific foundation, and reliable and valid principles and methods..." (proposed 15 CCR 2240, subdivision (c)).

The new December 22, 2017 proposed amendment to 15 CCR 2240, subdivision (a), mandates use of "structured risk assessment instruments like the HCR-20-V3 and the STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals" and, in 15 CCR 2240 subdivision (c) places review by Senior Psychologists on "adequate scientific foundation."

Proposed 15 CCR 2240 does not meet Administrative Procedure Act ("APA") needs.

03 **Lack of Clarity:** The meaning of the proposed regulation cannot be "easily understood by those persons directly affected." (Govt. Code § 11349, subd. (c).)

04 **Lack of Necessity:** The record does not demonstrate **any** substantial evidence or need for this regulation to effectuate the purpose of any **statute, court decision, or provision of law.** Specifically, the BPH has **never** presented one fact, study, or expert opinion that has withstood the test of time to justify the use of the CRA assessment tools. It is therefore in violation of Government Code section 11346.2, subdivision (b) and California Code of Regulations, Title 1, section 10, subdivision (b), which states to meet a necessity standard, the record of the rulemaking procedure "shall" include:

> "(b) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion...."

01 The May 5, 2011 OAL DECISION OF DISAPPROVAL OF REGULATORY ACTION, page 2, states the APA requires "identification of each technical, theoretical, **and empirical study**, report, or similar document, **if any**, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation" (Govt. Code, § 11346.2, subd. (b)(2)), and "The Board prepared an Initial Statement of Reasons, **but it does not fulfill the above requirements**" (emphasis added). The BPH failed that requirement with the existing 15 CCR 2240 with its 2011 Revised Initial Statement of Reasons. **It completely lacks reference to any empirical study, report, peer review and/or publication in professional journals.** The BPH 2011 Revised Initial Statement of Reasons to implement 15 CCR section 2240, page 7, states "**future research**" is needed because their validity is "unknown."

03 **The Board, with this new amendment, seeks to continue its practice without any explanation or clarification of what it is intended to accomplish.** The proposed regulation provides color-of-law pretext for what the Sherman-Bey Court declared to be "invalid." On this basis alone, it should not be adopted.

OBJECTION III

THERE IS AN INHERENT LACK OF RELIABILITY IN THE FAD'S ASSESSMENTS

01

July 1, 2010, David Shaw, California Office of the Inspector General (OIG), issued a SPECIAL REPORT entitled "The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements." The report reviewed concerns expressed by the Senate Rules Committee for two particular issues: 1) factual errors that may exist in psychological evaluations, and 2) certain psychologists who give **elevated risk assessment conclusions when compared to conclusions made in prior evaluations.** (Ibid., including letters to Matthew L. Cate, Secretary, CDCR, from David R. Shaw, Inspector General, and **vice versa.**)

The Johnson v. Shaffer Court December 3, 2014 Findings and Recommendations also noted the 2010 OIG report. Doc. 62, p. 5:16-25.

In brief, the OIG found substantive flaws in the FAD process:

a) The Board "**lacks reliable data to determine the number of factual errors** contained in the psychological evaluations."

b) The Board "**lacks reliable data** to determine the number of low-, medium-, and high-risk assessment conclusions in evaluations."

c) There are "**weaknesses in the parole board's oversight** of the methods it uses to review psychological evaluations," and

d) "**the parole board failed to provide** most of its commissioners, deputy commissioners, and senior psychologists with **the sufficient number of mandatory training hours.**" (07/01/2010 OIG SPECIAL REPORT, p. 2 ["Findings in Brief"], emphasis added.)

Referencing the above OIG report, the December 3, 2014 Johnson v. Shaffer Court stated, "senior psychologists routinely rubberstamp staff psychologists' reports without verifying the validity of anything written." Doc. 62, p. 5:22-23. Thus, the concern expressed in 2010 by the OIG continued through to 2014. There is nothing to evidence any change since then or with this amendment.

In addition, it is noteworthy to observe that the California District Attorney's Association, Prosecutor's Notebook, Volume XVII, "Lifer Hearing Manual" 2007 Update, page 105 states:

> "The panel knows that it is virtually impossible to predict future dangerousness. Reports typically fail to go into any real depth and are often slanted in the prisoner's favor. Thus, a good report is usually of little use to an inmate in receiving a date. On the other hand, a report not totally supportive of release supplies the panel with additional reasons to find the prisoner unsuitable."

From an objective view, that is a stacked deck to a prisoner's detriment.

This proposed amendment to section 2240 does nothing to address problems inherent in the FAD's practices. In fact, it perpetuates the same concerns that have existed for years. Accord: In re Elkins (2006) 144 Cal.App.4th 475, 498, quoting In re Scott (2005) 133 Cal.App.4th 573, 595, fn. 9.

OBJECTION IIII

SPECIFIC JOHNSON vs. SHAFFER OBJECTIONS

05 **First**, these regulations should provide for recording and transcription of clinical interviews -- not for all prisoners, but for those who volunteer to have their interviews recorded. This is vital to ensure the CRA process is transparent. California Lifer Newsletter (link @ lifesupportalliance@gmail.com) quoted BPH Executive Director Jennifer Shafter and Chief Legal Counsel Jennifer Neill are of the "opinion that inmates have no due process rights to have such interviews recorded" (CLN #71, p. 57; Oct. 2016). I counter that, at a minimum, California Constitution, article I, section 28, subdivision (f)(2) enforces a right to truth in evidence at post-conviction hearings. In the undersigned's example, I am able to document deliberate falsehoods in Dr. M. Geca's CRA as it applies to me, and such recording (if it were available) would be able to set the record true. Instead, affected prisoners continue to receive the same obfuscations of egregious wrongs, year after year, until now without redress.

06 **Second**, proposed 15 CCR 2240(e)(2) prevents **all** objections to "disagreement[s] with clinical observations, opinions, or diagnoses" or assessments not supported by objective criteria documented in the "psychologist's Bible" in the Diagnostic and Statistical Manual of Mental Disorders (DSM) based solely upon an **ad hominem** perception toward FAD psychologists' "expertise." Such limitation to appeal is contrary to the review protected by Evidence Code sections 801 and 802, as noted by the California Courts in, e.g., People v. Gardeley (1996) 14 Cal.4th 605, 618 and People v. Dodd (2005) 133 Cal.App.4th 1564, 1569. "Experts" are not given **carte blanche** under law -- except here. 15 CCR 2240 should allow prisoners to address all errors that appear in these FAD reports. The proposed 15 CCR 2240 does not state how CRAs are to be done. The BPH must explain assessment tools to comply with the APA (Govt. Code, § 11346.9(a)(3)).

07 **Third**, proposed 2240, subdivisions (f)(1) and (i)(1) allow untrained laypersons (the "Chief Counsel" and "hearing panel," respectively) to make determinations on the validity of the CRA outside of their own expertise in a subject they have no education in. Such actions are the unlawful practicing psychology without a license, and may be in violation of Government Code section 2052.

08 **Fourth**, it is unclear which standards will be applied in any attempt at lodging an appeal under amended section 2240, subdivision (e) or (f). The STIPULATED SETTLEMENT, presented by the Office of Attorney General filed 09/10/2015, page 7, line 9 (Doc. 79), and the AMENDED STIPULATED SETTLEMENT filed 10/02/2015, page 7, line 9, both state, "This settlement shall be governed and construed according to California law." Doc. 83, p. 7:9. That specific wording is not in the final ORDER in Johnson vs. Shaffer, filed May 27, 2016. Doc. 167.

02 Assuming for the sake of argument that California law is to govern this action, then the Board's attempt at shielding itself from meaningful review by holding to such a narrow view of "factual error" in the proposed 15 CCR 2240(e)(2), **et sequence** is contrary to Evidence Code sections 801 and 802, and the decisional authorities that have interpreted psychological reviews. The undersigned's

09 specific objections to his 2014 CRA prepared by M. Geca, Psy.D., follows. This writer received a "rubber-stamp" review by FAD Senior Staff Psychologist Cliff Kusaj (ltr. dtd 8/24/2015), a broken promise of review by Senior Staff Attorney Heather McCray (ltr. dtd 09/15/2016), and a contrary reply by BPH staff attorney Jim Logsdon (ltr. dtd. 10/10/2016). The FAD "appeal" is a complete sham.

OBJECTION V

THE UNDERSIGNED'S PERSONAL EXPERIENCE AT FALSE FAD REPORTS

09

In 2010 Dr. Geca wrote a FAD Report, and, using historical data, noted my 20-year Coast Guard career, an "exemplary" prison programming, and positive interaction with staff and prisoners. In 2011, joined by others across the state, my colleagues and I on the M.A.C. opposed implementing 15 CCR section 2240 which would have affected FAD employment. In an apparent retaliation, Dr. Geca's 2014 FAD CRA misquotes my family history, engages in speculation and deliberate falsehood, and alleges a "life-long" and "entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder misdiagnosis (2014 FAD CRA, 9, 11) without using **any** DSM-IV-TR and/or DSM-5 301.81 criteria. Documented in Objections to the FAD Report and exhibits mailed to your office January 8, 2015 and entered into my C-File, my life history does not reflect that DSM criteria. (In 2003 Dr. Mona Gupta wrote, "While diagnostic certainty...remains a philosophical problem in psychiatry, there are, at least, explicit diagnostic criteria for specific disorders," citing the DSM (165).)

As succinctly detailed in my Objections to the FAD Report and exhibits, Dr. Geca appears to simply compile lists of factors or symptoms that support a desired conclusion of unsuitability for parole, and writes that I either suffer from or possess them. The imaginative recreation of my personal and social history, and my inner life, would be entertaining if the consequences were not so serious. It is filled with contradictions, statements without foundation, and is contrary to objective criteria in the DSM-IV and 5. What she states is intentionally false, and at best is guesswork and speculation.

Dr. Geca fabricates an allegation of my "frustration and anger while having served in the Coast Guard" (FAD Rpt. 14). I served honorably for 20 years and have five (5) good conduct medals; my DD-214 documents numerous accolades and no "anger." She glosses over positive programming and evaluations by prison staff over the past twenty years, decades of Bible studies, a recent two-year college degree, scores of "self help" programs (including planning and facilitating some), and her own 2010 FAD Report--all of which contradict her 2014 FAD Report.

The FAD Report is little more than piling conjecture upon speculation and misrepresentations of my work and social history. It states I have a complete lack of insight, yet also says I present insightful information (7). It often refers to unspecified "life problems" (7, 8, 13, 14). It uses one Rules Violation Report I received in 2001 to find "manipulative schemes" (8, 9, 11). Without one factual basis, it says I have "a pervasive and inflexible pattern of overvaluation of self-worth," a "life history" alleged to be "egocentric and manipulative" with "an aura of arrogance" indicating a belief I "was above the conventions and struggles expressed by [my] peers" (7, 8) and "an entrenched maladaptive pattern of relating to others" to support a Narcissistic Personality Disorder diagnosis (8, 9, 11, 13, 14). Here, Dr. Geca contradicts herself stating I do "not have a history of unstable growing up experiences" and "did not present with a documented history of behavioral dyscontrol prior to [my] involvement in the life crime" (14). She states unnamed "people say" I am "arrogant, glib, and smooth" and I "became indignant" when "confronted" with this (7, 8, 9, 12, 15). She never "confronted" me with this. She also accuses unnamed prison officals as my co-conspirators by stating I "search for prison staff who collude with" my undefined "pathology and through them" I "reaffirm[] the 'truth' about [my]self, as [I] know it" (13). She says I have a "seriously

damaged" "character" based upon her interpretation of a few static facts now twenty years removed (9, 12, 13, 15). (One college text states, "character refers to value judgments of a person's moral and ethical behavior" (Cirrarelli & White, 494).) Burdening me with baggage of a "moderate" risk of reoffending (14), an "insidious" program (15), and "blaming others" (8) (all of which are willfully false), she concludes my "maladaptive" "diagnosis" "will" remain until I make inchoate changes, or until I can demonstrate the ability to live outside of prison (14-15) -- an impossible "Catch-22" circular condition to satisfy especially when at the mercy of such evaluations. Dr. Geca magnifies my risk of reoffending for "failing" (in her words) "to recognize and address critical factors which led to [my] relational problems" (which I disagree with; I did discuss them with Dr. Geca and am prepared to discuss with the Panel), and I have "yet to accept culpability for this crime" (14). That is a direct violation of Penal Code section 5011 and court decisions. (The crime's details are in the Sentencing Transcripts, page 10, the Court Minutes, and the Probation Officer Report's blank pages 14 to 19 in my C-File, available on SOMS.)

The 08/24/2015 "rubber-stamp" review by Senior Psychologist Cliff Kusaj is an abject failure of answering this serious charge of professional malfeasance by Dr. Geca. See, Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 307; Kelly v. Trunk (1998) 66 Cal.App.4th 519, 523-525. Without regulatory change, the proposed "review" and "appeal" process is now and will remain a sham, as is documented by my receipt of correspondence from Heather McCray, BPH Senior Staff Attorney dated 09/15/2016 stating my complaint would be sent to the CRA Appeals Team, and the subsequent correspondence from BPH staff attorney Jim Logsdon dated 10/10/2016 stating something entirely different.

CONCLUSION

The proposed regulation does not meet the necessity or clarity requirements of the APA, but seeks to legitimize a decades-long underground regulation. FAD reports are neither clinical nor individually based, but statistical, and based on flawed science. Steve Disharoon of the University of San Francisco writes they are viewed, however, by "the members of the Board, [who,] while experts in penology, lack the requisite psychological training to make the determinations called for by this factor" (197 & fn. 154). For these reasons, I strongly oppose the proposed draft regulations. I urge the BPH to take these regulations off the agenda and to address all problems noted herein.

01

Respectfully presented:

D. OTT

Works cited

Ciccarelli, Saundra K. and J. Noland White. Psychology. 3rd ed. 2012. Prentice Hall, Upper Saddle River, N.J.

Disharoon, Steve. California's Broken Parole System. University of San Francisco Law Review, Summer 2009. 44:177-214.

Gupta, Mona. "All locked up and nowhere to go." 155-178. Involuntary Detention and Therapeutic Jurisprudence. Eds.: Kate Diesfeld & Ian Freckelton. 2003. Ashgate, Burlington, VT.

cc. CLN; POB 277, Rancho Cordova, CA 95741
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re: BPH RN 16-01

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OMMENT

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Heather L. McCray, Ass't Cheif Counsel
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DATE: 1.1.2018

RE: Proposed § 2240, Comprehensive Risk Assessments.

Dear Ms. McCray,

I have been actively involved in the outcome of this class action suit, Johnson v. Shaffer, but have received no updates. I was afforded an update and comment timeline through another inmate here at C.T.F.,

1

On 7.11.16 I received a notice of case update,
On 8.30.16 received 2nd update,
On 9.22.16 received from Board of Prison Terms a notice that they would consider my suggestions to the CRA.

I would like to request to be kept informed of these proceedings. As an interested person I make the following comment regarding the modified text of proposed reg. § 2240, CRA in the BPH RN 16-01 notice that was received here at C.T.F.

I have been following this case and researching it with other C.T.F. inmates and have come to the following determination.

02 Subdivision (g)(3) begins "The board shall request that the department permanently remove any risk assessments that..." This "request" alone is not adequate protection to ensure that the affected risk assessment is actually removed and not viewed by any hearing panel member. You can't put the cat back in the bag once its letout, and can result in prejudice against the parolee if its found not to be a fact.

03 Although I do not know if the Board maintains inmate files for parole proceedings that are separate from the inmate's central file. I suggest that the Board must have a copy of the "request" document that was sent to the department and a process to

04 verify that the affected risk assessment was in fact removed prior to the central file **being seen** by a hearing member.

For that reason, subdivision (g)(3) should state to the effect "The board shall request and verify that the department permanently removed any risk assessments... from the inmate's central file

05 prior [illegible] hearing member."

Thank you in advance for all your hard work [illegible]

Sincerely,

Rodney T. Kratochvil

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BPH RN 16-01
NOTICE
PUBLIC
COMMENT

December 28, 2017

Ms. Heather L. McCray, Esq.
Assistant Chief Counsel
Board of Parole Hearings
Post Office Box 4036
Sacramento, CA 95812-4036

ATTN: BPH RN 16-01: Proposed Modifications And Additions To Text Of Regulations--To Rulemaking File.

RE Mr. G.J. Bouras, #E-02059. A Member of the Plaintiff Class in the Case: JOHNSON VS. SHAFFER.

Dear Ms. Heather L. McCray:

01 As a member of the plaintiff class in Johnson vs. Shaffer, I write to strongly object and oppose the proposed changes regarding CRAs' regulations, that the board will accept no later than Jan. 8, 2018.

NOTED: That in my previous letters to both the BPH and to UNCOMMON LAW, I had turned over my letters to the mail (C/O) in my unit well ahead of the announced date for to be submitted. However, apparently, they were kept in this prison for a couple weeks(?) before your office received them. Whereby, in your correspondence back to me you told me that my comments or objections were not included because they did not arrive on time(!).

02 FIRST, the proposed changes to regulations do not provide for recording and transcription of clinical interviews - not for all prisoners, but at least for those who voluntarily choose to have their interviews recorded--like inmates from a different culture like myself.

03 SECOND, the psychologists who work for the BPH need and must have clinical and anthropological knowledge about other cultures, as the U.S. population it is not comprised of ANGLO-Saxon people - Only!

04 THIRD, the error-filled CRA reports must be removed/EXPUNGED from the prisoners' files. Otherwise, in every new CRA the psychologist who will review all the records in the prisoners' files--Will Rely on the uncorrected errors, including the governer's atterneys.

05 FOURTH, to allow the Board panel officials to immediately address objections and other irregularities in a fair manner, and not prejudicially as they do presently. In other words, the BPH panel to have a greater authority to be abled to correct glaring irregularities.

06 FIFTH, to afford indigent prisoners a "fair forum" to appeal biased and abitrary decisions made by either BPH panels or psychologists, as more than 83% of the prisoners do not have the financial means to hire their own atterneys.

01 For the reasons mentioned above, I strongly oppose the proposed changes and/or lack of changes to CRA reg.s I urge you to take my proposed changes into serious consideration, as they'll affect a multitude of prisoners similarly situated.

Sincerely, George J. Bouras, CDCR #E-02059
Cc: File

George John Bouras
CDCR #E-02059
CHCF. C-5B-116-C
P.O. Box 32200
Stockton, CA 95213
USA

CHCF
CA DEPARTMENT
OF CORRECTIONS
AND REHABILITATION

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01/02/2018
US POSTAGE

Ms. Heather L. MaCray, Esq.
Assistant Chief Counsel
Board of Parole Hearings
Post Office Box 4036
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CONFIDENTIAL MAIL

95812-403636

16-01-55
(Duplicate to
16-01-51)

January 2nd, 2018

IDENTICAL TO 16-01-51

BPH RN 16-01-55 RENOTICE PUBLIC COMMENT

Peter M. Bergne, E-57901
Housing Unit 4-W-45
West Block Center
San Quentin State Prison
San Quentin, Calif. 94974

Mrs. Heather L. McCray,
Assistant Chief Counsel
California Board of Parole Hearings
Post Office Box 4036
Sacramento, Calif. 95812-4036

Control No: BPH RN - 16 - 01
O A L Notice File Number:
(Related ref: z 2016-1024-02
Ref: Bus. & Prof Code, §2936

Dear Mrs. McCray,

COMMENTS REGARDING PROPOSED CHANGES

Pursuant to page 2 of your NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS dated 12-22-17, I am propounding the following comments and objections. There exists a serious anomaly and problem legally with Item 4 and 'Information regarding the APA ethics code governance only of its own members and not all California psychologist licensees'.

No record or valid information is provided and should be indicated in the regulations exactly who the qualified licensing authority is for forensic psychologists if not the Board of Psychology. The Board of Parole Hearings itself as a public entity has no medical certification or professional authority to license any psychologists in the state. A fortiori, what professionally qualified organization are BPH forensic psychologists members of if not the Board of Psychology???

Moreover, due to the professional nature of their employment and work product, BPH forensic psychologists must be obligated by law and regulation to comply with a clear and transparent code of professional ethics and conduct of some kind similar to the APA Ethical Principles and Code of Conduct, but in a simplified version. (Please refer to Cal. Bus. & Prof. Code, §2936). Such a code of ethical principles and conduct needs to be drafted and presented to the public and the Office of Administrative Law before Section 2240 of the Board's regulations can be modified. See Cal. Gov. Code, §§11346.4(a), 11346.8(a), 11346.8(d), and 11346.9(a)(1).

Under the current penological regime and administration the BPH forensic psychologists are virtually accountable to no one other than themselves and their immediate supervisors who coddle and shield them under color of law. It is the truth, and no one should try to contradict or downplay this reality.

* NO IDENTIFIED ADDITIONAL COMMENTS — LETTER IDENTICAL TO 16-01-51 *

HERE ARE THE MOST BASIC ETHICAL PRINCIPLES AND STANDARDS THAT NEED TO BE DRAFTED AND INCORPORATED INTO THE MODIFIED TEXT OF SECTION 2240:

Pursuant to Comprehensive Risk Assessments (CRAs) [1]

A) The proposed regulation text under C.C.Regs., Title 15, Div. 2, Sect. 2240(c)(1), should include 'a risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to assure that the psychologist's opinions are based upon A) adequate scientific foundation **which is not obsolete**, or based upon an obsolete record, and B) the opinions and allegations stated by any psychologist shall have conformed to the basic professional principles of accuracy, truthfulness and integrity without engaging in fraud, subterfuge and/or intentional misrepresentation of fact which would jeopardize the future welfare and rights of prisoners who are eligible for parole.

B) BPH forensic psychologists shall seek to safeguard the welfare and rights of all those with whom they interact professionally, and take care to do no harm. Also, forensic psychologists when preparing CRA work product shall give sufficient credit to prisoners they evaluate for their positive post-conviction achievements and laudatory accomplishments including chronos and certificates earned.

C) BPH forensic psychologists shall not refer to any prisoner misconduct in their CRA evaluations which is obsolete and more than 50 (fifty) years out of date unless it resulted in a criminal conviction for murder, armed robbery or kidnapping.

D) BPH forensic psychologists shall refrain from preparing any CRAs in cases where there is a substantial likelihood that their personal problems or prejudices will prevent them from being impartial in the course of their work-related activity. In such cases they shall recuse themselves, and the Chief Psychologist will appoint a substitute psychologist

---

1. Reference is incorporated herein with regard to the APA (American Psychological Association's ETHICAL PRINCIPLES, STANDARDS AND CODE OF CONDUCT; Cal. Bus. & Prof. Code, §2936 and §2960; Cal. C.C.Regs., Tit. 15, Div.2, §2240(c)(1); and Cal. Gov. Code, §§11346.4(a), 11346.8 (a), 11346.8(d) and 11346.9(a)(1).

I sincerely hope and do request that the aforegoing COMMENTS REGARDING PROPOSED CHANGES herein will be carefully reviewed and incorporated wherever possible and appropriate according to law. I stipulate that this letter may be included to the record.

DATED: JAN. 2ND, 2018

DUE DATE: JAN. 8TH, 2018

Respectfully submitted,

PETER M. BERGNE, E-57901
Paraprofessional-Emeritus in
Anglo-American Jurisprudence

cc: John Dannenberg
California Lifer Newsletter
Post Office Box 277
Rancho Cordova, Cal. 95741

cc: Beverly J. Johnson, Deputy Director
Office of Administrative Law
300 Capitol Mall, Ste. 1250
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P. M. BERGNE, E-57901
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16-01-56

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WENDELL BICELOW #K-66059
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January 2, 2018

TO: Heather McCray, Asst. Chief Counsel
Board of Parole Hearings
Box 4036
Sacramento, CA 95812-4036

Keith Wattley, Esq.
UnCommon Law
220 4th Street Suite 10
Oakland, CA 94607

SUBJ: OBJECTIONS TO PROPOSED REGULATORY TEXT, 15 CCR 2240
Comprehensive Risk Assessments (CRA)

Dear Ms. McCray,

I. PROPOSED REGULATIONS LACK A LEGAL FOUNDATION VALIDATING THEIR EXISTENCE AND ARE THEREFORE ILLEGAL.

01 The proposed regulations attempt to legitimize the notion that board psychologists are infallible and therefore no due process safeguards are necessary. This notion is especially apparent in the effort to hide behind fiscal excuses for not providing transcripts (or at a minimal, audio recordings) of evaluations. It is also true for proposed section 2240(b)'s reference to youth offender-specific risk assessments, when this section says "the psychologist shall also take into consideration the youth factors in Penal Code section 3051, subdivision (f)(1) and their mitigating effects." Evidence Code section 801(a) governs all expert witness testimony and requires that the testimony (i.e., evaluations) and processes thereof comport with applicable law. So, even as state courts wrestle with the definition and implementation of "Great Weight" (see Penal Code section 3051(f)(1)) as it relates to youth offenders, the assessment regulations should not be tip-toeing around the legislative intent in the youth offender statutes.

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04 Another example of the evasion of Evidence Code section 801(b) compliance is the opaque definition of "factual error" and the specious notion that mere "disagreement with clinical observations, opinions, or diagnoses is not a factual error." Because the clinician can say anything about what an inmate says during an assessment and without a record of the evaluation an inmate has no defense, the scope of "untimely circumstance or event" remains undefined. Such statutory construction is Machiavellian.

II. FAILURE TO CITE PENAL CODE SECTION 5011(b) AND TITLE 15 SECTION 2236 AS A MANDATE CONDITIONING THE ASSESSMENT PROCESS VIOLATES DUE PROCESS.

05 A conundrum arises when an inmate's version of the crime is plausible but the clinician decides that it demonstrates a lack of insight; section 2236 this shall not be held against an inmate, yet this proposal skirts this possibility by subsuming the issue under the guise of "clinical observation." Evidence Code section 801(b) places limits on the scope of expert testimony.

Further, there is no indication in the proposed regulations that an inmate's rights under Penal Code section 5011(b)(an inmate need not admit guilt or even discuss the crime, and exercising this right is not to be held against the inmate) are protected. Anecdotal evidence clearly indicates this is a problem and should not be allowed.

III. CONCLUSION

02 06 To avoid mocking constitutional protections, transcripts (at least audio recordings), must be enshrined in regulations. And Administrative Procedures Act compliance requires these regulations be specific to inmate rights as noted above and required by Evidence Code section 801(b).

01 Implementing the current proposed regulations would be a blatant bias against an inmate's due process. See **Swarthout v. Cooke** (2011) 131 S. Ct. 859, 862 ("the Due Process Clause requires fair procedures for its vindication."). The proposed changes do not address problems inherent in the PAD's practices; instead the same concerns existing for years are perpetuated. See **In re Elkins** (2006) 144 Cal.App.4th 475, 498, quoting **In re Scott** (2005) 133 Cal.App.4th 573, 595, fn. 9. The BPH must take seriously these objections and fashion regulations accordingly. To do otherwise is to commit an act of unmitigated immorality.

Respectfully submitted,

Wendell Bigelow

Wendell Bigelow

ORIGINAL

PROOF OF SERVICE BY MAIL

BY PRISONER "IN PRO PER"

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prison inmate.

My prison address is: California State Prison - Solano
Housing: C-15-5-20
P.O. Box 4000
Vacaville, California 95696-4000

On the "*date*" specified below, I served the following document(s) on the parties listed below by delivering them in an envelope to prison authorities for deposit in the United States Mail pursuant to the "Prison Mailbox Rule":

Case Name: JOHNSON v. SHAFFER **Case #:** No. 2:12-CV-1059

Document(s) Served: OBJECTIONS TO PROPOSED CHANGES TO DECEMBER 2017 VERSION OF 15 CCR 2240

The envelope(s), with postage fully pre-paid or with a prison Trust Account Withdrawal Form attached pursuant to prison regulations, was/were addressed as follows:

BOARD OF PAROLE HEARINGS
ATTN: HEATHER MCCRAY, ASST. CHIEF COUNSEL
BOX 4036
SACRAMENTO, CA 95812-4036

UNCOMMON LAW
ATTN: KEITH WATTLEY
220 4TH STREET STE 103
OAKLAND, CA 94607

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on 1/2/18, in Vacaville, California.

"*date*"

Signature: Wendell Bigelow

Printed Name: WENDELL BIGELOW

WANDELL BIGELOW #K-66054
CSP-SOLANO C-15-5-2UP
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SACRAMENTO CA 957

California State Prison-Solano

BOARD OF PAROLE HEARINGS
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JAN 08 2018
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16-01-57

BPH RN
16 1-57
RENOTICE
PUBLIC
COMMENT

JANICE THOMAS, PH.D.
CLINICAL PSYCHOLOGIST – CA PSY 10496
JThomasPhD@gmail.com

January 7, 2018

RECEIVED V/A
EMAIL ON
1/7/2018

Heather L. McCray
Assistant Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036

Via email: BPH.Regulaltions@cdcr.ca.gov

Re: BPH RN 16-01

To: Chief Counsel for the Board of Parole Hearings, Jennifer Neill, and to the Board of Parole Hearings.

I am writing in response to the modifications to text of the proposed regulatory action to amend § 2240 of the California Code of Regulations (CCR), Title 15, Division 2, concerning Psychological Risk Assessment for Life Inmates. The modifications do not substantially correct or improve the original amendments, and minor tweaks to the text do not correct fundamental, substantive problems. Related to my objection is the fact that neither did the Board, or Counsel on the Board's behalf, respond to my comments which were written on 12/18/16 and which were emailed to the Board and are identifiable in the record.

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The overarching problem with the amendment, both the original and the revision, is that examiners are directed to use instruments which do not have demonstrated validity on the specific population being evaluated and for the specific risk-related question being asked. The fact that the risk assessment instruments are "commonly used by mental health professionals who assess risk of violence of incarcerated individuals" might seem to satisfy some evidentiary standard. However, it is not enough for a test or a method to be accepted by mental health professionals generally, or to be used on incarcerated populations generally. It is also must be valid for the specific population whose violence risk is at issue.

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Risk assessments are used to evaluate various individuals in various situations, including psychiatric patients who might be released to the community, jail detainees who might be released, etc. However, the question which remains is whether the instruments in question have validity with respect to individuals who have been incarcerated for decades.

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We know from anecdotal evidence and possibly BPH records that California inmates with indeterminate sentences have a lower recidivism rate than California inmates with determinate sentences, that life term inmates have a lower recidivism rate than short-term inmates, that older inmates have lower recidivism than inmates in their early 20's, etc. "Incarcerated populations" is therefore an overly general category and should be refined to reflect the specific, exceptional type of incarcerated population which is represented by life-term inmates. Please produce the study which

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uses the HCR-20-V3, or any version of the HCR-20, with California life-term inmates or any life-term inmates in any state, or country, for that matter.

The amended text gives examples of risk assessment tests and against which the mental health professional can select similar tests. So, for example, the text lumps together the STATIC-99R – which is an actuarial risk assessment method used on sex offender populations – and the HCR-20-V3 – which is known as structured professional judgment and which, in fact, is not an actuarial risk assessment method. The category of acceptable instruments is unclear.

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Yet the regulation directs examiners to what they "shall" do when they prepare comprehensive risk assessments. If a regulation is directive to the point of stating what "shall" be done, then it is equally imperative that greater precision be required. It is imperative that if an actuarial risk assessment test, e.g. the STATIC99, be used that it has been validated on the population for which the test is used; and if, for example, the HCR-20-V3 is one of the methods that is used that there be research which demonstrates the validity with the specific population (life term inmates).

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The adequacy of any test results must meet demonstrated standards which are not adequately articulated in the proposed text or the modifications to the proposed text. The standard is not just that a test is accepted by the professional community but also that is valid for the particular population whose liberty interests are at stake. These are the population parameters which can render a test invalid depending on who the individual is and whether the individual is represented in the normative sample.

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In short, it is not enough that the risk assessment be reviewed by the Chief Psychologist. The regulatory language should be clear that only tests should be used which have demonstrated validity for the exceptional population of California life-term inmates. It is anticipated that this would require data gathering that has heretofore not been done.

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Another category of problems in the modification to the text is the directive for the examiner to consider factors of "suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2042 of this division." These are dated lists and are in conflict with new laws for juvenile offenders and at odds with what we know about adolescent development. In fact, inmates with juvenile histories might indeed be at more risk in the short-term but at lower risk in the long-term. The weight of that risk factor would vary depending on the age of the individual being evaluated.

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Again, is there any data which show that there is a greater risk of violence when a juvenile offender is released at 45 years of age relative to an adult offender who is released at 45 years of age? What is the contemporary foundation for "no juvenile record" (suitability factor per § 2281)?

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In addition to being outdated, some of the suitability and unsuitability factors are unreliable as predictors because they are unreliable during the assessment process. Evidence of remorse is dependent upon interviewer characteristics and not only dependent on the person being evaluated. In other instances, the suitability and unsuitability factors, e.g. victim abuse, mutilation, execution-style murders, might be very reliable. In short, the question is whether the BPH has evidence which shows which of these suitability and unsuitability factors are reliable?

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Finally, the proposed amendments in regulatory language are overly narrow by focusing more or less exclusively on risk assessment tools and on suitability and unsuitability factors. There are cultural factors to consider, age-based factors to consider, mental disorders which might mitigate the commitment offense, e.g. PTSD.

In closing, the modifications to the text do not materially improve upon the originally proposed amendment pertaining to Comprehensive Risk Assessments. Both are flawed and risk being another means of depriving an individual of his or her liberty interests. I am proud of my profession but am equally aware of how psychological information, masked in jargon and under the cover of expertise, can be harmful. It is for this reason that I previously identified problematic ethical issues, and which I reiterate, by reference, here.

Yours sincerely,

Janice Thomas, Ph.D.
Clinical Psychologist
PSY-10496

16-01-58

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PH RN 16-01-58 NOTICE PUBLIC COMMENT

January 8, 2018

RECEIVED VIA EMAIL ON 1/8/2018

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Jessica.Blonien@doj.ca.gov

Heather McCray, Assistant Chief Counsel
California Board of Parole Hearings
BPH.Regulations@cdcr.ca.gov

Re: *Johnson v. Shaffer* – Revised Draft Regulations (BPH RN 16-01)

Dear Ms. Blonien and Ms. McCray:

As class counsel in *Johnson v. Shaffer*, we write to provide comments on the proposed regulatory amendments to Title 15 of the California Code of Regulations, Section 2240, Comprehensive Risk Assessments. Unfortunately, as we outline below, this amended draft of the regulations does not resolve all the concerns the *Johnson* plaintiff class raised about previous drafts of the regulations, nor does it resolve those concerns more recently raised by the District Court (in extending its jurisdiction in the case) and by the Office of Administrative Law (in disapproving the previously proposed amendments). This draft also raises new concerns. As we have previously indicated, we are very interested in discussing these issues with you in person and working together to address them.

Amendments Addressing the Court's Concerns

On October 6, 2017, the District Court issued an Order extending its jurisdiction over the *Johnson v. Shaffer* Settlement Agreement so that the regulatory amendments could be redrafted in three ways: (1) to provide a definition of "factual error" that reasonably reflects our mutual intent at the time of the Agreement; (2) to establish deadlines and adequate review timelines binding upon the Board; and (3) to provide a mechanism for correcting all factual errors in CRAs. In addition, the Court extended jurisdiction so that the language describing comparative risk levels in CRAs would be modified to comply with the Agreement's terms. While the newly amended draft of the regulations reflects some progress toward fulfilling the Court's Order, it still falls short in some significant ways.

1. Amended definition of factual error. The amended draft provides in subdivision (e)(2): "For the purpose of this section, "factual error is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error."

This amended definition is problematic in at least three ways. One problem is that the phrase "untrue circumstance or event," which is new in the amended draft, simply does not mean anything. *Statements*, *attributions*, and *conclusions* are things that can be assessed as true or untrue. In contrast, *circumstances* and *events* are not the types of things that can sensibly be

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assessed as true or untrue – although their *existence* can be confirmed or disconfirmed, and *statements about them* can be true or untrue. Accordingly, the definition of "factual error" should be made sensible; an acceptable revision would be: "a factually untrue statement about a circumstance or event."

A second problem with the current definition of "factual error" originated with the prior draft regulations – specifically, the exclusion of "clinical observations, opinions, or diagnoses." Since the previous draft was submitted to the OAL, the Board has been applying this exclusion as a procedural shield against objections to various subjective, unverifiable statements made by psychologists in CRAs, under the guise that *any* opinion held by a clinician must be a "clinical opinion." In view of this problem, this definition needs to be accompanied by a sensible clarification of what opinions do and do not constitute "clinical opinions."

Of even greater concern is that this new draft of the regulations makes no provision for identifying and addressing all the CRA appeals that have been erroneously screened out under the prior draft's definition of "factual error," which the District Court has declared unacceptable. We are concerned about the lack of remedy provided for prisoners whose appeals have been wrongfully screened out since the Board started implementing the prior definition at some point in the summer or fall of 2016 (even though we alerted the Board as early as July 2016 that this definition was unacceptable and unworkable at the outset,). We understand that developing and implementing an appropriate remedy will be a large undertaking, and we are eager to work together with the Board on this task.

2. Amended deadlines and review timelines. The amended draft provides in subdivision (d)(2): "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing." Other aspects of the review timeline remain unchanged from the previous draft – namely the 30-day deadline for a prisoner to submit objections, set forth in subdivision (e)(1), and the 10-day deadline for Chief Counsel to give notice of the decision, set forth in subdivision (f)(2)(A).

The new 60-day deadline for CRAs to be served on prisoners marks an improvement over the previous draft, which provided no deadline at all. However, it is still inadequate in that it leaves a prisoner only 15 days to review the CRA, consult with an attorney, and draft written objections before the 45-day waiver deadline hits.[1] Further, the 10-day deadline for notice of a decision regarding an objection is still unreasonably tight, as it leaves prisoners and their attorneys very little time to confer about the outcome of the objection prior to the hearing.

For the review timeline to afford reasonable due process protections, the deadline for serving completed CRAs on prisoners should be set at 90 days before the hearing, and Board-appointed attorneys should be required to meet with each client 60 days before the hearing. Further, given that the regulatory text currently states that the Chief Counsel's decision not to

[1] It is crucial that prisoners are given a meaningful opportunity to review their CRAs *and* meet with counsel in advance of the waiver deadline of presumptive validity, because it is very common for issues raised in the CRA to be grounds for waiver if not resolved. Prisoners must first consult with counsel to make such decisions.

address an untimely objection "is not alone good cause for either a postponement or a waiver under section 2253" of the regulations, the regulatory text should provide that the Board's failure to address a timely objection *can* constitute "good cause" for either a postponement or a waiver.

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In addition, Board-appointed attorneys should be required to meet with each client sometime after the Board's deadline for responding to that client's CRA objections – at the very latest, during the 10-day period preceding the hearing – to ensure prisoners have an opportunity to confer with counsel after receiving any decisions regarding identified errors in the CRA. An attorney's failure to schedule such a meeting, moreover, should be deemed good cause for a prisoner to waive the hearing.

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3. New requirement that *all* factual errors be corrected. The amended draft removes conditions that previously constrained a prisoner's ability to object to identified factual errors, constrained the Chief Psychologist's obligations to correct factual errors and remove error-affected CRAs, and constrained Commissioners' obligations to flag or refer factual errors in CRAs. Previously, the appeal process was designed to address only those factual errors believed to have "material impact" on the CRA's overall conclusions regarding the prisoner's risk of violence – even though, as the District Court recognized, no such limitation was permitted under the terms of the *Johnson* Settlement Agreement. As a result of the amendment, any and all factual errors identified through the appeal process must be flagged and corrected by the Board's Chief Counsel, Chief Psychologist, and Commissioners.

The removal of "material impact" limitations marks an improvement over the previous draft. However, two issues remain unaddressed. First, the regulations remain unclear as to what criteria a Board hearing panel will use to overrule a prisoner's objection to a factual error, determine that no factual error exists, and complete the hearing despite the prisoner's objection.

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Second, for cases in which a Board hearing panel identifies factual errors at the hearing, the regulations provide no timeline for the Board to correct those errors. A reasonable timeline for post-hearing corrections is necessary to ensure prisoners are not prejudiced by the impact of error-affected CRAs on other decisions regarding their liberty – such as parole decisions by subsequent hearing panels and by the Governor, as well as decisions by reviewing courts.

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4. Language in CRAs describing comparative risk. Although the amended draft does not explicitly address it, this issue concerns one of the Board's obligations under the *Johnson v. Shaffer* Settlement, and the District Court extended its jurisdiction to cover this issue (among others). Near the end of 2017, the Board began adding new language to at least some CRAs stating the following: "Generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences. The board defined overall risk ratings relative to other life prisoners."

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The first new sentence is somewhat helpful, reflecting the language required by the Settlement Agreement. However, the second new sentence is vague and confusing; its meaning is unclear. This second sentence should be replaced with one or more statements clearly explaining that, *in the context of these CRAs*: (1) a prisoner assessed as "high risk" is about *equally likely* to commit violence as an average CDCR prisoner released from a non-life sentence; (2) a prisoner assessed as "moderate risk" is *significantly less likely* to commit violence than an average CDCR

prisoner released from a non-life sentence, and generally *very unlikely* to commit violence; (3) life-term prisoners pose a *far lower risk* of violence than CDCR prisoners released from non-life sentences, who collectively pose only about a 5 percent risk of violence. Statements clarifying these statistical facts, in addition to better addressing the concerns at the heart of the *Johnson* litigation, would be consistent with statements made by the Board's Chief Psychologist in public presentations to the Commissioners in November 2016 and October 2017. Full disclosure is critical if the Board expects the people affected by these CRAs to believe in their objectivity.

Amendments Addressing the OAL's Concerns

1. **Lack of clarity in subdivision (a).** The amended draft provides in subdivision (a): "…Psychologists shall consider factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals."

The OAL noted that the prior draft was unclear as to what "risk factors" psychologists must consider, what an "approach" is and how it is "standardized," what it means for an approach to be "generally accepted," and who constitutes the "psychological community." The amended draft addresses this concern by deleting unclear language, but it also adds language that raises new issues.

12 One issue is that the new language suggests that, when administering risk assessments, the Board's psychologists will be applying legally defined criteria – "factors of suitability and unsuitability" – which they are not professionally qualified or legally authorized to do. A second issue is that the phrase "including but not limited to" does not clarify what *other* factors may or must be considered by the Board's psychologists. A third issue is that the statement that the HCR-20-V3 and STATIC-99R are "commonly used by mental health professionals who assess risk of violence in incarcerated individuals" is improper and misleading in this context: aside from the 13 Board's current use of these tools, the HCR-20-V2 and STATIC-99R have never been scientifically endorsed for use with long-term prisoners for purposes of predicting their future violence risk and, in turn, basing parole release decisions on such predictions.

2. **Lack of clarity and lack of rationale regarding subdivision (d).** The amended draft deletes the provision, previously set forth in subdivision (d)(2), that stated: "The board may prepare a risk assessment for inmates housed outside of California."

The OAL noted that the prior draft was unclear regarding what criteria would govern the Board's decisions whether to prepare CRAs for out-of-state prisoners. The OAL also noted the lack of any explanation as to why the previous draft eliminated subdivision (g) from an even 14 earlier version of the regulation, which outlined such criteria. In view of the OAL's concerns, it is unclear how simply deleting the provision that previously set forth criteria helps clarify how the decisions will be made.

3. Lack of clarity in subdivision (h). The amended draft provides in subdivision (h) that, upon receiving untimely submitted objections to factual errors in a CRA prior to the hearing: "[…] the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall refer the objection to the hearing panel for consideration. […]"

The OAL had noted that the previous draft was unclear regarding what criteria, other than time, would govern the Chief Counsel's decisions (a) whether to complete review of an untimely objection prior to the hearing and (b) whether to refer the objection to the panel for consideration. While the amended draft adds some clarity by indicating the Chief Counsel *shall* (rather than *may*) take these actions if sufficient time exists, it leaves unclear what criteria will govern the determination of whether sufficient time exists to address a particular objection.

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4. Lack of rationale for subdivision (c). Both the amended draft and the previous draft provide: "[(c)](2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist."

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The OAL had noted the lack of explanation as to why the date of approval must be the date a CRA is deemed "final." The amended draft does not furnish any such explanation.

Indeed, it would be more sensible to deem the risk assessment "final" on the date the evaluator completes an interview with the prisoner – that is, the date on which the data that serve as the basis for the evaluator's judgments, namely the prisoner's statements and central file documentation, are current. In cases involving numerous errors in a CRA report or other procedural issues that warrant postponement of a parole hearing, many months or perhaps years may pass between the CRA interview and the date on which a corrected CRA report is finally approved. Due to this possibility, it would better promote the interests of fairness and professional integrity to ensure that every life prisoner is entitled to a new CRA evaluation once their last CRA *interview* is three years old – and thus deem each CRA final once the interview is completed.

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Other Concerns Not Resolved by the Amended Draft

1. Less clarity regarding the Board's obligation to remove error-affected CRAs. The amended draft provides in subdivision (g)(3) that "the board shall request that the department permanently remove" any error-affected CRAs that need to be revised or redone. This provision replaces stronger, more direct language in the previous draft, which stated: "Impacted risk assessments shall be permanently removed" from the prisoner's central file." This amendment subtly undermines clarity regarding the Board's obligation to remove error-affected CRAs. What is the reason for replacing the stronger requirement with weaker language?

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2. Deleted provision defining "good cause" for submitting an untimely objection. The amended draft deletes the provision that defined "good cause." Why was the definition deleted?

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3. Deleted language regarding opportunity to clarify attributed statements. The amended draft provides, as did the previous draft, that prisoners shall have the opportunity at a hearing to respond to any "clinical observations, opinions, or diagnoses" in the CRA; however, it deletes language from the previous draft that provided for the opportunity at a hearing to "clarify any statements a risk assessment attributed to the inmate." Why was this language deleted? This is a critical and problematic omission, particularly relative to prisoners unable to satisfy the pre-hearing appeal timelines.

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4. Lack of provision for translating documents in cases where an interpreter is required for the CRA interview (as well as the parole hearing). In such cases, even though specific prisoners are *known* by the Board not to understand English, the Board is providing these prisoners CRA reports written *only* in English. That is, the Board is knowingly failing to provide the accommodation necessary to make meaningful these prisoners' rights to receive copies of their CRA reports. A provision for language translation is necessary to remedy this failure.

Conclusion

We recognize the difficult work that goes into developing a solid draft of regulations, and we are hopeful that the remaining issues can be addressed. As counsel for the *Johnson* plaintiff class, however, we are also very concerned by the lack of prompt communication with us regarding the OAL's decision of disapproval and subsequent amendments made to the regulations, even despite our repeated requests for status updates. Nevertheless, we appreciate this opportunity to share our concerns about the revised draft.

Although we were unable to find a mutually agreeable time to meet prior to the holidays regarding the current draft, we are still very much interested in finding a time to discuss the issues outlined here, and working together to resolve them.

Thanks for your consideration.

Sincerely,

UNCOMMON LAW

By: _____
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16-01-59

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BPH RN
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NOTICE
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COMMENT

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VIA E-MAIL AND U.S. MAIL

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Re: *Armstrong v. Brown*; *Coleman v. Brown*
Comments on Proposed Revisions to Title 15 § 2240
Our File No. 0581-04; 0489-03

Dear Ms. McCray:

Together with our co-counsel, the Prison Law Office, we are class counsel in *Armstrong v. Brown*, N.D. Cal. Case No. C94-2307-CW, and *Coleman v. Brown*, E.D. Cal. Case No. 2:90-cv-00520 KJM. We write to provide our joint comments on the Proposed Regulatory Amendments to Title 15 § 2240, Comprehensive Risk Assessments, issued on December 22, 2017. Comprehensive Risk Assessments have a direct and significant impact on our clients: all CDCR prisoners with specified physical, developmental and learning disabilities (*Armstrong*) and all CDCR prisoners who are part of the Mental Health Services Delivery System (*Coleman* and *Armstrong BPH*). As we have informed you repeatedly in our regular *Armstrong BPH* tour reports, and most recently through a letter to Sharon Garske and Danielle O'Bannon dated August 17, 2017, BPH Commissioners often rely heavily on the findings of the Comprehensive Risk Assessments completed by the Forensic Assessment Division (FAD) in determining whether an individual will pose an unreasonable risk to society if released.

We are writing, together with our co-counsel the Prison Law Office, to ask for changes to the proposed regulations in order to ensure our clients are provided the same opportunities to be released on parole by the Board of Parole Hearings ("BPH") that are provided to other individuals in CDCR institutions who do not have mental health or

physical disabilities. We are also writing to ensure that CDCR does not impose barriers through these regulations that result—even unintentionally—in discrimination against our clients.

01 First and most importantly, we are concerned that the proposed regulations, a copy of which proposed text is attached to this letter, contain no mention of the need for licensed psychologists to identify and accommodate prisoners' disabilities while conducting Comprehensive Risk Assessments. As you know, the Armstrong Remedial Plan for BPH issues, amended on December 1, 2010, contains a variety of requirements for ensuring that effective communication is provided during the Comprehensive Risk Assessment process. The 2010 ARP requires that staff conducting the interview for the psychiatric assessment review the 1073 and DECS and document the accommodations provided in DECS. *See Armstrong* Parole Proceedings Remedial Plan, Amended 12/1/10, ("2010 ARP II") at XI.A.2.a (defining parole proceeding contacts to include "interviewing the inmate for Board Report and for psychiatric report" and requiring that prior to all parole proceeding "contacts," including interviews by psychiatric staff, staff members review DECS and the 1073, and requiring that "[a]fter review of the BPH 1073 and DECS, if it is determined that the inmate requires a reasonable accommodation, it is the responsibility of BPH or institutional staff to ensure that the accommodation is provided"). The ARP II also requires BPH psychologists to provide accommodations documented in DECS to individuals who are being assessed. *See* 2010 ARP II at XI.A.5.a and b. ("If an inmate requires a reasonable accommodation, the BPH clinician shall ensure the accommodation is provided in each contact and complete the necessary documentation").

It is critical that these requirements be incorporated into the regulations to ensure that they are followed and are documented in the risk assessments. We do not believe that these procedures are being followed consistently – or at the very least are not being followed adequately – by the BPH psychologists. If these requirements about effective communication are being followed, they are not well documented in DECS or in the risk assessments themselves. Moreover, the regulations should clarify a number of outstanding questions in the current process: Do the BPH psychologists always have access to DECS and do they receive a copy of the Form 1073 prior to their psychological interviews for the Comprehensive Risk Assessments? Are they required to document the accommodations provided in DECS? Are the BPH psychologists provided access to critical accommodations such as staff assistants for their parole proceeding contacts when interviewing the life prisoner for the risk assessment? If so, how is this provided? If not, why not?

We were surprised to see that your proposed regulations are completely silent on these important issues.

The lack of effective communication is often problematic, particularly for class members who are developmentally disabled ("DDP"), have a learning disability ("LD") or have a mental disability ("CCCMS. EOP, MHCB, DSH or PIP levels of care"). These disabilities are often not accounted for within the risk assessment.

02 Second, as acknowledged by various CDCR forensic psychologists, the tools provided to them to evaluate individuals are not validated for those with lower IQs, an underlying mental illness, or other mental or cognitive disabilities. Despite this acknowledgement, often the risk assessments do not pay particular attention to an individual's disabilities and related cognitive limitations in assessing their risk, and in evaluating insight, institutional behavior, community contacts and parole plans as they relate to risk formulation.

Below are examples of problematic risk assessments as they relate to reasonably accommodating an individual's disabilities:

- An individual diagnosed with dementia whose cognitive abilities and memory are on the decline cannot reasonably be expected to discuss his/her crime or upbringing with the evaluator. This inability is then held against the individual and considered to be an unwillingness to participate or engage with the psychologist. *See, e.g.*, 16.08.14 Q2 Life Prisoner Monitoring Report at page 6.

- An individual who cannot read or write cannot be expected to provide the forensic psychologist with parole plans. The lack of such plans is then cited as a reason why the individual is a risk to society. *See, e.g.*, 17.2.23 Q4 Life Prisoner Monitoring Report at page 2; 16.11.13 Q3 Life Prisoner Monitoring Report at page 5; 16.08.14 Q2 Life Prisoner Monitoring Report at page 4.

- An individual who is diagnosed with a developmental disability cannot reasonably be expected to develop further insight when it is clear that they have plateaued in that area. *See, e.g.*, 17.2.23 Q4 Life Prisoner Monitoring Report at page 2; 16.11.13 Q3 Life Prisoner Monitoring Report at page 5.

- An evaluator cannot rely on a 115 given to a developmentally disabled client which was either dismissed, or which is clearly related to his/her disability without first commenting on whether or not it is reliable.

- A misunderstanding by the forensic psychologist about what prison life is really like for a person with a cognitive or developmental disability. *See, e.g.*, 17.05.11 Q1 Life Prisoner Monitoring Report at page 1 (evaluator assumed severely cognitively impaired DD3 prisoner who reported late to their interview must be accompanied by an ADA worker at all times and seemed to hold it against him when he told her he got lost coming to the evaluation); 17.05.11 Q1 Life Prisoner Monitoring Report at page 7 (evaluator criticized DDP class member for not achieving vocational training when a GED is a prerequisite that he was still struggling to attain).

Your proposed regulations perpetuate these problems and indeed enshrine them into law. We request that the regulations be amended to specifically require psychologists to consider whether the individual prisoner has any disabilities and the limitations that such disabilities may place on their ability to achieve the standard expectations of the Board, including insight, self-help, and parole plans.

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The regulations should also require psychologists to document effective communication clearly and precisely, including documentation (1) that they reviewed DECS and the 1073, (2) whether they used any accommodations and which accommodations they used to achieve effective communication, (3) whether they believe they achieved effective communication in interviewing prisoners, and (4) how they confirmed that effective communication was established (e.g., by asking the person to repeat back in his/her own words what was communicated.)

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The regulations must also require the Board psychologists (1) to provide adaptive supports listed on the 128-C2 for people in the DDP, (2) to document how they followed and met the 128-C2 requirements, and (3) to review the mental health input forms for all recent 115s for *Clark* and *Coleman* class members and to take that information into account in assessing a prisoner's institutional conduct.

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We also strongly object to several other specific provisions of the proposed regulations:

- The draft regulations provide that the life prisoner may appeal a "factual error" in the Comprehensive Risks Assessments. The regulation also specifically states that "[a] disagreement with clinical observations, opinions, or diagnoses is not a factual error." However, oftentimes, the risk assessments include erroneous characterizations of prior clinical assessments, or focus on negative clinical information from the treatment record and fail to highlight more positive information from the treatment

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record. Life prisoners and their attorneys should be allowed to appeal reports that mischaracterize the clinical treatment record.

- Many FAD risk assessments diagnose Anti-Social Personality Disorder. A review of multiple reports for the same prisoner almost always establishes that this diagnosis is made extremely inconsistently. In our experience, this diagnosis appears in only about half the reports for individuals who are given this diagnosis at all. Many clinicians and observers consider this diagnosis of little clinical validity or significance among a population of offenders. Despite its lack of clinical significance, the use of this diagnosis can be very prejudicial to someone's chances for parole. We think the regulations should ban the inclusion of this diagnosis, or at the very least require significantly heightened clinical assessment requirements for making, justifying and documenting such a diagnosis.

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The regulations also make reference to the parole consideration suitability factors "listed in subdivisions (c) and (d) of Sections 2281 and 2402 of this division." We note that both of those sections include a version of the following regulation listing mental illness as a factor tending to show someone is unsuitable for parole (text below is from 2281):

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(c) **Circumstances Tending to Show Unsuitability**. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

The inclusion of "Psychological Factors" in this list of factors tending to show unsuitability is discriminatory on its face and violates the ADA and California state anti-discrimination law.[1] We ask that you remove psychological factors from this list. At the

[1] A public entity may not (1) "impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary[,]" 28 C.F.R. § 35.130(b)(8); or (2) "utilize criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability . . . or the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities[.]" 28 C.F.R. §35.130(b)(3)(i)(ii). The use of these psychological factors in determining whether or not to grant parole screens out, or tends to screen out, individuals with mental illness in violation of 28 C.F.R. § 35.130(b)(8). BPH has not shown such criteria are necessary and not based on mere speculation, stereotypes about individuals with mental illness or generalizations as required by 28 C.F.R. § 35.130(h).

very least (and without conceding that such criteria are ever appropriate) there should be qualifying language limiting the scope of this factor to cases in which a prisoner with a psychological condition is actively displaying severe symptoms of untreated mental illness that would make it difficult for the prisoner to succeed on parole, and the symptoms are not responding to appropriate and aggressive treatment that is being offered by the CDCR.

10 Finally, our review of CRAs suggests that some FAD psychologists lack familiarity with the experiences of CDCR prisoners with disabilities and the workings of CDCR prisons. For that reason, we suggest your regulations include a requirement for a comprehensive annual training program for FAD psychologists, similar to the one provided to Commissioners and panel attorneys, that will include training designed to impart a full understanding of CDCR policies and procedures and their impact on prison life for people with disabilities.

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We hope you will consider our comments when issuing the final regulations. If you have any questions, please do not hesitate to contact me.

Very truly yours,

ROSEN BIEN
GALVAN & GRUNFELD LLP

/s/ Gay Crosthwait Grunfeld

By: Gay Crosthwait Grunfeld

GCG:cg
Attachment

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Attachment A

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PROPOSED REGULATORY TEXT

ORIGINAL Proposed additions are indicated by single underline and deletions are indicated by single ~~strikethrough~~.

NEW Proposed additions are indicated by double underline and deletions are indicated by double ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. ~~Psychological~~ Comprehensive Risk Assessments ~~for Life Inmates~~.

(a) ~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. ~~The p~~Psychologists shall consider ~~the current relevance of any~~ factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate ~~standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence~~ structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~When preparing a risk assessment under this section for a youth offender, as defined in Penal Code section 3051, subdivisions (a) and (h), the psychologist shall also take into consideration the

youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.

(c) ~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three-year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case. The 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. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~(1) A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation~~, and reliable and valid principles and methods have been appropriately applied to the facts of the case~~.
(2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.

(d) ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, 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.~~(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) ~~The board may prepare a risk assessment for inmates housed outside of California~~ Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing.

(e) ~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of

the hearing. Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.
(2) For the purposes of this section, "factual error" is ~~defined as an explicit finding about a~~ an untrue circumstance or event ~~for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include~~ A disagreements with clinical observations, opinions, or diagnoses is not a factual error ~~or clarifications regarding statements the risk assessment attributed to the inmate~~.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." ~~Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.~~

(f) ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.~~(1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and ~~determine~~ evaluate whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 calendar days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.

(g) ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~(1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. Following the review, the Chief Psychologist shall promptly take one of the following actions:
(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, ~~T~~the Chief Psychologist shall direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.

(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 calendar days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall ~~overrule the objection,~~ issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision, the revised risk assessment, and the Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, ~~order a new or revised risk assessment,~~ postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision, the new or revised risk assessment, and Chief Psychologist's addendum to the inmate or attorney of record.
(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision. ~~Impacted risk assessments shall be permanently removed~~ from the inmate's central file.

(h) ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist ~~may~~ shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel ~~may~~ shall refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (~~3~~2) or (~~4~~3) of this subdivision.
~~(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.~~

(~~3~~2) If the hearing panel determines the risk assessment may contain a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(~~4~~3) If the hearing panel determines the risk assessment does not contain a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object ~~to or clarify any statements a risk assessment attributed to the inmate,~~ or respond to any clinical observations, opinions, or diagnoses in a risk assessment.

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3051, 11190, and 11193, Penal Code; ~~In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A,~~ *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.

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School of Law
POST-CONVICTION JUSTICE PROJECT

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January 8, 2018

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Submitted via Email: BPH.Regulations@cdcr.ca.gov

Re: Proposed Regulations for Comprehensive Risk Assessments

Dear Ms. McCray,

On behalf of the Prison Law Office, the USC Post-Conviction Justice Project, and the Anti-Recidivism Coalition (ARC), I am writing to provide public comments on the draft regulations for Comprehensive Risk Assessments (CRA).

The Prison Law Office, a nonprofit public interest law firm, has been in the forefront of legal efforts to enforce the constitutional rights of people who are incarcerated for 40 years. Our staff attorneys represent individuals, engage in impact litigation, educate the public about prison and juvenile detention conditions, and provide technical assistance to attorneys throughout the country.

The Post-Conviction Justice Project (PCJP) at the USC Gould School of Law has provided student-supervised representation to many hundreds of life term inmates at parole suitability hearings and on habeas corpus for more than two decades. The Project successfully litigated *In re Lawrence* (2008) 44 Cal.4th 1181, which clarified the "some evidence" standard of judicial review of parole decisions. More recently, PCJP co-sponsored Senate Bill 260 ("SB 260"), which added § 3051 and amended §§ 3041, 3046, and 4801 of the California Penal Code to create the Youth Offender parole process. Since the effective date of SB 260, the Project has represented clients at more than thirty youth offender parole hearings, sponsored an empirical study of 427 California youth offender parole transcripts, and participated in numerous Youth Offender workshops for prisoners.

ARC is a support network for, and comprised of, formerly incarcerated individuals devoted to changing their lives. ARC provides job training and connects its members to employment,

educational, housing and other opportunities in order to help them acquire the skills and social capital necessary to support themselves and their families, and avoid many of the difficulties that befall individuals with criminal histories and experiences incarcerated. Moreover, ARC prepares its formerly incarcerated members to advocate for fair and rehabilitative justice reform policies throughout California.

The following comments are based on our monitoring of the implementation of youth offender parole, our personal experiences being incarcerated, correspondence with incarcerated people subject to these regulations, and our legal representation of people in parole hearings and filing habeas petitions challenging parole decisions. The risk assessment rating is a statistically significant predictor for whether someone will be granted parole[1]. The BPH's own chief psychologist Dr. Cliff Kusaj found a strong correlation between risk level and parole decision; someone found low risk by a psychologist using a risk assessment was far more likely to be granted parole than someone with a higher score.[2] If these regulations do not provide adequate due process to ensure that the selection, use, and outcomes of risk assessments used are appropriate and accurate, BPH and CDCR risk releasing and/or continuing to incarcerate the wrong people and are sure to face a barrage of challenges.

Type of Risk Assessments: The current proposed regulations include provisions for psychologists to use "structured risk assessment instruments like the HCR-20-V3 and Static-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals." It is unusual and unwise for the regulations to name specific instruments because the regulations will become outdated when improved risk assessments are available or worse, psychologists will be less likely to use more appropriate risk assessments because they are not listed in the regulations. 01

The current use of both the HCR-20-V3 and Static-99R are already problematic. The HCR-20-V3 is most appropriately used to assess people who have recently committed a crime. It is not meant and, to the extent of our knowledge, not validated to be used for people who have not committed any new offenses in years or decades. According to Dr. Cliff Kusaj, the Static-99R actually over-predicts recidivism for people who have been incarcerated for long periods of time[3] and the "Static-99R categories do not necessarily correspond with psychologists' overall opinions regarding risk of violence."[4] The Static-99R has also been shown to be less accurate at predicting recidivism for non-Caucasians.[5] 02

The California Static Risk Assessment (CSRA) "is a validated risk assessment tool that utilizes a set of risk factors which are most predictive of recidivism. The tool produces a risk number value that 02

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[1] Caldwell, Beth C., Creating Meaningful Opportunities for Release: Graham, Miller and California's Youth Offender Parole Hearings (May 24, 2016). New York University Review of Law & Social Change, Forthcoming; Southwestern Law School Research Paper No. 2016-5. Available at SSRN: https://ssrn.com/abstract=2783909

[2] Guy, L. S., Kusaj, C., Packer, I. K., & Douglas, K. S. (2015). Influence of the HCR-20, LS/CMI, and PCL-R on decisions about parole suitability among lifers. *Law and Human Behavior, 39*(3), 232-243. http://dx.doi.org/10.1037/lhb0000111

[3] Though there is no standard definition for a "long term inmate", Dr. Kusaj considers all people eligible for parole consideration to be "long term".
https://www.cdcr.ca.gov/BOPH/docs/johnsonvshaffer/Recidivism_Rates_Long_Term_Offenders.pdf

[4] https://www.cdcr.ca.gov/BOPH/docs/johnsonvshaffer/Overview_Static_99R.pdf

[5] http://static99.org/pdfdocs/Coding_manual_2016_InPRESS.pdf

will predict the likelihood that an offender will incur a felony arrest within a three-year period after release to parole."[6] It was developed and validated in partnership with CDCR specifically for people incarcerated in California prisons. If any tool was specifically named in §2240(a), it should be the CSRA.

01 If BPH continues to name assessments in the regulations, it should develop and adhere to a regular and transparent process to routinely update the named assessments with ones that have been recently validated and tested for reliability.

03 Validation and Reliability: §2240(a) must include a requirement that a risk assessment can only be used if it has been validated and tested for reliability for use on people similarly situated to the person being evaluated (i.e. someone incarcerated for years, sometimes decades, after the original commitment offense, someone with cognitive disabilities, someone who committed their offense before turning 25, someone who committed a sex offense before 21). The industry standard for validation is every 3-5 years.

04 Risk Assessment Scores: There is no reason not to share risk assessment scores with the person being assessed. This information was routinely shared when these risk assessments were first used by BPH psychologists. Failure to disclose the scores runs the risk that the prediction of risk is elevated by factors that the Board may not legally consider in isolation, including historical factors and mitigating factors of youth. (See *In re Lawrence* (2008) 44 Cal.4th 1181; Penal Code § 4801.)

05 Training: The regulation should also require that psychologists be initially trained and regularly refreshed to administer the specific tests by certified trainers. We understand that current psychologists receive training, but without any criteria regarding the qualifications of the trainer, this results in inconsistent scoring. For example, the makers of the HCR-20-V3, a commonly used risk assessment by BPH, have extensive guidelines to help evaluators determine which of the key violence risk factors are relevant for the person being assessed and how to make an accurate assessment of the person's risk.[7] There is overwhelming evidence from our collective personal experience and derived from hearing transcripts that psychologists are not uniformly administering tests. It is common for the same person to get different scores when different psychologists conduct the assessment even when nothing substantive has changed between the administrations of the risk assessments other than the person conducting it.

06 **Youth Factors**: As written, §2240(b) provides no meaningful consideration of the hallmarks of youth as required for people eligible for youth parole by California law and court precedent. The proposed language directs a psychologist to "take into consideration the youth factors", relegating these factors an "add on". Dr. Kusaj has previously directed BPH psychologists to conduct and score the risk assessment and then consider the youth factors in a paragraph in the CRA instead of incorporating the youth factors into the scoring. This section must make clear that parole unsuitability factors that run counter to the legislative understanding of "youth offenders" shall not be used to elevate an individual's risk level.

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[6] 15 C.C.R. §3768.1

[7] http://hcr-20.com/about/

Use of Some Risk Assessments Contradict Requirements of *Franklin* and *Caballero*: Again, the risk assessments used must be appropriate for people eligible for youth parole. Though the Static-99R is meant to assess people who were adult males at the time they committed the sex offense, we have seen instances where it is used on people who were not adults at the time of the sex offense. Dr. Kusaj trains BPH psychologists that the Static-99R is appropriate to use on juveniles when the offense was "adult" in nature.[8] The creators of the assessment caution against using the tool on juveniles in consideration of the hallmarks of youth and suggest that if it is used, the accompanying report include caveats about the person's youthfulness.[9] In our experience, we have seen no such caveats about the use of the Static-99R in these types of cases.

Many clinicians recommend that the Static-99R not be used to assess people who have been incarcerated for a long time, particularly people who have been incarcerated since they were young. That is because by virtue of having been incarcerated from an early age, a person will almost certainly get one point for not having lived with a lover for at least two years; those who committed their offenses as youth will also labor for many years with an additional point for being younger than 35 at the time of their parole hearing.[10] In our experience, the Static-99R is often used on people eligible for youth parole who are not incarcerated for a sex offense, which means they will get another point for a conviction involving violence, not sex. Those three points alone result in risk assessment score of moderate.

Review: The proposed regulations state that a risk assessment cannot be finalized until it has been reviewed to "ensure that the psychologist's opinions are based upon adequate scientific foundation." §2240(c) must also specify that this review of whether there is "adequate scientific foundation" must include an affirmation that an appropriate, validated risk assessment meant for people similarly situated to the person who was assessed was used.

The review by the Chief or Senior Psychologist should include a statement of reasons why he or she approves or disapproves of each section of the CRA and how the scoring of the risk assessments and the conclusions drawn take into account the particular identity of the person being assessed (i.e. person eligible for youth parole, developmentally disabled person). A review of the report absent these pieces would merely serve as a rubber stamp.

Any factual error should be stricken, whether or not the Chief Psychologist finds that it materially impacted the risk assessment's conclusions because that inaccurate information would otherwise remain in the record and could erroneously be relied upon by the Board or Governor, or by future evaluators. The Chief Psychologist should review any factual error to determine if it materially

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[8] https://www.cdcr.ca.gov/BOPH/docs/johnsonvshaffer/Overview_Static_99R.pdf

[9] "Evaluations of juveniles based on Static-99R must be interpreted with caution as there is a very real theoretical question about whether juvenile sex offending is the same phenomena as adult sex offending in terms of its underlying dynamics and our ability to affect change in the individual, with research increasingly concluding that adults and adolescents who commit sex offences are meaningfully different (citation omitted). ... In comparison to adult sex offences, the sex offences committed by juveniles are more likely to involve peers as co-offenders, lack planning, and lack indicators of deviant sexual interests. ... We have reason to believe that people who commit sex offences only as children/young people are a different profile than adults who commit sex offences. In cases such as these, we recommend that Static-99R scores be used with caution and only as part of a more wide-ranging assessment of sexual and criminal behaviour." http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf

[10] http://www.static99.org/pdfdocs/static-99rcodingform.pdf

impacts the conclusions, not just related to violence, but to any factor that could influence the Board's decision to grant or deny parole (i.e. lack of insight, minimization, unstable social history).

Timing: In order for the appeal process to be meaningful, the CRAs must be provided with sufficient time to challenge and resolve any errors before the individual must make a determination whether to proceed with the parole hearing or request a waiver. §2240(d) proposes that the assessment must be provided no later than 60 calendar days before the hearing. This, however, is insufficient time to allow for an appeal or have an independent psychological assessment completed, get those results, and make an informed decision about whether or not to waive the parole hearing, which needs to be done 45 days before the hearing date.

Transparency/Appeal Process: The current proposed regulations offer no meaningful appeal process, and pointedly omit the ability to appeal errors based on disagreements over what was communicated during a risk assessment, a gross violation of due process. Analyses of hundreds of parole transcripts have shown the risk assessment scores to be a significant factor in determining whether a person is granted or denied parole. Due process requires that there be a meaningful and fair process for a person to challenge the information in his or her CRA.

Documentation: This cannot be done without a recording or transcript that can be made available to a review panel when there is a dispute about what was said during the interview. Furthermore, the worksheet used for the risk assessment must be made available to incarcerated people. This is a particularly salient issue for people eligible for youth parole because the HCR-20 includes many historical factors that could increase a person's risk score, but are directly countered by the legislative intent for people eligible for youth parole.

Omissions of Information: The appeal process should also specifically apply to an omission of relevant information. When a person eligible for youth parole does not have a *Franklin* hearing, there is no opportunity to submit highly relevant information related to the youth factors such as juvenile records or fitness reports into his/her c-file. We have many examples of psychologists refusing to consider anything other than what is in a c-file, including evidence of the youth factors, and consequently failing to consider these factors as required by the statute and subsequently diagnosing people with Anti-Social Personality Disorder and/or deeming people to be a moderate or high risk for reoffending. Psychologists must be directed to consider and make written inventory of what a person eligible for youth parole has provided related to the hallmarks of youth.

Also, our experience tells us it is not uncommon for people to bring documents such as juvenile psychological evaluations, amenability reports, relapse prevention plans, or remorse letters to the risk assessment interview only to find in the CRA that the psychologist recommends the person develop and collect these documents to gain more insight and avoid minimization. Recordings or transcripts of the hearings are necessary to protect the integrity of this process.

Youth Factors

The proposed regulations include provisions for people eligible for youth parole to appeal a failure to properly consider evidence of youth factors or a misapplication of youth factors pursuant to *Franklin*. (*People v. Franklin* (2016) 63 Cal. 4th 261.)

Translators: Providing a recording or transcript of the risk assessment interview is also essential for people being assessed who rely on remote audio translation. We are aware of many examples where the meaning of one's comments are lost in translation because the person being assessed is speaking in Spanish slang and the translator, who is not physically present for the interview, misinterprets because (s)he is only familiar with formal Spanish.

Risk Instruments: The regulations should allow a person to challenge the use of an inappropriate risk assessment instrument. When an instrument is used on someone who it is not meant for, the results are inaccurate and unreliable, but the current regulations do not allow for this use to be challenged. Since the risk assessment score is so predictive in whether or not someone will be granted parole, any potential inappropriate assessment could result in someone being wrongfully denied parole. The regulations must provide a check on the type of risk assessment used.

Factual Errors – Beyond Risk of Violence: Furthermore, pursuant to §2240(g), if there is a factual error referred to the Chief Psychologist, the psychologist should determine whether the error materially impacted the risk assessment's conclusion regarding, not just the person's risk of violence, but any conclusion that could influence the Board's decision to grant or deny parole (i.e. lack of insight, minimization).

Thank you for your consideration of our feedback. I hope you will take them into consideration and revise the proposed regulations before submitting them for public comment.

Sincerely,

Lynn Wu, Staff Attorney, Prison Law Office
Heidi Rummel, Director, Post-Conviction Justice Project, USC Gould School of Law
Bikila Ochoa, Policy Director, Anti-Recidivism Coalition
Sam Lewis, Director of Inside Programs, Anti-Recidivism Coalition

Law and Human Behavior

Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers

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Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers

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Among 5,181 inmates indeterminately sentenced to life in California who were evaluated for parole suitability between January 2009 and November 2010, 11% were granted parole. After administration of the HCR-20, LS/CMI, and PCL-R, psychologists judged most inmates (78%) to be at low or moderate risk for future violence. This overall risk rating (ORR) was significantly associated with parole suitability decisions. Moderate to large associations were observed between the ORR and all risk indices. The HCR-20 Clinical and Risk Management scales demonstrated the strongest associations with parole suitability decisions. Among the LS/CMI scales, Procriminal Attitudes and Leisure/Recreation were most predictive of failure to obtain parole. PCL-R scores had little influence on parole suitability decisions beyond the HCR-20 and LS/CMI. Overall, findings suggest parole board members' decisions were consistent with empirically supported practice, in that individuals assessed to be at relatively low risk were far more likely to be granted parole than those assessed to be at moderate or high risk for future violence.

Keywords: HCR-20, long-term inmate, LS/CMI, parole, PCL-R

The United States has the world's highest rate of incarceration, with 2.2 million people in prison or jail. For every 100,000 individuals, 716 are imprisoned— a rate that far exceeds those of runner up countries Rwanda (595 per 100,000) and Russia (568 per 100,000) (Carson & Sabol, 2012). The number of individuals serving life sentences (either indeterminate, with the possibility of parole, or determinate, without the possibility of parole) in the U.S. has increased considerably during the past three decades, from 34,000 in 1984 to 140,610 in 2008 (Nellis & King, 2009). Of the states, California has the highest percentage (20%) of life-sentenced prisoners (Weisberg, Mukamal, & Segall, 2011).

As a group, indeterminately sentenced "lifers" or older offenders released after serving long sentences infrequently return to prison with new felony convictions and rarely commit violent crimes (e.g., Manchak, Skeem, & Douglas, 2008; Turley, 2007). In one large scale study of 860 lifers with instant offenses of murder released by California's parole board between 1995 and 2011, five (0.5%) returned to prison with new felonies and none recidivated with new life-term crimes in that state (Weisberg et al., 2011). In a reanalysis (Mauer, King, & Young, 2004) of recidivism rates among prisoners released in 1994 across 15 states (Langan & Levin, 2002), the 1,228 lifers were less than one third as likely as all released offenders (n = 272,000) to be rearrested within three years of release from prison. Moreover, although 90% of lifers were incarcerated for a violent offense, they were no more likely to be rearrested for a violent offense (18%) than property (21.9%) or drug offenders (18.4%). In sum, although the extent to which data on selectively released indeterminately sentenced inmates apply to all lifers is unknown, available research indicates older inmates are less likely to return to prison, to be arrested for new felonies, and to be convicted of violent crimes compared with younger correctional cohorts.

Violence Risk Assessment and Parole Board Decision Making

Despite the comparatively lower detected recidivism rate among lifers, as with all types of release decision-making, decisions about parole suitability must balance the community's safety and the offender's liberty interests. Except under mandatory release mechanisms, parole boards continue to play the key role in the discretionary release of prisoners. Several well-validated risk assessment

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Jana Larmer (Psychologist) and Amy Parsons (Senior Psychologist) assisted in the coding of parole outcome data and extracting and coding HCR-20 categorical ratings from reports.

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instruments are available to inform such decisions, such as the Level of Service Inventory–Revised (LSI-R; Andrews & Bonta, 1995) and the Historical, Clinical, Risk Management-20 (HCR-20; Webster, Douglas, Eaves, & Hart, 1997). These instruments are similar in that they contain dynamic risk factors and comprise items selected primarily on the basis of the scientific literature (vs. statistical selection). However, whereas the LSI-R (and a version comprising fewer items, the Level of Service/Case Management Inventory [LS/CMI; Andrews, Bonta, & Wormith, 2004]) offers an actuarially based risk estimate (i.e., based on a predetermined formula for combining risk information), the HCR-20 is based on principles of the Structured Professional Judgment (SPJ) model. In the SPJ model, ample structure is provided to guide the process, but the decision about how to weight and combine the factors is based on a trained evaluator's professional opinion (e.g., Douglas, Hart, Webster, & Belfrage, 2013).

The extent to which parole boards make use of these risk assessment technologies is not known, and no research has examined how the tools contribute to parole board decision-making. Studying this topic indirectly, Vincent (1999) investigated whether offense characteristics, current mental state, and other risk relevant variables were associated with release decisions of a Canadian Review Board among individuals who successfully ($n = 125$) or unsuccessfully ($n = 125$) pled insanity. The Screening Version of the Psychopathy Checklist (PCL:SV; Hart, Cox, & Hare, 1995) and the HCR-20, which were not used by the Review Board, were coded from files retrospectively. When examined together, only the HCR-20 was associated with release decisions, with higher levels of risk associated with longer time to release. The Risk Management scale accounted for the majority of the measure's predictive power, implying that the Review Board was concerned with likelihood of reintegrating into the community. Higher risk ratings on both measures were significantly associated with longer time to release among insanity acquittees, but neither tool was predictive among offenders.

Background to the Present Study

Despite the large, and growing, population of long-term inmates in the United States, few data on their risk for violence are available. Studying 555 offenders incarcerated in Washington for at least 10 years, Manchak et al. (2008) reported good predictive validity for general recidivism of practitioners' LSI-R scores. Potentially dynamic risk factors (financial, substance use) were predictive even after controlling for static risk factors. However, a significant limitation of the study was that, consistent with scoring rules provided in the manual and/or adapted for Washington, many factors were rated based on functioning in the community during the year before incarceration (i.e., one to two *decades* before release from prison). Nevertheless, the study is important in that it offers solid evidence that the LSI-R is useful for assessing risk for general (though perhaps not violent) reoffending among this unique type of offender population.

Building on the empirical foundation of Manchak et al. (2008), the overarching goal of the present study was to examine the performance of three measures—the HCR-20, LS/CMI, and PCL-R—used routinely in violence risk assessments prepared for parole hearings among inmates with indeterminate life sentences in California. Evaluators' structured clinical judgment regarding overall risk level based on the totality of case information also was of interest. Rather than predicting recidivism, our outcome under study was the parole board's decision regarding suitability for release to the community. Next, we provide background information regarding parole procedures with lifers in California, and then elaborate on the specific aims of our study.

The Parole Process in California

The Board of Parole Hearings' (BPH) parole grant rates historically have been low but may be increasing. Between 1980 and 2008, the grant rate fluctuated between almost 0% to approximately 10%. In 2010, it was roughly 18% after approximately 2,800 hearings (Weisberg et al., 2011). Risk for violence plays a central part in the BPH's suitability decision process, which the California Supreme Court reaffirmed recently (e.g., *In Re Shaputis II,* 2011). In addition to the risk assessment, the BPH receives information about the inmate's behavior in prison, vocational and education certificates, letters of support and opposition, and victims' statements. In a study of factors associated with BPH hearing outcomes for approximately 450 lifers between 2007 and 2010, recommendation in favor of parole was related to participation in a 12-step program and ability to answer questions about those steps, whereas having a sexually violent index offense and a history of a violent disciplinary infraction were significantly related to parole denial (Weisberg et al., 2011).

Specific Aims for the Present Study

Given the increasing prevalence of the lifer population in the United States and the critical role played by parole boards in determining who is released, the relative dearth of research related to violence risk among this unique population, and the paucity of empirical data on parole boards' use of empirically supported risk assessment measures generally but also with lifers specifically, it is important to evaluate the role such measures play in parole decision-making. The specific aims of the current study are as follows: (a) to explore the risk profile of a large sample of prisoners serving life sentences as indexed by evaluators' categorical ratings regarding overall level of risk and ratings on the HCR-20, LS/CMI, and PCL-R; (b) to investigate the correspondence between evaluators' overall risk ratings and the three instruments; and (c) to assess the nature and magnitude of the association between the various risk indices and parole suitability decisions.

Method

Participants

The sample comprised all inmates ($N = 5,187$) indeterminately sentenced to life in California who the BPH evaluated for parole suitability between January 2009 and November 2010. In the subset of individuals for whom age and race/ethnicity was known ($n = 5,177$, or 99.92%), inmates on average were 47.51 years old ($SD = 10.34$; range: 19–89) and were racially and ethnically diverse: Latino (33.8%); African American (32.2%); Caucasian (26.9%); Asian (3.1%); Native American (1.3%); and 'Other' (2.6%). Among the 843 inmates for whom gender was known,

most (95.6%) were men, which is consistent with recent statistics on indeterminately sentenced lifers in California (Weisberg et al., 2011). At the time of the assessment, inmates had been incarcerated on average for 20.60 years ($SD = 6.96$; range: 0–57.19).

Measures and Risk Indices

Overall risk rating (ORR). Evaluators offer this five-level categorical rating (Low, Low/Moderate, Moderate, Moderate/High, High) about overall risk for violence based on information from risk assessment instruments (typically the HCR-20 and LS/CMI, and the Static-99 [Hanson & Thornton, 1999] if relevant) and the PCL-R.

Historical-Clinical-Risk Management-20 (HCR-20; Webster et al., 1997). The HCR-20 is a violence risk assessment instrument developed according to the SPJ model. It is intended for use in a range of settings, including civil and forensic psychiatric, correctional, and general community settings. Hundreds of research evaluations, including studies conducted in correctional settings, support its reliability and validity (see Douglas et al., 2014). The HCR-20 comprises 20 core items rated on a 3-level scale divided across three subscales (Historical, Clinical, and Risk Management). Evaluators assign a Summary Risk Rating (SRR) of low, moderate, or high after consideration of the presence, manifestation, and individual relevance of the 20 risk factors as well as any other pertinent case specific factors. SRRs reflect evaluators' judgments about the anticipated likelihood of future violence and the necessary level of intervention, management, or supervision required to mitigate risk. Numerous studies show that these judgments are as or more strongly related to violence compared with the numeric use of the HCR-20 as well as other risk assessment or psychopathy instruments (see Douglas, Hart, Groscup, & Litwack, 2013; Guy, Hart, & Douglas, in press).

Item-level data were available for a subset of cases ($n = 750$). For the larger sample, modified HCR-20 SRRs were available that were made using a locally adapted five-level scheme: Low, Low/Moderate, Moderate, Moderate/High, and High. For some analyses, the five-level ratings were recoded to reflect an adapted three-level SRR scheme: Low (comprising cases initially rated as low and low/moderate), Moderate (cases initially coded as moderate or moderate/high), and High (cases initially coded as high). Evaluators made "out" ratings on the Risk Management scale to reflect considerations within a community context (vs. "in" ratings, reflective of risk while institutionalized). Total HCR-20 scores were computed and included in analyses if at least 16 of the 20 items were rated (total scores were computed strictly for research purposes; when the HCR-20 is used for clinical decision-making, evaluators *should not* sum item ratings to create a total score). At the scale level, a maximum of two Historical scale items and one item each on the Clinical and Risk Management scales could be missing. Cases with an allowable number of missing items were prorated.

Level of Service/Case Management Inventory (LS/CMI; Andrews et al., 2004). The LS/CMI was developed to assess risk for reoffending among probationers and parolees, but has demonstrated validity with other types of correctional and forensic populations (Andrews, Bonta, & Wormith, 2010). It contains 43 dichotomously scored items that sum to yield a total General Risk/Need score. Items are organized conceptually on eight scales: Criminal History, Education/Employment, Family/Marital, Leisure/Recreation, Companions, Substance Abuse, Procriminal Attitude/Orientation, and Antisocial Pattern. The LS/CMI total score is used to assign individuals to a risk category: very low (0–4), low (5–10), moderate (11–19), high (20–29), and very high (30+). Evaluators can adjust the final risk rating based on professional discretion. For the present study, we had access to total and scale scores; item-level data and information about whether a professional override was applied were not available. Total scores were prorated in limited circumstances using guidelines in the manual (Andrews et al., 2004).

Psychopathy Checklist–Revised, 2nd Ed. (PCL-R; Hare, 2003). The PCL-R was developed to assess psychopathic personality disorder and has a strong research base demonstrating a robust association with antisocial behavior (e.g., Guy, Edens, Anthony, & Douglas, 2005; Yang, Wong, & Coid, 2010). It contains 20 items rated on a three-point scale. We report on the four facets, which represent two related components: interpersonal (Facet 1) and affective (Facet 2) traits (together constituting Factor 1) and lifestyle impulsivity (Facet 3) and antisocial and socially deviant lifestyle (Facet 4) aspects (together constituting Factor 2). PCL-R total and scale scores, but not item-level data, were available. Evaluators prorated facet scores if one item was omitted; if two or more items were omitted, the facet was not scored. Total PCL-R scores were prorated if two or fewer items were omitted from either Factor.

Outcome

The dependent variable was the BPH decision about parole suitability. Three outcomes are possible: Parole Grant, Denial of Parole (of varying lengths), and Stipulation of Parole (of varying lengths). Lengths associated with denial and stipulation (akin to an inmate making a no contest plea regarding parole unsuitability) can range from one to 15 years. Outcomes of parole hearings were coded from the BPH's scheduling and tracking system.

Procedure

Risk assessments were completed by one of 46 psychologists working for the Forensic Assessment Division (FAD), a division with the BPH. Risk assessments are based on an interview with the inmate and review of collateral information; the HCR-20, LS/CMI, and PCL-R (and, if relevant, the Static-99) are completed as part of routine practice. Senior Psychologist supervisors review all written assessment reports and raw test scores. FAD evaluators are doctoral-level licensed psychologists who work exclusively on violence risk assessments of life-sentenced inmates for parole suitability hearings. They typically possess some degree of training and experience administering these or similar risk assessment instruments before their employment with the FAD. Psychologists with relatively less forensic experience are paired with veteran psychologists for a 1-month mentorship period before conducting assessments independently. All psychologists receive a minimum of two days of didactic training on the PCL-R and HCR-20, and two days of training on the LS/CMI. Psychologists thereafter receive annual refresher training from experts in violence risk assessment. In addition to these basic training activities, the majority of psychologists whose cases are included in the present

sample participated in a peer review program designed to enhance interrater reliability through independent scoring of multiple case vignettes. Psychologists also receive annual evaluations that include feedback regarding the profile of the risk assessments they have completed (i.e., average scores on the risk tools administered and distribution of categorical risk ratings relative to their [anonymous] peers).

For the present study, three psychologists coded item-level data from files for each of the four risk indices (the ORR, HCR-20, LS/CMI, and PCL-R). These data were reviewed for accuracy by a team comprising a psychologist, Senior Psychologist, and Chief Psychologist. The team subsequently reviewed written reports to obtain HCR-20 categorical ratings (not originally coded) and a scheduling and tracking database to identify subsequent parole decisions.

Results

Aim 1. What Is the Risk Profile of This Sample of Life-Sentenced Inmates?

Psychologists rated most (78%) inmates as having a Low or Moderate level of risk according to the FAD's five-level Overall Risk Rating (ORR) scheme. More specifically, the ORR profile was as follows: Low (26.3%), Low/Moderate (18.7%), Moderate (33.3%), Moderate/High (10.7%), and High (10.9%). Similarly, among the 4,738 inmates with whom the HCR-20 was used, most (85.8%) were given a Summary Risk Rating (SRR) of Low to Moderate according to the BPH's categorical scheme: Low (31.8%), Low/Moderate (5.1%), Moderate (48.9%), Moderate/High (2.9%), and High (11.3%). Recoding these risk categories into the three-level HCR-20 SRR scheme according to the guidelines described above resulted in assignment of roughly half the sample (51.8%) to the Moderate risk category (36.9%, Low; 11.3%, High). Using the total score cut-offs recommended in the LS/CMI manual, percentages of the 5,187 inmates assigned to the actuarially based LS/CMI risk categories were as follows: Very Low (2.0%); Low (22.7%), Moderate (46.5%), High (18.3%); and Very High (10.5%). Table 1 presents the central tendencies, dispersions, and percentile scores of the HCR-20, LS/CMI, and PCL-R and their respective subscales.

Across the 10 items comprising the Historical scale (see Table 1), items with the lowest mean scores were H6 (Major Mental Illness) and H7 (Psychopathy). Perhaps unsurprisingly given the nature of the sample, the highest mean score was on H1 (Previous Violence). Having a history of substance use problems (as indexed by H5) also was relatively prevalent in this sample. On the Clinical subscale, C1 (Lack of Insight) was most prevalent, and C4 (Impulsivity) was least prevalent. Finally, on the Risk Management subscale, R5 (Stress) and R2 (Exposure to Destabilizers) were the most frequently identified risk factors. R3 (Lack of Personal Support) and R4 (Noncompliance with Remediation Attempts) were relatively less common.

Aim 2. What Is the Relation Between the ORR and Each of the Three Instruments?

To examine the association between evaluators' ORR and the HCR-20, LS/CMI, and PCL-R, we first computed Kendall's tau-b correlations (see Table 1), a nonparametric measure of rank correlation that makes adjustments for ties. Values range between plus and minus one, where ± 1 indicates perfect agreement or disagreement, and 0 indicates no relationship. Generally, moderate to large associations were observed between the ORR and all risk indices, and all correlations were statistically significant ($p < .001$). Largest correlations were observed for the HCR-20 5-level SRR (.81) and 3-level SRR (.78). Correlations for the other HCR-20 indices ranged from .55 (Risk Management scale; $SE = .01$; $n = 4{,}762$; 95% CI: .53–.57) to .73 ("total score"; $SE = .01$; $n = 4{,}731$; 95% CI: .72–.75). Correlations for the LS/CMI indices ranged from .27 (Alcohol/Drug Problems scale; $SE = .01$; $n = 4{,}750$; 95% CI: .24–.30) to .67 (General Risk/Needs Total; $SE = .01$; $n = 4{,}753$; 95% CI: .66–.69). Finally, correlations for the PCL-R ranged from .37 (Arrogant and Deceitful Interpersonal Style facet; $SE = .01$; $n = 4{,}742$; 95% CI: .35–.39) to .64 (Total; $SE = .01$; $n = 4{,}706$; 95% CI: .62–.66).

Next, we examined agreement in risk level classification between the ORR and the five-level HCR-20 SRR evaluators use in practice, and between the ORR and actuarially based LS/CMI risk category. Statistically significant differences were found for both comparisons: HCR-20 SRR ($\chi^2 = 7359.97$, $df = 16$, $p < .001$; $\phi = 1.25$, $p \leq .001$) and LS/CMI ($\chi^2 = 4291.08$, $df = 16$, $p < .001$; $\phi = .91$, $p \leq .001$), although this is attributable in part to the very large n. Focusing on "category mismatches," wherein an individual is classified as being at low risk according to one risk index but at high risk according to the second index, only 6 (or .01%) inmates with ORR classifications of Moderate/High had HCR-20 SRR classifications of Low or Low/Moderate. Although no inmates with HCR-20 SRRs of Low or Low/Moderate were given an ORR of High, two inmates with Moderate/High HCR-20 SRRs had Low or Low/Moderate ORRs, and one inmate with a High HCR-20 SRR had a Low/Moderate ORR.

Considerably more mismatches were observed between the ORR and the LS/CMI actuarial risk categories. Of the 538 inmates in the Very High LS/CMI category, 60 had an ORR of Low and 30 had an ORR of Low/Moderate, representing 16.8% of the 538 inmates with Very High LS/CMI risk classifications. Serious mismatches in the other direction were less frequent. Of the 1,178 inmates with LS/CMI classifications of Low, only 7 had an ORR of Moderate/High ($n = 6$) or High ($n = 1$), representing less than 1% of individuals in the Low LS/CMI category. No inmates with LS/CMI classifications of Low had ORRs of Moderate/High or High.

Aim 3. What is the Nature and Magnitude of the Association Between Each of the Risk Indices, Including Subscales and Items, and Parole Suitability Decisions?

We used several analytic strategies to evaluate the association between the risk indices and parole suitability decision. We present these results below for each risk index in turn: ORR, HCR-20, LS/CMI, and PCL-R. For each risk index, we report the distribution of ratings or scores on the index as a function of suitability decision and a test of statistical significance via chi-square. We also present the correlation (Kendall's tau-b) and Area Under the Curve (AUC) of the receiver operating characteristic analysis for each risk index, as well as Cohen's *d*

Table 1
Descriptive Characteristics of the Instruments and Their Concurrent Validity With ORR

Risk index (max. possible score)	n[a]	*M* (*SD*)	Range	Percentile			τ (*n*)
				25th	*Mdn*	75th	
HCR-20 "total score" (40)	4,781	17.82 (7.09)	0–40	13	17	23	.73
Historical scale (20)	4,771	10.29 (3.97)	0–20	7	10	13	.57
H1, Previous Violence	750	1.94 (.32)	0–2	2	2	2	
H2, Young Age First Violent Incident	750	1.40 (.63)	0–2	1	1	2	
H3, Relationship Instability	739	1.05 (.82)	0–2	0	1	2	
H4, Employment Problems	748	.68 (.74)	0–2	0	1	1	
H5, Substance Use Problems	750	1.41 (.82)	0–2	1	2	2	
H6, Major Mental Illness	749	.35 (.70)	0–2	0	0	0	
H7, Psychopathy	750	.40 (.62)	0–2	0	0	1	
H8, Early Maladjustment	750	1.21 (.86)	0–2	0	2	2	
H9, Personality Disorder	750	1.21 (.88)	0–2	0	2	2	
H10, Prior Supervision Failure	750	1.14 (.95)	0–2	0	2	2	
Clinical scale (10)	4,762	2.71 (2.34)	0–10	1	2	4	.58
C1, Lack of Insight	748	1.19 (.76)	0–2	1	1	2	
C2, Negative Attitudes	749	.49 (.72)	0–2	0	0	1	
C3, Active Symptoms Major Mental Illness	749	.18 (.52)	0–2	0	0	0	
C4, Impulsivity	749	.41 (.65)	0–2	0	0	1	
C5, Unresponsive to Treatment	750	.74 (.77)	0–2	0	1	1	
Risk Management scale (10)	4,762	4.81 (2.42)	0–10	3	5	7	.55
R1, Plans Lack Feasibility	749	.95 (.76)	0–2	0	1	2	
R2, Exposure to Destabilizers	750	1.44 (.63)	0–2	1	2	2	
R3, Lack of Personal Support	750	.60 (.72)	0–2	0	0	1	
R4, Noncompliance With Remediation	750	.65 (.75)	0–2	0	0	1	
R5, Stress	750	1.50 (.59)	0–2	1	2	2	
LS/CMI total score (43)	4,753	15.03 (6.30)	0–36	10	14	19	.67
Criminal History scale (8)	4,752	5.07 (2.00)	0–8	3	6	7	.41
Education/Employment scale (9)	4,751	1.74 (1.93)	0–9	0	1	2	.43
Family/Marital scale (4)	4,746	1.20 (1.05)	0–4	0	1	2	.30
Leisure/Recreation scale (2)	4,737	.76 (.85)	0–2	0	0	2	.44
Companions scale (4)	4,746	2.77 (1.16)	0–4	2	3	4	.32
Alcohol/Drug Problems scale (8)	4,750	1.38 (.98)	0–8	1	2	2	.27
Procriminal Att./Orientation scale (4)	4,751	.86 (1.13)	0–4	0	0	1	.48
Antisocial Pattern scale (4)	4,738	1.28 (1.21)	0–4	0	1	2	.59
PCL-R total score (40)	4,706	14.17 (6.81)	0–35	9	14	19	.64
Arrogant/Deceitful Interpersonal Style (8)	4,742	2.03 (2.01)	0–8	0	2	3	.37
Deficient Affective Experience (8)	4,739	3.75 (2.31)	0–8	2	4	5	.46
Impulsive/Irresponsible Behavioral Style (10)	4,742	4.04 (2.36)	0–10	2	4	6	.52
Antisocial (10)	4,710	4.34 (2.77)	0–10	2	4	6	.45

Note. HCR-20 = Historical, Clinical, Risk Management-20; LS/CMI = Level of Service/Case Management Inventory; PCL-R = Psychopathy Checklist-Revised.
[a] Sample sizes vary by risk index; data were reported when available for any case (item level data were available for only a subset of cases in the sample).

values for each numerical risk index (see Table 2). AUC values indicate the probability that a score on the measure drawn at random from the group of parole grantees will be lower than a score drawn at random from the group of inmates not granted parole. AUC values can range from 0 (perfect negative prediction) to 1.0 (perfect positive prediction), with .50 indicating chance prediction. A rough interpretive guide is: small, below .7; moderate, .70 to .75; and large, above .75 (see, e.g., Douglas, Yeomans, & Boer, 2005; Rice, 1997). Cohen's *d* represents the difference between two means divided by a standard deviation for the data. Generally, *d* values of around .20 are considered small, .50 medium, and .80 large (Cohen, 1992). Because our sample size was so large, we focused our analyses and interpretation of the data using effect sizes rather than tests of statistical significance. In addition, for the HCR-20, LS/CMI, and PCL-R, we report results of separate logistic regression analyses in which the instrument's subscales were entered into a model using direct entry procedures to examine the magnitude of their contributions to predicting parole suitability decisions. We conclude this section by reporting results of partial point biserial correlations to examine the unique contribution of each tool for predicting parole suitability decision and logistic regression analyses to investigate the relative power of the HCR-20, LS/CMI and PCL-R for predicting BPH parole suitability decisions when examined concurrently. Before investigating the predictive validity of the risk indices, we first examined the prevalence of outcomes of the BPH's parole suitability decisions.

Base rates of parole suitability decisions. Of the 4,589 inmates for whom data on the outcome variable of interest were available, parole was granted to 11.2% (n = 515). Many inmates stipulated to the parole suitability decision (20.5%; n =

Table 2
Association of the HCR-20, LS/CMI, and PCL-R With Parole Suitability Decision

Risk index	Max. possible	Parole suitability decision: Not granted *M*	Not granted *SD*	Granted *M*	Granted *SD*	Cohen's *d*	τ[a]	AUC[a]	95% CI
HCR-20 5-level SRR	—	—	—	—	—	—	.28	.75	.73–.77
HCR-20 3-level SRR	—	—	—	—	—	—	.28	.74	.72–.76
HCR-20 "total score"	40	18.15	6.95	11.78	4.44	1.09	.25	.78	.76–.78
Historical scale	20	10.40	3.95	8.10	3.41	.62	.16	.67	.76–.69
Clinical scale	10	2.83	2.31	.76	1.15	1.13	.28	.79	.77–.81
Risk Management scale	10	4.92	2.39	2.94	1.52	.99	.24	.75	.73–.77
LS/CMI risk category	—	—	—	—	—	—	.22	.71	.70–.74
LS/CMI total score	43	15.29	6.22	10.17	4.06	.97	.23	.75	.73–.77
Criminal History scale	8	5.11	1.99	4.28	2.01	.41	.11	.62	.59–.64
Education/Employment scale	9	1.78	1.93	.71	.99	.70	.19	.68	.66–.71
Family/Marital scale	4	1.23	1.07	.86	.88	.38	.10	.60	.57–.62
Leisure/Recreation scale	2	.79	.85	.21	.54	.81	.21	.69	.67–.71
Companions scale	4	2.80	1.14	2.26	1.19	.46	.13	.62	.60–.65
Alcohol/Drug Problems scale	8	1.38	.98	1.13	.86	.27	.07	.56	.54–.59
Procriminal Attitude/Orientation scale	4	.90	1.14	.16	.50	.84	.22	.70	.68–.72
Antisocial Pattern scale	4	1.32	1.21	.55	.81	.75	.19	.68	.66–.71
PCL-R total score	40	14.45	6.70	9.36	5.30	.84	.20	.73	.70–.75
Arrogant and Deceitful Interpersonal Style facet	8	2.11	2.02	1.01	1.37	.64	.15	.65	.63–.68
Deficient Affective Experience facet	8	3.85	2.28	2.27	1.93	.75	.19	.70	.68–.73
Impulsive and Irresponsible Behavior Style facet	10	4.07	2.33	2.79	1.95	.60	.15	.66	.64–.68
Antisocial facet	10	4.40	2.77	3.20	2.52	.45	.12	.63	.60–.65

Note. HCR-20 = Historical, Clinical, Risk Management-20; LS/CMI = Level of Service/Case Management Inventory; PCL-R = Psychopathy Checklist-Revised. τ = Kendall's tau-b correlation; AUC = Area Under the Curve (all results were statistically significant, $p < .001$); *SE* = Standard Error; CI = Confidence Interval.
[a] All values in the column were statistically significant, $p < .001$. All Standard Errors for τ and AUC $\leq .01$.

943), but most were denied parole (68.2%; $n = 3{,}131$). In the analyses reported below, stipulations to and denials of parole are collapsed into a single category of 'not granted parole' (88.8%, $n = 4{,}074$).

ORR. The ORR was significantly associated with parole suitability decision, $\chi^2 = 594.30$ ($df = 4$), $p < .001$; $\phi = .36$, $p \leq .001$; $n = 4{,}584$, 95% CI: .34–.38. There was an 80% chance that a randomly selected inmate not granted parole was assigned a higher ORR than a randomly selected paroled inmate (AUC = .80, *SE* = .009, $p < .001$, CI: .78–.82). The correlation between ORR and parole suitability decision was .31, $p < .001$; *SE* = .01; $n = 4{,}584$; 95% CI: .28–.34. Of the 4,584 inmates for whom data on both ORR and parole suitability decision were available, 1,294 were rated as Low risk. Of these 1,294 inmates, 369 (28.5%) were granted parole and 925 (71.5%) were not granted parole. Corresponding rates for the other ORR levels were: Low/Moderate ($n = 95$ or 10.6% granted parole; $n = 800$ or 89.4% not granted parole); Moderate ($n = 47$ or 3.1% granted parole; $n = 1{,}454$ or 96.9% not granted parole); Moderate/High ($n = 3$ or 0.7% granted parole; $n = 448$ or 99.3% not granted parole); and High (none of the 443 inmates were granted parole).

Next, we considered the same data but from the perspective of the percentage of inmates at each ORR level as a function of parole suitability decision. Of the 4,584 inmates for whom data on ORR and parole suitability decision were available, 514 were granted parole. Of those 514, most ($n = 369$; 71.8%) were rated as being at Low risk. The ORR levels of the remaining 145 inmates granted parole were: Low/Moderate ($n = 95$; 18.5%), Moderate ($n = 47$; 9.1%), and Moderate/High ($n = 3$; 0.7%). There was relatively more variability in the ORRs assigned to the 4,070 inmates not granted parole: Low ($n = 925$; 22.7%), Low/Moderate ($n = 800$; 19.7%), Moderate ($n = 1{,}454$; 35.7%), Moderate/High ($n = 448$; 11%), and High ($n = 443$; 10.9%).

The BPH has discretion regarding the length of time allowed until an inmate denied parole might have a subsequent parole hearing ("denial length"). As a more nuanced investigation of the relation between ORR and suitability decision, we examined the association between ORR and length of denial period. Proportionately fewer inmates given longer lengths of denials were at Low risk compared with inmates given shorter lengths of denial. Lengths of denial among the 2,768 inmates denied parole were as follows: one year ($n = 18$); two years ($n = 29$); three years ($n = 1{,}185$); four years ($n = 6$); five years ($n = 738$); seven years ($n = 416$); 10 years ($n = 265$); and 15 years ($n = 111$). There was a significant, moderately sized, positive correlation between ORR and length of denial ($\tau = .37$, $p \leq .001$; *SE* = .01; $n = 2{,}768$; 95% CI: .34–.40).

HCR-20. Both the HCR-20 three-level SRR ($\chi^2 = 377.03$, $df = 2$, $p < .001$; $\phi = .30$, $p \leq .001$; $\tau = 28$, $p \leq .001$; $n = 4243$) and five-level SRR ($\chi^2 = 395.38$, $df = 4$, $p \leq .001$; $\phi = .31$, $p \leq .001$; $\tau = 28$, $p \leq .001$; $n = 4243$) were significantly associated with parole suitability decision. Considering the three-level SRR, among inmates granted parole, most had a Low SRR (80.2%). One inmate (.2%) rated as being at High risk was granted parole. According to the BPH's five-level SRR scale, among inmates granted parole, most also had a Low (73.3%) or Low/Moderate (6.9%) SRR. AUC values for the HCR-20 three-level SRR (.74; 95% CI: .72–.77), five-level SRR (.75; 95% CI: .73–.77), and

"total score" (.78; 95% CI: .76–.80) were large. Among the HCR-20 scales, the smallest effect sizes were observed for the Historical scale ($\tau = .16$, $SE = .01$; $d = .62$; AUC = .67, 95% CI: .64–.69), and generally were moderate in magnitude (Cohen, 1992). The Clinical scale had the largest effect sizes ($\tau = .28$, $SE = .01$; $d = 1.13$; AUC = .79, 95% CI: .77–.81).

To examine the collective contribution to parole suitability decisions of the HCR-20 scales, we used direct entry procedures in logistic regression. Entering scores for the three scales together was predictive of denial/stipulation, Model $\chi^2(df = 3) = 576.02$, $p < .0001$, -2 LL = 2441.565, Negelkerke $R^2 = .25$. Consistent with the pattern of results observed thus far for the HCR-20, the Clinical scale had the largest effect size ($e^b = 1.80$; Historical, $e^b = 1.06$; Risk Management, $e^b = 1.24$). The exponentiated coefficient (e^b) indicates the change in the odds as the predictor that corresponds to it increases by one, controlling for other variables in the analysis. e^b values of 1.00 indicate no association between the predictor and the odds; values greater that 1.00 indicate that as the predictor increases, so too do the odds; and values of less than 1.00 convey that as the predictor increases, the odds decrease. Values for all three scales were significant ($p \leq .001$). There was a similar pattern of results when forward conditional entry procedures were used, with the Clinical scale continuing to demonstrate the largest effect size.

Item-level data were available only for the HCR-20. As a preliminary step to explore the prevalence of individual HCR-20 risk factors among inmates granted parole, we visually present the distribution of item ratings for each of the 20 core HCR-20 items in Figure 1. Figure 1 indicates that roughly 80% or more of inmates granted parole had ratings of '0' on the following items: Major Mental Illness, Psychopathy, Negative Attitudes, Active Symptoms of Major Mental Illness, Impulsivity, and Noncompliance with Remediation Attempts.

LS/CMI. The actuarial risk category was associated with parole suitability decision, $\chi^2 = 306.04$ ($df = 4$), $p < .001$, $n = 4{,}586$; $\phi = 26$, $p \leq .001$. Among inmates granted parole, the majority (57%) was classified in the Low or Very Low risk categories. However, several inmates classified as High ($n = 10$, 2%) or Very High ($n = 29$, 5.7%) risk were granted parole. AUC values for the LS/CMI risk category (.71; 95% CI: .68–.73) and General Risk/Need total score (.75; 95% CI: .73–.77) were large. At the subscale level, the largest differences in mean scores between inmates granted and not granted parole were on Procriminal Attitude/Orientation ($d = .84$), Leisure/Recreation ($d = .81$), and Antisocial Pattern ($d = .75$). The LS/CMI scales with smallest d values were Alcohol/Drug Problems, ($d = .27$), Family/Marital ($d = .38$), and Criminal History ($d = .41$). AUC values across the LS/CMI scales ranged from .56 (Alcohol/Drug Problems; 95% CI: .54–.59) to .70 (Procriminal Attitude/Orientation; 95% CI: .68–.72).

When the LS/CMI subscales were entered via direct entry into a logistic regression model, six of the eight predictors together were predictive of parole denial and/or stipulation, $\chi^2(df = 8) = 484.997$, $p \leq .001$, -2 LL = 2501.432, Negelkerke $R^2 = .214$. Alcohol/Drug Problems and Family/Marital scales were not statistically significant. In descending order of magnitude, odds ratios for the scales were as follows: Procriminal Attitudes ($e^b = 2.36$), Leisure/Recreation ($e^b = 1.85$), Education/Employment ($e^b = 1.35$), Antisocial Pattern ($e^b = 1.16$), Companions ($e^b = 1.12$), Criminal History ($e^b = 1.06$), Alcohol/Drug Problems ($e^b = 1.10$), and Family/Marital ($e^b = 1.08$). Forward conditional entry procedures produced a statistically significant model comprising the same six scales; in the final model, Procriminal Attitudes also had the largest odds ratio.

PCL-R. Of the total scores for the three instruments studied, the PCL-R yielded the smallest standardized mean difference between the mean total scores of inmates granted versus not granted parole ($d = .84$), although it was still large in magnitude. AUC values for the four PCL-R facets ranged from .63 (Antisocial; 95% CI: .60–.65) to .70 (Deficient Affective Experience; 95% CI: .68–.72). Using direct entry procedures, all PCL-R scales together were predictive of parole denial/stipulation, Model $\chi^2(df = 4) = 297.653$, $p < .0001$, -2 LL = 2688.048, Negelkerke $R^2 = .134$. In descending order of magnitude, odds ratios for the

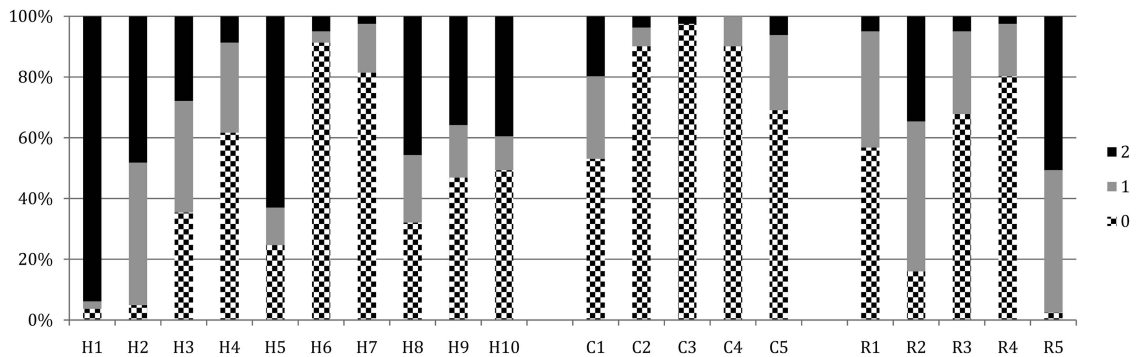

Figure 1. Distribution of HCR-20 item ratings (0, 1, or 2) among inmates granted parole. *Note.* Data are for the subset of 81 inmates who were granted parole and for whom HCR-20 item-level data were available. H1 = Previous Violence, H2 = Young Age First Violent Incident, H3 = Relationship Instability, H4 = Employment Problems, H5 = Substance Use Problems, H6 = Major Mental Illness, H7 = Psychopathy, H8 = Early Maladjustment, H9 = Personality Disorder, H10 = Prior Supervision Failure, C1 = Lack of Insight, C2 = Negative Attitudes, C3 = Active Symptoms of Major Mental Illness, C4 = Impulsivity, C5 = Unresponsive to Treatment, R1 = Plans Lack Feasibility, R2 = Exposure to Destabilizers, R3 = Lack of Personal Support, R4 = Noncompliance with Remediation Attempts, R5 = Stress.

facets were: Deficient Affective Experience ($e^b = 1.27$), Arrogant and Deceitful Interpersonal Style ($e^b = 1.14$), Impulsive and Irresponsible Behavior Style ($e^b = 1.11$), and Antisocial ($e^b = 1.09$). A forward conditional entry model was statistically significant and included all four facets. In the final model, the Deficient Affective Experience facet also had the largest odds ratio.

Comparison of instruments. Given that the information from the HCR-20, LS/CMI, and PCL-R all contributed to the evaluator's final ORR, it was impossible to examine the extent to which any of the instruments added to the predictive capacity of the ORR given the expected conflation. Therefore, we chose to investigate the *relative* power of the HCR-20, LS/CMI, and PCL-R for predicting BPH parole suitability decisions, examining the instruments as they were intended for use in practice (i.e., using risk categories of the HCR-20 and LS/CMI).

We examined the zero order and partial point biserial correlations (r_{pb}, controlling for the variance of other relevant indices) to understand the unique contribution of each tool for predicting parole suitability decisions. To do so, we focused on any change between the zero-order correlation and the partial correlation, the latter representing the association between the index and parole decision that is not attributable to its shared variance with the other (controlled) indices (i.e., its unique association with parole decisions). For the 3-level HCR-20 SRR, once the association of the other two indices was removed, its correlation with parole suitability decision changed from .28 to .13, $p <= .001$. For the BPH's 5-level HCR-20 SRR, once the association of the LS/CMI risk category and PCL-R total score were removed, its correlation with parole outcome changed from .29 to .14, $p <= .001$. The LS/CMI risk category's correlation with suitability decisions decreased from .25 to .07, $p <= .001$. Finally, the correlation for the PCL-R total score decreased from .24 to .03, $p = .04$. These results suggest that the HCR-20 SRR (both three- and five-level schemes) retained relatively more unique association with parole suitability decisions after removing the impact contributed by the other risk indices compared with the LS/CMI and PCL-R. Following procedures recommended by Steiger (1980), each pair of partial correlations was found to be statistically significantly different from one another, $p \leq .001$.

We used logistic regression to examine the relative contribution of the instruments to predict parole suitability decisions, entering the three-level HCR-20 SRR, LS/CMI risk category, and PCL-R total score using forward conditional stepwise entry. HCR-20 SRR entered first, followed by the LS/CMI risk category, with the PCL-R total score on the final step. Each step produced a statistically significant model (in the final model, $\chi^2 = 424.75$, $df = 3$, $p < .001$, -2 LL = 2456.907, Negelkerke $R^2 = .194$), and Wald statistics for all indices were significant at every step. When on its own in the model in the first step, the HCR-20 SRR had an odds ratio (e^b) of 6.87, meaning that for every one step increase on the SRR rating (i.e., from low to moderate, and from moderate to high), there was a near sevenfold increase in the odds of not being granted parole. The odds ratio for the 3-level HCR-20 SRR decreased with the addition of the LS/CMI on step two to 4.59 and on step 3 with the addition of the PCL-R to 4.09. The odds ratios associated with the LS/CMI risk category were relatively smaller than those for the HCR-20 SRR and demonstrated the same pattern of decreasing magnitude with the addition of the PCL-R (from $e^b = 1.67$ on step 2 to $e^b = 1.52$ on step 3). The e^b for the PCL-R in the final step was 1.02, indicating a very minor role in the explanation of parole decisions.

When the five-level HCR-20 SRR was used, a slightly different pattern of findings emerged. In this model, the PCL-R did not enter on either of the two steps. The final model was significant, $\chi^2 = 423.83$, $df = 2$, $p < .001$; -2 LL = 2457.836, Negelkerke $R^2 = .194$). The odds ratio (e^b) for the 5-level HCR-20 SRR decreased when LS/CMI entered on step two from 7.01 to 4.81. The odds ratio (e^b) for the LS/CMI when it entered on the final/second step was 1.57.

Finally, to examine the relative contributions of the instruments to predicting parole suitability decisions, we entered all 15 subscales (three HCR-20 scales, eight LS/CMI scales, and four PCL-R facets) into a forward conditional stepwise entry multiple regression model. The HCR-20 Clinical scale entered first, with an odds ratio (e^b) of 2.09, meaning that for every unit increase on the Clinical scale score, there was a 2.09 greater odds of not being granted parole. In sequential order, scales that entered on subsequent steps were: HCR-20 Risk Management, LS/CMI Education/Employment, LS/CMI Leisure/Recreation, LS/CMI Antisocial Pattern, Procriminal Attitude/Orientation, and LS/CMI Criminal History. No PCL-R facets entered on any step. The variables and their odds ratios in the final, 8th step were: HCR-20 Clinical ($e^b = 1.58$), LS/CMI Procriminal Attitude/Orientation ($e^b = 1.42$), Leisure/Recreation ($e^b = 1.36$), Employment/Education ($e^b = 1.22$), HCR-20 Risk Management ($e^b = 1.17$), and Criminal History ($e^b = 1.08$). The final model was significant, $\chi^2 = 601.29$, $df = 6$, $p < .001$, -2 LL = 2368.375, Nagelkerke = .26. We reran the logistic regression with H7 omitted from the Historical scale to avoid conflation with PCL-R scores in the model, restricting our analyses to the 750 cases for which item-level HCR-20 data were available. Again, the HCR-20 Clinical scale entered first ($e^b = 1.62$). Only the Risk Management scale entered on the second step. The final model was significant, $\chi^2 = 54.836$, $df = 2$, $p < .001$, -2 LL = 416.087, Nagelkerke = .16; $n = 599$, and contained only the Clinical ($e^b = 1.50$) and Risk Management ($e^b = 1.19$) scales.

Discussion

This large-scale study of parole eligible life sentenced inmates was designed (a) to provide a risk profile for this population; (b) to explore the correlations between three instruments (HCR-20, LS/CMI, and PCL-R) and clinicians' overall ratings of risk (ORR); and (c) to assess the association between these indices and decisions of the parole board.

Risk Profile of Life-Sentenced Inmates

Across the four risk indices studied, the majority of this large sample of lifers was considered to be at Low to Moderate risk, with approximately 22% being considered at High or Moderate/High risk by clinicians' ORR. Using the actuarially based LS/CMI categorical risk classification, more inmates were designated to be at High or Very High risk compared with the HCR-20 SRR. No other studies of similar populations are available for comparison with our results.

Although these group level data indicate that, overall, this sample of lifers was at relatively low to moderate risk for future

violence, every risk assessment should be an individualized evaluation. Moreover, risk by definition is context-dependent and therefore it would be inaccurate to offer in absolute terms a risk profile for this (or any other) type of population. Among other factors, estimates of risk for violence will be affected by the opportunities or pitfalls that the evaluator reasonably foresees in the inmate's immediate future following release. As such, although different samples of lifer populations studied subsequently also may be shown to be at relatively Low risk, such a finding should not be expected automatically on the basis of our findings.

The PCL-R scores and item-level HCR-20 data indicate there were relatively low rates of psychopathy and severe mental illness, in contrast to findings from general correctional populations. For example, in a systematic review of the prevalence of mental disorders in prisoners from 62 studies completed in 12 Western countries, Fazel and Danesh (2002) observed considerable variability across individual studies, but confirmed earlier findings (e.g., Blaauw, Roesch, & Kerkhof, 2000) that the prevalence of mental disorder among correctional samples tends to be substantially elevated compared to rates in the general community population. This finding, however, appears not to generalize to individuals who have been incarcerated continuously for lengthy periods. On the other hand, in the present sample there was a high rate of personality disorder and history of substance abuse (as indexed by the HCR-20), which is consistent with data from other correctional samples and settings (e.g., Proctor, 2012; Slade & Forrester, 2013).

Concordance Between the ORR and the HCR-20, LS/CMI, and PCL-R

All instruments' indices correlated moderately or strongly with the ORR, with the largest correlation being with the HCR-20 SRR. Moreover, there was extremely strong agreement between categorical risk classifications using the ORR and HCR-20 SRR, which should be expected given that the same clinician determines both ratings. By contrast, although there was a robust positive correlation between the ORR and the LS/CMI, substantial category mismatches were observed for the risk group classifications. These major discrepancies almost always occurred in the direction of the actuarial LS/CMI rating being higher than the ORR.

Given roughly similar coverage in terms of general content domain between the HCR-20 and LS/CMI (also see Kroner, Mills, & Reddon, 2005), the stronger agreement between the ORR and HCR-20 SRR relative to that between the ORR and the LS/CMI categories may be attributable to the structured discretion the HCR-20 provides to the clinician to consider the relevance of the various risk domains to the individual evaluee. Data on professional overrides of the LS/CMI were not available for this sample, and so we were unable to investigate whether final estimates of risk based on the LS/CMI as it is intended to be used in practice (i.e., with allowance for professional discretion) would have narrowed the gap observed here. Another possible explanation for the relatively greater discrepancy between risk classifications of the ORR versus LS/CMI is that the latter was developed to assess risk for general recidivism, whereas the ORR reflects a judgment about likelihood of future violence. Importantly, our data do not permit conclusions about the comparative accuracy of the indices' risk estimates in terms of predictive validity for future violence, and we therefore could not determine whether the LSI/CM overestimates risk, or whether the ORR is an underestimate.

Association Between Risk Indices and Parole Suitability Decisions

The BPH's decisions about parole suitability were aligned strongly with evaluators' overall judgments about risk for violence in that rates of parole denial/stipulation increased in the expected manner at each successive increase in ORR level. None of the 443 inmates classified at the highest ORR category were granted parole, and the majority—71.8%—of the 514 inmates granted parole was judged to be at Low risk. Nonetheless, the parole board was more conservative (i.e., less likely to grant parole) than the structured professional ratings, in that the majority of inmates rated as being at Low risk were denied parole (71.5%). Of course, low risk is not synonymous with no risk. Moreover, by law the BPH must take into consideration factors other than risk for future violence when making decisions about release to the community. Overall, our findings suggest the BPH's parole decisions were consistent with data from instruments well validated for predicting future violence, particularly the HCR-20.

Having established that there was a robust association between all global risk indices and parole suitability decisions, we next investigated which risk factor content domains were most strongly related to parole suitability decisions. Although research typically shows strong associations between criminal history and reoffending, in the present sample all risk indices' criminal history variables demonstrated little utility for discriminating between inmates granted or denied parole. Because serious criminal histories likely are prevalent among lifers, this factor may not have been influential on parole board members' decision-making. Risk factors with relatively smaller associations with BPH decisions included a history of family or marital issues and substance use problems, the latter being consistent with findings reported by Weisberg et al. (2011).

The robust association between parole suitability decision and scores on the HCR-20 Clinical and Risk Management scales is consistent with regulatory guidelines. For example, California Code of Regulations Title 15 outlines several suitability and unsuitability factors, many of which are dynamic factors similar to those on the C Scale, or contextual variables similar to the R Scale that would be relevant to life in the community following release from prison (e.g., signs of remorse, having realistic plans for release). Regulations also describe other information that may be considered, including past and present mental "attitudes toward the crime," which courts have interpreted broadly to include the inmate's insight into his or mental state and violent behaviors. HCR-20 item-level data suggested that individuals who were granted parole tended not to have problems with or a history of negative attitudes, complying with remediation attempts, major mental illness, and psychopathic personality traits (including impulsivity). Our findings also are consistent with Liem and Richardson's (2014) observation that the key difference between the 67 lifers who did or did not desist from crime was the degree to which they possessed self-awareness and a capacity to act independently of social forces and to accept responsibility for past failures and future conduct. In our sample, in addition to the mainly dynamic factors of the HCR-20, parole denial was associated with procrimi-

nal attitudes and problems with leisure/recreation and employment/education (as indexed by the LS/CMI).

Of the four PCL-R facets, Deficient Affective Experience had the strongest relation with parole decisions, but none were related to parole decisions once considered together in a model with dynamic risk factors as indexed by the HCR-20. Although interpreting the contribution of the PCL-R to parole board decisions is confounded by the fact that analyses of the HCR-20 Historical scale included item H7 (Psychopathy), our results suggest that the PCL-R had a negligible impact on BPH decisions compared with the other risk indices. There is substantial overlap between the constructs represented on the PCL-R and HCR-20 (and to a lesser extent, the LS/CMI), such as impulsivity, instability, hostility, substance use problems, and so forth. Therefore, we interpret our findings regarding the apparent smaller contribution of the PCL-R to parole suitability decisions to be reflective of the fact that important constructs tapped by the PCL-R likely would have been considered via assessment using the HCR-20. Analyses using the smaller subset of inmates for whom H7 could be omitted confirmed this interpretation, as does recent research on the relative predictive validity of these instruments (Guy, Douglas, & Hendry, 2010).

Issues about content overlap between the HCR-20 and PCL-R notwithstanding, it should be noted that higher PCL-R scores were associated with lower parole grant rates. This finding is consistent with research on a forensic psychiatric sample in which the presence of psychopathic traits was among the most important factors associated with a decision to not release insanity acquitees (Manguno-Mire, Thompson, Bertman-Pate, Burnett, & Thompson, 2007). On the other hand, our finding contrasts with those of Porter, ten Brinke, and Wilson (2009), who retrospectively studied 310 male federal inmates in Canada and found that release applicants with higher PCL-R scores were 2.5 times *more likely* to be granted parole than individuals below the diagnostic "threshold" for psychopathy. As one of the characteristics of psychopathy is a superficial, nongenuine presentation, a possible explanation of Porter et al.'s finding is that prisoners with high traits of psychopathy presented "well" to the Parole Board, essentially deceiving Board members (who were not given PCL-R scores) into believing they were good candidates for release. In our cohort, the thorough clinical work-up, which included assessment of psychopathy, was presented to the BPH. Thus, it could be expected that the BPH would be less likely to perceive individuals with more psychopathic traits and nongenuine presentations as being credible. This provides support for a practice model and policy in which structured, comprehensive assessments of violence risk are provided to parole suitability decision-makers.

Limitations

Because we are reporting on field data that amassed during the course of real-world practice, interrater reliability data were not available. Concerns about the field reliability of violence risk assessments tools emerged in light of reports that the PCL-R and Static-99 may have lower rater agreement when used by clinicians in practice than by trained raters for research (e.g., Boccaccini, Murrie, Rufino, & Gardner, 2013; Miller, Kimonis, Otto, Kline, & Wasserman, 2012). Despite the finding that perceived subjectivity of item rating guidelines is associated with poor agreement on the PCL-R and HCR-20 (Rufino, Boccaccini, & Guy, 2011), several studies indicate acceptable interrater agreement among practitioners in the field using SPJ measures (Belfrage, 1998; Guy, Perrault, & Vincent, 2014; Penney, McMaster, & Wilkie, 2014; Vincent, Guy, Fusco, & Gershenson, 2011). Strong agreement also has been reported for field assessments using the LSI-R (Manchak et al., 2008). Nevertheless, given the many influences on rater agreement, it is likely that interrater reliability for the tools in this study—particularly the PCL-R—could have been lower than results from controlled research investigations.

Another limitation relates to the obstacles presented by studying system outcomes as they occur naturally in practice. That is, because the findings from the PCL-R and risk indices were provided to the BPH, we cannot determine whether these factors actually influenced parole suitability decisions, or whether they merely were correlated with the decision for another reason—perhaps because they tapped into the types of concerns considered by the BPH Commissioners (15 California Code of Regulations § 2281(d)). Nonetheless, our findings suggest that the kinds of data that can be provided by psychologists utilizing structured approaches to violence risk assessment are relevant to parole decision-making. This was true not only for decisions about parole suitability, but also for determining the length of denial for individuals not granted parole. When one considers findings from earlier studies that parole board members often did not consider information provided by caseworkers (e.g., Holland, Holt, & Brewer, 1978), the present results provide validation of the potential positive impact of implementing validated, empirically based structured risk assessment instruments for release decision-making.

Future Directions

Our research findings lead naturally to several questions of key relevance for clinical practice and policy. Which risk assessment instruments are most useful for decision-making about parole suitability for lifers? Which provide the most guidance for making empirically guided, feasible recommendations for risk management strategies tailored to the specific parolee that a parole officer or others could reasonably implement? Does facilitation of recommended risk management strategies prevent violence? These questions are especially critical to address given that several states in addition to California are contemplating adoption of various approaches to assessing risk among similarly situated long-term inmates. These approaches tend to be agency-specific, actuarial in nature, devoid of clinical input, and heavily weighted toward historic risk. In our opinion, investigation of purely actuarial tools (even those containing dynamic factors) to answer these types of practice and policy questions would be of negligible benefit because of their limitations related to issues such as sample-dependency, fluctuating probability estimates across samples and settings, and lack of individualized assessment approach, among other issues (see Douglas, Hart, et al., 2013). Our findings demonstrate the important contribution of dynamic risk factors (Douglas & Skeem, 2005) and therefore may offer timely guidance to states tasked with making decisions with high stakes for public safety and inmates' individual liberties. Without consideration of the recent status and relevance of dynamic risk factors, and with undue reliance on static risk factors present at the time of an index

offense that may have occurred 20 years prior, there may be a danger of overestimating risk relative to observed and theorized base rates of violence among this unique population. As such, future research that examines the utility of violence risk assessment instruments that contain dynamic risk factors and operate within a prevention-focused paradigm that builds or capitalizes on lifers' existing strengths to support community reintegration is needed.

Conclusions

A key public policy question centers on whether routine use of empirically validated, structured risk assessment instruments results in parole being given to the "right" people—that is, to individuals whose risk of reoffending can be managed safely in the community. This is the first study to look at the consistency of thousands of parole suitability decisions from the country's largest correctional system and psychologists' risk ratings with contemporary risk assessment instruments. Our findings suggest that inmates who were granted parole during this study were, by and large, at relatively lower risk than individuals not granted parole. Moreover, evaluators' overall judgments about risk for future violence were informed by empirically validated tools, *and* the parole board appeared to be influenced by evaluators' judgments about violence risk. These results are encouraging in that they suggest California's BPH is engaging in empirically supported release decision-making that is aligned with principles of best practice. Moreover, considering the 11% parole grant rate in this study, use of structured risk assessment instruments does not appear to be associated with fewer paroles being granted. Perhaps more importantly, such empirically supported measures may offer guidance to parole boards who must make decisions that are life altering for inmates and critical for public safety.

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THE PREDICTION OF VIOLENCE IN ADULT OFFENDERS

CE

A Meta-Analytic Comparison of Instruments and Methods of Assessment

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Using 88 studies from 1980 to 2006, a meta-analysis compares risk instruments and other psychological measures on their ability to predict general (primarily nonsexual) violence in adults. Little variation was found amongst the mean effect sizes of common actuarial or structured risk instruments (i.e., Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; Level of Supervision Inventory–Revised; Violence Risk Assessment Guide; Statistical Information on Recidivism scale; and Psychopathy Checklist–Revised). Third-generation instruments, dynamic risk factors, and file review plus interview methods had the advantage in predicting violent recidivism. Second-generation instruments, static risk factors, and use of file review were the strongest predictors of institutional violence. Measures derived from criminological-related theories or research produced larger effect sizes than did those of less content relevance. Additional research on existing risk instruments is required to provide more precise point estimates, especially regarding the outcome of institutional violence.

Keywords: risk assessment; violence; meta-analysis; adult offenders; forensic patients; recidivism; misconduct

Assessments of violence risk should play a central role in decision making pertaining to sentencing, release, case management, and the selection of rehabilitation methods to achieve risk reduction (Andrews & Bonta, 2006; Heilbrun, 1997). The ability to assess risk is facilitated by the use of structured, empirically derived, and theoretically driven instruments (Andrews, Bonta, & Wormith, 2006; Grove, Zald, Lebow, Snitz, & Nelson, 2000). Despite the availability of violence-specific risk tools and other measures associated with criminality and aggression, there are relatively few meta-analytic comparisons of their predictive validity for predicting risk, identifying risk-reduction targets, and monitoring changes in risk level. Comparisons of this nature are necessary to adequately inform professional practice parameters concerning the selection of instruments for inclusion in

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violence risk assessments. Thus, this study provided a meta-analytic appraisal of a wide range of instruments and methods used in the literature to inform estimates of violence risk in adult offenders and forensic patients.

Tools for assessing risk have undergone various modifications in the past 50 years. First-generation risk assessment, arising in the mid-20th century, was based on unstructured clinical judgments of risk that were prone to error and bias (Grove et al., 2000; Monahan & Steadman, 1994; Rice, 1997). In light of these limitations, second-generation risk instruments offered a standardized assessment that was based on constructs statistically predictive of recidivism (e.g., criminal history, Diagnostic and Statistical Manual of Mental Disorders diagnoses). Examples of second-generation tools are the Violence Risk Assessment Guide (VRAG; Harris, Rice, & Quinsey, 1993) and the Statistical Information on Recidivism (SIR; Bonta, Harman, Hann, & Cormier, 1996). Some of these measures were criticized because their items were selected with little regard for their theoretical or rehabilitative value (Bonta, 2002). In addition, despite the fact that some second-generation instruments demonstrate fairly good predictive validity (e.g., r = .30 to .35; Bonta & Yessine, 2005; Gendreau, Little, & Goggin, 1996; Glover, Nicholson, Hemmati, Berfeld, & Quinsey, 2002; Loza & Green, 2003; Polvi, 2001), they are mainly composed of static risk items (Andrews & Bonta, 2006). Static risk factors are unchangeable (e.g., criminal history, age, gender). Sole reliance on static factors for risk assessment has been criticized because these factors do not capture the complexity of recidivism, do not permit measurement of changes in risk over time, and fail to identify areas for intervention (Andrews, Bonta, & Hoge, 1990; Hoge & Andrews, 1996; Wong & Gordon, 2006).

In contrast to second-generation measures, third-generation risk instruments emphasized the need for prediction models to not only predict risk but to also inform the identification of criminogenic needs that could be targeted for change as a means of reducing risk (Andrews et al., 2006; Bonta, 2002). Common examples are the Level of Supervision Inventory–Revised (LSI-R; Andrews & Bonta, 1995); Historical, Clinical, and Risk Management Violence Risk Assessment Scheme (HCR-20; Webster, Douglas, Eaves, & Hart, 1997); and Self-Appraisal Questionnaire (SAQ; Loza, 2005). These instruments included empirically supported risk factors, but item selection was more deliberately driven by theoretical understandings of persistent criminality and violence (i.e., social learning and cognition theories, the principles of risk-need-responsivity) than were second-generation measures (Andrews & Bonta, 2006; Gendreau, Goggin, French, & Smith, 2006).

Third-generation measures also included dynamic risk factors, which are risk factors that are variable in nature and can change with time or with the influence of social, psychological, biological, or contextual factors (e.g., intervention; Douglas & Skeem, 2005). Examples of such malleable risk factors (i.e., criminogenic needs) are substance use, interpersonal conflict, and antisocial attitudes. A meta-analysis by Gendreau et al. (1996) demonstrated that dynamic risk factors were as useful as static factors were in predicting risk. This finding encouraged the view held by some researchers that dynamic risk factors may even be more relevant than static factors when the focus is on risk reduction (Andrews, 1989; Douglas & Skeem, 2005; Heilbrun, 1997). The advantage of using instruments that assess dynamic risk factors is that they are sensitive to changes in risk that might occur with time and/or as a result of rehabilitation (Andrews & Bonta, 2006; Heilbrun, 1997). However, it should be noted that some dynamic risk factors are best described as “potential” dynamic risk factors (e.g., accommodation problems) until

additional research confirms their individual links to fluctuations in recidivism risk level (see Brown, St. Amand, & Zamble, 2009).

The latest evolution in risk instruments (i.e., fourth generation) are those specifically designed to be integrated into (a) the process of risk management, (b) the selection of intervention modes and targets for treatment, and (c) the assessment of rehabilitation progress (Andrews & Bonta, 2006; Andrews et al., 2006). These instruments are administered on multiple occasions and are particularly informative because they document changes in specific criminogenic needs that might occur between an offender's entrance into the criminal justice system through his or her exit from the criminal justice system. Fourth-generation instruments are intended to identify areas of success within a case management plan as well as areas in which intervention strategies need to be modified to maximize their potential for risk reduction. Examples are the Level of Service/Case Management Inventory (LS/CMI; Andrews, Bonta, & Wormith, 2004), Violence Risk Scale (VRS; Wong & Gordon, 2006), Correctional Offender Management Profile for Alternative Sanctions (COMPAS; Brennan & Oliver, 2000), and Correctional Assessment and Intervention System (CAIS; National Council on Crime and Delinquency, 2004). Notably, few of these measures have sufficiently available prospective validity data.

With significant growth in risk research, many instruments have been advocated for use in the assessment of violence risk. These measures range from tools specifically designed to predict violence (e.g., Violence Prediction Scheme [VPS; Webster, Harris, Rice, Cormier, & Quinsey, 1994] and HCR-20 [Webster et al., 1997]), to measures that predict specific types of violence (e.g., Spousal Assault Risk Assessment Guide [SARA; Kropp, Hart, Webster, & Eaves, 1995]), to measures that assess personality constructs related to violence (e.g., Psychopathy Checklist–Revised [PCL-R; Hare, 2003]), and to measures designed to assess general recidivism (e.g., LSI-R [Andrews & Bonta, 1995]). Thus, professionals have access to a variety of tools to inform their predictions of violence risk.

With this variety in tools, the issue confronting a professional is "Which of these instruments should I use?" Complicating the answer to this question is the fact that there are differing administration methods of assessment within this array of instruments (e.g., paper-and-pencil vs. professional-rated forms; file review vs. interview) and they can vary in content (e.g., measure a single risk-related construct vs. multiple constructs). The diversity in both the administration format and content may lead some assessors to use multiple measures to generate a consensus estimation of risk (Doren, 2002). This practice can be problematic. Mills and Kroner (2006) used the PCL-R, LSI-R, VRAG, and the General Statistical Information on Recidivism (GSIR) to predict postrelease violence and general recidivism. For most offenders, there was agreement in the standardized risk scores generated for each of these instruments, but predictive accuracy was substantially reduced for cases with a high level of disagreement between instruments on their standardized risk scores. The challenges associated with formulating risk judgments based on several risk instruments highlight the need for research that identifies the most appropriate risk instrument(s) for a given offender population, forensic setting, and assessment purpose (see also Seto, 2005).

PREVIOUS META-ANALYTIC COMPARISONS OF RISK INSTRUMENTS

A number of individual studies have compared the relative utility of risk instruments for the prediction of violence in adults (e.g., see Dahle, 2006; Douglas, Yeomans, & Boer,

2005; Glover et al., 2002; Grann, Belfrage, & Tengström, 2000; Kroner & Loza, 2001; Mills & Kroner, 2006; Rice & Harris, 1995). Given the variation across these prediction and comparison studies in terms of such factors as sample characteristics, setting, and definitions of outcome, it is not surprising that it has been virtually impossible to identify a dominant violence risk measure. In fact, much of the variation across prediction studies may be due to sampling error, which, according to Hunter and Schmidt (2004), is the major source of variation in prediction studies. One means of addressing this issue is to conduct meta-analyses, which statistically culminate primary study data to better estimate true population parameters.

Four meta-analyses of the risk-prediction literature have provided a comparison of various instruments used in the assessment of risk in adults. In the first analysis, Gendreau et al. (1996) compared the LSI-R, PCL-R, Salient Factor Score (Hoffman, 1983), Wisconsin Classification System (Baird, 1981; Baird, Heinz, & Bemus, 1979), and Minnesota Multiphasic Personality Inventory (MMPI; Hathaway & McKinley, 1967) in the prediction of general recidivism across 131 primary studies. Although each instrument was moderately predictive, the LSI-R produced the strongest effect size. Subsequently, Gendreau, Goggin, and Law (1997) compared the LSI-R, MMPI, "other" risk measures, and non-MMPI measures of antisocial personality as predictors of an aggregate criterion of violent and nonviolent institutional misconducts. The LSI-R produced the highest predictive validity and outperformed the other measures. A third meta-analytic comparison by Gendreau, Goggin, and Smith (2002) focused specifically on the prediction of violent recidivism and found that the LSI-R had a slight advantage over the PCL-R. Other risk measures were not assessed by Gendreau et al., thus, it is unclear whether other instruments would perform on par with the LSI-R and PCL-R for violent risk prediction. Moreover, all of the above meta-analyses were concerned with a limited number of risk-related instruments and are in need of updating given the availability of additional primary studies since their publication.

More recently, Walters (2006) meta-analytically compared an aggregate category of selected structured/actuarial risk instruments (i.e., HCR-20, LSI-R, PCL-R, VRAG, and the Lifestyle Criminality Screening Form created by Walters, White, & Denney, 1991) with a number of self-report measures often used in risk judgments for institutional misconduct, general recidivism, and violence. Some of these self-report measures were specific to risk prediction (e.g., Psychological Inventory of Criminal Thinking Styles [PICTS; Walters, 1995, 1996] and Self-Appraisal Questionnaire [SAQ; Loza, 2005]), whereas others reflected general clinical constructs relevant to an individual's general personality and emotional functioning (e.g., NEO Personality Inventory–Revised, Multidimensional Anger Inventory, Beck Hopelessness Scale). Walters's findings supported the predictive validity of self-report measures in risk assessment but only if these instruments were based on constructs that were empirically tied to risk (e.g., antisocial attitudes). Walters suggested that the integration of content-relevant self-report measures with actuarial/structured risk instruments could add to the validity of risk assessment. Unfortunately, only a select number of structured/actuarial risk instruments were coded in Walters's meta-analysis, and their individual predictive validities were not reported. In addition, only nine effect sizes were available to compare the aggregate category of structured/actuarial methods with self-report measures in terms of their ability to predict violent recidivism. Across these nine effect sizes, the mean effect was larger for the structured/actuarial measures than for the

general category of self-report measures. A larger database that encompasses a greater range of measures is required to replicate Walters's findings.

In summary, many advances have been made in the assessment of risk in adults. Nonetheless, uncertainty remains concerning the most appropriate instruments for the prediction of violence given variations in item content, purpose and format, and administration method. Only a few meta-analyses (i.e., Gendreau et al., 1997; Gendreau et al., 1996; Gendreau et al., 2002; Walters, 2006) have been conducted to synthesize this literature for professionals, and none of these has been sufficiently comprehensive in its estimation of violence risk. A synthesis of this nature is timely given that very few correctional psychologists report using instruments empirically supported as relevant to the task of risk estimation (see Boothby & Clements, 2000). Thus, the primary objective of the current meta-analysis was to determine which instruments function most effectively as valid predictors of future violence (primarily nonsexual) within prison settings and in the community. Four secondary objectives of this meta-analysis were to compare the predictive utility of risk measures depending on which generation they represented, the type of items (static vs. dynamic), their method of administration, and their content relevance to corrections. With this information, guidelines can be generated to assist with the selection of risk instruments.

METHOD AND PROCEDURE

DESCRIPTION OF DATABASE

An electronic literature search was conducted via EBSCO databases (Academic Search Elite, PsycARTICLES, and PsycINFO). Key search terms included (a) assessment-related terms (e.g., *actuarial*, *clinical*, *prediction*, *LSI-R*, *PCL-R*), (b) terms related to the offender population (e.g., *adult offender*, *prisoner*, *parolee*), and (c) terms related to violent outcomes (e.g., *recidivism*, *misconduct*). Unpublished data were requested via an e-mail sent to 33 researchers and 23 research centers known to conduct risk research. Additional studies were added via reviews of article reference sections. The search was restricted to studies conducted between 1980 and 2006. Inclusion criteria required that primary prediction studies (a) were truly prospective in nature (i.e., assessment preceded the measurement of outcome), (b) involved adult general offender or forensic patient (i.e., sample mean of 18+ years at time of assessment), and (c) reported sufficient data to calculate an effect size (e.g., Pearson *r,* Phi coefficient Φ) between the prediction measure and violent misconduct or recidivism outcomes; prison or probation studies were included regardless of length of follow-up but we included only postrelease recidivism studies that had least a 6-month follow-up period. For each study, data from the largest sample, longest follow-up period, and most specific type of criterion (i.e., conviction vs. arrest) were recorded. To avoid redundancy with Hanson and Morton-Bourgon's (2007) recent meta-analysis on the predictive validity of risk instruments for sexual and violent recidivism in sex offenders, this analysis excluded studies using samples that were exclusively of sex offenders. Likewise, instruments designed specifically to assess sexual recidivism were not included. Thus, studies included in the meta-analysis pertained almost exclusively to nonsexual offenders and forensic patients with nonsexual violent outcomes. It is estimated that sex offenders contributed only 2% of the total sample size for the predictors in the current meta-analysis.

The data set contained 88 coded studies reporting on various risk measures predicting institutional violence ($k = 76$) and violent recidivism ($k = 185$) in adults. Most of the data set was based on studies published in books, journals, or government reports (63.1%) that were primarily conducted in North America (60% Canadian and 24.8% American). Authors were largely academically affiliated (51.3%) and from the discipline of psychology (85.4%). The sample sizes for the predictors were 232,790 for institutional violence and 40,944 for violent recidivism. The majority of the data set (81.3% collapsed across outcomes) represented male-dominated samples. Samples representing general offender populations produced 63.9% of effect sizes, and the remainder were based on forensic psychiatric (30.7%) and mixed (5%) samples. Institutional violence effect sizes were based on an equivalent percentage of general offender (50.7%) and forensic samples (49.3%), and most violent recidivism effect sizes were from general offender samples (70.0%).

Overall, almost half of all effect sizes were drawn from samples coded as being of a low or moderate risk level (43.6% for institutional violence and 44.0% for violent recidivism), whereas only 7.5% came from high risk samples. Fewer than 3% were from mixed risk samples and 2.1% could not be coded on risk level because of insufficient information. Predisposition for violence among offenders could not be assessed with any degree of certainty across studies because information about previous/index violent offenses was not reported for more than half of the obtained effect sizes (67.6% of institutional violence outcomes and 56.0% of violent recidivism outcomes). The mean base rate for major institutional violence (excluding verbal threats) was 25.84% ($SD = 13.61$) and was 21.73% ($SD = 12.99$) for violent recidivism. Only 39.4% of institutional violence effect sizes were based on follow-up periods of greater than 1 year and most community-released offenders were followed from 2 to 5 years (41.7%). The most common index of institutional misconduct was official prison records (74.7%); rearrest, reconviction, and reincarceration were the most common violent recidivism indices (72.2% of effect sizes). In nearly all studies (97.0%), violent recidivists were compared to an aggregate group of offenders (i.e., offenders who did not reoffend at all combined with those who may have nonviolently recidivated).

Although studies examined more than 70 different risk measures in total, only instruments with ≥10 effect size estimates per outcome of interest will be reported to emphasize individual instruments for which the greatest amount of data were available. These instruments included the HCR-20 ($k = 11$ for misconduct; $k = 11$ for recidivism), LSI/LSI-R ($k = 19$ for recidivism), PCL/PCL-R ($k = 24$ for recidivism), SIR scale ($k = 17$ for recidivism), and VRAG ($k = 14$ for recidivism). Some instruments with ≤10 effect sizes are reported, but their predictive validities should be interpreted cautiously. Most effect sizes were based on risk assessment methods that involved only the use of file extraction methods (52.2% of effect sizes), followed by self-report questionnaires (17.4%), a combination of interview and file review (16.5%), only an interview (11.2%), or staff behavioral observations (1.8%). Most effects were based on measures containing potentially dynamic (51.9%) or static (34.9%) risk items, whereas 8% were derived from measures using relatively equal numbers of static and dynamic items. For almost 5% of effect sizes, their static or dynamic item composition could not be determined. The vast majority of effect sizes (85%) were based on measures rooted in a theory of criminal behavior and/or created specifically for use as a criminal risk instrument. Fewer than 3% were coded as first-generation methods of risk assessment, and the sample was relatively split between second- (52.3%)

and third-generation measures (42.3%). Only 2.5% of the data were from fourth-generation instruments.

CODING OF STUDIES

The descriptor, predictor, and outcome data were gathered from studies using a coding guide created for this current analysis. Major coded categories included (a) study and author characteristics (e.g., type of publication, author affiliation, publication year), (b) sample variables (e.g., ethnicity, gender, offender type), (c) risk assessment descriptors (e.g., name of measure, administration method, item content), and (d) effect size descriptors (e.g., type of outcome, calculated effect size). In accordance with previous definitions used in the literature (see Andrews et al., 2006; Bonta, 2002), each identified instrument was coded as to its most relevant generation of risk category. A list of instruments coded under each generation can be obtained from the first author, as can a copy of the entire coding manual. All studies were coded by S. French. Interrater reliability was established using a randomly selected sample of 15 studies, blindly coded by a second experienced coder. Using the Yeaton and Wortman (1993) formula, $\sum$(agreements) / $\sum$(agreements + disagreements), the index for agreement was .82. The source of disagreements concerned less obvious sample characteristics (i.e., determination of sample risk level) and aspects of the nature of a particular risk instrument (i.e., type of item content, generation of risk instrument). Disagreements most often resulted from a misunderstanding or a clerical error when entering item codes. The two raters discussed disagreements and a consensus coding was achieved for those items prior to analysis.

EFFECT SIZE CALCULATION

For the rationale behind this study's approach to meta-analysis, the reader is referred to Gendreau and Smith (2007). Correlation coefficients were recorded for each measure's predictive validity with institutional violence and recidivism outcomes. Where statistics other than *r* were reported (i.e., *F*, *t*, χ^2, *p*, *AUC*), we employed the appropriate formula for conversion to *r* (see Rosenthal, 1991; Swets, 1986). In light of generally low base rates for violent institutional misconduct and recidivism, it was necessary to consider this potential influence on effect sizes.[1] Correlation coefficients were adjusted using Ley's (1972) formula: $r' = [(r_{xy})(\delta_x'/\delta_x)] / [1 - r_{xy}^2 + (r_{xy}^2)(\delta_x'^2 / \delta_x^2)]^{1/2}$, where r_{xy} was the observed correlation, δ_x was the observed standard deviation of the base rate, δ_x' was the average standard deviation based on the average base rate for studies in the analysis, and r_{xy}' was the corrected correlation. The standard deviation of the base rate was calculated using the formula $\delta = [pq / (N)(N - 1)]^{1/2}$, where *p* was the number of participants who were institutional or community recidivists, *q* was the number of participants who were institutional or community nonrecidivists, and *N* was the total sample size.

The primary metric used to estimate and interpret the magnitude of the relationships between each risk predictor category and institutional violence and recidivism outcomes was the mean *r* value (M_r) weighted by sample size (Z^+; see Hedges & Olkin, 1985), along with its associated 95% confidence interval (CI_{Z+}). Although M_r is reported in Tables 1 through 5, interpretation of relationships was based on the mean Z^+ values and their associated *CI*s. The *CI*s were used to interpret whether mean effect sizes from different variables (e.g., different risk measures) were likely drawn from the same population parameter. If

there was no overlap at all between the *CI*s for any two mean effect sizes, or the *CI*s just touched, then these two effects would be interpreted as representing different population parameters. This criterion is equivalent to statistical significance of $p < .006$ as long as the sample size was ≥10 and the width of the *CI*s did not vary by more than a factor of two (Cumming & Finch, 2005). When two *CI*s overlapped by no more than one quarter of the average length of the two intervals, then these mean effects were also interpreted as representing two different population parameters and were statistically different at approximately $p \leq .05$ (Cumming & Finch, 2005). Overlap in *CI*s exceeding the above criteria meant that the mean effect sizes likely represented the same population parameter and, therefore, were not statistically different from each other. A second use of *CI*s was to reflect the precision of effect size estimates, which was judged by noting the width of the *CI* (i.e., narrower intervals indicate a more precise estimate of a population parameter than do wider intervals; Cumming & Finch, 2001; Gendreau, Goggin, & Smith, 2000; Schmidt, 1996).

EFFECT SIZE HETEROGENEITY

Effect size variability was assessed using the *Q* statistic (Rosenthal, 1991). For each effect size, a *q* value was calculated using the following formula: $(n - 3)(z_{r'} - Z^{+})$, where *n* was the total sample size per effect size; $z_{r'}$ was the standardized r' value per effect size; and Z^{+} was the sample-weighted $M_{r'}$ value for each predictor category. These *q* values were then summed for each predictor category, yielding *Q*, which is an estimate of the heterogeneity of the effect sizes within that category. To test its significance, the *Q* was evaluated using the critical value of χ^2 with $(k - 1)$ degrees of freedom. A significant *Q* statistic indicates that there is more variability than would be expected by chance. In such cases, outlying effect sizes were inspected and only eliminated if there was a logical reason for exclusion (e.g., a coding error or a unique study characteristic, such as a restrictive sample).

FAIL-SAFE ESTIMATION

A fail-safe estimate was employed to provide an index of how many additional effect sizes would be required to alter an obtained effect size estimate. An index of the number of effect sizes ($Z^{+} = .00$) needed for a given risk measure of greater accuracy in the prediction of misconduct or recidivism to approach an effect size equal to one of lesser accuracy was calculated using the following formula: $[(k_B(Z_B^{+} - Z_A^{+}))]/(Z_A^{+} - Z_{B=0}^{+})$, where $Z^{+}_{B=0}$ indicates a null effect for the more accurate risk measure (see Gendreau et al., 2002). As applied to this meta-analysis, assume that the mean effect size was .30 ($k = 50$) for Measure A and .35 ($k = 40$) for Measure B. Using the above formula, an estimate of seven B predictions with a $Z^{+} = 0$ would be necessary to negate Measure B's supremacy over A. That is, seven additional Measure B effect sizes, each with a magnitude of $Z^{+} = .00$, would have to be located to conclude that the two measures were at predictive parity.

RESULTS

RISK MEASURES: PREDICTIVE VALIDITIES FOR INSTITUTIONAL VIOLENCE

Throughout the results section we focus on the Z^{+} values, which produced similar results to the *r* values with the exception of four cases. These exceptions pertained to institutional

TABLE 1: Effect Size Comparisons of Risk Measures for the Prediction of Institutional Violence[a] and Recidivism[b]

Measure	k	N	M_r (SD)	CI_r	Z^+	CI_{z+}	Q
Institutional violence							
HCR-20	11	758	.31 (.14)	.21 to .40	.28	.10 to .24	12.26
LSI/LSI-R	6	650	.24 (.08)	.16 to .33	.24	.09 to .25	5.91
PCL/PCL-R	5	626	.15 (.12)	.01 to .30	.14	.00 to .16	2.90
PCL:SV	7	504	.25 (.10)	.16 to .34	.22	.07 to .25	5.59
SIR scale[c]	1	215	.08	–.05 to .21	—	—	—
VRAG	2	222	.17 (.13)	–.98 to 1.00	.15	–.08 to .18	1.54
Violent recidivism							
HCR-20	11	1395	.25 (.15)	.14 to .35	.22	.17 to .27	6.68
LSI/LSI-R	19	4361	.25 (.08)	.21 to .28	.28	.25 to .31	57.15*
PCL/PCL-R	24	4757	.24 (.10)	.19 to .28	.27	.24 to .30	48.04*
SIR Scale	17	5618	.24 (.13)	.18 to .31	.22	.19 to .25	32.54*
VRAG	14	2082	.27 (.13)	.20 to .35	.32	.28 to .36	47.06*

Note. k = effect sizes per risk measure; N = offenders per risk measure; *CI* = confidence interval; $Z^+ = r'$ value weighted by sample size; CI_{Z+} = 95% confidence interval about Z^+. HCR-20 = Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; LSI = Level of Supervision Inventory; PCL = Psychopathy Checklist; PCL:SV = Psychopathy Checklist: Screening Version; SIR = Statistical Information on Recidivism; VRAG = Violence Risk Assessment Guide.

a. Although the total number of effect size estimates for risk measures with institutional violence was 76, there was only one category with $k > 10$. The other measures reported above are included to facilitate tentative comparisons of the predictive validity for those measures with misconduct and recidivism outcomes.

b. Although the total number of effect size estimates for risk measures with recidivism was 185, only those measures with more than 10 predictive validities were included in Table 1.

c. Only one effect size was available for the SIR scale ($r = .08$). Therefore, Z^+ was not calculated for this instrument.

*$p < .05$, indicates that the level of variability is greater than would be expected by chance.

violence and related to second-generation tools (see Table 2), static-based instruments (see Table 3), file-extraction methods (see Table 4), and content-relevant instruments (see Table 5). In each of these cases, base rate and sample size adjustments to r resulted in a higher Z^+ value and more precise *CI*s around that value. Table 1 contains the Z^+ values and associated 95% *CI*s for risk measures and institutional violence. Only one measure was represented by more than 10 effect sizes (i.e., the HCR-20); however, preliminary data for some instruments are reported despite a $k \leq 10$ to create consistency with instruments reported for violent recidivism. The HCR-20 and LSI-R had the largest mean weighted effect sizes for predicting institutional violence ($Z^+ = .28$ and .24, respectively) and their *CI*s were wide and overlapping. The PCL: Screening Version (PCL:SV; $k = 7$) produced the third largest mean effect size ($Z^+ = .22$), whereas the PCL-R and VRAG produced the weakest associations with institutional violence ($Z^+ = .14$ and .15, respectively). However, 95% *CI*s for each of the above risk measures overlapped considerably, suggesting that they were all sampling from the same population parameter. Furthermore, the width of the *CI*s (all greater than .10) and the small number of effect sizes foreshadow a lack of precision for each instruments' effect size estimate. As a result, interpretations based on these estimates should be viewed as tentative until more studies have been conducted with institutional violence as the criterion. Given that a minimum of 10 effect sizes per instrument was set for calculation of fail-safe analyses, these metrics were not calculated for institutional violence.

RISK MEASURES: PREDICTIVE VALIDITIES FOR VIOLENT RECIDIVISM

The Z^+ values and associated 95% *CI*s for predicting violent recidivism are displayed in the latter part of Table 1. The largest Z^+ value was recorded for the VRAG. There was

TABLE 2: Comparison of Risk Assessment Generations for the Prediction of Institutional Violence[a] and Recidivism[b]

Measure	k	N	M_r (SD)	CI_r	Z^+	CI_{z+}	Q
Institutional violence							
Second generation	48	229397	.23 (.15)	.19 to .27	.34	.33 to .35	410.12*
Third generation	27	3349	.21 (.12)	.17 to .25	.20	.17 to .23	26.94*
Violent recidivism							
Second generation	92	19874	.20 (.14)	.17 to .23	.18	.17 to .19	328.13*
Third generation	81	15233	.22 (.12)	.19 to .25	.23	.21 to .25	247.38*

Note. *k* = effect sizes per risk measure; *N* = offenders per risk measure; *CI* = confidence interval; $Z^+ = r'$ value weighted by sample size; CI_{Z+} = 95% confidence interval about Z^+.
a. Only 75 of 76 institutional violence effect sizes are represented. One effect size, produced by a fourth-generation measure, was not included in the table.
b. Only 173 of 185 recidivism effect sizes are represented. Seven effect sizes produced by a first-generation measure and 5 effect sizes produced by a fourth-generation measure were not included in the table.
*$p < .05$, indicates that the level of variability is greater than would be expected by chance.

TABLE 3: Comparison of Static and Dynamic-Based Instruments for Institutional Violence[a] and Recidivism[b]

Measure	k	N	M_r (SD)	CI_r	Z^+	CI_{z+}	Q
Institutional violence							
Static	26	226026	.22 (.12)	.17 to .27	.32	.316 to .324	210.48*
Dynamic	37	5616	.20 (.14)	.15 to .25	.21	.18 to .24	165.50*
Combination[c]	12	1029	.27 (.14)	.18 to .36	.23	.17 to .29	14.36
Violent recidivism							
Static	64	13409	.22 (.13)	.19 to .26	.22	.20 to .24	152.17*
Dynamic	96	21913	.22 (.13)	.19 to .24	.25	.24 to .26	512.45*
Combination[c]	13	1697	.23 (.15)	.14 to .32	.20	.15 to .25	28.53*

Note. *k* = effect sizes per risk measure; *N* = offenders per risk measure; *CI* = confidence interval; $Z^+ = r'$ value weighted by sample size; CI_{Z+} = 95% confidence interval about Z^+.
a. Only 75 of the 76 institutional violence outcomes are represented because the nature of predictors could not be determined for 1 effect size.
b. Only 173 of 185 recidivism effect sizes are represented because the nature of predictors could not be determined for 12 effect sizes.
c. Only measures based on an equivalent number of static and dynamic risk factors were included in this coded category. Thus, this coded category does not reflect a statistical combination of the primarily static and primarily dynamic risk measure categories.
*$p < .05$, indicates that the level of variability is greater than would be expected by chance.

CI overlap between this measure and the LSI-R and PCL-R, but its *CI* did not overlap with the HCR-20 or SIR scale. Based on the widths of the Z^+ *CI*s shown in Table 1, the LSI-R, PCL-R, and SIR scale each generated slightly more precise point estimates than the HCR-20 and VRAG. Fail-safe analyses indicated that only six additional null VRAG effect sizes would be needed to reduce its predictive ability to that of the HCR-20 or SIR scale. Only another two null VRAG effect sizes would be needed for the VRAG to perform at par with the LSI-R or PCL-R.

In terms of notable measures for violent recidivism with ≤10 effect sizes (not in Table 1), the LS/CMI ($k = 3$, $N = 841$) yielded relatively strong predictive validity ($Z^+ = .47$, $CI_{Z+} = .40$ to .54), followed closely by the SAQ ($k = 8$, $N = 1094$, $Z^+ = .37$, $CI_{Z+} = .31$ to .43). The *CI*s for these two measures only slightly overlapped and may be estimating distinct population parameters. Note, however, that any conclusions about these two measures must be made

TABLE 4: Comparison of Administration Methods for the Prediction of Institutional Violence[a] and Recidivism[b]

Measure	k	N	M_r (SD)	CI_r	Z^+	CI_{z+}	Q
Institutional violence							
File review	32	223071	.23 (.14)	.19 to .29	.34	.336 to .344	209.14*
Interview only	6	635	.17 (.09)	.08 to .27	.14	.06 to .22	2.52
Self-report	13	2505	.18 (.11)	.11 to .25	.16	.12 to .20	21.63*
File/interview[c]	13	1352	.26 (.14)	.18 to .35	.22	.17 to .27	20.18
Violent recidivism							
File review	97	24648	.24 (.13)	.21 to .26	.26	.25 to .27	591.04*
Interview only	21	2921	.14 (.11)	.09 to .19	.11	.07 to .15	24.58
Self-report	29	5029	.16 (.13)	.11 to .21	.12	.09 to .15	53.31*
File/interview[c]	27	5741	.26 (.09)	.22 to .29	.30	.27 to .33	100.13*

Note. *k* = effect sizes per risk measure; *N* = offenders per risk measure; *CI* = confidence interval; $Z^+ = r'$ value weighted by sample size; CI_{Z+} = 95% confidence interval about Z^+.
a. Only 64 of the 76 institutional violence outcomes are represented because the administration method could not be determined for 12 effect sizes.
b. Only 174 of 185 recidivism effect sizes are represented because the administration method could not be determined for 11 effect sizes.
c. Only measures scored from information gathered by means of using an interview with the offender and a file review are included in this category. It does not reflect the statistical combination of the interview-only and file-only effect size categories.
*$p < .05$, indicates that the level of variability is greater than would be expected by chance.

TABLE 5: Comparison of Relevant Versus Less Relevant Measures for the Prediction of Institutional Violence and Recidivism[a]

Measure	k	N	M_r (SD)	CI_r	Z^+	CI_{z+}	Q
Institutional violence							
Relevant	63	214444	.22 (.12)	.19 to .25	.35	.346 to .354	286.10*
Less relevant	13	18346	.21 (.20)	.09 to .33	.27	.26 to .28	144.25*
Violent recidivism							
Relevant	153	33031	.23 (.13)	.21 to .25	.26	.25 to .27	647.86*
Less relevant	25	5835	.09 (.12)	.05 to .14	.07	.04 to .10	56.93*

Note. *k* = effect sizes per risk measure; *N* = offenders per risk measure; *CI* = confidence interval; $Z^+ = r'$ value weighted by sample size; CI_{Z+} = 95% confidence interval about Z^+.
a. Only 178 of 185 recidivism effect sizes are represented because the relevance of the measures could not be determined for 7 effect sizes.
*$p < .05$, indicates that the level of variability is greater than would be expected by chance.

in light of the few effect sizes available on their predictive validity, especially for the LS/CMI. Other notable measures were the Psychopathy Checklist: Screening Version (PCL:SV) (k = 5, N = 641, Z^+ = .20, CI_{Z+} = .12 to .28), the Salient Factor Score (SFS; k = 5, N = 989, Z^+ = .15, CI_{Z+} = .09 to .21), and measures comprised solely of criminal history variables (k = 9, N = 2230, Z^+ = .23, CI_{Z+} = .19 to .27). The MMPI (using the Megargee Typology and the Prison Adjustment Scale) did not predict violent recidivism (k = 3, Z^+ = .00).

COMPARISON OF EFFECT SIZES BY GENERATION OF RISK INSTRUMENT

Table 2 displays the mean effect sizes across generations of risk measures.[2] First- and fourth-generation measures were excluded from the table because each had ≤10 effect sizes, but tentative data on these methods are described below. As shown in Table 2,

second-generation instruments outperformed those of the third generation as predictors of institutional violence. This was because of the substantial weight given to three particularly large second-generation studies with *n*s > 10,000 offenders. Fail-safe calculations estimated that another 34 second-generation effect sizes of zero would be required before its mean effect would lower and become equivalent to third-generation measures in the prediction of institutional violence. The benefit of second- versus third-generation instruments was reversed when the outcome was violent recidivism. Third-generation measures had a slight advantage over those of the second generation, with no overlap of their *CI*s. According to the fail-safe index, another 23 null effect sizes for third-generation measures would be needed to reduce this category's mean effect to that of the second-generation instruments for the outcome of violent recidivism. For the generations not referenced in Table 2, first-generation methods produced a Z^+ of .18 ($k = 7$, $N = 1461$, CI_{Z+} = .13 to .23) for violent recidivism. Of all the generations, fourth-generation measures ($k = 5$, $N = 3759$) resulted in the largest predictive estimate ($Z^+ = .52$, CI_{Z+} = .49 to .55) for violent recidivism and shared no overlap with first-, second-, and third-generation effect size estimates.

COMPARISONS BASED ON THE CONTENT OF THE INSTRUMENT: STATIC VERSUS DYNAMIC

Table 3 summarizes the predictive validity for instruments containing primarily static or dynamic risk items and those with an equal combination of static and potentially dynamic items.[3] For institutional violence, static instruments had a significantly larger mean effect ($Z^+ = .32$) than did dynamic ($Z^+ = .21$) and combined ($Z^+ = .23$) instruments. According to the fail-safe index, an additional 14 static effect sizes of zero would be needed to reduce its predictive magnitude to the level of dynamic instruments. Further, 10 additional nil effect sizes would be necessary to reduce the predictive estimate of static instruments to that of the combination instruments. In terms of violent recidivism, it was the dynamic instruments that had a slight advantage over static instruments as evidenced by very little *CI* overlap between these factors (i.e., $p < .05$). The mean effect for dynamic instruments was marginally larger than that for combination instruments, with very slight overlap of the two *CI*s as well. Fail-safe calculations indicated that another 13 dynamic effect sizes of zero would be needed to reduce this category's predictive validity to that of static measures. An additional 24 nil effect sizes would be required to lower the predictive power of dynamic measures to that of the combination measures.

COMPARISONS BASED ON MEASURE ADMINISTRATION METHOD

Comparisons of mean predictive validities between different administration methods are presented in Table 4. Beginning with institutional violence, the largest Z^+ value (.34) was attributed to the file review only. The *CI* associated with this effect shared no overlap with self-report, interview-only, or file-and-interview methods. Fail-safe calculation revealed that an additional 36 null file extraction effect sizes would be needed to reduce its mean effect to that of the self-report category; a further 17 effect sizes of zero would be needed for parity with the file-and-interview method; and 46 nil effect sizes for equality with the interview-only method. With regard to violent recidivism, the second part of Table 4 shows that the file-and-interview method had the largest predictive validity ($Z^+ = .30$). The *CI* for this category only touched that of file extraction methods, and shared no overlap with the other two methods. To reduce the predictive accuracy of file-plus-interview to that of file

review only, interview only, or self-report methods, an additional 4, 47, and 41 nil file review, respectively, would be needed.

COMPARISONS BASED ON INSTRUMENT RELEVANCE TO CORRECTIONS

The final comparison of interest was the relevance of an instrument to corrections. Each effect size was coded as to whether the measure was derived from a criminological theory and/or whether it was created specifically for use as a risk instrument.[4] For instance, a measure like the LSI-R was coded as relevant to corrections because it was both derived from theories of criminality and created for use as a risk instrument. The VRAG also was coded as relevant because, although not created from theory, it was specifically created for risk evaluation. Less relevant instruments were those assessing constructs found to be unrelated or weakly related to correctional outcomes (e.g., literacy, self-esteem). Table 5 lists results for relevant versus less relevant instruments. Relevant instruments were better predictors of both institutional violence and recidivism, with no overlap in *CI*s with less relevant instruments. Fail-safe analyses indicate that, for institutional violence, an additional 19 effect sizes of zero would be needed to reduce their predictive validity of relevant measures to that found for less relevant measures. For violent recidivism, as many as 415 new null effects for the relevant instrument category would be needed to equate its validity to that found for less relevant measures.

DISCUSSION

Although professionals are presented with a range of tools for use in risk assessment, a challenge arises when trying to decide which of these instruments is most suitable. To assist with the decision-making process, the current meta-analysis synthesized research focusing on the predictive validities of various instruments used to assess violence risk. From a pool of 88 studies, a total of 185 effect sizes were produced for violent recidivism and 76 were obtained for institutional violence. Collapsed across instruments, their moderate ability to predict risk outcomes was consistent with estimates reported in other risk prediction meta-analyses (e.g., Gendreau et al., 1997; Gendreau et al., 1996; Schwalbe, 2007; Walters, 2006). Although most of the common risk instruments analyzed produced relatively equivalent predictive estimates, variations related to specific instruments are discussed below.

The following discussion should be considered with a mind to the limitations of the current meta-analysis. The first set of limitations related to serious deficits in the primary studies that prohibited the coding of important variables as potential moderators (e.g., 68% of effect sizes were based on studies in which there was insufficient information to code or define the violence history within a particular sample). In addition, none of the institutional violence studies provided details about their sample's pre-existing level of institutional violence. Omission of violence history data precluded an examination of this variable as a moderator of effect size. Furthermore, information was lacking for 56% of effect sizes about the nature of the sample's index offenses (violent vs. nonviolent), which prevented examination of the moderating effects of index offense severity on predictive validity. It was also noted that 21 effect sizes were derived from studies that did not report the gender

composition of their samples. When gender was noted, it was clear that most of the effect sizes were generated from male samples. Thus, generalization of the results to female offenders, and other poorly represented offender subgroups (e.g., native offenders), is limited. One final methodological issue was that over 88% of effect sizes were generated from samples defined as low or moderate risk to reoffend. Thus, it is difficult to generalize the current findings to high-risk samples with any degree of certainty until additional data with this population has been accrued.

PREDICTION OF VIOLENT RECIDIVISM

Instruments comprised primarily of dynamic risk items generated the strongest effect size for violent recidivism ($Z^+ = .25$). The *CI* for this category shared minimal overlap with the *CI* for instruments derived primarily of static-based risk items ($Z^+ = .22$). When considered with the fail-safe index, this finding suggests a small advantage for potentially dynamic over static risk instruments when it comes to predicting violent reoffending and replicates Gendreau et al. (1996). However, it is interesting to note the performance of the primarily static VRAG, which produced an effect size equivalent to that generated by dynamic risk measures. In addition, third-generation instruments produced a better estimate of violent recidivism risk than did second-generation measures. This finding is consistent with Schwalbe (2007), whose meta-analysis of adolescent risk measures also found a slight predictive advantage for third-generation measures over those of the second generation. While noting the limitations associated with only five effect sizes for fourth-generation measures, this category produced the strongest predictive estimate of the different generations ($Z^+ = .52$). Thus, further evaluation of this newer generation of risk measures is crucial.

In examining the mean effect size magnitudes for individual instruments with ≥10 effect sizes, it was clear that each predicted violent recidivism with at least a moderate degree of success. The mean effect sizes ranged from .22 for the HCR-20 and SIR scales to .32 for the VRAG. The LSI-R, PCL-R, and SIR scales provided the most precise point estimates (i.e., the narrowest *CI*s), but no one measure stood out as the most effective for predicting violent recidivism. The VRAG performed well, but its *CI* overlapped with those of the LSI-R and the PCL-R. According to fail-safe indexes, only two null VRAG effect sizes would be required to reduce its mean effect to that of the LSI-R and PCL-R. Thus, they are all likely sampling the same population parameter. Our analysis also found that the LSI-R was equivalent in its predictive validity to that of the PCL-R, and to a lesser degree with the HCR-20 and SIR scale. The current meta-analysis updated Gendreau et al. (2002), who had originally found a slight advantage of the LSI-R over the PCL-R in predicting violent recidivism. With the inclusion of additional effect sizes published since Gendreau et al., these results suggest that the PCL-R and LSI-R are actually more comparable than not as predictors of violent reoffending.

In summary, most of the measures reported in Table 1 appear to be similar in their predictive power. The one exception was that the VRAG had a predictive advantage over both the HCR-20 and the SIR scale. Collectively, these data suggest that the variation across primary studies in the predictive validity estimates of most risk instruments is a reflection of sampling error (Hunter & Schmidt, 2004). Only more primary studies will offer a definite conclusion on this matter. At present, our results are congruent with findings that suggest that many of the commonly used risk instruments are moderately to highly

intercorrelated (e.g., Dahle, 2006; Glover et al., 2002). The similarity between instruments was further reflected in Kroner, Mills, and Reddon (2005), who randomly generated four hybrid risk measures based on the item content of the PCL-R, LSI-R, VRAG, and GSIR. When they tested each of these measures on their ability to predict general recidivism, the hybrid instruments performed as well as each of their respective parent instruments. Thus, there is a significant degree of overlap between the common risk measures.

PREDICTION OF INSTITUTIONAL VIOLENCE

Unlike the prediction of violent recidivism, there was much more variability within the individual risk instruments in their ability to predict institutional violence. An aggregate category of criminal history indexes ($Z^+ = .26$) produced the most precise mean effect size, as noted by its very narrow *CI*. This was a catch-all category of measures related to past criminality, which makes its value difficult to interpret. In terms of standardized risk measures, the HCR-20 had the greatest number of effect sizes and produced the largest mean effect size for institutional violence ($Z^+ = .28$). Despite its strong performance, the HCR-20 has challenges related to its use in that the current data were derived from the numerical risk score of the HCR-20 and not the structured clinical prediction judgments advocated for use in its clinical application by the test developers (Webster et al., 1997). In addition, data for the HCR-20 were primarily generated from forensic psychiatric samples; this limits its generalizability to institutional violence in nonpsychiatric correctional facilities. In terms of other measures, the PCL:SV ($Z^+ = .22$) and LSI-R ($Z^+ = .24$) were moderately predictive of institutional violence, while the VRAG ($k = 2$) and PCL-R ($k = 5$) each recorded small associations with this outcome ($Z^+ = .15$ and .14, respectively). A few primary VRAG studies predicting institutional violence have come to light since the completion of our analysis (e.g., McDermott, Edens, Quanbeck, Busse, & Scott, 2008; Nadeau, Nadeau, Smiley, & McHattie, 1999). The inclusion of these data in future meta-analyses may clarify the role of the VRAG in predicting this outcome. Consistent with the current results regarding the PCL-R, Guy, Edens, Anthony, and Douglas (2005) found that the PCL-R produced a mean weighted effect size of .17 for physical aggression in the institution. Guy et al.'s analysis suggested that the PCL-R was better used as a predictor of verbal aggression than physical aggression within institutional settings. Thus, caution is warranted in the choice of instrument to predict risk within an institutional setting until data has been sufficiently compiled (i.e., at least 10 effect sizes per instrument).

In contrast to our violent recidivism data, second-generation instruments had an advantage over third-generation measures ($Z^+ = .34$ vs. .20, respectively) in predicting institutional violence. More specifically, instruments based on criminal history and other static variables were more informative than other types of measures when estimating the risk of institutional violence. It is possible that static factors were more valuable as risk items when assessing institutional violence because of the short-term follow-up duration of these assessments. Most of these effect sizes were based on studies with follow-up periods of less than 1 year. Arguably, the effect of dynamic factors on behavior may have had little time to emerge over such short periods. The inclusion of dynamic risk factors may be more relevant to longer-term predictions of institutional violence (as was the case for recidivism, which had longer follow-up periods).

Despite justifiable concern about the accuracy of predicting future violence, and the ongoing debate as to which measure is best to achieve this goal, there are still remarkably

few studies available to address these issues (i.e., the largest number was obtained for the PCL-R at $k = 24$). We caution that there is likely little value in the generation of new risk measures at this point. The last thing the risk assessment field needs is to imitate the wasted efforts found in the psychiatric rehospitalization prediction literature, in which 419 scales have been produced with only 3 reporting more than 10 predictive validity estimates (Smith, Gendreau, & Goggin, 2007). Instead, research should focus on further validation of existing risk measures within different forensic contexts and offender subgroups. Such information will likely better showcase an individual measure's strengths and weaknesses. Additional data will also provide much more precise estimates (i.e., width of *CI*s) of these point estimates.

CONTENT RELEVANCE AND ADMINISTRATION METHOD

Similar to Walters's (2006) meta-analysis, measures with content relevant to criminal behavior and risk constructs yielded more accurate predictive validities for violent recidivism than instruments containing unrelated and/or less relevant content (e.g., anxiety). Although less relevant instruments performed substantially better in predicting cases of institutional violence, content-relevant instruments were still superior for this outcome as well. A notable finding within this data set was the little attention received by the MMPI-2 as a predictor of future violence in recent prospective research. This is of concern because the MMPI has been one of the most commonly used assessment instruments by psychologists working in correctional settings in the United States (Boothby & Clements, 2000). Only one study reported on the predictive validity of the MMPI (Megargee Typology) as an index of future violence (L. L. Motiuk, 1991). This study found that it was a poor predictor of violent recidivism and only performed slightly better as a predictor of institutional violence. Thus, assessors must be cautious when using this instrument to inform decisions about violence risk in light of the lack of recent data. Its use should be directed more to understanding potential personality dynamics and mental health problems that may be relevant to responsivity concerns.

These data support the inclusion of self-report measures in the assessment of violence risk but not as the sole means of prediction. Specifically, the mean effect size for the general category of self-report measures was small for both violent recidivism and institutional violence ($Z^+ = .12$ and .16, respectively). The file review only and file-and-interview approaches to assessment produced the largest predictive validities for both outcomes. Given that we did not separate relevant and less relevant self-report measures, it is possible that the less relevant self-report measures in this category detracted from its overall mean effect size. This possibility is supported by Walters (2006). Of the self-report measures that are content relevant in nature, the SAQ stands out. The mean SAQ effect size for violent recidivism in the current data was very promising ($Z^+ = .37$). The SAQ's prediction of institutional violence was based on only one effect size (Loza & Loza-Fanous, 2002) but might have some utility in that domain as well. The advantage of the SAQ is that it yields valuable information about risk-need factors that have been empirically associated with risk outcomes (see Bonta, Law, & Hanson, 1998; Gendreau et al., 1996), including antisocial attitudes, characteristics of antisocial personality disorder, early behavior problems, past criminal behavior, substance abuse, and antisocial associates. This instrument also contains a validity index and an anger subscale (Loza & Loza-Fanous, 2003). Nevertheless,

the SAQ and other content-relevant self-report measures (e.g., PICTS) require additional study to document their ability to predict future violence and require testing within different subgroups of offender populations. Only one prospective study has tested the validity of the SAQ with female offenders from different ethnic groups (Loza, Neo, Shahinfar, & Loza-Fanous, 2005).

CONCLUSION

A practical issue for professionals involved in risk prediction and treatment is the selection of the best instruments for their work with offenders (Bonta, 2002). Although this analysis found little difference among the predictive validities of actuarial and structured instruments for violent reoffending, this does not mean that they would be equally informative for case planning when the goal is risk reduction. The interested reader should refer to Bonta (2002) and Quinsey, Harris, Rice, and Cormier (1998) for useful professional practice parameters relevant to the selection of instruments for the purposes of violence risk assessment and reduction. These parameters stress the importance of considering the context and objective of the specific risk assessment as well as the content and structure of a particular risk instrument that is being considered for use. These parameters should be applied within the structure of the risk-need-responsivity principles (see Andrews & Bonta, 2006) for effective case management and risk reduction. Adherence to the risk-need-responsivity principles contributes to greater risk reduction than when these principles are ignored or minimally adopted (e.g., Dowden & Andrews, 2000; French & Gendreau, 2006; Gendreau et al., 2006).

In addition to ongoing prospective validation of existing risk measures, an area for future research is the identification of factors predictive of the nature and context of an offender's violent behavior. Such research aims to identify acute and/or transitory risk factors relevant to determining the imminence of violence or assist with judgments about the likely occurrence of various forms of aggressive behavior (e.g., reactive vs. instrumental or proactive; see Quinsey et al., 1998). The detailed aspects of violence risk and the conditions under which violence is most likely to occur are arguably more useful to case managers than a vague statement about the general estimate of violence risk. Research in this area is important given that assessors have difficulty accurately predicting the likelihood of various dimensions of violent behavior (e.g., severity of aggression, likely imminence of the violent event, weapon use; Douglas, Ogloff, & Hart, 2003).

Examination of incremental validity research may also assist professionals in the selection of the most appropriate measures for the assessment of violence risk. As a case in point, Edens, Skeem, and Douglas (2006) found that the PCL:SV had incremental validity over a modified version of the VRAG (with the PCL and two other items removed) in the prediction of violence in discharged civil psychiatric patients. The VRAG continued to predict violence but it did so more modestly than the PCL:SV itself. Edens et al. concluded that the personality traits assessed by the PCL:SV may be more useful than the VRAG for the assessment of violence risk in nonoffenders. Walters, Knight, Grann, and Dahle (2008) also reported on incremental validity variations within the four facet scales of the PCL-R and PCL:SV. Thus, the combined interpretation of data from both incremental validity studies and meta-analytic research provides useful information about the comparative contributions between measures and within various components of a single measure.

Another issue for future research is attention to the composition of the comparison group for violent recidivists in prediction studies. The majority of coded studies (97%) defined their outcome criterion for nonrecidivism in such a way that this group likely included recidivists of other types of crimes (e.g., nonviolent recidivists). As a result, little predictive data were available using a pure outcome criterion of no recidivism at all. This problem is compounded by the practice of plea bargaining and police discretion at the early stages of legal involvement, which may result in some violent offenses being reduced to nonviolent charges. These offenders would then be incorrectly classified as nonviolent recidivists if the coding of recidivism categories was based solely on the type of charge. Examination of offense descriptions may help minimize this classification difficulty. Effect size estimates for risk instruments may be larger when distinguishing between participants with no recidivism at all and violent recidivists. Future violence prediction studies should attempt to operationalize the outcome criteria in a way that reflects a pure violent–nonviolent recidivist dichotomy to determine whether there is an effect on predictive validity estimates.

A final issue relates to the practice of interpreting confidence intervals within meta-analyses. Examination of confidence intervals is one means by which researchers can determine the degree to which an effect size estimate represents population parameters. There are no consistent decision rules about the appropriate width of a *CI* required to create a precise estimate of the population parameters (Smithson, 2003). In response to the lack of decision rules, Snook, Eastwood, Gendreau, Goggin, and Cullen (2007) argued in a related criminal justice field that correlation coefficients effect sizes with *CI* widths of >.10 are imprecise estimates. The number of effect sizes required to achieve this criterion will depend on many factors (e.g., variables of interest, study quality, representativeness of the data) but the objective is to collect as much data as is necessary to efficiently narrow the confidence interval around a point estimate. Some variability is to be expected, but wide *CI*s (>.10; see Gendreau & Smith, 2007) only point to the need for additional research and offer little insight into the true state of population parameters.

NOTES

1. Base rate adjustments were required because correlations based on the binomial effect size display assume a 50% base rate (i.e., that half of the population would reoffend violently and half would not; Randolph & Edmondson, 2005). Given that the real-world base rate of violence is lower than 50%, effect size correlations need to be adjusted to account for this lower base rate (see Thompson & Schumacker, 1997).

2. Page constraints limit a detailed reporting of each measure included in the generation categories, but more information can be obtained from the first author.

3. Common examples of indexes coded as containing primarily static risk items included the Statistical Information on Recidivism scale; Violence Risk Assessment Guide; Historical, Clinical, and Risk Management Violence Risk Assessment Scheme, historical scale only; Salient Factor Score; Custody Rating Scale: Institutional Adjustment/Security Risk; Risk Assessment for Prison Scale; history of conduct disorder; and miscellaneous criminal history variables. Common examples of measures coded as containing primarily dynamic risk factors included the Level of Supervision Inventory (LSI)/LSI–Revised/LSI: Screening Version, Violence Risk Scale, Self-Appraisal Questionnaire, and the Psychopathy Checklist (PCL)/PCL–Revised/PCL: Screening Version.

4. Examples of measures coded as content relevant (see Andrews and Bonta, 2006, and Walters, 2006, for elaboration) included such instruments as the Psychopathy Checklist–Revised; Level of Supervision Inventory–Revised; Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; Criminal Sentiments Scale-Modified; Self-Appraisal Questionnaire; Criminal Insensitivity and Irresponsibility Scale; Lifestyle Criminality Screening Form; Measures of Criminal Attitudes and Associates; Diagnostic and Statistical Manual of Mental Disorders–related measures of conduct problems and antisocial personality disorder; Violent Beliefs Inventory; Wisconsin Assessment of Client Risk Scale; and the Offender Group Reconviction Scale. Measures coded as "less relevant" include the Coping Situations Scale, Minnesota Multiphasic Personality Inventory–2, Positive Affect/Negative Affect Scale, Psychological Referral Screening Form, and the Perceived Stress Index.

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The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools

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Actuarial risk assessment tools are used extensively to predict future violence, but previous studies comparing their predictive accuracies have produced inconsistent findings as a result of various methodological issues. We conducted meta-analyses of the effect sizes of 9 commonly used risk assessment tools and their subscales to compare their predictive efficacies for violence. The effect sizes were extracted from 28 original reports published between 1999 and 2008, which assessed the predictive accuracy of more than one tool. We used a within-subject design to improve statistical power and multilevel regression models to disentangle random effects of variation between studies and tools and to adjust for study features. All 9 tools and their subscales predicted violence at about the same moderate level of predictive efficacy with the exception of Psychopathy Checklist—Revised (PCL-R) Factor 1, which predicted violence only at chance level among men. Approximately 25% of the total variance was due to differences between tools, whereas approximately 85% of heterogeneity between studies was explained by methodological features (age, length of follow-up, different types of violent outcome, sex, and sex-related interactions). Sex-differentiated efficacy was found for a small number of the tools. If the intention is only to predict future violence, then the 9 tools are essentially interchangeable; the selection of which tool to use in practice should depend on what other functions the tool can perform rather than on its efficacy in predicting violence. The moderate level of predictive accuracy of these tools suggests that they should not be used solely for some criminal justice decision making that requires a very high level of accuracy such as preventive detention.

Keywords: risk assessment, violent outcome, meta-analysis, multilevel models

Violence and its control are significant social, political, criminal justice, mental health, and international security issues. It is a major public health issue as well, affecting perpetrators, victims, and witnesses, and influencing the general population through fear of crime. Violence has been identified as one of many hazards that should be minimized through risk assessment and appropriate management; some have argued that risk is to be avoided at all cost (Adams, 1995). The prediction of future violence has been one of the most complex and controversial issues in the behavioral sciences (Borum, 1996; Grisso & Appelbaum, 1993; Litwack, 1993; Poythress, 1992). Courts have increasingly relied on mental health professionals for assistance in civil and criminal cases to assess dangerousness or risk of future violence. The premium placed on prediction is evidenced by policy changes that reflect the growth of a culture emphasizing risk aversion, with the increasing implementation of policies, such as zero tolerance, hard targeting, surveillance, selective incapacitation (Haapanen, 1990), long-term incarceration (Kemshall, 2003; Kemshall & Maguire, 2001), and so forth.

The past 20 years have witnessed the development of specialized tools for the prediction and management of violence for use with a variety of populations (Heilbrun et al., 2009). The increasingly severe sanctions for those identified as high risk for violence together with dire career consequences for professional who made erroneous clinical judgments (Maden, 2007) have attracted extremely close scrutiny on the accuracy of risk prediction from both research and policy perspectives. Answers to the question of which risk assessment instrument should be applied to whom and under what circumstances have major implications for routine clinical practice, criminal justice work, teaching and training, and the commercial development of new instruments. The consequences of inaccurate predictions raise a host of legal and ethical issues as well. The identification of the most accurate violence prediction tool or tools therefore deserves the highest priority.

Violent Individuals and Violent Situations

Evidence exists that a disproportionate amount of violent crime is committed by the most persistent adult male offenders, who account for a relatively small proportion of the offender population. For example, it is estimated that about 50% of all crimes are committed by 5%–6% of the offender population (see Farrington, Ohlin, & Wilson, 1986, for a review). However, even violence-

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prone individuals are not always violent; they commit violence only under certain conditions. For example, the likelihood of violence for a spouse abuser increases when the individual is in contact with a partner (Dearwater et al., 1998) or, for a pedophile, when given access to children (Hanson & Bussière, 1998; Hanson & Morton-Bourgon, 2004). Even in seemingly random violent acts, such as school shootings, retrospective investigation reveals the perpetrator to have acted only under exceptional personal circumstances (FBI Academy, National Center for the Analysis of Violent Crime, Critical Incident Response Group, n.d.). Thus, by identifying a relatively small number of individuals, understanding the cause of their violence, and effectively managing these individuals, it is theoretically possible to reduce the incidence of violence significantly. It follows that predicting who and under what conditions violence is more likely to occur, followed by effective management or intervention for those identified as at high risk for violence, could be an effective violence prevention strategy.

This model of violence reduction has been applied successfully in the reduction of future violence among offender populations (Andrews, 1995; Andrews, Bonta, & Hoge, 1990) and high-risk youths (Lipsey & Wilson, 1998) and should be equally applicable to many other types of violent behavior. For example, the government of the United Kingdom has committed significant resources to develop a program, termed the Dangerous and Severe Personality Disorder (DSPD) treatment program, to provide treatment and management services for a relatively small number of persons who are deemed to be at very high risk for future violent and sexual offending and also suffer from severe personality disorders, in particular, those with psychopathy (Maden & Tyrer, 2003). The assessment–prediction–intervention model for violence prevention is therefore based on the accurate assessment of risk and prediction of future violence. However, this model inevitably raises the question as to what type of violence risk assessment and prediction is the most accurate.

Issues in the Assessment and Prediction of Violence

There are several major hurdles to overcome in violence prediction, in particular, the problems inherent in trying to predict low-frequency events, vis-à-vis who will be the perpetrator of violence and when he or she will act violently. Predicting any low-frequency event is difficult and error prone (e.g., consider predicting who will be the next perpetrator of a school shooting and when he or she is likely to act). Making such predictions tends to overidentify suspected perpetrators, that is, committing many false positive errors. Even with a moderately accurate method of prediction, predicting low- or very-low-frequency events, such as serious violence (e.g., mass murder, serial killing, or predatory child sexual abuse) will inevitably result in a high false-positive error rate, that is, identifying many people who are deemed violent but, in fact, are not (see Meehl & Rosen, 1955, and Monahan, 1981, for more detailed discussion). The financial and human costs of such errors are very significant if individuals so identified are detained for preventive purposes. However, the human cost is less if therapeutic or rehabilitative services are offered instead to those identified as at risk.

Another issue is the identification of valid predictors of violent behaviors. In recent years, theoretical developments in risk prediction research have begun to tackle this issue with some success (e.g. Andrews & Bonta, 1998, 2003, 2006; Bonta, Law & Hanson, 1998; Hanson & Bussière, 1998; Hare, 1991, 2003; Monahan & Steadman, 1994). It is probable that the most significant advancement in the technology of risk assessment is the development of structured and standardized risk assessment tools, that is, actuarial tools, to complement, if not replace, the use of unstructured clinical judgments (sometimes referred to as the first-generation of risk assessment approaches) that are prone to error and biases (see Andrews, Bonta, & Wormith, 2006; Dawes, Faust, & Meehl, 1989; Grove & Meehl, 1996; Harris, Rice, & Quinsey, 1993; Monahan & Steadman, 1994).

The use of actuarial risk assessment tools has now become an accepted standard of forensic risk assessment practice (Monahan et al., 2001, pp. 134–135). In most cases, actuarial tools are designed by combining empirically or theoretically derived constructs that are predictive of violence or antisocial activities to guide the forecasting of future antisocial or violent acts. These constructs can be historical (e.g., criminal history), clinical (e.g., personality disorder), or situational (e.g., community support) in nature. They can be further classified as either static/unchangeable, such as criminal history, or dynamic/changeable, such as community support. Some constructs are theoretically derived (e.g., psychopathic personality), whereas others are purely empirically derived (e.g., victim age). Some constructs are more relevant to certain subgroups, such as youths (e.g., peer group influences), whereas others are more typically applicable to adults (e.g., employment history). The "rules" for combining predictor variables in forecasting violence can be quite specific, such as following guidelines in rating predictors and in summing and interpreting the ratings (vis-à-vis the actuarial approach), as opposed to being left to the assessor to use his or her clinical judgment to arrive at a decision (vis-à-vis the structured clinical judgment approach). It should be noted that the term *actuarial* refers to the specified rules that risk predictors are combined and results interpreted and not to the static nature of the risk predictors. Regardless of the approach taken, the predictive efficacies of all tools must be eventually subjected to repeated empirical validation with client groups that differ in demographic characteristics (e.g., age, gender, socioeconomic status, ethnicity), level and type of past violence (e.g., criminal histories, sexual vs. nonsexual offenders), psychiatric diagnosis (e.g., presence of personality disorder, psychosis), intervention received (e.g., treated vs. untreated), the specific criterion being predicted (e.g., violent vs. nonviolent behavior or different types of violent behavior), environmental setting (e.g., clients residing in institutions vs. the community), countries of origin of the research, and so forth.

Since the late 1970s, a range of actuarial risk assessment and risk prediction instruments have been developed in many countries and jurisdictions, all of which have been validated as demonstrating acceptable predictive efficacies for various types of antisocial and/or violent behaviors. With such a wide range of tools, it is reasonable to question which is best to use clinically for predicting violence (see also Campbell, French, & Gendreau, 2009). The answer has important theoretical and practical implications besides the political and legal implications highlighted above. From a theoretical perspective, it is important to know whether an actuarial approach or structured clinical judgment approach is better in violence prediction. Furthermore, how does the predictive efficacy

of theoretically derived violence prediction constructs compare with that emanating from empirically derived ones? How do the predictive efficacies of tools with only static constructs compare with tools that include both static and dynamic constructs? On the practical side, practitioners naturally want to use instruments that give them the best prediction possible, given that major criminal justice and forensic mental health decisions could hinge on the accuracy of such predictions. The predictive efficacies of these tools have been the focus of a number of traditional and meta-analytic reviews. However, there are significant methodological issues with a number of previous meta-analytic reviews, making the interpretation of the results problematic (see section, "Previous Meta-Analyses Conducted With Random-Effects Models and Rationale for the Present Study").

Selection of Risk Prediction Instruments for the Present Study

We selected nine tools for comparison in this meta-analysis. All were used in an actuarial manner in the sense of computing a "risk score" for prediction. All instruments were structured, standardized, and designed to predict antisocial behaviors or violence as their major objectives. Because the use of actuarial tools is now an accepted standard of forensic risk assessment practice (see Monahan et al., 2001, pp. 134–135), it makes sense to compare the predictive efficacies of such tools. They are also instruments designed for assessing nonsexual offenders, contrasting with purposely designed sexual offender risk assessment tools such as the Static 99 (Hanson & Thornton, 1999), the Sexual Violence Risk–20 (SVR-20; Boer, Hart, Kropp, & Webster, 1998), and the Violence Risk Scale—Sexual Offender version (VRS-SO; Olver, Wong, Nicholaichuk, & Gordon, 2007).

The tools included in this study differ along important dimensions often used to categorize risk tools (see Andrews, Bonta, & Wormith, 2006, and Campbell et al., 2009, for detailed discussion of the different "generations" of risk tools). Some are regarded as second-generation tools with mostly static/unchangeable risk predictors (Violence Risk Assessment Guide [VRAG]; Harris, Rice, & Quinsey, 1993; General Statistical Information for Recidivism [GSIR]; Bonta, Harman, Hann, & Cormier, 1996; Risk Matrix 2000 for Violence [RM2000V]; Thornton, 2007); and the Offender Group Reconviction Scale (OGRS; Copas & Marshall, 1998), whereas others are regarded as third-generation tools with mostly dynamic or potentially changeable risk predictors (Level of Service Inventory and revised version [LSI/LSI-R]; Andrews & Bonta, 1995; Historical, Clinical, and Risk Management Violence Risk Assessment Scheme [HCR-20]; Webster, Douglas, Eaves, & Hart, 1997; and the Violence Risk Scale [VRS]; Wong & Gordon, 2006). Although some second-generation tools (including all of the ones selected) demonstrate fairly good predictive validity (Gendreau, Little, & Goggin, 1996; Glover, Nicholson, Hemmati, Bernfeld, & Quinsey, 2002), the sole reliance on static factors for risk assessment has been criticized because these factors do not reflect the complexity of individual functioning and cannot measure changes in risk over time or identify areas for intervention (Andrews et al., 1990; Campbell, French, & Gendreau, 2009; Wong & Gordon, 2006). So-called third-generation tools were designed to overcome these problems. The tools selected for inclusion also differ according to whether their risk predictors have been largely theoretically derived (Psychopathy Checklist—Revised [PCL-R]; Hare, 2003; HCR-20; LSI-R; and VRS), identified empirically (GSIR, RM2000V, and OGRS), or represent a mixture of both approaches (VRAG). Theoretically based tools, unlike atheoretical ones, can also be used to test the validity of the theories on which they are based, can be informed by changing theoretical formulations, and can inform theoretically based clinical activities. For example, as discussed later, the predictive validity of Factors 1 and 2 of the PCL-R may be highly relevant to the treatment of psychopathy. Although we attempted to compare the selected risk tools like for like (all are actuarial, designed to predict risk, and used widely in forensic practice), the results of the study, in addition to answering the key question of which tool has the highest predictive efficacy, can potentially inform other relevant issues, such as the relative performance of second- vs. third-generation instruments and theoretically based vs. empirically based instruments.

Violence Prediction: What Is Being Predicted?

There is no universally accepted definition of violence. Definitions have changed over time and with technological developments. For example, cyber-bullying or bullying over the Internet, with no direct physical or even visual contact, can be deemed a form of violent behavior (Kowalski, Limber, Patricia, & Agatston, 2007). For researchers, a definition of violence such as "behaviors that can or are expected to lead to significant physical or psychological harm" (see Wong & Gordon, 2003, p. 76; see also Wong & Gordon, 2006, p. 288) would probably suffice as a working definition to guide research and theoretical discussions. However, the definition of the criterion or outcome variable for prediction, that is, what is being predicted, is more complex, as it has to withstand tests of validity, reliability, and practicality. The range of possible criterion variables for violence is wide: It includes self-reports to third-party reports of incidents of violence, informal social service or police contact, formal contact or police charges, formal adjudication and court convictions, and incarceration. The frequency or base rate of occurrence also varies: It is generally higher for self-reported incidents and lowest for measures of convictions and incarceration because many police contacts do not result in convictions. The level at which violence is defined can therefore be set according to the goal of the prediction and the practicality of data collection.

The selection of a criterion measure for violence should be guided by the goal of the research and the reliability and construct validity of the variable of choice, as well as the ease and cost of data access and collection. It would be ideal if there were a common metric to assess the level of violence assumed by various criterion variables such that between-study comparisons could be made. To our knowledge, none is available. For the purpose of the present review, the criterion variables, of necessity, were the ones chosen by the various investigations we reviewed. In general, studies usually focused on violent recidivism in the community or violence in institutions, such as assaults against staff. In a recent meta-analysis of the efficacy of risk assessment tools, all violent outcomes in 88 studies could be coded as either institutional violence or violent criminal recidivism (Campbell et al., 2009).

Psychopathy: Assessment, Links to Violence, and Implications

Psychopathy is a psychological construct underpinned by a number of personality traits that, taken together, can be described as a personality disorder. As a point of departure, researchers (e.g., Hare, 2003; Hare et al., 1990) have often referred to Cleckley's (1941, 1976) definition of *psychopathy* in the operationalization of the construct of psychopathy. The personality traits generally considered germane to psychopathy include affective deficits, such as shallow affect, lack of remorse and shame, callousness, and lack of empathy, as well as dysfunctional personality traits related to social functioning, such as egocentricity, manipulativeness, unwillingness to accept responsibility, insincerity, and lying (Cleckley, 1941, 1976; Hare, 2003).

One of the most widely used assessment tools for psychopathy is the PCL-R (Hare, 1991, 2003), a 20-item symptom construct rating scale. The PCL-R is broadly conceptualized as comprising two correlated factors, with Factor 1 tapping the interpersonal and affective personality traits similar to that indicated above and Factor 2 indexing chronic antisocial and unstable behaviors, including impulsivity, a persistent pattern of antisocial and criminal behaviors, and poorly regulated and unstable lifestyle. The number of factors indicative of psychopathy continues to be debated; both three-factor (Cooke & Michie, 2001) and four-factor (Hare, 2003) models (with Factor 1 and Factor 2 each subdivided into two facets) have been proposed. Still, there is much more research on the two-factor as compared with the three- or four-factor models. The debate centers on whether the chronic antisocial characteristics captured by Factor 2 should be part of the conceptualization of psychopathy. The debate is relevant both theoretically and with respect to violence prediction and violence reduction interventions for psychopathy. A major issue is the equivalency of the psychopathy constructs assessed with the PCL-R and the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. [*DSM–IV*], American Psychiatric Association, 1994) as well as the *International Statistical Classification of Diseases and Related Health Problems* (10th Rev. [ICD-10]; World Health Organization, 1990) diagnoses of antisocial personality disorder and dyssocial personality disorder, respectively. Such discussion is beyond the scope of this article, but see Hare (2003, pp. 87–92) and Ogloff (2006) for further details.

There is considerable empirical evidence, including a number of meta-analyses, linking psychopathy assessed by the PCL-R with criminality and violence (Edens, Campbell, & Weir, 2007; Walters, 2003a, 2003b). A previous meta-analysis of 18 studies reported the pooled raw effect sizes as 0.79 (95% confidence interval [*CI*] = 0.42–1.18) or area under the curve (AUC) value of 0.71 for the PCL/PCL-R, plus a somewhat larger value of 1.92 for the Psychopathy Checklist: Screening Version (PCL:SV) (Salekin, Rogers, & Sewell, 1996). A subsequent meta-analysis of 10 studies reported the point-biserial correlation between the PCL-R and institutional adjustment (mostly aggression and violence) of 0.25–0.27, which converted to AUC values of 0.64–0.66 (Walters, 2003b). Additional meta-analyses have also investigated the links of Factor 1 and Factor 2 separately to criminality and violence. The two factors are correlated in the range of .5 to .6 (Hare, 2003), and there are important conceptual differences between them. The PCL-R, originally developed to assess disordered personality, has become one of the most widely used instruments for assessing risk and predicting violence in the areas of criminal justice and forensic mental health. That the PCL-R can predict violence has received extensive empirical support (see Hare, 2003, for a review of the evidence). However, it is less clear as to whether its predictive efficacy should be attributed more to Factor 1 or to Factor 2. Aside from theoretical debates over what really constitutes psychopathy, clarifying the links of Factor 1 and Factor 2 with violence has important implications for risk assessment, violence prediction, and interventions to reduce violence. If Factor 2 has stronger links with violence than Factor 1, then it is the criminality and chronic patterns of antisocial behaviors that should be targeted in violence prediction. However, if Factor 1 has stronger links to violence than Factor 2, then violence risk predictions should focus more on assessing core psychopathic personality traits.

In parallel, interventions to reduce the likelihood of violence should be directed toward the factor or factors with significant causative links with violence. Correlational links between a factor and violence are a necessary, but not a sufficient, condition to indicate causation. However, intervention directed toward factors with few or no links to violence would not be effective in reducing violence (Coie et al., 1993).

Interventions aimed to change personality traits represented by Factor 1 would require therapeutic approaches effective in altering egocentricity, callousness, lack of guilt or empathy, and so forth. Personality traits are, by definition, resistant to change (e.g. *DSM-IV*; American Psychiatric Association, 1994) and, as of yet, there is no empirically supported effective intervention that can be used to change Factor 1 traits (see O'Donohue, Fisher, & Hayes, 2003). This is not to say that psychopathy is not treatable. Quite the contrary, a recent review of the evidence did not support the contention that treatment can make those with psychopathy worse (D'Silva, Duggan, & McCarthy, 2004). As well, there is increasing evidence to suggest that treatment can have a positive impact on psychopathic offenders (see Olver & Wong, 2009). However, if Factor 2 is the causative link with violence, then interventions toward antisocial behaviors should be effective in reducing violence.

There is an extensive literature (generally referred to as the "what works" literature) that addresses interventions effective in reducing antisocial and criminal behaviors, essentially Factor 2 characteristics. The risk, need, and responsivity principles have been set forth as guidelines for the delivery of risk reduction treatment and have received considerable empirical support, including meta-analyses (see Andrews & Bonta, 1998, 2003, 2006, 2010; McGuire, 2008). Within this context, the present study examined the efficacy of both Factor 1 and Factor 2 in predicting violence because of the theoretical, policy, and practical implications for violence risk assessment and prediction as well as violence reduction interventions.

Comparison of the Predictive Efficacy of Violence Prediction Instruments

To answer the question of which is the best tool for predicting violence, a proper index for comparison must be used. Two approaches are most frequently used when comparing the predictive efficacies of different risk assessment tools: (a) comparison of two or more tools, with indices of predictive efficacy such as AUC or

correlational statistics and (b) meta-analysis of a fixed-effects model to pool data from different studies for comparison. Studies conducted with the first approach have compared the PCL-R (Hare et al., 1990), the Violence Risk Appraisal Guide (VRAG; Quinsey, Harris, Rice, & Cormier, 1998), the Violence Risk Assessment Scheme (HCR-20; Webster et al., 1997), the Level of Service Inventory—Revised (LSI-R; Andrews & Bonta, 1995), the Psychopathy Check List: Screening Version (PCL:SV; Hart, Cox, & Hare, 1995), the Lifestyle Criminality Screening Form (LCSF; Walters, White, & Denney, 1991), General Statistical Information on Recidivism (GSIR; Nuffield, 1982), Sexual Violence Risk–20 (SVR-20; Boer et al., 1998), and Static 99 (Hanson & Thornton, 2000). However, these studies have produced inconsistent results, varying from no difference (e.g., Edens, Poythress, & Lilienfeld, 1999; Kroner & Mills, 2001) to large but inconsistent differences in favor of one or more instruments (e.g., Douglas, Ogloff, Nicholls, & Grant, 1999; Hilton, Harris, & Rice, 2001; Gendreau, Goggin, & Smith, 2002; Loza & Green, 2003; Stadtland et al., 2005). Such inconsistencies may be attributable, in part, to variations between the studies, including sample characteristics (e.g., age, gender, size of sample, length of follow-up) and criterion variables (general vs. violent recidivism vs. institutional infractions) and sample (mental health vs. criminal justice vs. a mixture of both), not to mention potential proprietary, biases that were unaccounted for in the studies. Meta-analyses conducted with random-effects models are intended to overcome some of these limitations and should yield more reliable results, as explained below.

Previous Meta-Analyses Conducted With Random-Effects Models and Rationale for the Present Study

Meta-analyses conducted with random-effects models are now considered to be a standard approach for dealing with heterogeneity among studies and have, in many cases, superseded fixed-effects models (see Hunter & Schmidt, 2000). According to Hunter and Schmidt, this is particularly true in social sciences, where studies of effect sizes on certain interventions are most likely based on observational investigation rather than randomized experimental design. The assumption that effect size is the same in all of the studies is not tenable, and the random-effects model is arguably preferable. Walters (2003b) reported a meta-analytic study that compared the effect sizes of (a) the PCL-R, PCL:SV, and PCL:Youth Version (PCL:YV) with (b) that of the LCSF in predicting institutional adjustment and general recidivism. Analyses conducted with inmate samples generated 48 separate effect sizes from 41 studies for the PCL family of tools and 14 separate effect sizes from nine studies for the LCSF. These studies were carried out from 1989 to 2001. Significant heterogeneity in effect sizes across studies was reported. Weighted effect sizes were then calculated to take into account the heterogeneity or significantly different variability in the outcome measures between studies. The 95% confidence intervals (*CI*s) were used to compare the overall weighted effect sizes between the two types of instruments for each of the two outcomes. No significant difference between the two types of instruments in predicting institutional adjustment and general recidivism was found, as their *CI*s overlapped. To examine sources of heterogeneity among studies, Walters then conducted a stratified analysis and found that differences in prediction were related to various study characteristics, such as country of origin of the report, retrospective versus prospective designs, follow-up time, and sample characteristics such as gender, age, and type of participants (mentally disordered vs. prisoners). However, this analysis did not consider violent outcome.

A subsequent meta-analysis by the same author (Walters, 2006) compared effect sizes between professional-rated and self-report risk assessment tools for institutional violent infractions and for general recidivism. The rated tools included the HCR-20, the LCSF, the LSI/LSI-R, the PCL/PCL-R, and the VRAG; there were 13 self-report measures. In all, 25 studies of adult male offenders published between 1986 and 2005, with one or more measures in the two groups of instruments, were included. Using the same random-effects model, weighted analysis suggested moderately larger effect sizes for rated tools compared with self-reported tools, but only for general recidivism. No comparison of effect sizes was made between the five professional-rated instruments, and no attempt was made to adjust for possible moderator effects, such as study features, when comparing instruments.

Edens, Skeem, and Douglas (2006) reported a meta-analysis of 21 studies that compared the effect sizes of the PCL-YV and the Youth Level of Service/Case Management Inventory (YLS/CMI; Hoge & Andrews, 2002) in predicting general and violent recidivism among young offenders, with a simple random-effects model. They found that the predictive efficacy of the two measures was comparable and cautioned that there was considerable heterogeneity among the effect sizes, which should be addressed in further studies. No attempt was made to assess or account for study or sample characteristics in this analysis.

Following the study of Edens et al. (2006), Schwalbe (2007) conducted a meta-analytic study to compare a large number of instruments for youths, with similar outcomes in similar populations, based on 42 AUC values from 28 studies of youth recidivism. To address the issue of study heterogeneity in comparing risk instruments, the author used a different approach from previous meta-analyses by means of a two-step process: first, using restrictive inclusion criteria to minimize heterogeneity by including only prospective or longitudinal studies that were carried out with youths and, second, adjusting for potential moderators using a weighted least square (WLS) regression model that took into account random effects of studies while comparing instruments. Potential moderators were labeled as methodological and interval level. Instruments were broadly grouped as second and third generation. The methodological moderators were publication status (published or not), sampling frame (probation or institutional), information source (file review or direct interview), and cross validation (yes or no). Interval-level moderators included sample size, percentage female, percentage minority, and length of follow-up. The WLS analysis indicated significantly larger effects of studies on construct samples than validation samples, third-generation as compared with second-generation measures, and studies with smaller samples; smaller effects occurred with studies utilizing institutional samples as opposed to probation samples. The last three moderators together accounted for 42% of the total variation (based on AUC values), whereas instrument type accounted for only 17%. This study did not provide comparison by individual instruments because there were only 42 AUC values in the analysis. The WLS analysis was able to identify some key

moderators and adjust for them simultaneously while comparing two groups of instruments by second or third generation. This approach has yet to be applied in other settings, for example, efficacy of risk instruments for violence among adults.

In predicting adult violence, the recent meta-analysis by Campbell et al. (2009) was probably one of the most comprehensive comparisons of multiple instruments in predicting institutional violence (76 effect sizes) and violent recidivism (185 effect sizes). These authors pooled 88 independent studies from 1980 to 2006 and compared effect sizes of the HCR-20, the LSI/LSI-R, the PCL/PCL-R, the PCL:SV, the GSIR Scale, and the VRAG for each of the two violent outcomes. The weighted effect sizes showed no differences among instruments for institutional violence, but a somewhat larger effect size of the VRAG compared with the HCR-20 and the GSIR Scale for violent recidivism. The authors applied a conventional random-effects model and weighted effect size analysis. Their study again demonstrated significant heterogeneity among studies for most instruments in the comparison except for the HCR-20, but the sources of the heterogeneity remained unexamined.

In sum, most of the previous meta-analyses reviewed found inconsistent to no difference among instruments they compared. However, the authors of these studies recognized the presence of heterogeneity among studies and attempted to account for them by using random-effects models to calculate weighted effect sizes and by examining the effects of one moderator at a time by a stratified analytic approach. On the basis of subsample data, such analysis has two obvious drawbacks: (a) reduced statistical power to detect differences in predictive efficacy and (b) unexplained variation in effect sizes due to differences in moderators that could not be included in the stratification, which, in practice, usually involves no more than two moderators at a time. Both drawbacks could lead to large standard errors and wide confidence intervals in effect sizes and, hence, could potentially obscure moderate differences between two instruments. The WLS regression analysis reported by Schwalbe (2007) with restrictive study selection criteria could be effective in estimating effects of multiple moderators by using all available data. However, whether the findings could be generalized to studies with larger heterogeneity based on less restrictive inclusion criteria is debatable.

Another source of study heterogeneity, rarely acknowledged in previous meta-analyses, was large individual differences embedded in differences between risk instruments because the comparisons of the tools were based on different studies with different individuals.

Our study objectives were to make a number of improvements on the extant literature, in light of the above methodological issues and conceptual considerations. First, we compared the efficacy of nine widely used instruments to predict violent behavior, including the PCL-R, the PCL:SV, the HCR-20, the VRAG, the OGRS, the RM2000V, the LSI/LSI-R, the GSIR, and the VRS, as well as seven subscales: PCL-R Factor 1 and Factor 2, the 10-item Historical subscale, the five-item Clinical subscale, and the five-item Risk Management subscale of the HCR-20; and the Static and Dynamic scales of the VRS. The PCL-R subscales were included for key conceptual reasons, elucidated above. The HCR-20 subscales are often reported in the literature together with the total score. The VRS is the only tool that has separately identified static and dynamic predictors, and their comparison should also be informative for reasons discussed earlier. Second, in an attempt to minimize sampling error between individuals, we used a within-group design by including only independent studies that compared the predictive efficacy of more than one risk tool on the same individual. Third, we used multilevel regression models (Goldstein, 2003) to estimate the magnitude of heterogeneity or random effects to compare weighted effect sizes among instruments, taking into account random effects, and to examine and adjust for impacts of study features on the differences of effect sizes between the risk instruments. Indeed, our position is that the multilevel regression model can improve on the WLS used by Schwalbe (2007) in several ways. It decomposes total variance by the natural layers in the data structure, such as between studies and between instruments within study. It tests for random effects as the conventional Q statistic does, estimates weighted effect sizes for instruments, and adjusts for moderators or study features simultaneously all within the same model. The model also measures variation of effect sizes among studies that are attributable to different study features and sample characteristics (see Method section for more detail).

Overall, our primary objective was to determine which, among the instruments included in the study, is the most effective violence prediction tool after addressing the methodological issues of earlier meta-analyses. Furthermore, we aimed to evaluate the predictive efficacy of second-generation (static) and third-generation (dynamic) tools, together with comparisons between theoretically derived and empirically derived tools. The study also investigated the links between the PCL-R Factor 1 and Factor 2, and violence.

Method

Selection of Studies

There were four study selection criteria: (a) more than one risk assessment instrument must have been evaluated in the same sample; (b) the reported outcome measures must have clearly involved some form of violent behavior, including violent charges or convictions as well as noncriminal violence against persons or objects; (c) reported statistics must have been reported in sufficient detail for the computation of the instruments' effect sizes; and (d) published or unpublished studies reported since 1999 to capture recent work as most comparative studies of actuarial instruments were reported during the last decade. On the basis of the above selection criteria, key words *risk assessment, violence prediction,* and *comparing risk assessment instruments* were used in literature searches. The databases included PsycINFO, Embase, and Medline, from 1999 to 2008. Authors who were known contributors to the risk assessment literature were added to the searches. Keyword search was also applied to specific criminal justice and behavioral sciences journals. The abstracts were independently read and selected by the first and third authors. Full versions of articles were obtained if the abstract indicated compliance with inclusion criteria a and b. At this point, cross-reference reviews of reference lists of all papers were used to identify any other relevant papers missed in the original search. The first author then read all papers to decide whether sufficient statistics were presented in the article (using tables, figures or text) to calculate effect sizes for subsequent analyses. Unpublished papers identified were solicited from authors by mail or e-mail. A final source of relevant studies came

from recommendations of anonymous journal reviewers, who read an early version of the manuscript. Initial selection of the meta-analysis sample included four Canadian studies with overlapping samples but with different follow-up periods. Advice from journal reviewers prompted us to exclude all but the one with the largest sample size. Two studies (Mills & Kroner, 2006; Mills, Kroner, & Hemmati, 2007) included some individuals who participated in both studies but were assessed by different instruments over different follow up periods. They were coded in the analysis as one study.

These procedures yielded 28 independent studies, published or unpublished, from 1999 to 2008, which compared between two and nine risk assessment instruments, including subscales of the HCR-20, the PCL-R/PCL:SV, and the VRS, and which had sufficient data to be included in the meta-analysis.

Criterion or Outcome Measures

Generally, outcome measures reported in the literature are based on violent criminal reconvictions extracted from official records after the individual has been released and followed up for some time in the community (oftentimes referred to as community violence), or some form of physical aggression or violence toward others based on staff observations documented in institutional case files when the individual (often a forensic psychiatric patient) was in custody in an institution (oftentimes referred to as institutional violence). To address the potential concern raised by an anonymous reviewer that the many criterion variables of violence reported in the literature could represent qualitatively different types of violent behaviors, we created a covariate consisting of four violence categories based on the study outcome descriptions. The following four categories were developed because, first, they appear to be able to best sort the articles into mutually exclusive categories and, second, they are sufficiently conceptually different as to potentially represent different types of violent behaviors. The four categories are the following: (a) specific mention of actual physical aggression or violent acts toward institutional staff and others (excluding threats or attempts) perpetrated within an institution (see Morrissey et al., 2007); (b) actual, attempted, or threats of harm to others primarily determined with the HCR-20 definition of violence as per Webster et al. (1997; see de Vogel, de Ruiter, de Hildebrand, Bos, & van de Ven, 2004); (c) broadly defined violent criminal recidivism from official records which included sexual offense and robbery (e.g., Wong & Gordon, 2006); and (d) violent criminal recidivism from official records excluding sexual offenses and robbery (see Coid et al., 2009). All of the original articles were reviewed and coded into one of four categories by the first author. When there was overlap in the criteria in the article, the predominant category that best represented the outcomes was selected. Ten articles were selected and retrospectively reviewed by the second author. There were agreements on the categorization on 7 of 10. On further discussion, all disagreements were resolved in favor of the categorization of the first author: One was misread by the second author, and two were agreed to after further reviewing of the criteria use. It was not possible to develop even more precise categories to cover the broad literature because of the lack of detailed descriptions in the studies, and outcomes of convenience were often used. The outcome categories also overlapped according to type of participant and country of studies. However, according to this categorization of outcome, 62.5% of studies of forensic psychiatric patients used category a; 62.5% of studies of mixed offender and psychiatric patients used category c, and 25% used category b. A total of 50% of studies of prisoners used category d, with 33.3% of these studies also using category c. Some studies reported multiple outcomes that included both violent and nonviolent acts. Nonviolent acts, such as general criminal recidivism and behavior that involved only verbal aggression, were excluded from the meta-analyses. In view of the importance of outcome criteria in this type of research, we make some specific suggestions in the Recommendations section regarding future attempts to resolve these issues.

The question of whether sexual offenses should be considered as violent offending is open to interpretation. Our position that they should be is in line with the views of the authors of a number of risk assessment tools, such as the HCR-20: "All sexual assaults should be considered violent behaviour" (see Webster et al., 1997, p. 25; see also the VRAG, Quinsey et al., 1998, p. 142; and the VRS, Wong & Gordon, 2006, p. 288). However, if a certain study author chose to exclude sex offenders from his or her study for specific reasons, then we accepted such reasoning in our choice of studies to review. The complexity of the issue is illustrated by the following: An offender with a long history of nonsexual offending but with an index sexual offense may be deemed a sex offender for the purpose of his or her current sentence management; on the other hand, an offender who committed a minor sex offense many years ago but more recently was convicted of a serious, nonsexual violent offense is likely to be deemed a nonsexual violent offender.

Study Features Included in the Analyses

Differences in study characteristics and sample variables must be taken into account, as they could act as covariates or moderators in the estimation of instrument efficacy. The effects of study characteristics and sample variables should be quantified and adjusted in order to obtain independent estimates of the effect sizes in violence prediction. In addition, it is well established that risk of violence is strongly associated with sex, age, and certain forms of mental disorder, for example, antisocial personality disorder. Other potential contributing factors include retrospective compared with prospective study design, different operationalizations of the criterion variable (as discussed above), and country of origin of studies. Although there is an inevitable lack of uniformity in the use and/or reporting of such factors, we endeavored to extract as much information as possible from all studies to include in our analyses.

Sample variables used in the study were as follows: (a) mean age, (b) percentage of male participants, (c) study type (retrospective vs. prospective), (d) country where the study was carried out, (e) type of participants (nonsexual offenders or prison inmates vs. forensic mental health patients vs. mixed samples), (f) type of violence, and (g) average follow-up time in months. For studies reporting a number of follow-up times (e.g. Craig, Beech, & Browne, 2000; Dahle, 2006; Snowden, Gray, Taylor, & MacCulloch, 2007; Wong & Gordon, 2006), we used data at the time point for which the maximum sample size was reported.

Effect Size Measure

There are three commonly used measures of effect size for predictive accuracy: Cohen's *d*, receiver–operating characteristics area under the curve (AUC), and the correlation coefficient. Cohen's *d* is well established for meta-regression analysis with covariates or mediators; it is used particularly to deal with random effects (Goldstein, Yang, Tuner, Omar, & Thompson, 2000). It can easily be converted into the other two measures for comparison purposes (M. E. Rice & Harris, 2005). Cohen's *d* values have been calculated directly for eight studies in which the risk assessment instrument's means and standard deviations of scores for groups, with and without the defined violent outcomes, were available. For one study (Grann, Belfrage, & Tengström, 2000), the Cohen's *d* effect size value was approximated on the basis of medians and quartiles observed in graphs. For another 13 studies that reported various correlation coefficients, we converted the correlation coefficient *r* to Cohen's *d* using the formula $d \approx r[pq(1 - r^2)]^{-0.5}$ (Hunter & Schmidt, 2004; M. E. Rice & Harris, 2005), where *p* was the base rate of the outcome and $q = 1 - p$. When the base rate was close to 50%, the formula was reduced to $d \approx 2r(1 - r^2)^{-0.5}$ or $d \approx [(n - 2)/n]^{0.5}\,[2r(1 - r^2)^{-0.5}]$ for small samples. If the study reported the correlation coefficient separately for men and women, the *d* value was computed for men and women separately. The sample size reported for assessing each instrument was used as a weighting factor in the meta-regression model for the effect size analysis. For eight studies that reported only the AUC values, a direct conversion of the *AUC* value to the *d* value was carried out on the basis of the table of M. E. Rice and Harris (2005).

The effect size as *d* value was calculated for each risk instrument assessed for each study. In total, 174 effect size values from 28 studies were included in the analysis.

Multilevel Regression Models

Multilevel regression models developed from educational effectiveness assessment have been shown to provide optimal flexibility both to disentangle random effects by sources of variation (Goldstein, 2003) and to estimate effects of sample characteristics simultaneously in meta-analysis with complex data structure (Goldstein et al., 2000). This approach has followed the principle of meta-regression methods (Greenland, 1987) for observational data with measurable moderators in epidemiology. It is advanced by building in random parameters to identify and quantify sources of variation or heterogeneity. The merits of multilevel models in comparison with standard statistical approaches to meta-analysis of effect sizes and odds ratios have been explicitly demonstrated (Tuner, Omar, Yang, Goldstein, & Thompson, 2000). Applications of multilevel models can be found in health (Leyland & Goldstein, 2001; N. Rice, Carr-Hill, Dixon, & Sutton, 1998; Von Korff, Koepsell, Curry, & Diehr, 1992) and in educational (Goldstein, 2003), as well as social, political, and behavioral studies (Sampson, Raudenbush, & Earls, 1997; Yang, Heath, & Goldstein, 2000). Software tools for multilevel analysis models are now available in many major statistical packages, such as SAS, Stata, SPSS, and SPlus.

The hierarchical features in many published risk assessment studies are well suited for multilevel regression analysis. Hierarchical features pertain to the condition that several risk assessment instruments are applied to the same sample of individuals within a study; they also afford analysis of the marked heterogeneity or random effects between studies, including differences in sample characteristics, such as sex and age, and differences in study characteristics, such as country of origin, follow-up time, prospective versus retrospective designs, and outcome categories. Multilevel models consist of two parts: (a) random parameter estimates for random effects at the level of variation sources, and (b) fixed parameter estimates for mean effects of covariates or moderators. We used random parameter estimates to quantify and disentangle total variation in effect sizes to the level of study (between-study variation) and level of instrument (within-study variation), and fixed parameter estimates to examine independent effects of study features or moderators mentioned above. Weighted effect sizes of instruments adjusted for random effects and effects of moderators were estimated and compared within the framework of multilevel models.

Design and Analytic Strategy

Compared with a between-subjects design, a within-subject design yields smaller random sampling error and thus provides better statistical power to detect differences of interest. We chose a within-subject design for this study, meaning that only studies evaluating more than one risk assessment instrument on the same sample of subjects with the same outcome variable were included in the analyses. Such a model provides a natural three-level hierarchical structure: that is, risk instruments nested within studies and participants nested within instruments. Three-level multilevel regression models were therefore applied.

When comparing effect sizes among risk instruments, the PCL-R was used as the reference category because it was one of the most widely used tools and was reported by most studies included in our meta-analysis. The mean differences in effect sizes between other tools and the PCL-R were estimated in the multilevel regression model and tested by the generalized Wald test after fitting a model. The program MLwiN (Rasbash et al., 2000) was used to perform multilevel regression analysis. All models were weighted by the inverse of sample size.

Three nested models were fitted. Model A, a three-level variance component model, provided one estimate for the overall mean effect size in the regression, together with two variances of random effects segregated into study and instruments within study. This model was fitted to quantify the heterogeneity of effect sizes by the sources and to test the presence of random effects between studies and within study. If the two variances of random effects were no more than chance or sampling error, Model A was reduced to a simple fixed-effects model that estimated a pooled mean estimate of all studies, with the meta-analysis sample considered homogeneous.

Model B, an elaboration of Model A, provided a mean estimate of effect size for each instrument and its subscales, with PCL-R as the reference. It explored the magnitude of the total variance attributable to different risk assessment instruments. Changes in the study-level variances between the two nested models are measures of the contributions of the instruments to the variance of effects sizes. For example, Model A may estimate a variance of effect sizes at study level as 0.5, and Model B may estimate a

variance as 0.3, which is smaller than the Model A estimate. If the instrument effects in Model B are significant, the difference between 0.5 and 0.3 is the variance component in the total effect size explained by the differences in instruments. For comparison purposes, we also estimated a fixed-effects only regression model (B1) for the predictive efficacy of all instruments by removing variance components from Model B, that is, ignoring random effects in the effect sizes. Comparison of models with and without taking into account random effects between studies can indicate the contributions of random effects on the estimates of efficacy of risk instruments.

In Model C, study characteristics, such as type of participants, country of origin, type of study, age and sex of participants, time of follow-up, type of criterion measures, and so forth, were included to examine the extent to which study characteristics contributed to the effect size variation across studies. Model C provided estimates of the contributions of study characteristics to the effect size of violence prediction, such that comparisons of the effect sizes among risk instruments could be made independent of study characteristics. Interactive effects between some study features, such as sex and efficacy of instruments, were considered in order to understand the reason for the differences between instruments.

The adequacy of models was assessed by the goodness of fit, with the likelihood ratio test of chi-square statistic, that is, the difference in the −2log-likelihood values between any two nested models. The difference in predictive efficacy estimates between instruments was tested with the generalized Ward test in MLwiN. All models in the study were fitted by MLwiN. Conversions of Cohen's *d* values from the ROC AUC values were carried out following the table in M. E. Rice and Harris (2005) when appropriate.

It is well established that correlation coefficients and AUC values based on a smaller sample can be inflated and may have a direct impact on the effect size measures. In our multilevel regression models for aggregated data, the raw sample size for the calculation of each effect size value was used as a weighting factor to address this issue; it was applied in all models presented.

Results

Features of Studies

A summary of studies included in the meta-analysis is presented in Table 1. The majority ($k = 11$) were carried out in the United Kingdom, followed by Canada ($k = 9$), with three in Sweden, two in Holland, three in the United States, and one in Germany. Nine studies were prospective; 19 were retrospective. In the latter, participants were identified using archival information and were then followed up to assess their violent outcomes. The total sample size in the meta-analysis was in a range of 6,348–7,221 by different instruments and a range of 34–1,650 by study. Only those original studies in which some form of violence was identified as the outcome variable were included in the meta-analysis. As such, some samples in the present study may be lower than those in the original reports.

The mean age of participants in the sample was 33.3 years (range = 24–44 years), with 17 studies consisting of male participants only, 9 of mixed sex, and 2 of women only. Participants in the studies were mostly prisoners ($k = 12$); others were psychiatric patients residing in forensic hospitals ($k = 8$) or offenders with mental disorders ($k = 8$). Specific categories of mental disorder were not evaluated in the present study. The overall mean follow-up time was 43.8 months, varying from 3 to 133 months. For two studies that did not report the follow-up time, the average follow-up time of all studies was used as an estimation.

In total, 18 risk assessment tools, including subscales of the instruments, were evaluated. These included the VRAG ($k = 17$), the HCR-20 ($k = 16$), HCR-20 subscales Historical, Clinical, and Risk Management (ks = 18, 14, and 12, respectively), the PCL-R ($k = 16$), the PCL:SV ($k = 8$), PCL-R/PCL:SV Factors 1 and 2 (ks = 13 and 13), the RM2000V ($k = 3$), the GSIR ($k = 3$), the LSI/LSI-R ($k = 5$), the OGRS ($k = 2$), the VRS ($k = 4$), and the VRS Static and Dynamic scales (ks = 3 and 3). For one study (Craig et al., 2000), the SVR-20 and the Static99 were evaluated for violence of nonsexual offenders. The overall base rate of violent outcomes was 24.9%, ranging from 4.8% of violence recidivism of patients in a 5-year follow-up to 100% of physical aggression by female patients with mental disorders in a nearly 2-year follow-up. The raw effect size varied from −0.187 to 1.34.

Pooled Effect Size and Its Random Effects

The raw effect sizes were symmetrically distributed with a mean of 0.65 (variance = 0.096). The pooled effect size and its distribution of variance based on Model A (Table 2) demonstrated that, of the total estimated variance (0.0923), 48.2% (0.0445/0.0923) was due to the difference or random effects across studies and 51.7% (0.0478/0.0923) to the different instruments within the study. Both variances were statistically significant, Wald test $\chi^2(1) = 8.26$, $p = .004$, and $\chi^2(1) = 43.15$, $p < .0001$, respectively. The results suggested significant heterogeneity of effect sizes across studies as well as across instruments. On the basis of this model with the pooled effect size estimation as 0.66, a 95% distribution range of such effect sizes among all studies was estimated to vary from 0.25 to 1.08 and among all instruments, from 0.23 to 1.09, respectively.

Effect Sizes of Instruments From Fixed- and Random-Effects Models

We first fitted a single level or fixed effect regression model (Model B1 in Table 2) with weighting factor to compare effect sizes of instruments. By ignoring the heterogeneity among studies on the outcome measure, the simple meta-regression analysis suggested that effect sizes for eight instruments and their subscales, including the VRAG, the HCR-20, the PCL:SV, the OGRS, the GSIR, the RM2000V, the VRS Static subscale, the VRS Dynamic subscale, and PCL-R Factor 2, were significantly larger than that of PCL-R total, whereas the effect sizes of PCL-R Factor 1, the five-item Clinical subscale and the five-item Risk Management subscale in HCR-20, and other sexual risk assessment instruments were significantly smaller than that of PCL-R. However, by allowing effect sizes to vary randomly among different studies and estimating a variance at study level for such difference, the two-level random effect model (Model B2 in Table 2) showed considerably improved goodness of fit over Model B1, with the likelihood ratio test $\chi^2(1) = 800.9$, $p < .0001$. Furthermore, by

Table 1
Description of Studies Included in the Meta-Analysis

Authors of study	Country[a]	Type of participants[b]	% Male participants	Mean age of participants (years)	Study type[c]	Mean follow-up (months)	Sample size[d]	Outcomes	Rate of violence (%)	Instruments assessed	Effect size[e]	Source data of effect size
Belfrage et al. (2000)	2	1	100.0	34.1	2	8	41	Institutional violent acts vs. nonviolent acts	19.5	HCR-20	1.20	Mean, standard deviation
										H10	0.36	
										C5	0.73	
										R5	0.95	
										PCL:SV	0.78	
										Part 1	0.289	
										Part 2	1.065	
Coid et al. (2009)	4	1	100	30.7	2	24	1271	Violent re-offending vs. nonoffending and other offending	13.2	HCR-20	0.622	AUC value
							1281			H10	0.585	
							1339			C5	0.500	
							1337			R5	0.325	
							1337			RM2000V	0.707	
							1350			OGRS	0.825	
							1345			PCL-R	0.500	
							1353			Factor 1	0.141	
							1353			Factor 2	0.665	
							1343			VRAG	0.740	
Coid et al. (2009)	4	1	0	28.2	2	25.2	302	Violent re-offending vs. nonoffending and other-offending	8.2	HCR-20	0.745	AUC value
							302			H10	0.675	
							302			C5	0.795	
							302			R5	0.320	
							303			RM2000V	0.545	
							290			OGRS	0.141	
							303			PCL-R	0.870	
							302			Factor 1	0.545	
							302			Factor 2	0.780	
							302			VRAG	0.545	
Cooke et al. (2002)	4	1	100	26.8	1	Missing	190	Any violent reconviction vs. other	20.0~30.0	HCR-20	0.707	Mean, standard deviation
										H10	0.665	
										C5	0.522	
										R5	0.160	
										PCL-R	0.545	AUC value
										VRAG	0.622	
Craig et al. (2006)	4	1	100	33.9	1	120	131	Violent recidivism vs. nonviolent/non-sex recidivism	16.0	RM2000V	0.972	Correlation coefficient (Spearman's)
										SVR-20	0.159	
										Static-99	0.426	
Dahle (2006)	6	1	100	29.8	2	120	86	Violent reconviction vs. other	32.6	PCL-R	0.668	Correlation coefficient (Pearson's)
										HCR-20	0.644	
										LSI-R	0.467	

(*table continues*)

Table 1 (*continued*)

Authors of study	Country[a]	Type of participants[b]	% Male participants	Mean age of participants (years)	Study type[c]	Mean follow-up (months)	Sample size[d]	Outcomes	Rate of violence (%)	Instruments assessed	Effect size[e]	Source data of effect size
de Vogel et al. (2004)	5	3	89.0	26.0	1	72.5	119	Violent reconviction	36.1	HCR-20 H10 C5 R5 PCL-R Factor 1 Factor 2	1.27 1.11 1.08 1.11 0.49 0.469 1.056	Correlation coefficient (Pearson's)
De Vries Robbe et al. (2006)	5	3	100.0	30.0	1	112.8	50	Violent reconviction	Missing	VRS PCL-R HCR-20	1.10 0.905 1.10	AUC value
Dolan & Fullam (2007)	4	1	100.0	35.5	2	12	136 80	Violence against others	53.7 48.8	VRS VRS-Static VRS-Dynamic HCR-20 H10 C5 R5	0.72 0.42 0.75 0.80 0.62 0.85 0.60	Cohen's *d* effect size
Douglas et al. (1999)	1	2	61.0	38.1	1	20.6	193	Any violence	38.0	HCR-20 H10 C5 R5 PCL:SV Factor 1 Factor 2	1.00 0.825 0.470 0.870 0.660 0.430 0.660	AUC value
Douglas et al. (2005)	1	1	100.0	38.3	1	92.4	188	Violent recidivism vs. nonviolent recidivism	49.5	HCR-20 H10 C5 R5 VRAG PCL-R Factor 1 Factor 2 PCL:SV Part 1 Part 2 PCL:SV VRAG	1.19 0.76 1.16 1.13 1.04 0.94 0.377 1.113 0.67 0.410 1.009 1.02 0.71	Mean, standard deviation
Doyle & Dolan (2006)	4	3	67.0	40.6	2	5.5	112	Violent recidivism vs. nonviolent recidivism	18.8	H10 PCL:SV Part 1 Part 2 VRAG	0.56 0.68 0.65 0.559 0.50	Mean, standard deviation

Table 1 (*continued*)

Authors of study	Country[a]	Type of participants[b]	% Male participants	Mean age of participants (years)	Study type[c]	Mean follow-up (months)	Sample size[d]	Outcomes	Rate of violence (%)	Instruments assessed	Effect size[e]	Source data of effect size
Doyle et al. (2002)	4	2	97.0	35.5	1	3	87	Violent physical assault vs. nonviolent assault	51.7	H10	0.69	Mean, standard deviation
Edens et al. (2006)	3	2	59.0	30.0	2	4.6	741	Violent behavior/crime	18.6	VRAG PCL:SV	0.865 1.11	AUC value
Glover et al. (2002)	1	1	100	28.0	1	23.5	78	Violent recidivism vs. nonrecidivism	43.6	GSIR PCL-R Factor 1 Factor 2 VRAG	1.06 0.58 −0.139 0.432 0.94	Mean, standard deviation
Grann et al.[f] (2000)	2	3	92.8	32.5	1	24	404	Violent crime vs. nonviolent crime	22.5	H10 VRAG	0.72 0.71	Median, quartile
Gray et al. (2003)	4	2	76.5	33.0	1	3	34	Physical aggression vs. other	32.4	HCR-20 H10 C5 PCL-R Factor 1 Factor 2	1.34 1.02 1.20 0.80 0.396 0.749	Correlation coefficient (Spearman's)
Gray et al. (2007)	4	3 (Offenders with intellectual disabilities)	81.4	31.6	1	60	115 132 124 129 139 139 139 138	Violence re-offending (including robbery, rape, kidnap) vs. other	4.8	VRAG PCL:SV Factor 1 Factor 2 HCR-20 H10 C5 R5	0.870 0.870 0.608 0.471 0.785 0.791 0.780 0.505	AUC value
Gray et al. (2007)	4	3 (Offenders without intellectual disabilities)	85.6	32.0	1	60	420 775 667 762 898 889 893 894	Violence re-offending (including robbery, rape, kidnap) vs. other	11.2	VRAG PCL:SV Factor 1 Factor 2 HCR-20 H10 C5 R5	0.910 0.700 0.470 0.780 0.660 0.700 0.190 0.470	AUC value
Grevatt et al. (2004)	4	2	100.0	44.0	1	6	44	Physical aggression vs. other	29.5	H10 C5 VRS VRS-Static VRS-Dynamic	0.116 0.362 −0.12 0.077 −0.154	Mean, standard deviation
Hilton et al. (2001)	1	1	100.0	24.0	1	82.5	88	Violent recidivism vs. nonviolence	21.6	PCL-R VRAG	0.91 1.13	Correlation coefficient (unspecified)

(*table continues*)

Table 1 (*continued*)

Authors of study	Country[a]	Type of participants[b]	% Male participants	Mean age of participants (years)	Study type[c]	Mean follow-up (months)	Sample size[d]	Outcomes	Rate of violence (%)	Instruments assessed	Effect size[e]	Source data of effect size
McDermott et al. (2008)	3	2	84.0	45.6	2	30	108	Physical violence aggression to others	28.0	PCL-R Factor 1 Factor 2 VRAG HCR-20 H10 C5 R5	0.283 0.212 0.354 0.141 0.540 0.396 0.396 0.585	AUC value
Mills & Kroner (2006)	1	1	100.0	29.9	1	14	209	Violent recidivism vs. nonviolence	29.0	GSIR LSI-R PCL-R VRAG	0.69 0.59 0.40 0.59	Correlation coefficient (unspecified)
Mills et al. (2007)	1	1	100.0	27.9	1	55	83	Violent recidivism vs. nonviolence	35.0	HCR-20 H10 C5 R5 VRAG	0.84 0.64 0.96 0.76 0.61	Correlation coefficient (unspecified)
Morrissey et al. (2007)	4	3	100.0	38.0	2	12	54 60	Physical aggression vs. other	59.3	HCR-20 PCL-R Factor 1 Factor 2	0.94 0.08 −0.187 0.319	Correlation coefficient (Spearman's)
Nicholls (2004)	1	2	100	36	1	22.7	117 117 117 117 146 146 146	Any violent behavior/ crime vs. other	79.3	HCR-20 H10 C5 R5 PCL:SV Part 1 Part 2	0.82 0.608 0.396 0.865 0.47 0.354 0.396	AUC value
Nicholls et al. (2004)	1	2	0	42	1	22.7	75 75 75 75 90 90 90	Any violent behavior/ crime vs. other	100	HCR-20 H10 C5 R5 PCL:SV Part 1 Part 2	0.779 0.95 0.545 0.78 0.622 0.431 0.622	AUC value
Snowden et al. (2007)	4	2	100.0	37.7	1	60.0	320	Violent reconviction	14.7 13.0	OGRS VRAG	0.830 0.976	AUC value
Tengström (2001)	2	3	100.0	33.0	1	86	106	Violent crime	29.0	H10 VRAG PCL-R Factor 1 Factor 2	1.00 0.665 1.150 −0.139 0.432	
Warren et al. (2005)	3	1	0.0	30.0	1	Missing	132	Violent crime/behavior vs. other	43.2	HCR-20 H10 C5 R5 PCL-R	0.28 −0.03 −0.11 0.00 0.28	Mean, standard deviation

Table 1 (*continued*)

Authors of study	Country[a]	Type of participants[b]	% Male participants	Mean age of participants (years)	Study type[c]	Mean follow-up (months)	Sample size[d]	Outcomes	Rate of violence (%)	Instruments assessed	Effect size[e]	Source data of effect size
Wong & Gordon (2006)	1	1	100.0	38.8	1	52.8	918	Violent reconviction	31.3	VRS	0.872	Correlation coefficient (Pearson's)
						52.8	918			VRS-Static	0.651	
						52.8	918			VRS-Dynamic	0.872	
						50.7	696			PCL-R	0.872	
						42.4	701			GSIR	0.675	
Wormith et al. (2007)	1	1	100	25.7	1	133.2	61	Violent reconviction	55.0	PCL-R	0.618	Correlation coefficient (unspecified)
										YLS/CMI	0.687	

Note. HCR-20 = Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; H10 = 10-item Historical subscale of the HCR-20; C5 = 5-item Clinical subscale of the HCR-20; R5 = 5-item Risk Management subscale of the HCR-20; PCL:SV = Psychopathy Checklist: Screening Version; RM2000V = Risk Matrix 2000 for Violence; OGRS = Offender Group Reconviction Scale; PCL–R = Psychopathy Checklist—Revised; VRAG = Violence Risk Assessment Guide; SVR-20 = Sexual Violence Risk–20; LSI-R = Level of Service Inventory—Revised; VRS = Violence Risk Scale; GSIR = General Statistical Information for Recidivism; YLS/CMI = Youth Level of Service/Case Management Inventory.

[a] 1 = Canada; 2 = Sweden; 3 = United States; 4 = United Kingdom; 5 = Holland; 6 = Germany. [b] 1 = prisoner; 2 = psychiatric patients; 3 = mixed sample. [c] 1 = retrospective follow-up; 2 = prospective follow-up. [d] No. of participants used to calculate the effect size. [e] Effect size $d = \sqrt{(n-2)/n} \times 2 \times r/\sqrt{(1-r^2)}$ if r is Pearson's or Spearman's correlation coefficient, and $d = r/\sqrt{(pq(1-r^2)}$ if r is point-biserial correlation coefficient or unspecified. The Cohen effect size d was calculated if mean scores and standard deviations of the violent and nonviolent groups were provided for each instrument scale. The pooled SD for Cohen's effect size d was defined as $\sqrt{((n_1-1)SD_1 + (n_2-1)SD_2)/(n_1+n_2-2)}$. [f] The study by Grann et al. (2000) did not present means and standard deviations in numbers but plots of distribution by outcome categories. The median and 25% percentiles were read off from the plots to approximate means and standard deviations.

allowing effect sizes to vary among instruments and by disentangling variance components for studies and for instruments respectively, the three-level model (Model B3) further significantly improved the goodness fit of Model B3 over Model B2, with the likelihood ratio test $\chi^2(1) = 398.6$, $p < .0001$. Among the three models, the single-level model B1 had the smallest standard errors of efficacy estimates for all instruments, hence, a greater chance for Type I error (i.e., more false significant findings). The considerably larger log-likelihood value of Model B1 than the other two nested models indicated the worst fit of the model to the data.

Results of Model B3 suggested that only HCR-20 had a larger effect size than PCL-R, $\chi^2(1) = 12.86$, $p = .0003$, and only PCL-R Factor 1 had a significantly smaller effect size than PCL-R, $\chi^2(1) = 21.36$, $p < .0001$. No significant differences were found between the remaining risk assessment instruments compared with the PCL-R. The goodness of fit of Model B3, after estimating instrument differences, was a significant improvement to Model A, with the likelihood ratio test, $\chi^2(16) = 64.20$, $p < .0001$. The differences among instruments reduced the total variance in effect sizes by 22.6% between Models A and B3 and, in particular, reduced the variance within study by 48.0%, from 0.0445 in Model A to 0.0249 in Model B3. This finding signifies that a large proportion of variation in the mean effect sizes between studies was related to the correlation between instruments within studies. Failing to take into account such correlation in comparing the predictive efficacy, such as in Model B1 and B2, can lead to underestimations of standard errors of parameters and could produce false positive findings.

Based on Model B3, we still observed a considerable amount of variation among studies, $\chi^2(1) = 10.29$, $p < .0001$, and among instruments, $\chi^2(1) = 35.00$, $p < .0001$. It was reasonable to hypothesize that differences in effect sizes between studies could be related to study features that tended to vary from study to study. Taking such variability into account may reduce the effect size estimates for instruments. In Model C1, we accounted for study and sample characteristics that were not accounted for in Model B3. The likelihood ratio test suggested that Model C1 represented a significant improvement in the goodness of fit over Model B3, $\chi^2(11) = 30.55$, $p = .001$, and a marked reduction of the study level variance by 70.3% (from 0.0445 in Model A to 0.0132 to Model C1). The results strongly supported our hypothesis that study and sample characteristics could be major contributors to differences between studies. On the basis of this model, the major study features that contributed to the effect size were the origin of study, type of study, time of follow-up, and participants' sex. After controlling for such difference in study features in Model C1, the effect size of HCR-20 was still significantly larger than that of PCL-R, $\chi^2(1) = 12.45$, $p = .0004$, and the effect size of PCL Factor 1 was still significantly smaller than that of PCL-R, $\chi^2(1) = 20.89$, $p < .0001$, and that of Factor 2, $\chi^2(1) = 31.79$, $p < .0001$. The rest of the instruments were no different from the PCL-R in their predictive efficacy. Raw effect sizes of risk instruments and their estimated efficacy determined with Model C1 are presented in Table 3. It can be seen that after taking into account the data structure, the country of study, participants' sex, mean age of participants, follow-up time to the outcome, and type of study, the predictive efficacy of the risk instruments all fall between a range of 0.56 and 0.71 in terms of the AUC value, with the majority falling within a narrow range of 0.65–0.69. According to the general rule of the effect size, d values = 0.2, 0.5, and 0.8 are small, medium, and

Table 2
Effect Sizes of Risk Instruments to Predict Violent Behavior From Multilevel Regression Analysis

Variable	Model B1 Estimate (*SE*)	Model A Estimate (*SE*)	Model B2 Estimate (*SE*)	Model B3 Estimate (*SE*)
Overall	0.636 (0.016)	0.664 (0.046)	0.666 (0.047)	0.637 (0.064)
Instrument: PCL-R	Reference		Reference	Reference
OGRS	0.088 (0.028)***		0.134 (0.030)***	0.130 (0.141)
VRAG	0.129 (0.022)***		0.105 (0.024)***	0.089 (0.071)
RM2000V	0.072 (0.029)*		0.132 (0.031)***	0.204 (0.153)
HCR-20	0.095 (0.022)***		0.136 (0.024)***	0.243 (0.068)***
H10	0.021 (0.022)		0.061 (0.023)**	0.059 (0.067)
C5	−0.128 (0.022)***		−0.080 (0.024)***	0.038 (0.071)
R5	−0.152 (0.023)***		−0.107 (0.024)***	0.051 (0.073)
PCL:SV	0.184 (0.026)***		0.094 (0.030)**	0.068 (0.087)
PCL-R/PCL:SV Factor 1	−0.315 (0.023)***		−0.310 (0.024)***	−.335 (0.073)***
PCL-R/PCL:SV Factor 2	0.084 (0.022)***		0.090 (0.024)***	0.061 (0.073)
LSI/LSI-R	−0.058 (0.055)		−0.042 (0.062)	−0.023 (0.129)
GSIR	0.073 (0.036)*		−0.069 (0.040)	0.063 (0.119)
VRS	0.013 (0.033)		−0.135 (0.041)**	−0.025 (0.117)
VRS Static	0.148 (0.034)***		0.009 (0.042)	−0.047 (0.129)
VRS Dynamic	0.188 (0.034)***		0.041 (0.042)	0.013 (0.129)
Others[a]	−0.341 (0.064)***		−0.525 (0.106)***	−0.424 (0.242)
Level of variance				
Between study		0.0445 (0.015)**	0.0521 (.014)**	0.0500 (0.015)**
Within study		0.0478 (0.007)***		0.0249 (0.004)***
−2 log-likelihood	1,400.91	265.60	599.96	201.39
χ^2 for goodness of fit	1,135.30*** (Model B1 vs. A)		800.95*** (Model B1 vs. B2)	398.57*** (Model B2 vs. B3)

Note. $N = 174$. See text for description of the models. PCL-R = Psychopathy Checklist—Revised; OGRS = Offender Group Reconviction Scale; VRAG = Violence Risk Assessment Guide; RM2000V = Risk Matrix 2000 for Violence; HCR-20 = Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; H10 = 10-item Historical subscale of the HCR-20; C5 = 5-item Clinical subscale of the HCR-20; R5 = 5-item Risk Management subscale of the HCR-20; PCL:SV = Psychopathy Checklist: Screening Version; LSI/LSI-R = Level of Service Inventory/Revised version; GSIR = General Statistical Information for Recidivism; VRS = Violence Risk Scale.
[a] Others included the Sexual Violence Risk–20 and the Static 99.
* $p \leq .05$. ** $p \leq .01$. *** $p \leq .001$.

large effects, respectively (Cohen, 1988). Thus the instruments included in this study demonstrated medium effects for predicting violence risk. As PCL-R Factor 1 showed no predictive effect (*CI* overlaps with 0), the efficacy of the PCL-R and the PCL:SV were mainly explained by Factor 2 (or Part 2 for PCL:SV). The three subscales of the HCR-20 were all predictive, with medium effects respectively. The larger effect size in the HCR-20 total seemed to suggest some incremental effects among the subscales. For the VRS, the Dynamic scale appeared to contribute more to the total than to the Static scale, but there was no significant difference between them as a result of the limited number of studies of this instrument.

Association of Study Characteristics With Predictive Effect Size

Results in Model C1 demonstrated that country of study, mean time of follow-up, type of study, and sex of participants significantly affected predictive efficacy for violent outcomes. In general, the U.S. studies reported smaller effect sizes by a mean of −0.513 compared with studies conducted in Canada, $\chi^2(1) = 20.99$, $p < .001$. Prospective studies reported a larger effect size by a mean of 0.156 compared with retrospective studies, $\chi^2(1) = 4.82$, $p = .028$. Longer follow-up time was associated with larger effect size, $\chi^2(1) = 7.73$, $p = .0005$, and studies on women and mixed samples reported larger effect sizes by a mean of 0.045, $\chi^2(1) = 5.68$, $p = .017$, and 0.245, $\chi^2(1) = 9.03$, $p = .0038$, respectively, compared with studies utilizing only men.

Model C2 tested interactive effects between study origin and sex, between instruments and sex for differentiated effect sizes. Including these interactions in Model C2 significantly improved the goodness of model fit over Model C1, $\chi^2(7) = 179.34$, $p < .0001$, as shown in Table 4.

Compared with Model C1, in Model C2 the efficacy of the OGRS for men became significantly larger than that for the PCL-R, $\chi^2(1) = 5.25$, $p = .022$, by a mean of 0.315, whereas for women, the effect size was considerably reduced by −0.81, $\chi^2(1) = 132.9$, $p < .0001$. There was a significantly reduced efficacy of the RM2000V for women, $\chi^2(1) = 13.22$, $p = .003$, and an increased efficacy of the PCL-R/PCL:SV Factor 1 for women, $\chi^2(1) = 14.53$, $p = .0001$. The overall effect size for women in the U.S. studies was significantly lower than that of others by −0.48, $\chi^2(1) = 4.44$, $p = .035$, whereas the effect size for men in the U.S. studies was no different from that in other studies, $\chi^2(1) = 3.69$, $p = .055$. Furthermore, the difference between prospective and retrospective studies now became nonsignificant, $\chi^2(1) = 1.43$, $p = .230$.

Other consistent findings in both models C1 and C2 were as follows: (a) better efficacy of the HCR-20 compared with the PCL-R total, (b) poorer efficacy of PCL-R/PCL:SV Factor 1 (for men) compared with the PCL-R total, and (c) larger effect sizes for

Table 3
Efficacy of Risk Instruments in Predicting Violent Outcomes

Instrument	No. reports	No. participants	Raw effect size (minimum, maximum)	Model C1 estimates (weighted and adjusted)	
				Effect size (95% *CI*)	*AUC* (r_{pb})
PCL-R	16	3,854	0.64 (0.08, 1.15)	0.55 (0.37, 0.74)	0.65 (0.27)
PCL:SV	8	2,506	0.76 (0.47, 1.11)	0.65 (0.40, 0.90)	0.68 (0.31)
PCL-R/PCL:SV Factor 1	13	3,895	0.34 (−0.19, 0.65)	0.22 (0.00, 0.45)	0.56 (0.11)
PCL-R/PCL:SV Factor 2	13	3,995	0.71 (0.32, 1.11)	0.61 (0.38, 0.84)	0.67 (0.30)
OGRS	2	1,955	0.60 (0.14, 0.83)	0.78 (0.45, 1.11)	0.71 (0.36)
RM2000V	3	1,784	0.75 (0.58, 0.97)	0.76 (0.41, 1.11)	0.70 (0.35)
VRAG	17	4,894	0.74 (0.14, 1.13)	0.68 (0.44, 0.92)	0.68 (0.32)
HCR-20	16	4,161	0.85 (0.28, 1.34)	0.79 (0.56, 1.02)	0.71 (0.37)
H10	18	4,725	0.66 (−0.03, 1.11)	0.61 (0.38, 0.84)	0.67 (0.29)
C5	14	4,078	0.64 (−0.11, 1.20)	0.59 (0.40, 0.78)	0.66 (0.29)
R5	12	3,998	0.63 (0.00, 1.13)	0.60 (0.37, 0.83)	0.66 (0.29)
GSIR	3	988	0.81 (0.68, 1.06)	0.67 (0.37, 0.97)	0.68 (0.25)
LSI-R	3	355	0.58 (0.47, 0.69)	0.51 (0.20, 0.82)	0.65 (0.25)
VRS	4	1,148	0.59 (−0.12, 1.10)	0.53 (0.22, 0.83)	0.65 (0.25)
VRS-Static	3	1,098	0.46 (0.08, 0.87)	0.51 (0.21, 0.84)	0.65 (0.25)
VRS-Dynamic	3	1,098	0.49 (−0.15, 0.87)	0.57 (0.27, 0.89)	0.66 (0.28)

Note. PCL-R = Psychopathy Checklist—Revised; PCL:SV = Psychopathy Checklist Screening Version; OGRS = Offender Group Reconviction Scale; RM2000V = Risk Matrix 2000 for Violence; VRAG = Violence Risk Assessment Guide; HCR-20 = Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; H10 = 10-item Historical subscale of the HCR-20; C5 = 5-item Clinical subscale of the HCR-20; R5 = 5-item Risk Management subscale of the HCR-20; GSIR = General Statistical Information for Recidivism; LSI-R = Level of Service Inventory—Revised; VRS = Violence Risk Scale.

female participants (except for a U.S. study) and mixed-sex studies than for male-only studies.

Sex-differentiated predictive efficacy of the risk instruments is presented in Figure 1. The mean effect size and its 95% confidence interval (*CI*) for each of seven instruments and certain subscales were derived from the estimates of Model C2. The OGRS and the RM2000V demonstrated considerably better efficacy in predicting violence for men than for women, whereas PCL-R/PCL:SV Factor 1 had a larger effect size for women than for men. No sex difference was found for PCL-R and PCL:SV total scores, HCR-20, or PCL-R/PCL:SV Factor 2.

Variance of Effect Sizes Explained

Through multilevel models, the total variance of random effects in the effect sizes was decomposed into variance between and within studies. If a variable is known to contribute to a source of variance component, adding such a variable to the model will result in a substantial reduction in variance attributed to that component. Table 5 shows variances of both between and within study in four nested models: A, B3, C2, and C3. Model A is the "empty" model without any covariate effects; Model B3 is the elaborated model with instrument effects only; Model C2 is a further elaboration with both instruments and study features effects; and, finally, Model C3 includes effects of outcome categories in addition to all variables in Model C2. The reduction of 48.1% of the within-study variance in Model B3 compared with Model A was related to differences between instruments. However, 51.9% of within-study variation remained significant and unexplained, $\chi^2(1) = 35.0, p < .0001$. Compared with Model A, the marked 76.6% reduction of between-study variance in Model C2 was mainly related to study features, such as mean age of participants, follow-up time, proportion of women participants, sex-differentiated efficacy between countries and in risk instruments.

However, the study-level variance of Model C2 was still significantly larger than zero ($p < .05$), which could relate to the use of different criterion measures by different studies. To test our hypothesis, we added the outcome criterion category as another moderator in Model C2, to form Model C3. With four outcome categories, three variables were entered into the model to estimate differences in effect sizes between violent official criminal recidivism, excluding sexual offenses and robbery (the reference category) and (a) physical aggression within an institution; (b) actual, attempted, or threat of harm to others (as defined by HCR-20); and (c) broadly defined violent official criminal recidivism, including sexual offense and robbery. The new model, Model C3, estimated a moderately larger effect size from studies with the broadly defined violence by a mean 0.239, $\chi^2(1) = 4.64$, $p < .05$, than that of the reference category but no difference among the other three. The between-study variance was reduced further by 31.9% to 0.0068 compared with that of Model C2, indicating the absence of any study differences, $\chi^2(1) = 3.27$, $p = .071$. All other significant findings in Model C2 remained unchanged.

Considering the impact of heterogeneity of study on effect sizes reported in literatures, we compared effect sizes of studies between models without and with adjustment of study features in Figure 2. Without taking into account heterogeneity among studies, Model B1 yielded a wide range of effect sizes across studies, from 0.08 to 1.03, with an overall mean of 0.64 (AUC = 0.67). With adjustments in Model C1, the effect sizes of most studies were significantly reduced, with a mean estimate of 0.55 (AUC = 0.65). Overlapping confidence intervals of the estimates in the studies indicated no substantive differences.

Discussion

The critical importance of violence assessment, prediction, and reduction in forensic mental health and criminal justice practices has resulted in the rapid research and development of violence

Table 4
Effect Sizes of Risk Instruments and Associations of Study Features to Predict Violent Behavior

Instrument	Model C1 Estimate (*SE*)	Model C2 Estimate (*SE*)
Overall	0.554 (0.094)	0.629 (0.097)
Instrument: PCL-R	Reference	Reference
OGRS	0.231 (0.139)	0.315 (0.138)*
VRAG	0.123 (0.071)	0.116 (0.071)
RM2000V	0.204 (0.149)	0.245 (0.147)
HCR-20	0.240 (0.068)***	0.249 (0.068)***
H10	0.054 (0.068)	0.061 (0.068)
C5	0.032 (0.072)	0.040 (0.071)
R5	0.043 (0.073)	0.050 (0.073)
PCL:SV	0.095 (0.087)	0.094 (0.086)
PCL-R/PCL:SV Factor 1	−.335 (0.074)***	−0.341 (0.073)***
PCL-R/PCL:SV Factor 2	0.061 (0.073)	0.067 (0.073)
LSI-R	−.045 (0.129)	−.063 (0.128)
GSIR	0.120 (0.121)	0.106 (0.120)
VRS	−.021 (0.116)	−.002 (0.115)
VRS-Static	−.040 (0.127)	−.022 (0.126)
VRS-Dynamic	0.019 (0.127)	0.038 (0.126)
Others[a]	−.425 (0.228)	−.381 (0.221)
Country		
Sweden vs. Canada	−.015 (0.119)	−.025 (0.111)
United Kingdom vs. Canada	−.172 (0.086)	−.167 (0.081)
United States vs. Canada	−.513 (0.112)***	−.299 (0.156)
Holland vs. Canada	0.114 (0.155)	0.058 (0.146)
Germany vs. Canada	−.490 (0.201)*	−.361 (0.198)
Study type		
Prospective vs. retrospective	0.156 (0.071)*	0.094 (0.078)
Type of participants		
Psychiatric patients vs. prisoners	0.022 (0.097)	0.017 (0.096)
Mixed vs. prisoners	−.132 (0.109)	−.086 (0.102)
Participant gender		
Women only vs. men only	0.045 (0.019)*	0.108 (0.027)***
Mixed gender vs. men only	0.245 (0.081)***	0.192 (0.081)*
Mean age of participants	−.003 (0.005)	−.013 (0.005)**
Mean time at risk (months)	0.0028 (0.0011)**	0.0020 (0.001)*
Women-only study in United States		−.476 (0.226)*
OGRS for Women		−.807 (0.070)***
PCL:SV for Women		0.082 (0.136)
PCL-R/PCL:SV Factor 1 for Women		0.240 (0.063)***
PCL-R/PCL:SV Factor 2 for Women		0.025 (0.063)
RM2000V for Women		−.251 (0.069)***
HCR-20 for Women		−.011 (0.061)
Level of variance		
Between study	0.0132 (0.0056)*	0.0104 (0.0048)*
Within study	0.0257 (0.0043)***	0.0253 (0.0042)***
−2 log-likelihood	170.85	−8.50
χ^2 for goodness of fit	30.55** (Model B3 vs. C1)	179.35*** (Model C1 vs. C2)

Note. $N = 174$. PCL-R = Psychopathy Checklist—Revised; OGRS = Offender Group Reconviction Scale; VRAG = Violence Risk Assessment Guide; RM2000V = Risk Matrix 2000 for Violence; HCR-20 = Historical, Clinical, and Risk Management Violence Risk Assessment Scheme; H10 = 10-item Historical subscale of the HCR-20; C5 = 5-item Clinical subscale of the HCR-2-; R5 = 5-item Risk Management subscale of the HCR-20; PCL:SV = Psychopathy Checklist: Screening Version; LSI-R = Level of Service Inventory—Revised; GSIR = General Statistical Information for Recidivism; VRS = Violence Risk Scale.
[a] Others included the Sexual Violence Risk–20 and the Static 99.
* $p \leq .05$. ** $p \leq .01$. *** $p \leq .001$.

prediction methodologies. Clinicians and researchers now have available to them an assortment of well-constructed and well-validated tools that purport to assess and predict violence to various degrees. Which tool or tools can provide the most accurate prediction of violence is an important theoretical and practical question. Recent attempts to answer this question by way of meta-analytic reviews of the literature have produced inconsistent results, in part because of various methodological issues. In the present study, we attempted to answer the question of which tool can best predict violence by comparing the predictive efficacy of nine commonly used risk assessment tools with multilevel regression models based on a within-study design that addressed many

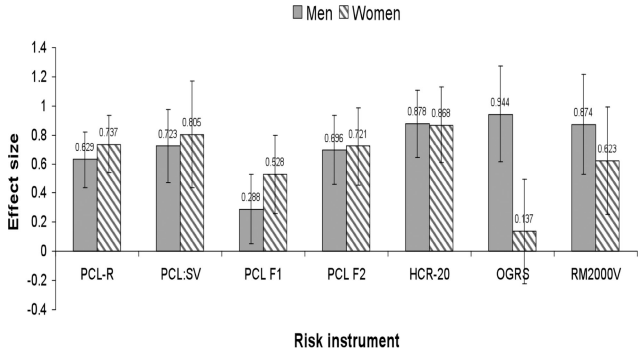

Figure 1. Effect sizes and 95% confidence intervals by gender from Model C2. PCL-R = Psychopathy Checklist—Revised; PCL:SV = Psychopathy Checklist: Screening Version; PCL F1 = Psychopathy Checklist—Revised and Psychopathy Checklist: Screening Version Factor 1; PCL F2 = Psychopathy Checklist—Revised and Psychopathy Checklist: Screening Version Factor 2; HCR-20 = Historical–Clinical–Risk Management–20; OGRS = Offender Group Reconviction Scale; RM2000V = Risk Matrix 2000 for Violence.

key methodological issues. Overall, our results showed that all of the nine tools predicted violence at above-chance levels, with medium effect sizes, and no one tool predicting violence significantly better than any other. In sum, all did well, but none came first.

Comparison of the Predictive Efficacies of the Tools and Subscales

Only the OGRS (when applied to men) and the HCR-20 were found to predict significantly better than the PCL-R; all other instruments predicted better than chance at about a medium level of efficacy (AUC range from .65 to .70). PCL-R/PCL:SV Factor 1 was significantly worse compared with total PCL-R scores. We discuss the tools individually and then the implications for violence risk prediction, assessment, and management.

OGRS. For the OGRS, both the construction and the validation/prediction samples consisted of United Kingdom prisoners. It is to be expected that the OGRS would enjoy some predictive advantage because of the similarity of the two samples. Schwalbe's (2007) meta-analyses also found similar effects. Until the predictive efficacy of the OGRS can be compared with samples different to its construction sample, it is premature to conclude that such a predictive advantage will generalize.

HCR-20. Consistent with the literature, we also found the HCR-20 predicted violence better than the PCL-R/PCL:SV. However, PCL-R/PCL:SV scores are used to rate one of its 20 items and are thus already embedded in the HCR-20. The additional Historical, Clinical, and Risk Management variables in the tool would be expected to improve on violence prediction. Removal of the psychopathy item in the HCR-20 may remove the prediction advantage of the HCR-20 over the PCL-R, and this was indeed shown to be the case by de Vogel et al. (2004). We were not able to disentangle this confound in our analyses. For research purposes, the total HCR-20 scores are often derived from summing individual HCR-20 item scores, a practice the developers of the HCR-20 specifically cautioned against in the clinical use of the tool (Webster et al., 1997, p. 22). It is, therefore, unclear to what extent the present findings, based entirely on summing of the scores, could be generalized to the clinical use of the tools. For the above reasons, it is premature to conclude that the HCR-20 predicted violence better than the PCL-R. We also found that each of the three HCR-20 subscales demonstrated similar predictive effects compared with other risk instruments. The three subscales also appeared to have a synergistic effect: The overall predictive efficacy appeared higher when the subscales were combined, which is the way the tool was developed. As the present results indicate, this is how it should be used.

PCL-R, PCL-SV, Factors 1 and 2. The average PCL-R effect size (0.64) was smaller than, but still within, the 95% *CI* of Salekin's meta-analysis and close to Walters's (2003b) findings. The PCL:SV effect size was larger than that for the PCL-R. However, this difference in the effect sizes did not exceed chance after adjusting for study characteristics and other random effects. The effect size (.55, AUC = .65) of the PCL-R is comparable to that of the other tools. However, Factor 1, which assesses the core psychopathic personality features, demonstrated practically no predictive efficacy (effective size = .22, AUC = .56); it was the only scale among the 16 investigated with effect size overlapping with 0. Recent meta-analyses on institutional adjustment and recidivism, on youth recidivism, and among civil psychiatric patients also produced similar findings (Edens et al., 2006; Skeem & Mulvey, 2001; Walters, 2003a, 2003b). Together, these findings

Table 5
Variance of Effect Sizes Estimated and Attributors

Variable	Model A	Model B3	Model C2	Model C3
Variation level				
Between study	0.0445**	0.0495**	0.0104*	0.0068
Within study	0.0478***	0.0248***	0.0253***	0.0253***
		Model B3 vs. A	Model C2 vs. A	Model C3 vs. A
% Reduction of variance				
Between study			76.6	84.7
Within study		48.1	47.1	47.1
Total		19.5	61.3	65.1
Attributes to variance reduction		Differences in instruments	Differences in instruments and study features	Differences in instruments, study features, and outcome criterion

* $p \leq .05$. ** $p \leq .01$. *** $p \leq .001$.

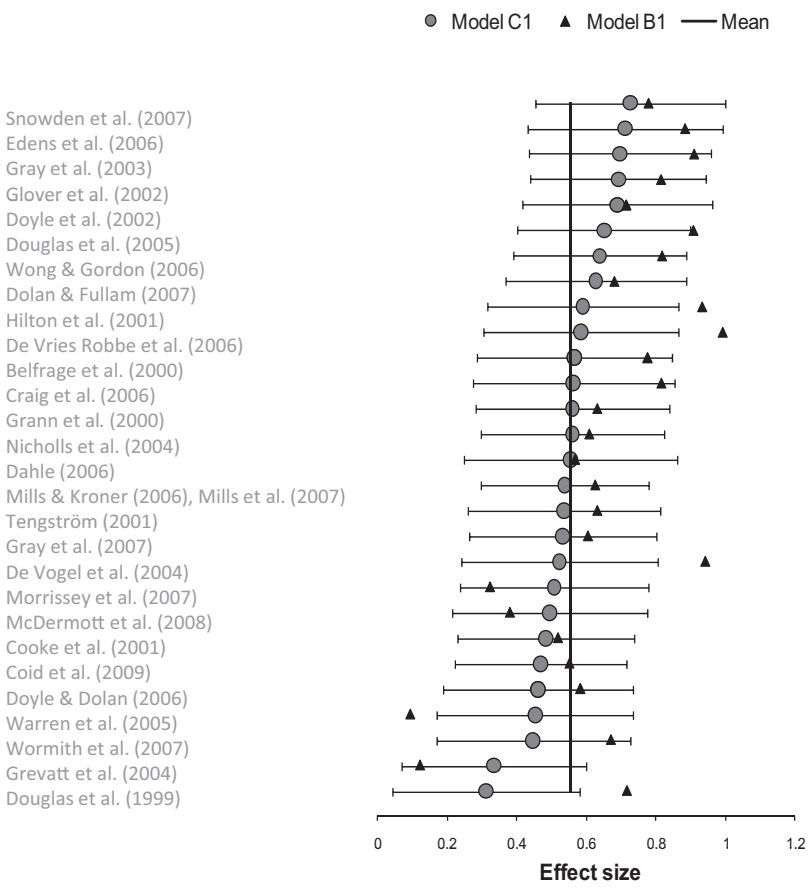

Figure 2. Effect sizes of studies with 95% confidence intervals estimated from Model C.

suggest that Factor 1 personality features, the core personality features of psychopathy, are not linked to violence. The predictive efficacy of the PCL-R appeared to be attributable almost entirely to Factor 2 (effect size of .61, AUC = .67), which is essentially a measure of previous criminality and antisocial behavior, such as impulsivity, criminal versatility, and irresponsibility (often termed *criminogenic characteristics*). Previous violence and criminality are powerful predictors of future violence and criminality, which may explain why the predictive efficacy of Factor 2 is similar to the RM2000V and OGRS, tools that also rely heavily on past criminality to predict violence.

VRAG. We found an effect size of 0.68 for the VRAG based on 4,894 participants in 17 studies, which is comparable to the AUC value in a recent meta-analysis of 14 effect sizes (Campbell et al., 2009) but smaller than that found in the construction sample (AUC of 0.76; Harris et al., 1993). The mean follow-up for the construction study was 6.80 years compared with only 3.07 years in this meta-analysis; our finding may therefore not be unexpected given that we found larger effect sizes with longer follow-up time.

Past studies comparing predictive effects between the VRAG and the PCL-R or PCL:SV were either inconsistent (Campbell et al., 2009; Coid et al 2009; Douglas, Yeomans, & Boer, 2005; Glover et al., 2002; Hilton, Harris, & Rice, 2001; Loza & Loza-Fanous, 2001; Mills & Kroner, 2006) or reported higher effect sizes of the PCL-R/PCL:SV than of the VRAG (Doyle & Dolan 2006; Kroner & Loza, 2001; Kroner & Mills, 2001; Loza & Green, 2003). The present results indicated that any difference in effect sizes between the two measures was due to chance after adjusting for study characteristics and correlations between instruments.

LSI-R. The effect size of the LSI-R in the present study (AUC = 0.65) was identical to that from a previous large-scale meta-analysis (Gendreau et al., 2002) and close to that from a meta-analysis by Walters (2003a; AUC = 0.67) in predicting institutional adjustment and recidivism (see also a recent meta-analysis by Campbell et al., 2009, which reported an AUC of 0.61). Our finding of similar predictive effects between the LSI-R and the PCL-R is consistent with previous findings.

Risk Matrix 2000 for Violence, OGRS, and sex effects. Whereas there was no difference for either the RM2000 V or the OGRS compared with the PCL-R for the combined sample of men and women (Model C1), we showed for the first time that predictive efficacies for both tools were significantly better for men than for women when men and women were considered separately (Model C2). The sex effect may be due to the fact that both tools were developed with male offenders in mind. For example, predictors such as offense history, which is a good risk predictor for men in the United Kingdom, and was selected for that purpose, did not perform as well for women in the United Kingdom (Coid et al., 2009). Furthermore, female participants in this study had a significantly higher prevalence of Axis I clinical syndromes, such as

affective disorder, psychotic illness, and substance use dependence (Coid et al., 2009); similar variables demonstrated smaller predictive ability with the HCR-20 among women compared with men. The sex-differential effects of the two instruments in predicting violence in the present study, with United Kingdom prison samples only, require further research with non–United Kingdom offender samples.

VRS. The VRS, which has both static and dynamic factors in separate domains, allows for within-subject comparison of the predictive efficacies of these domains. In contrast with static predictors, dynamic predictors are useful in guiding treatment intervention by identifying treatment targets linked to violence and measuring treatment change. The VRS and the PCL-R have similar predictive efficacies (effect sizes of .53 and .55, respectively), whereas the VRS dynamic domain performed slightly, but not significantly, better than the static domain (effect size of .57 vs. .51 respectively). The results highlight that static and dynamic predictors appeared to perform equally well in predicting violence recidivism. However, the clinical usefulness of dynamic variables outweighs the static ones in risk reduction treatment and management of forensic clients.

Conclusions and Implications

The HCR-20 and the OGRS showed statistically significantly larger effect sizes than the PCL-R, but such findings are tentative at best and did not exceed the other instruments by a large amount. This level of difference, even if replicated, is not likely to be translated into a meaningful level of difference in clinical practice. In contrast, a recent meta-analysis that compared the efficacy of five risk assessment tools (the HCR-20, the LSI-R, the PCL-R, the GSIR, and the VRAG) in predicting violence recidivism revealed that the HCR-20 and the PCL-R had similar predictive efficacies (overlapping 95% sample-adjusted *CI*s), whereas the VRAG performed better than the HCR-20 (with nonoverlapping but a small separation in their *CI*s). However, the *CI* of the VRAG overlapped with that of the LSI-R and PCL-R (Campbell et al., 2009). In essence, when differences in predictive efficacies for violence between instruments are found in different meta-analytic studies, they are usually not large and are inconsistent.

In all, based on our overall findings and the literature, such as Campbell et al. (2009), we conclude that there is no appreciable or clinically significant difference in the violence-predictive efficacies of the nine tools after accounting for differences in study features and other unexplained random effects with multilevel regression analysis. If prediction of violence is the only criterion for the selection of a risk assessment tool, then the tools included in the present study are essentially interchangeable. It would follow that the choice of using any one of the nine tools over another should be based largely on what additional relevant clinical, criminal justice, or management functions the tool of choice can perform, rather than on how well it can predict violence in comparison with other tools. Furthermore, predictive efficacy is essentially very similar when we contrasted second-generation (e.g., VRAG) with third-generation (e.g., LSI-R) tools, theoretically derived (e.g. PCL-R) with empirically derived tools (e.g., GSIR), or tools consisting of only static/unchangeable predictors (e.g., RM2000) with tools with both static and dynamic/changeable predictors (e.g., VRS). The instruments' confidence intervals overlap to such an extent that it is not possible to say that any one tool predicts violence consistently and significantly better than any others.

We are not implying that all of the tools are equivalent in all respects; different tools are designed for different functions in addition to risk prediction. Tools with dynamic risk predictors can assess change in risk (see Olver et al., 2007) while those with static predictors cannot. The PCL-R was designed for assessing a personality construct, whereas the LSI Case Management Inventory can inform on case management processes and the VRS, on treatment readiness and change. The knowledgeable assessor needs to select the appropriate tool from his or her toolbox for the purpose at hand. The nine tools have similar efficacy in violence predictions, but they have other important differences.

Despite the many conceptual and theoretical differences in the tools, why are they so similar when it comes to predicting violence? We can only speculate, but we posit first that, for the purpose of making violence predictions, the risk factors in the different tools could have been drawing from the same pools of variance that reflect a long-standing pattern of dysfunctional and aggressive interpersonal interactions and antisocial and unstable lifestyle that are common to many perpetrators of violence. The risk factors are probably different labels we use to tap into these common variances. The results of the study by Kroner, Mills, and Reddon (2005), which revealed that risk factors in many tools are essentially interchangeable, nicely illustrates this point.

After almost five decades of developing risk prediction tools, the evidence increasingly suggests that the ceiling of predictive efficacy may have been reached with the available technology. Other approaches such as tree modeling (Steadman et al., 2000) and Neural Networks (Price et al., 2000) require further exploration, but it is unlikely that a very high level of predictive accuracy is achievable because of theoretical constraints. Violent behavior is the result of the individual interacting with the immediate environment. Although it may be possible to improve on our understanding and predicting what an individual may do in hypothetical situations, it will be much more difficult to predict the situation that an individual actually encounters in the open community. Even predicting violence within an institutional environment is difficult, where the assessor has much more information about that environment.

From Risk Assessment to Risk Management

Building a better model of violence prediction should not be the sole aim of risk prediction research, which is just one link in the risk assessment–prediction–management triad that aims to achieve violence reduction and improved mental health. Risk management could be achieved by providing better treatment and continuity of care, but it must rely on good risk assessment. The risk, need and responsivity principles derived from the theory of the psychology of criminal conduct (see Andrews & Bonta, 1998, 2003, 2006, 2010; Andrew et al., 1990) provide a useful theoretical framework for risk reduction intervention. Appropriate risk assessment can identify high-risk individuals in need of more intensive management and intervention, by means of the risk principle. Using tools with dynamic risk predictors to assess risk can identify appropriate changeable treatment targets linked to violence (the need principle) in particular for treatment-resistant clients who require more specialized intervention (the responsivity principle). Assessment tools with dynamic or changeable

predictors, such as the HCR-20, the VRS, and the LSI-R can accomplish some of these tasks provided that the dynamic predictors are, in fact, causal predictors according to criteria set forth by Kraemer et al. (1997). A causal risk predictor is one that can be manipulated and, when it is manipulated, results in corresponding changes in the outcome measures (Kraemer et al., 1997). For example, criminal attitude is a causal risk predictor if reduction in criminal attitude with intervention in a treatment program could be linked to reduction in recidivism.

Prediction research, as typically undertaken, with tools and correlational methodologies illustrated in the present review, can elucidate the links between two variables, but it cannot establish the causal nexus between them: Correlations do not imply causation (see Arboleda-Florez & Stuart, 2000; Kraemer et al., 1997; Mullen, 2000). Risk management and violence reduction interventions require the clear understanding of causation (see Buchanan, 2008; Douglas & Skeem, 2005; Wong & Gordon, 2006); we can only intervene with confidence if we know that A causes B and that reducing A would lead to reducing B. Prediction research has identified many potential causes of violence, such as substance abuse, acute mental disorder, and criminal lifestyle. However, research is only scratching the surface of identifying causal predictors (see Andrews, Bonta, & Wormith, 2009; Hanson, Harris, Scott, & Helmus, 2007; Hudson, Wales, Bakker, & Ward, 2002; Olver & Wong, 2009; Olver et al., 2007). Understanding the causal relationships should also sharpen our predictive power. Much more research is required to identify causal risk predictors.

Our finding that Factor 1 interpersonal and affective traits of psychopathy are not linked to future violence can have important clinical and treatment implications. Treatment interventions that focus on changing these core psychopathy traits, based on the previous findings, will not have any significant impact on reducing future violence in men, even if the treatment is successful and the psychopathic traits are substantially modified. For example, The Dangerous and Severe Personality Disordered treatment program, established about ten years ago in the United Kingdom, aims at treating individuals who are dangerous or at high risk for violence and have one or more severe personality disorders, such as psychopathy, that are functionally linked to violence (Maden & Tyrer, 2003). The present results suggest that in such treatment programs, reducing the risk of violence should focus on reducing criminogenic factors rather than on reducing the core psychopathic traits.

To reduce propensity for violence among psychopathic individuals, treatment must target causal links to violence or criminogenic characteristics, such as Factor 2 characteristics, with "what works" approaches (Wong, Gordon, & Gu, 2007; Wong & Hare, 2005). However, Factor 1 core personality traits are still important clinical considerations because they interfere with treatment delivery as a result of conning, manipulative characteristics, lack of responsibility for actions, and low motivation to change. In addition, affective deficits and interpersonally exploitative behaviors could be significant impediments to the formation of a functional working alliance (Wong & Hare, 2005, p. 20). However, these are responsivity issues rather than criminogenic factors, and such responsivity issues must be appropriately managed in order for treatment to proceed.

There are a number of caveats here: lack of predictive effect of PCL-R Factor 1 for violent risk was only observed among men. Factor 1 has a small but significant effect size for women even after adjusting for study features; however, more research is required to validate these findings. Although Factor 1 did not appear to have direct links to future violence, it could interact with other risk factors, such as sexual deviance, to increase the risk of sexual violence in moderate- to high-risk sex offenders (see Hildebrand, de Ruiter, & de Vogel, 2004; Olver & Wong, 2006). Such possibilities were not tested in this meta-analysis. The present findings also point to the need to further assess the violence-predictive efficacy of Factor 1 and its derivatives (Facet 1 and Facet 2; see Hare, 2003) within the four- and the three-factor structure of the construct of psychopathy.

The Unpacking of Study Heterogeneity

It is widely accepted in meta-analysis that study heterogeneity originating from differences in study settings can be controlled for, but similar heterogeneity that originates from other sources may not be measurable or controlled for. It is convenient to use the term *random effects* to include all sources of differences attributable to heterogeneity without clearly identifying the specific attributes. Most researchers nowadays routinely apply Q statistic to test for overall random effects between studies and use weighted mean effect size to adjust for them (e.g., see Edens et al., 2006; Guy, Edens, Anthony, & Douglas, 2005; Walters, 2003a). In contrast to previous reports, the present study disentangled the total variation in effect sizes into two components: between-study variation or heterogeneity, accounting for 48%, and within-study variation, accounting for 52% of the total variance (Model A). Of the between-study heterogeneity, 85% was attributable to the age of participants, follow-up time, sex, sex–country interaction, sex–tool interaction, and outcome criteria, whereas 47% of within-study variation was attributable to instrument differences (Model C3). In sum, only about 25% of the total variance was attributable to instrument differences. Using a different type of regression analysis, a previous meta-analysis of predictive efficacy of risk tools for juvenile recidivism also showed that only 17% of the total variance in the AUC values was accounted for by type of risk tools, whereas 42% of the total variance was contributed by several methodological moderators (Schwalbe, 2007). Moderator effects in effect sizes of certain risk instruments were previously examined in some meta-analytic studies (Campbell et al., 2009; Guy et al., 2005; Walters, 2006) for different outcomes. The lack of significant effects of most moderators reported in those studies could be due to limitations of standard statistical procedures described in the early sections of this report.

By applying multilevel regression analysis that combines multivariate regression model and a random-effects model into a single model to preserve the maximum statistical power afforded by the data, we uncovered significant mean and differential effects of key moderators that were major sources of study heterogeneity. After controlling for these sources of study heterogeneity by explicitly modeling the effects of moderators, we were able to compare the predictive efficacies of risk instruments in a more effective and less biased manner based on homogeneous study samples. In essence, we created a statistically level playing field on which to compare the risk tools, a strategy that has many obvious advantages.

That age and follow-up time are significant moderators is not surprising. The association of increase age with a decrease in

prevalence in offending—the age–crime curve—is a well-established finding in criminology (Hirschi & Gottfredson, 1983). Violent offending occurs much less frequently than nonviolent offending. For example, the offense histories in a sample of over 900 Canadian federal offenders in their mid-30s showed that nonviolent convictions were more than five times more likely than violent convictions (Wong & Gordon, 2006). As such, longer follow-up time is expected to be associated with larger effect size as it takes more time to accumulate a substantial number of violent infractions for assessing predictive efficacy.

The variation of predictive efficacy for women in terms of instruments, country, and clinical characteristics (Factor 1) is complex. Needless to say, more studies are required to unravel these relationships, and it is important not to overinterpret the present results, as they are based on relatively few studies from a limited number of countries.

Predictive efficacy of risk assessment instruments may differ depending on the use of different outcome criteria. We found predictions of the broadly defined criterion of violence to have larger effect sizes than those of other three categories of violent outcome, contributing 8.2% to study heterogeneity and independent of the effects of other study features or moderators. A previous meta-analysis (Campbell et al., 2009) also found differences in predictive efficacy for institutional violence compared with violence recidivism. Most studies that used the broadly defined criterion of violence drew from samples of Canadian prisoners, and seven out of nine tools we compared were developed in Canada using Canadian forensic samples. It is possible that the larger effect size of the one outcome criterion could be associated with the similarity of the study samples with the construction samples on which the tools were developed. We did not model differential effects between outcome category and individual risk instruments, as such analyses might cause overfitting of our model. Further research is required to assess the replicability of the findings and the validity of our hypothesis.

Unpacking study heterogeneity with multilevel regression analyses has important implications. In validating risk assessment tools, one must take into account, either in the study design or in the statistical analyses, the various potential sources of heterogeneity.

Limitations

First, the literature search may not have included all published and unpublished papers that met our inclusion criteria, and some systematic biases may be introduced into article selection. However, these biases were minimized by using two persons to select and review the articles.

Second, a range of outcomes were used as criterion variables in the reviewed studies, and prediction efficacies vary with types of outcome Violence also varied in quality (type of violence), severity (harm inflicted), and frequency of occurrence (base rate). To truly compare the predictive efficacy of the tools, one needs to equate the outcomes or criterion variables of the predictions. Most, if not all, of the studies reviewed used prediction of the first occurrence of violence rather than prediction of a pattern of violence as the criterion variable; the latter has just as much, if not more, relevance to violence prediction, management, and reduction. The present study, as in other meta-analytic studies, is inevitably limited by the criterion reported in the studies.

A caveat that is common to many meta-analyses is that there is no control over the quality of the study and the data, nor proprietary interests; no study was excluded on the basis of quality considerations in the present analyses. We did not code for study quality, although some meta-analysts do so, and we did not code for proprietary interests. We also did not investigate the "operation" of the subscales within the mother tool (such as that of the HCR-20, the PCL-R, and the VRS), as doing so would involve major factor- analytic studies that were beyond the scope of this analysis. Findings on lower effect sizes of predictive efficacy in studies on U.S. women must be considered tentative as a result of the small numbers of studies included in the analysis.

Recommendations

On the basis of the results of present meta-analyses and review of the literature, we put forth the following recommendations.

1. All risk assessment instruments (excluding subscales) included in the study predicted violent recidivism moderately well, and their predictive efficacies were not significantly different. Because of their moderate level of predictive efficacy, they should not be used as the sole or primary means for clinical or criminal justice decision making that is contingent on a high level of predictive accuracy, such as preventive detention.

2. The selection of a tool for clinical or research purposes should be determined more by what other functions the tool can perform than its violence prediction efficacy per se.

3. Efforts should be directed toward investigating situational contingencies that precipitate violence. Little research has been carried out in this area, in contrast to individual variability.

4. The efficacy in identifying risk predictors and extracting prediction information from them based on the current methodology of summing ratings of predictors (exemplified by all the tools under study) may have reached a plateau. Future research should explore other novel means of identifying and combining risk predictors, for example, the tree method and neural network approaches, including all aspects of the risk assessment process, such as different categorizations of violent offender groups, criteria of violence, and additional situational or dynamic predictors that might be specific for violent prediction (Yang, Liu, & Coid, 2010).

5. More research should be carried out to identify causal predictors of violence to inform violence reduction interventions and to improve the accuracy of prediction.

6. The present results suggest that Factor 2 rather than Factor 1 of the PCL-R predict violence. It is hypothesized that when intervening to reduce violence among psychopathic individuals, efforts directed at changing Factor 2 (criminality) characteristics should be more effective than those directed at Factor 1 (personality) characteristics. Future research should test this hypothesis directly.

7. More studies of violence prediction should be undertaken with female participants as the pattern of prediction results for women appeared significantly different, in many instances, from those of men. Most prediction tools have been developed for use with men.

8. A common metric to assess different dimensions of violence, such as quality, severity, and frequency should be developed to facilitate between-study comparisons of the criterion variables.

9. Multilevel regression model analysis may be the preferred tool for meta-analysis where common methodological issues include (a) presence of random effects in effect size due to heterogeneity among studies, (b) lack of statistical power to draw meaningful conclusions due to small sample size, and (c) the need to adjust for characteristics of studies in order to estimate the pooled effect size. The nature of multilevel models in handling data with clustering effects and dependency also opens the door for meta-analysts to estimate effect sizes based on studies reporting efficacy measures at different follow-up times within study, effect sizes of correlated multiple outcomes, or effect sizes based on studies with individual data.

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Appendix

A Brief Description of Seven Risk Assessment Tools

The Violence Risk Appraisal Guide (VRAG; Harris et al., 1993) is a 12-item actuarial tool designed to assess risk of violent recidivism and can be used for men apprehended for criminal violence and with male mentally disordered offenders. The items assess early childhood problems, alcohol problems, criminal history, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed. [*DSM-III*]; American Psychiatric Association, 1980) diagnoses of schizophrenia, personality disorder, and so forth. The items are differentially weighted as reflected by the score assigned to the item and can be rated on the basis of a comprehensive social history. The Psychopathy Checklist score is included as one of the items and has the largest weight. Each total score has been associated with one of nine categories with a known likelihood of violent recidivism based on data from the construction sample with 7 years of follow-up data. The VRAG has been extensively validated with an average area under the curve (AUC) of .72 for the prediction of violent recidivism (Rice & Harris, 2005).

The Violent Risk Scale (VRS; Wong & Gordon, 2001, 2006) uses six static and 20 dynamic variables derived primarily from the risk, need, and responsivity principles (Andrew & Bonta, 2003). The VRS dynamic variables (measuring violence-linked attitudes, cognition, emotional regulation, community support, etc.) are changeable; changes in the dynamic factors have been shown to be associated with changes in recidivism in the community (Olver, Wong, Nicholaichuk, & Gordon, 2007). The VRS dynamic and static variables are equally weighted and are all rated on 4-point Likert scales (0, 1, 2 or 3) based on file review and a semi-structured interview. For most variables, higher ratings indicate a closer link to violence. Dynamic variables closely linked to violence (rated 2 or 3) are appropriate targets for violence reduction treatment. The total VRS score indicates the level of violence risk; the higher the score, the higher is the risk. The VRS is appropriate for use with male offenders and forensic psychiatric patients. The AUC of .74 has been reported for the prediction of violent recidivism (Wong & Gordon, 2006).

The Historical–Clinical–Risk Management–20 (HCR-20; Webster, Douglas, Eaves, & Hart, 1997) is a 20-item violence risk assessment tool based on the structured professional judgment model of risk assessment. This model relies on the assessor scoring the items and clinically combining the items to arrive at a risk estimate of low, medium, or high. The Historical domain assesses the presence of personality disorder, major mental illnesses, psychopathy (using formally assessed PCL-R or PCL:SV scores), history of violence, and so forth; the Clinical domain assesses insight, active symptoms of mental illness, impulsivity, and so forth; and the Risk Management domain assesses exposure to destabilizers, availability of support and stress, and so forth. Ratings of the items are based on file information and interview. (Formal PCL-R assessment of psychopathy and diagnosis of mental disorder based on *Diagnostic and Statistical Manual of Mental Disorders* or the International Classification of Diseases is required.) The median AUC value for the HCR-20 total score across 42 studies was .69 based on the summation of the numeric scores of the HCR-20 (see Douglas & Reeves, 2009).

The Level of Service Inventory—Revised (LSI-R; Andrews & Bonta, 1995) is a 54-item survey of indicators of risk and need across 10 components: Criminal History, Education/Employment, Financial, Family/Marital, Accommodation, Leisure/Recreation, Companions, Alcohol/Drug Problems, Emotional/Personal, and Attitude /Orientation. Some items are scored *absent* (0) or *present* (1); other items are rated 0 to 3, indicating very high risk) or very low risk, respectively, on the basis of file review and interview. A most recent meta-analyses of the LSI-R indicated a predictive validity for violent recidivism with an adjusted effect size of .28 (AUC = .61).

The Offender Group Reconviction Scale—Version 2 (OGRS-2; Copas & Marshall, 1998) is a 12-item rating tool based almost entirely on past offending history and demographic information, such as offence category; various offence history indicators, such as burglary, breach of an official order, offender's age at time of sentence and earliest possible release, gender, and a composite variable that measures the quantity and speed of past offending. Rating can be done based on file review alone, as all variables are either demographic or historical in nature. Predictive validity (AUC) on a large sample of male offenders has been found to be about .72 (Coid et al., 2009).

(*Appendix continues*)

The Risk Matrix 2000V (RM2000V) is a three-item rating tool designed to predict nonsexual violence in adult males serving a prison sentence. The items are age, number of sentencing occasions for nonsexual violence, and ever conviction for burglary. Scoring can be done from file information alone. Predictive validity determined with samples of prisoners ranged from AUCs of .78 to .80 depending on length of follow-up (see Thornton, 2007).

The General Statistical Information on Recidivism Scale (GSIR; Bonta, Harman, Hann, & Cormier, 1996), originally developed in 1982 by Nuffield, is 15-item rating scale designed to assess the risk of general re-offending. Items are all historical in nature and include criminal history, marital status, and employment status and are rated with weighted scores. Lower scores on the instrument are related to higher risk for recidivism. The instrument has been reliably associated with general recidivism (AUC = .76) and has been found to predict violent recidivism as well (Bonta et al., 1996).

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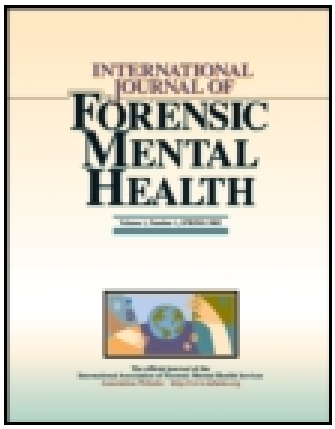

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International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries

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International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries

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Mental health professionals are routinely called upon to assess the risk of violence presented by their patients. Prior surveys of risk assessment methods have been largely circumscribed to individual countries and have not compared the practices of different professional disciplines. Therefore, a Web-based survey was developed to examine methods of violence risk assessment across six continents, and to compare the perceived utility of these methods by psychologists, psychiatrists, and nurses. The survey was translated into nine languages and distributed to members of 59 national and international organizations. Surveys were completed by 2135 respondents from 44 countries. Respondents in all six continents reported using instruments to assess, manage, and monitor violence risk, with over half of risk assessments in the past 12 months conducted using such an instrument. Respondents in Asia and South America reported conducting fewer structured assessments, and psychologists reported using instruments more than psychiatrists or nurses. Feedback regarding outcomes was not common: respondents who conducted structured risk assessments reported receiving feedback on accuracy in under 40% of cases, and those who used instruments to develop management plans reported feedback on whether plans were implemented in under 50% of cases. When information on the latter was obtained, risk management plans were not implemented in over a third of cases. Results suggest that violence risk assessment is a global phenomenon, as is the use of instruments to assist in this task. Improved feedback following risk assessments and the development of risk management plans could improve the efficacy of health services.

Keywords: violence, risk assessment, survey, international, mental health

INTRODUCTION

In light of heightened media attention on the link between violence and mental illness, there has been an increased demand for accurate and reliable methods of assessing

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violence risk (Brown, 2013). This focus on prevention is not new, however. The World Health Organization named violence prevention as one of its priorities over a decade ago (WHO, 2002). Moreover, current clinical guidelines for psychologists (American Psychological Association, 2006), psychiatrists (American Psychiatric Association, 2004; National Institute for Health and Clinical Excellence, 2009), and nurses (Nursing and Midwifery Council, 2004) recommend the routine assessment of violence risk for patients diagnosed with major mental illnesses. In recent decades, numerous violence risk assessment instruments have been developed to aid in this task. These instruments combine known risk and protective factors for violence either mechanically (the "actuarial approach") or based on clinical discretion (the "structured professional judgment", or SPJ, approach). They have been widely implemented in mental health and criminal justice settings, where they are used by psychologists, psychiatrists, and nurses to inform medico-legal decisions including commitment, classification, service plan development, and release (Conroy & Murrie, 2007).

As there are a large number of risk assessment tools available, practitioners are faced with the challenge of selecting the instrument that they feel to be the best fit for their population and that will best guide treatment planning. Indeed, recent meta-analyses suggest that risk assessment instruments may discriminate between violent and non-violent individuals with comparable accuracy (Yang, Wong, & Coid, 2010), implying that it may not be possible to base tool choice solely on predictive validity. In light of such findings, experts have recommended a shift in focus during the tool selection process (Skeem & Monahan, 2011), concentrating on the assessment needs of the practitioner in terms of the purpose of the evaluation, the population being assessed, and the outcome of interest (Singh, Grann, & Fazel, 2011). Thus, knowledge of which tools are currently being used in practice and which of them colleagues working in similar settings believe to be most useful may be informative. Surveys represent one approach to obtaining such information.

According to a search of PsycINFO, EMBASE, and MEDLINE, nine surveys have been published between January 1, 2000 to January 1, 2013 investigating violence risk assessment practices (Archer, Buffington-Vollum, Stredny, & Handel, 2006; Bengtson & Pedersen, 2008; Green, Carroll, & Brett, 2010; Hawley, Gale, Sivakumaran, & Littlechild, 2010; Higgins, Watts, Bindman, Slade, & Thornicroft, 2005; Khiroya, Weaver, & Maden, 2009; Lally, 2003; Tolman & Mullendore, 2003; Viljoen, McLachlan, & Vincent, 2010). The studies have provided evidence that risk assessment tools are commonly used in practice by psychologists in the United States, the United Kingdom, Denmark, and Australia. Though the quality of these surveys vary (Hurducas, Singh, de Ruiter, & Petrila, in this issue), they have consistently found that actuarial instruments and personality scales are used more commonly in the violence risk assessment process than SPJ instruments.

These surveys have advanced our understanding of the use of violence risk assessment tools, but also share important limitations. First, no surveys have been published comparing what instruments are used in routine practice on different continents. Second, previous surveys have not compared patterns of tool use and perceived utility across professional disciplines. Third, previous surveys have not attempted to disentangle risk assessment, management, and monitoring practices. Consequently, many questions remain regarding the application of risk assessment tools in practice. Specifically, what instruments are currently being used, how frequently, in what context, by whom, and where? The answers to such questions may help guide individual clinicians working with mental health and criminal justice populations to identify and implement the risk assessment tools with the greatest acceptability, efficacy, and fidelity (Andrews & Bonta, 2010). Hence, the present study aimed to investigate violence risk assessment practices in psychologists, psychiatrists, and nurses on six continents using a multilingual Web-based survey.

METHODS

Respondents

Mental health professionals were eligible to participate if they were between the ages of 18 to 65 years and had assessed the violence risk of at least one adult in their lifetime ($N = 2135$). Respondents included psychologists ($n = 889$, 41.6%), psychiatrists ($n = 368$, 17.2%), nurses ($n = 622$, 29.1%), and other professionals ($n = 256$, 12.0%) in 44 countries (Figure 1). The majority of respondents were from Europe ($n = 1062$, 49.7%) followed by North America ($n = 444$, 20.8%), Australasia ($n = 112$, 5.3%), Asia ($n = 60$, 2.8%), South America ($n = 57$, 2.7%), and Africa ($n = 4$, 0.2%). Demographic and clinical characteristics by professional discipline and continent are provided in Tables 1 and 2, respectively, and for the overall sample in Appendix 1.

Survey

The survey included closed-ended questions developed through a review of the violence risk literature and drawn from previous surveys of clinicians concerning forensic assessment practices. Questions were organized into three blocks: (1) demographic and clinical characteristics, (2) prevalence and frequency of risk assessment instrument use, and (3) use and perceived utility of instruments in risk assessment, management, and monitoring.

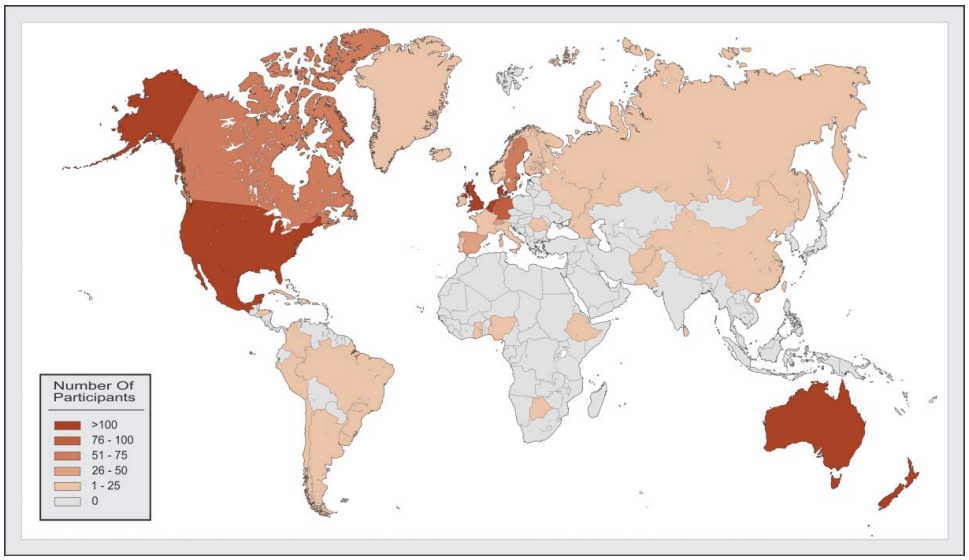

FIGURE 1 Countries participating in an international survey on violence risk assessment practices.

In the first block, respondents were asked about their demographic backgrounds and clinical activities over the past 12 months. Specifically, respondents were asked to approximate the total number of violence risk assessments conducted over their lifetime as well as in the past 12 months, estimating the percentage of those assessments conducted with the aid of an instrument. Respondents also reported how often they received feedback concerning the accuracy of their risk assessments, as well as how often they learned whether the risk management plans they developed were implemented. In the second block, respondents reported the prevalence and frequency with which they used specific instruments in the risk assessment process over the past 12 months. (A list of instruments was constructed using recent reviews of the risk assessment literature, and respondents could identify up to three additional measures.) Frequency of use was rated on a 6-point Likert-type scale (0 = *Almost never*; 5 = *Always*). In the third block, respondents reported the tasks for which they used the specific tools identified in the second block (i.e., to inform judgments of violence risk, to develop violence risk management plans, and/or to monitor such plans). Perceived utility of instruments in the identified task(s) was rated on a 7-point Likert-type scale (0 = *Very useless*; 6 = *Very useful*).

Procedure

The study was conducted in four phases between January to December 2012: (1) material development, (2) translation, (3) distribution, and (4) data analysis. The institutional review board at the University of South Florida approved all study procedures and waived the need for written informed consent (IRB Approval Number: Pro00007104).

In Phase 1 (January 2012–February 2012), the Web-based survey was constructed using Qualtrics electronic survey software (www.Qualtrics.com). The list of survey questions were compiled in English and piloted by members of the Florida Mental Health Institute as well as 16 international experts representing the countries of Argentina, Australia and New Zealand, Belgium, Canada, Chile, Denmark, Germany, Hong Kong, Mexico, The Netherlands, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. These collaborators provided feedback that was used to make further refinements prior to translation and distribution.

In Phase 2 (March 2012–August 2012), the survey and participation letter were professionally translated from English into eight additional languages: Danish, Dutch, French, German, Portuguese, Spanish (Latin American), Spanish (European), and Swedish. Translation services were provided by Software and Documentation Localization International (www.SDL.com). Translated materials were then sent to the international collaborators for back-translation. Identified discrepancies were corrected by the first author.

In Phase 3 (September 2012–November 2012), participation letters were distributed electronically via ListServs, membership directories, or bulletins of 59 national and international professional organizations (see Appendix 2 for a full list). The letters were distributed by each expert collaborator in their resident country's native language. Where available, the membership of at least three national organizations was targeted: (1) a national organization of psychologists (e.g., American Psychology-Law Society), (2) a national organization of psychiatrists (e.g., American Academy of Psychiatry and the Law), and (3) a national organization of nurses (e.g., Forensic Psychiatric Nurses Council). Where available, organizations of forensic specialists were identified. The membership of international

TABLE 1
Demographic and Clinical Characteristics of Survey Respondents by Continent

Characteristic	Continent of Practice Over the Past 12 Months[a]									
	North America ($n = 444$)		South America ($n = 57$)		Europe ($n = 1062$)		Asia ($n = 60$)		Australasia ($n = 112$)	
Demographic										
Men (n, %)	164	(36.94)	30	(52.63)	431	(40.58)	22	(36.67)	43	(38.39)
Age in years (M, SD)	46.13	(11.91)	43.03	(9.36)	43.12	(10.55)	37.56	(10.14)	45.29	(10.35)
Years in practice (M, SD)	17.59	(11.62)	16.05	(10.55)	14.92	(10.20)	11.94	(9.45)	19.26	(11.54)
Clinical setting over past 12 months										
General hospital ($M_{\%\ \text{Time}}$, SD)	18.09	(34.09)	10.83	(22.07)	2.67	(12.50)	10.61	(26.10)	10.92	(25.96)
Private practice ($M_{\%\ \text{Time}}$, SD)	27.80	(38.19)	24.52	(29.29)	7.51	(21.45)	6.33	(24.00)	19.61	(33.22)
Non-forensic psych hospital ($M_{\%\ \text{Time}}$, SD)	6.97	(21.81)	5.65	(15.55)	16.14	(32.69)	28.40	(39.30)	9.18	(23.17)
Non-forensic psych clinic ($M_{\%\ \text{Time}}$, SD)	7.71	(23.08)	1.87	(9.82)	12.93	(29.55)	15.53	(30.91)	15.86	(31.69)
Forensic psych hospital ($M_{\%\ \text{Time}}$, SD)	9.08	(25.82)	4.74	(14.97)	24.52	(39.31)	19.58	(34.97)	6.74	(21.72)
Forensic psych clinic ($M_{\%\ \text{Time}}$, SD)	5.09	(18.21)	6.12	(19.76)	9.91	(25.39)	2.76	(10.86)	6.52	(19.71)
Correctional institute ($M_{\%\ \text{Time}}$, SD)	8.29	(24.09)	20.25	(36.12)	15.31	(32.39)	13.85	(32.09)	18.03	(35.29)
Other ($M_{\%\ \text{Time}}$, SD)	1.50	(9.51)	11.83	(26.68)	2.12	(11.45)	0.16	(1.29)	4.73	(17.40)
Professional responsibilities over past 12 months										
Practice ($M_{\%}$, SD)	57.08	(30.88)	54.38	(23.62)	48.63	(25.30)	68.36	(19.09)	59.09	(24.80)
Administrative duties ($M_{\%}$, SD)	16.57	(18.82)	15.73	(17.02)	24.89	(17.00)	12.31	(11.68)	18.38	(16.82)
Teaching or supervision ($M_{\%}$, SD)	14.14	(16.56)	13.05	(11.74)	11.85	(12.02)	9.56	(8.43)	14.38	(17.43)
Research ($M_{\%}$, SD)	8.47	(15.35)	6.40	(8.90)	6.23	(13.21)	7.71	(10.49)	6.33	(10.14)
Other ($M_{\%}$, SD)	3.71	(13.65)	10.42	(21.89)	8.41	(19.39)	2.03	(9.03)	1.82	(6.64)
Risk assessment history										
RA over lifetime (M, SD)	573.47	(1495.54)	701.98	(1655.74)	413.28	(1914.41)	364.40	(665.50)	841.23	(2735.87)
RA with SRAI over lifetime ($M_{\%}$ SD)	52.13	(38.71)	40.22	(34.50)	58.88	(37.85)	33.20	(36.04)	62.08	(35.93)
RA over past 12 months (M, SD)	42.44	(95.01)	50.39	(77.02)	36.12	(82.29)	78.35	(175.55)	51.95	(120.45)
RA with SRAI in past 12 months ($M_{\%}$, SD)	51.24	(42.92)	41.66	(37.02)	63.04	(40.75)	30.20	(37.91)	62.80	(42.17)
Characteristics of examinees over past 12 months										
Men ($M_{\%}$, SD)	63.14	(37.07)	72.89	(31.61)	80.13	(27.74)	69.40	(31.27)	80.27	(27.60)
Psychotic disorder ($M_{\%}$, SD)	24.27	(30.48)	16.52	(23.47)	31.60	(32.33)	50.26	(30.79)	36.17	(34.68)
Mood disorder ($M_{\%}$, SD)	28.34	(28.22)	14.33	(17.11)	10.02	(16.67)	20.73	(26.91)	22.26	(25.20)
Anxiety disorder ($M_{\%}$, SD)	17.20	(24.35)	7.96	(14.50)	6.19	(14.61)	7.26	(18.45)	10.56	(17.43)
SU disorder ($M_{\%}$, SD)	35.37	(33.33)	43.82	(30.88)	27.39	(30.50)	25.15	(28.87)	43.88	(35.50)
Personality disorder ($M_{\%}$, SD)	28.91	(33.02)	35.01	(32.26)	41.19	(31.77)	24.08	(27.77)	37.02	(28.93)
Other disorder ($M_{\%}$, SD)	9.58	(22.13)	11.22	(21.52)	11.56	(23.75)	6.78	(15.43)	6.84	(19.68)

Note. n = number of respondents; M = mean; SD = standard deviation; Psych = psychiatric; SU = substance use; SRAI = structured risk assessment instrument.

[a]Excluding respondents from Africa ($n = 4$).

forensic mental health organizations (e.g., International Association of Forensic Mental Health) was also targeted.

To the extent possible, survey distribution followed the Dillman Total Design Survey Method (Dillman, Smyth, & Christian, 2009). Specifically, participation letters were sent via e-mail on a Friday and contained direct and active links to the survey. Two reminder e-mails were sent in seven day increments after the initial distribution to remind potential respondents about the study. A fourth e-mail was also sent indicating a final opportunity to participate. Respondents who completed the survey and volunteered their e-mail addresses were entered into a raffle for eight cash prizes, each valued at $50 USD. At the end of the data collection period, winners were randomly selected from the pool of respondents.

In Phase 4 (December 2012 to August 2013), respondent data was exported from Qualtrics to STATA/IC 10.1 and SPSS 17.01 for analysis. Descriptive and statistical analyses were conducted on the 12 most commonly used instruments in the violence risk assessment process. However, over 200 commercially available instruments and a further 200 institutionally- or individually-developed instruments were reported as being used. Frequency distributions were examined and measures of central tendency and dispersion were calculated for all variables. Differences between continents (North American, South America, Europe, Asia, Australia)[1] and professional disciplines (psychologists, psychiatrists, nurses)[2] regarding the percentage of assessments conducted using an instrument and the regularity with which risk assessment and management feedback is given were

[1]Given the small sample size from Africa, it was excluded from continental analyses.

[2]Professionals who did not self-report as being psychologists, psychiatrists, or nurses (e.g., social workers, counsellors, probation officer, law enforcement officer) were excluded from these analyses.

TABLE 2
Demographic and Clinical Characteristics of Survey Respondents by Professional Discipline

Characteristic	Professional Discipline[a]					
	Psychology ($n = 889$)		Psychiatry ($n = 368$)		Nursing ($n = 622$)	
Demographic						
Men (n,%)	321	(36.11)	208	(56.52)	225	(36.17)
Age in years (M, SD)	41.70	(11.32)	46.96	(10.30)	46.00	(9.94)
Years in practice (M, SD)	13.20	(9.78)	16.83	(9.72)	20.28	(11.30)
Clinical setting over past 12 months						
General hospital ($M_{\%\ \text{Time}}$, SD)	3.03	(14.65)	10.50	(23.42)	13.57	(31.16)
Private practice ($M_{\%\ \text{Time}}$, SD)	19.60	(33.94)	16.35	(29.52)	6.32	(21.84)
Non-forensic psych hospital ($M_{\%\ \text{Time}}$, SD)	5.47	(19.63)	22.65	(34.25)	21.10	(36.69)
Non-forensic psych clinic ($M_{\%\ \text{Time}}$, SD)	6.17	(21.06)	13.94	(28.03)	20.93	(36.69)
Forensic psych hospital ($M_{\%\ \text{Time}}$, SD)	17.94	(35.18)	20.03	(34.20)	18.22	(36.18)
Forensic psych clinic ($M_{\%\ \text{Time}}$, SD)	9.10	(24.72)	7.41	(18.96)	4.70	(18.45)
Correctional institute ($M_{\%\ \text{Time}}$, SD)	23.44	(38.62)	4.96	(14.78)	2.46	(13.30)
Other ($M_{\%\ \text{Time}}$, SD)	3.22	(14.70)	0.87	(6.32)	0.67	(5.02)
Professional responsibilities over past 12 months						
Practice ($M_{\%}$, SD)	51.22	(26.83)	61.76	(22.23)	45.66	(29.39)
Administrative duties ($M_{\%}$, SD)	19.82	(16.14)	17.49	(17.13)	27.53	(19.90)
Teaching or supervision ($M_{\%}$, SD)	13.90	(15.08)	11.06	(8.94)	13.07	(15.28)
Research ($M_{\%}$, SD)	8.87	(15.90)	6.01	(9.75)	4.28	(10.54)
Other ($M_{\%}$, SD)	6.20	(16.38)	3.66	(12.39)	9.45	(21.12)
Risk assessment history						
RA over lifetime (M, SD)	207.90	(690.72)	624.37	(1791.65)	650.05	(2401.35)
RA with SRAI over lifetime ($M_{\%}$ SD)	67.35	(36.61)	36.49	(35.31)	48.88	(37.56)
RA over past 12 months (M, SD)	21.99	(52.77)	45.62	(95.22)	47.75	(119.58)
RA with SRAI in past 12 months ($M_{\%}$, SD)	72.62	(37.56)	43.84	(40.65)	48.35	(42.26)
Characteristics of examinees over past 12 months						
Men ($M_{\%}$, SD)	84.33	(27.99)	76.76	(27.89)	65.64	(31.75)
Psychotic disorder ($M_{\%}$, SD)	20.56	(29.46)	45.83	(30.92)	38.07	(32.13)
Mood disorder ($M_{\%}$, SD)	14.92	(22.37)	13.84	(20.14)	17.15	(22.14)
Anxiety disorder ($M_{\%}$, SD)	8.67	(17.51)	5.73	(14.71)	9.87	(18.21)
SU disorder ($M_{\%}$, SD)	32.48	(32.80)	33.81	(31.70)	23.67	(28.64)
Personality disorder ($M_{\%}$, SD)	45.03	(33.21)	38.51	(30.60)	29.09	(28.89)
Other disorder ($M_{\%}$, SD)	12.31	(25.15)	8.72	(19.52)	8.28	(20.09)

Note. n = number of respondents; M = mean; SD = standard deviation; Psych = psychiatric; SU = substance use; SRAI = structured risk assessment instrument.

[a]Excluding respondents who self-identified as being members of other professional disciplines ($n = 256$).

explored via omnibus one-way ANOVAs. Statistical tests were two-tailed, and a Bonferroni-adjusted significance threshold of $\alpha = 0.004$ was used to address family-wise error due to multiple testing.

RESULTS

Demographic and Clinical Characteristics

The sample was composed of 2135 mental health professionals, the majority women ($n = 1288$, 60.3%). The average age of respondents was 43.9 years ($SD = 11.0$), with an average of 15.9 years ($SD = 10.7$) spent in practice. Approximately half of their time in the past 12 months was spent on clinical activities ($M = 50.9\%$, $SD = 28.2\%$), most often in forensic psychiatric hospitals ($M = 17.5\%$, $SD = 34.6\%$) followed by private practice ($M = 15.0\%$, $SD = 30.5\%$) and correctional institutions ($M = 12.7\%$, $SD = 29.9\%$). Additional professional responsibilities over the past 12 months included administrative duties ($M = 22.0\%$, $SD = 18.7\%$) and teaching ($M = 13.2\%$, $SD = 14.9\%$), with comparatively less time spent on research activities ($M = 7.2\%$, $SD = 14.4\%$).

Risk Assessment Practices

Respondents reported conducting an average of 435.5 ($SD = 1706.0$) violence risk assessments in their lifetime, over half of which ($M = 54.3\%$, $SD = 38.9\%$) were conducted using a structured instrument. They conducted an average of 34.5 ($SD = 86.9$) violence risk assessments over the past 12 months, again over half of which ($M = 58.3\%$,

$SD = 41.9\%$) were conducted using an instrument. Taking into consideration time spent conducting interviews, obtaining and reviewing records, and writing reports, structured violence risk assessments over the past 12 months took an average of 7.8 hours ($SD = 7.9$) to conduct, whereas unstructured assessments took an average of 2.8 hours ($SD = 2.7$).[3]

Of those respondents who used instruments over the past 12 months, the majority used them for the purposes of risk assessment ($n = 1134$ of 1266 respondents who specified the purpose of their instrument use, 89.6%) followed by developing risk management plans ($n = 869$, 68.6%) and monitoring those plans ($n = 499$, 39.4%). Respondents who used instruments to structure their violence risk assessments reported receiving feedback on the accuracy of their assessments in an average of 36.5% ($SD = 34.7\%$) of cases. Those who used instruments to develop risk management plans were made aware of whether those plans had been implemented in an average of 44.6% ($SD = 34.7\%$) of cases. Where such information was available, respondents reported that their proposed management plans were implemented in an average of 65.4% ($SD = 27.5\%$) of cases.

Comparisons by Geographic Location and Professional Discipline

Analyses showed differences in the prevalence of instrument use as a function of geographic location and professional discipline. Compared to North America, Europe, and Australasia, respondents in Asia and South America reported completing a smaller proportion of risk assessments with the aid of an instrument both over the lifetime, $F(4, 1706) = 11.06$, $p < .001$, $\eta^2 = 0.03$, 95% CI [0.02, 0.05], as well as over the past 12 months, $F(4, 1682) = 16.09$, $p < .001$, $\eta^2 = 0.04$, 95% CI [0.02, 0.06]. In terms of professional discipline, psychologists reported using instruments to structure their violence risk assessments more often than did psychiatrists or nurses both over their lifetime, $F(2, 1876) = 105.85$, $p < .001$, $\eta^2 = 0.10$, 95% CI [0.07, 0.11] and in the past 12 months, $F(2, 1503) = 82.35$, $p < .001$, $\eta^2 = 0.10$, 95% CI [0.07, 0.11]. Nurses reported more often obtaining feedback on whether their risk management plans had been implemented, $F(2, 770) = 10.04$, $p < .001$, $\eta^2 = 0.03$, 95% CI [0.01, 0.05], and that their risk management plans were implemented more often than psychologists or psychiatrists, $F(2, 660) = 10.19$, $p < .001$, $\eta^2 = 0.03$, 95% CI [0.01, 0.06]. Finally, psychologists reported taking significantly longer to conduct both unstructured violence risk assessments, $F(2, 202) = 10.06$, $p < .001$, $\eta^2 = 0.09$, 95% CI [0.02, 0.12], and structured violence risk assessments, $F(2, 896) = 57.33$, $p < .001$, $\eta^2 = 0.11$, 95% CI [0.10, 0.16].

[3]Findings concerning specific professional disciplines and continents are available upon request.

Specific Risk Assessment Instrument Use

More than 200 different instruments were reported as being used in the violence risk assessment process, not including over 200 additional instruments developed for personal or institutional use only. In the present study, we describe the prevalence and perceived utility of those 12 instruments used most commonly by respondents over the past year. Six of these were actuarial instruments and six were SPJ instruments.

The prevalence and frequency of risk assessment instrument use over the past 12 months is reported by professional discipline and continent in Tables 3 and 4, respectively, and for the overall sample in Appendix 3. Over both their lifetime and in the past 12 months, respondents reported that the instruments most commonly used in the violence risk assessment process were the Historical, Clinical, Risk Management-20 (HCR-20; $n_{\text{Lifetime}} = 1032$ of 2135 respondents, 48.34%; $n_{\text{Year}} = 669$ of 2135, 31.33%) (Webster, Douglas, Eaves, & Hart, 1997), Psychopathy Checklist-Revised (PCL-R; $n_{\text{Lifetime}} = 836$, 39.16%; $n_{\text{Year}} = 513$, 24.03%)[4] (Hare, 2003), and Psychopathy Checklist: Screening Version (PCL:SV; $n_{\text{Lifetime}} = 409$, 19.16%; $n_{\text{Year}} = 195$, 9.13%) (Hart, Cox, & Hare, 1995). Those who used specific instruments were also asked how frequently they used them. Respondents who used the HCR-20 ($M = 3.71$, $SD = 1.65$), PCL-R ($M = 3.32$, $SD = 1.58$), and the Historische, Klinische, Toekomstige-30 (HKT-30; $M = 3.16$, $SD = 1.73$) (Werkgroep Pilotstudy Risicotaxatie Forensische Psychiatrie, 2002) at some point in their lifetime reported using these most frequently. Over the past 12 months, the HCR-20 ($M = 4.40$, $SD = 1.58$), HKT-30 ($M = 4.33$, $SD = 1.71$), and the Forensisches Operationalisiertes Therapie-Risiko-Evaluations-System (FOTRES; $M = 4.33$, $SD = 1.71$) (Urbaniok, 2007) were the most frequently administered instruments by their users.

The HCR-20 was the instrument most commonly used for conducting violence risk assessments, developing risk management plans, and monitoring risk management plans (Table 5). Those who used SPJ instruments including the HCR-20, HKT-30, FOTRES, the Short-Term Assessment of Risk and Treatability (Webster, Martin, Brink, Nicholls, & Desmarais, 2009), and the Structured Assessment of PROtective Factors (de Vogel, de Ruiter, Bouman, & de Vries Robbé, 2007) rated these tools, on average, as being very useful for these tasks. Notably, the HKT-30 and FOTRES were virtually only used by professionals practicing in Europe.

[4]Consistent with previous surveys on forensic risk assessment, we did not assume that the use of instruments that incorporate the PCL-R as an item necessarily meant that the PCL-R was used. For example, the HCR-20 authors have found that the scheme performs better without the PCL-R (Guy, Douglas, & Hendry, 2010) and the VRAG manual allows for prorating should this information be missing (Quinsey et al., 2006).

TABLE 3
Risk Assessment Instrument Prevalence and Frequency of Use Over the Past 12 Months by Continent

	Continent of Practice Over Past 12 Months[a]									
	North America ($n = 286$)		South America ($n = 35$)		Europe ($n = 782$)		Asia ($n = 39$)		Australasia ($n = 112$)	
Instrument	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)
COVR	44 (15.38)	3.27 (1.22)	4 (11.43)	2.66 (1.52)	11 (1.41)	3.11 (1.26)	3 (7.69)	4.00 (1.00)	1 (0.89)	3.00 (—)
FOTRES	9 (3.15)	4.11 (1.76)	0 (0.00)	— (—)	52 (6.65)	4.30 (1.76)	1 (2.56)	3.00 (—)	0 (0.00)	— (—)
HCR-20	102 (35.66)	4.58 (1.56)	14 (40.00)	4.21 (1.57)	499 (63.81)	4.43 (1.54)	18 (46.15)	3.16 (1.61)	44 (39.29)	4.14 (1.74)
HKT-30	1 (0.35)	6.00 (—)	0 (0.00)	— (—)	51 (6.52)	4.29 (1.71)	0 (0.00)	— (—)	0 (0.00)	— (—)
LSI-R	22 (7.69)	4.31 (1.78)	0 (0.00)	— (—)	37 (4.73)	3.64 (1.93)	1 (2.56)	4.00 (—)	18 (16.07)	4.17 (1.92)
PCL-R	101 (35.31)	4.21 (1.66)	18 (51.43)	3.83 (1.46)	366 (46.80)	3.77 (1.63)	10 (25.64)	2.90 (1.19)	30 (26.79)	2.52 (1.40)
PCL:SV	26 (9.09)	2.84 (1.43)	4 (11.43)	4.50 (1.29)	144 (18.41)	3.71 (1.67)	7 (17.95)	2.71 (1.70)	19 (16.96)	3.39 (1.72)
SAPROF	14 (4.90)	3.85 (1.79)	0 (0.00)	— (—)	125 (15.98)	3.68 (1.65)	1 (2.56)	2.00 (—)	5 (4.46)	3.20 (1.92)
START	29 (10.14)	3.50 (1.45)	0 (0.00)	— (—)	113 (14.45)	3.53 (1.78)	13 (33.33)	2.84 (1.95)	7 (6.25)	4.00 (1.26)
V-RISK-10	26 (9.09)	2.95 (1.16)	2 (5.71)	2.50 (0.70)	26 (3.32)	3.62 (1.68)	2 (5.13)	3.00 (1.41)	2 (1.79)	4.00 (—)
VRAG	47 (16.43)	4.23 (1.59)	2 (5.71)	3.00 (1.41)	123 (15.73)	3.79 (1.53)	2 (5.13)	4.00 (1.41)	6 (5.36)	1.75 (0.96)
VRS	50 (17.48)	3.16 (1.47)	5 (14.29)	3.20 (1.78)	29 (3.71)	2.76 (1.55)	4 (10.26)	4.50 (1.00)	20 (17.86)	4.80 (1.58)

Note. n = number of respondents; M = mean; SD = standard deviation; Users = number of respondents using instrument over past 12 months; Frequency = mean frequency of use rating over past 12 months; — = not applicable; COVR = Classification of Violence Risk (Monahan et al., 2005); FOTRES = Forensisch Operationalisiertes Therapie- und Risiko-Evaluations-System (Urbaniok, 2007); HCR-20 = Historical, Clinical, Risk Management-20 (Webster et al., 1997); HKT-30 = Historische, Klinische, Toekomstige-30 (Werkgroep Pilotstudy Risicotaxatie, 2002); LSI-R = Level of Service Inventory-Revised (Andrews & Bonta, 1995); PCL-R = Psychopathy Checklist-Revised (Hare, 2003); PCL:SV = Psychopathy Checklist: Screening Version (Hart et al., 1995); SAPROF = Structured Assessment of Protective Factors (de Vogel et al., 2007); START = Short-Term Assessment of Risk and Treatability (Webster et al., 2009); V-RISK-10 = Violence Risk Screening-10 (Hartvig et al., 2007); VRAG = Violence Risk Appraisal Guide (Quinsey et al., 2006); VRS = Violence Risk Scale (Wong & Gordon, 2009). Frequency use was measured using a six-point Likert scale (0 = *Almost never*; 5 = *Always*).

[a]Excluding respondents from Africa ($n = 4$).

Sensitivity Analysis

As a sensitivity analysis, univariate linear regression analyses were performed to investigate whether sex, age, or number of years in practice was associated with the percentage of risk assessments conducted using a structured instrument over respondents' lifetime and in the past 12 months. Respondent sex was not found to be associated with instrument use. Younger respondents were found to have conducted a higher percentage of their assessments using structured instruments over their lifetime, $t(2115) = 7.22$, $p < .001$, $\beta = 0.04$, 95% CI [0.03, 0.06], as well as in the past 12 months, $t(1676) = 3.94$, $p < .001$, $\beta = 0.03$, 95% CI [0.01, 0.04]. Similarly, respondents earlier in their practice careers conducted a higher percentage of their assessments using structured instruments over their lifetime, $t(2133) = 9.00$, $p < .001$, $\beta = 0.05$, 95% CI [0.04, 0.06], as well as in the past 12 months, $t(1687) = 5.74$, $p < .001$, $\beta = 0.04$, 95% CI [0.02, 0.05].

DISCUSSION

Despite the proliferation of violence risk assessment methods in mental health and criminal justice settings, research on what instruments are used in practice and their perceived utility is rare (Elbogen, Huss, Tomkins, & Scalora, 2005). Work comparing risk assessment procedures on different continents and professional disciplines is particularly

TABLE 4
Risk Assessment Instrument Prevalence and Frequency of Use Over the Past 12 Months by Professional Discipline

	Professional Discipline[a]					
	Psychology ($n = 737$)		Psychiatry ($n = 255$)		Nursing ($n = 345$)	
Instrument	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)	Number of Users (n, %)	Frequency of Use (M, SD)
COVR	18 (2.44)	3.06 (1.28)	10 (3.92)	2.40 (1.34)	19 (5.51)	3.78 (1.13)
FOTRES	27 (3.66)	4.44 (1.88)	16 (6.27)	4.18 (1.51)	13 (3.77)	4.23 (1.69)
HCR-20	379 (51.42)	4.64 (1.47)	141 (55.29)	4.06 (1.58)	112 (32.46)	4.08 (1.74)
HKT-30	46 (6.24)	4.21 (1.77)	2 (0.78)	5.50 (0.70)	2 (0.58)	5.00 (—)
LSI-R	54 (7.33)	4.01 (1.88)	7 (2.75)	2.00 (1.52)	1 (0.29)	6.00 (—)
PCL-R	363 (49.25)	3.90 (1.66)	99 (38.82)	3.58 (1.59)	23 (6.67)	2.60 (1.37)
PCL:SV	124 (16.82)	3.73 (1.60)	45 (17.65)	2.91 (1.66)	14 (4.06)	4.07 (1.77)
SAPROF	115 (15.60)	3.71 (1.63)	13 (5.10)	3.23 (1.64)	6 (1.74)	4.00 (2.28)
START	66 (8.96)	3.65 (1.70)	35 (13.33)	2.74 (1.44)	47 (13.62)	3.80 (1.87)
V-RISK-10	18 (2.44)	3.76 (1.52)	14 (5.49)	3.46 (1.45)	13 (3.77)	3.16 (1.40)
VRAG	122 (16.55)	3.85 (1.62)	34 (13.33)	3.97 (1.35)	9 (2.61)	3.37 (1.50)
VRS	44 (5.97)	3.83 (1.83)	13 (5.10)	2.84 (1.67)	36 (10.43)	3.27 (1.46)

Note. n = number of respondents; M = mean; SD = standard deviation; Users = number of respondents using instrument over past 12 months; Frequency = mean frequency of use rating over past 12 months; — = not applicable; COVR = Classification of Violence Risk (Monahan et al., 2005); FOTRES = Forensisch Operationalisiertes Therapie- und Risiko-Evaluations-System (Urbaniok, 2007); HCR-20 = Historical, Clinical, Risk Management-20 (Webster et al., 1997); HKT-30 = Historische, Klinische, Toekomstige-30 (Werkgroep Pilotstudy Risicotaxatie, 2002); LSI-R = Level of Service Inventory-Revised (Andrews & Bonta, 1995); PCL-R = Psychopathy Checklist-Revised (Hare, 2003); PCL:SV = Psychopathy Checklist: Screening Version (Hart et al., 1995); SAPROF = Structured Assessment of Protective Factors (de Vogel et al., 2007); START = Short-Term Assessment of Risk and Treatability (Webster et al., 2009); V-RISK-10 = Violence Risk Screening-10 (Hartvig et al., 2007); VRAG = Violence Risk Appraisal Guide (Quinsey et al., 2006); VRS = Violence Risk Scale (Wong & Gordon, 2009). Frequency use was measured using a six-point Likert scale (0 = *Almost never*; 5 = *Always*).

[a]Excluding respondents who self-identified as being members of other professional disciplines ($n = 256$).

scarce, making it unclear whether clinicians working in different contexts should assume the generalizability of previous survey findings. Therefore, the present study aimed to survey the use and perceived utility of violence risk assessment methods in practice by 2135 psychologists, psychiatrists, and nurses on six continents. Respondents reported using over 400 instruments to assess, manage, and monitor violence risk, with over half of risk assessments in the past 12 months conducted using such an instrument. Due to the emphasis on assessment as part of their training and practice, the majority of respondents as well as the majority of tool users were psychologists.

The survey findings may have important implications for practice and research. First, the results identify which structured instruments are being used by mental health professionals to conduct violence risk assessments, to inform the development of risk management plans and to assist in their monitoring. The findings also speak to the perceived utility of instruments in these tasks. This information may assist practitioners' selection of which risk assessment tools to implement. With the two leading approaches to structured risk assessment (actuarial and SPJ) demonstrating similar popularity and with mechanical and clinically-based tools having similar reliability and accuracy (Fazel, Singh, Doll, & Grann, 2012), the focus of instrument selection should be on the goodness-of-fit between the population and setting in which a professional is working and those for which tools were designed. Additional practical considerations include administration time, cost, training needs, and

TABLE 5
Instrument Use in Violence Risk Assessment, Management, and Monitoring Over the Past 12 Months

	All respondents ($N = 976$)					
Instrument	Number of RA Users (*n*,%)	Usefulness in RA (*M, SD*)	Number of RMx Users (*n*,%)	Usefulness in RMx (*M, SD*)	Number of RMon Users (*n*,%)	Usefulness in RMon (*M, SD*)
COVR	37 (3.79)	3.81 (0.78)	33 (3.38)	3.73 (1.15)	28 (2.87)	3.96 (1.32)
FOTRES	50 (5.12)	4.14 (1.05)	35 (3.59)	4.49 (0.89)	28 (2.87)	4.36 (1.06)
HCR-20	588 (60.25)	4.44 (0.78)	453 (46.41)	4.40 (0.80)	237 (24.28)	4.13 (0.92)
HKT-30	46 (4,71)	4.52 (0.69)	31 (3.18)	4.48 (0.72)	20 (2.05)	4.00 (0.86)
LSI-R	66 (6.76)	4.09 (1.05)	51 (5.23)	3.90 (1.20)	22 (2.25)	3.59 (1.30)
PCL-R	461 (47.23)	4.26 (0.84)	326 (33.40)	3.75 (1.06)	162 (16.60)	3.09 (1.31)
PCL:SV	164 (16.80)	4.05 (0.89)	137 (14.04)	3.61 (0.99)	73 (7.48)	3.12 (1.29)
SAPROF	127 (13.01)	4.35 (0.83)	100 (10.25)	4.44 (0.73)	52 (5.33)	4.02 (0.98)
START	132 (13.52)	4.19 (0.97)	117 (11.99)	4.32 (0.88)	92 (9.43)	4.26 (0.85)
V-RISK-10	34 (3.48)	3.88 (0.77)	29 (2.97)	3.97 (1.09)	18 (1.84)	4.11 (1.08)
VRAG	151 (15.47)	4.03 (0.92)	97 (9.94)	3.21 (1.22)	55 (5.64)	2.93 (1.43)
VRS	72 (7.38)	4.14 (1.03)	69 (7.07)	4.10 (0.96)	42 (4.3)	4.10 (0.88)

Note. n = number of respondents; RA = risk assessment; RMx = risk management; RMon = risk monitoring; M = mean; SD = standard deviation. COVR = Classification of Violence Risk (Monahan et al., 2005); FOTRES = Forensisch Operationalisiertes Therapie- und Risiko-Evaluations-System (Urbaniok, 2007); HCR-20 = Historical, Clinical, Risk Management-20 (Webster et al., 1997); HKT-30 = Historische, Klinische, Toekomstige-30 (Werkgroep Pilotstudy Risicotaxatie, 2002); LSI-R = Level of Service Inventory-Revised (Andrews & Bonta, 1995); PCL-R = Psychopathy Checklist-Revised (Hare, 2003); PCL:SV = Psychopathy Checklist: Screening Version (Hart et al., 1995); SAPROF = Structured Assessment of Protective Factors (de Vogel et al., 2007); START = Short-Term Assessment of Risk and Treatability (Webster et al., 2009); V-RISK-10 = Violence Risk Screening-10 (Hartvig et al., 2007); VRAG = Violence Risk Appraisal Guide (Quinsey et al., 2006); VRS = Violence Risk Scale (Wong & Gordon, 2009). Perceived utility was measured using a 7-point Likert scale (0 = *Very useless*; 6 = *Very useful*).

personal preference for a tool's approach to assessment (Desmarais & Singh, 2013). Given that the users of SPJ instruments rated them as very useful in the development and monitoring of risk management plans, assessors working in rehabilitation and recovery-focused settings may wish to consider adopting such tools (e.g., HCR-20, HKT-30, FOTRES, SAPROF, START). Instruments following this approach may be particularly useful internationally, as recent meta-analytic evidence suggests that probabilistic estimates of violence risk produced by actuarial risk assessment instruments may vary considerably depending on local factors (Singh, Fazel, Gueorguieva, & Buchanan, 2013, 2014). Findings also suggest that personality scales such as the Psychopathy Checklist measures continue to be used as part of the risk assessment process. Albeit such instruments may have an important role to play in developing responsive risk management plans, they have not been found to predict violence as accurately as tools explicitly designed for the purposes of violence risk assessment (Singh et al., 2011).

Second, findings suggest a need for increased communication about violence risk assessments. Respondents who used instruments to inform their assessments reported receiving any kind of feedback on their accuracy in only a third of cases (36.5%). However, social psychology research demonstrates that judgment accuracy increases when decision-makers receive feedback about their performance (Arkes, 1991). Therefore, violence risk assessors should be provided with follow-up information on their examinees whenever possible. This may be particularly helpful in the avoidance of false negative decisions, because individuals judged to be at higher risk will, in practice, be less likely to have access to potential victims. We also found that respondents who used instruments to develop management plans frequently did not know whether their plans had been implemented (44.6%) and,

amongst those who did, proposed plans were not implemented in over a third of cases (34.6%). The latter is of principal importance: what is the use of developing risk management plans if they are not implemented into practice? Risk assessments will not reduce violence unless their findings are communicated transparently and suggestions for risk management are executed (Heilbrun, Dvoskin, Hart, & McNiel, 1999). These findings require further research to clarify what feedback on risk assessments constituted and to what extent risk management plans were implemented. Which form of feedback (e.g., obtaining court records to view judges decisions, obtaining information from criminal registers, interviewing family members) is most effective in improving accuracy could be a promising area of future research.

Third, the results may inform the research agendas of several geographic regions. Fewer than half of risk assessments in South America and Asia over the past year were conducted with the use of a risk assessment tool, despite the large evidence base demonstrating the superiority of structured methods over unstructured clinical judgment. Though it may be that this continuing trend is due to cultural differences, it is also possible that more evidence of such superiority is needed using non-Western samples to be influential in practice. Additionally, despite an existent literature on the predictive validity of risk assessment tools in these regions (Folino, Marengo, Marchiano, & Ascazibar, 2004; Ho et al., 2013), the rarity of their use may also be due to a lack of familiarity with commercially available instruments or the unavailability of authorized translations (e.g., Telles, Day, Folino, & Taborda, 2009; Zhang, Chan, Cai, & Hu, 2012). Moving forward, clinical training programs in these areas may wish to incorporate modules on violence risk assessment tools, funding agencies may wish to issue grants to encourage the development of novel instruments in native languages or the authorized translations of available tools, and there needs to be increased discussion in the field about the strengths and limitations of the contemporary literature and best-practice recommendations in international settings.

Limitations

Limitations of the present study include coverage, sampling, and nonresponse errors characteristic of probability-based surveying methods (Couper, 2000), as well as both respondent- (e.g., lack of motivation, comprehension problems, reactivity) and software-related measurement error (e.g., technical difficulties). Specifically, a response rate was unable to be established for the present survey, impeding our ability to make a statement of the generalizability of our findings. Many of our respondents were members of more than one of the organizations that assisted in the dissemination process. Also, it is likely that some respondents heard about the survey through colleagues or friends, but may not necessarily have been members of the organizations sampled. These are limitations shared by previous Web-based surveys that have been disseminated using multiple ListServs (Archer et al., 2006; Viljoen et al., 2010). Future surveys should include as an item a list of the organizations through which they disseminated calls for participation. Respondents should be allowed to identify all those organizations of which they are members. Researchers can then request information from each organization as to its membership count for the date on which the calls for participation were made. This would allow statistical correction for overlap in organizational membership, and for the calculation of a response rate. It is also difficult to assess generalizability as information is not available regarding characteristics of nonrespondents, who may have differed systematically from respondents. For example, nonrespondents who employ violence risk assessment instruments may do so less often or have significantly poorer perceptions of their utility. Another issue of generalizability is evidence that men may be less likely than women to respond to surveys (Kwak & Radler, 2002; Underwood, Kim, & Matier, 2000). Hence, the current study findings should be treated as tentative until replication attempts are made in future research.

Conclusion

The routine assessment of violence risk has become a global phenomenon, as has the use of instruments to assist in this task. Across continents, providing practitioners with feedback on the accuracy of their predictions and whether their management plans were implemented could improve the predictive validity of assessments as well as risk communication. Given the substantial evidence base supporting the benefits in reliability and validity of structured over unstructured assessment (Ægisdóttir et al., 2006), the study of violence risk assessment methods in South America and Asia should be a public health research priority. And, as the prevalence of tool use grows in additional regions such as Africa (Roffey & Kaliski, 2012) and Eastern Europe (Jovanović et al., 2009), the importance of high-quality research into psychometric properties and fidelity in implementation will become ever more important.

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APPENDIX 1
Demographic and Clinical Characteristics of All Survey Respondents

Characteristic	All respondents ($n = 2135$)	
Demographic		
Men (*n*,%)	847	(39.67)
Age in years (*M, SD*)	43.93	(10.97)
Years in practice (*M, SD*)	15.91	(10.71)
Clinical setting over past 12 months		
General hospital ($M_{\%\ \text{Time}}$, *SD*)	8.66	(24.46)
Private practice ($M_{\%\ \text{Time}}$, *SD*)	15.03	(30.46)
Non-forensic psych hospital ($M_{\%\ \text{Time}}$, *SD*)	13.27	(29.62)
Non-forensic psych clinic ($M_{\%\ \text{Time}}$, *SD*)	12.08	(28.59)
Forensic psych hospital ($M_{\%\ \text{Time}}$, *SD*)	17.48	(34.59)
Forensic psych clinic ($M_{\%\ \text{Time}}$, *SD*)	7.02	(21.35)
Correctional institute ($M_{\%\ \text{Time}}$, *SD*)	12.68	(29.87)
Other ($M_{\%\ \text{Time}}$, *SD*)	2.58	(13.07)
Professional responsibilities over past 12 months		
Practice ($M_{\%}$, *SD*)	50.91	(28.23)
Administrative duties ($M_{\%}$, *SD*)	21.95	(18.66)
Teaching or supervision ($M_{\%}$, *SD*)	13.17	(14.86)
Research ($M_{\%}$, *SD*)	7.18	(14.36)
Other ($M_{\%}$, *SD*)	6.80	(17.79)
Risk assessment history		
RA over lifetime (*M, SD*)	435.46	(1705.99)
RA with SRAI over lifetime ($M_{\%}$ *SD*)	54.32	(38.93)
RA over past 12 months (*M, SD*)	34.53	(86.87)
RA with SRAI in past 12 months ($M_{\%}$, *SD*)	58.25	(41.94)
Characteristics of examinees over past 12 months		
Men ($M_{\%}$, *SD*)	75.55	(31.87)
Psychotic disorder ($M_{\%}$, *SD*)	32.29	(33.04)
Mood disorder ($M_{\%}$, *SD*)	17.55	(23.54)
Anxiety disorder ($M_{\%}$, *SD*)	10.22	(19.16)
SU disorder ($M_{\%}$, *SD*)	31.14	(32.19)
Personality disorder ($M_{\%}$, *SD*)	36.34	(32.26)
Other disorder ($M_{\%}$, *SD*)	9.74	(22.27)

Note. n = number of respondents; M = mean; *SD* = standard deviation; Psych = psychiatric; SU = substance use; SRAI = structured risk assessment instrument.

APPENDIX 2
International and Intranational Organizations Involved in the Dissemination of Survey Materials

1. Red Iberolatinoamericana de investigación y Docencia en Salud Mental Aplicada a lo Forense
2. Royal Australian and New Zealand College of Psychiatrists
3. Societe Royale de Medecine Mentale de Belgique
4. Canadian Psychological Association - Criminal Justice Psychology Section
5. Gendarmería de Chile
6. Dansk Psykologforening, Hospitals-Sektionen
7. Bundesfachvereinigung Leitender Krankenpflegepersonen der Psychiatrie e.V., Netzwerk Forensik
8. Hong Kong College of Psychiatrists
9. Colegio Nacional de Enfermeras
10. Nederlands Instituut van Psychologen - Forensic Psychology Section
11. Instituto Nacional de Medicina Legal
12. PSI-FORENSE ListServ
13. Swedish Medical Association
14. Schweizer Gesellschaft fur Forensische Psychiatrie
15. Royal College of Nursing
16. American Academy of Psychiatry and the Law
17. International Association for Forensic Mental Health Services
18. Maestría en Salud Mental aplicada a lo Forense, Departamento de Postgrado, Facultad de Ciencias Médicas, Universidad Nacional de La Plata
19. Australian Psychological Society

20. Belgian College of Neuropsychopharmacology and Biological Psychiatry
21. Canadian Psychiatric Association
22. Dansk Retspsykologisk Selskab
23. Berufsverband Deutscher Psychologinnen und Psychologen e.V. (BDP), Sektion Rechtspsychologie
24. Hong Kong Psychological Society
25. Asociación Psiquiátrica Mexicana A.C.
26. Verpleegkundigen & Verzorgenden Nederland - Social Psychiatric Nurses Section
27. Guarda Nacional Republicana
28. Societat Catalana de Medicina Legal i Toxicologia Centre d'Estudis
29. Swedish Psychiatric Association
30. Schweizer Gesellschaft fur Rechtpsychologie
31. Royal College of Psychiatrists
32. American Psychology-Law Society
33. American Institute for the Advancement of Forensic Studies
34. Australian College of Mental Health Nurses
35. Belgian Association for Psychological Sciences
36. Canadian Academy of Psychiatry and the Law
37. Psykologfagligt Forum, Øst
38. Deutsche Gesellschaft für Psychologie (DGPs), Fachgruppe Rechtspsychologie
39. Academy of Mental Health
40. Sociedad Mexicana de Psicología A.C.
41. Nederlandse Vereniging voor Psychiatrie
42. Direcção-Geral dos Serviços Prisionais e Reinserção Social
43. Juridics i Formacio Especialitzada
44. Swedish Forensic Psychiatric Association
45. Schweizer Amt für Justiz
46. British Psychological Society
47. PSYLAW ListServ
48. Association Francophone des Infirmières spécialisées en santé mentale et Psychiatrique
49. Dansk Psykiatrisk Selskab
50. Deutsche Gesellschaft für Psychiatrie, Psychotherapie und Nervenheilkunde (DGPPN), Referat Forensische Psychiatrie
51. Policia Judiciária
52. Swedish Psychologists' Association
53. American Board of Forensic Psychology
54. Nationale Federatie van Belgische Verpleegkundigen Fédération National des Infirmières de Belgique
55. Fagligt Selskab for Psykiatriske Sygeplejersker
56. Niedersächsisches Justizministerium, Abteilung Justizvollzug und Kriminologischer Dienst
57. American Academy of Forensic Psychology
58. American Psychiatric Nurses Association
59. Forensic Behavioral Services, Inc.

APPENDIX 3
Risk Assessment Instrument Prevalence and Frequency of Use Over the Past 12 Months by All Survey Respondents

	All respondents ($n = 2135$)	
Instrument	Number of Users (n,%)	Frequency of Use (M, SD)
COVR	63 (2.95)	3.23 (1.21)
FOTRES	60 (2.81)	4.33 (1.71)
HCR-20	669 (31.33)	4.40 (1.58)
HKT-30	52 (2.44)	4.33 (1.71)
LSI-R	77 (3.61)	3.95 (1.88)
PCL-R	513 (24.03)	3.77 (1.66)
PCL:SV	195 (9.13)	3.56 (1.68)
SAPROF	144 (6.74)	3.66 (1.67)
START	160 (7.49)	3.50 (1.73)
V-RISK-10	54 (2.53)	3.29 (1.45)
VRAG	176 (8.24)	3.84 (1.57)
VRS	106 (4.96)	3.44 (1.68)

Note. n = number of respondents; M = mean; SD = standard deviation; Users = number of respondents using instrument over past 12 months; Frequency = mean frequency of use rating over past 12 months; — = not applicable; COVR = Classification of Violence Risk (Monahan et al., 2005); FOTRES = Forensisch Operationalisiertes Therapie- und Risiko-Evaluations-System (Urbaniok, 2007); HCR-20 = Historical, Clinical, Risk Management-20 (Webster et al., 1997); HKT-30 = Historische, Klinische, Toekomstige-30 (Werkgroep Pilotstudy Risicotaxatie, 2002); LSI-R = Level of Service Inventory-Revised (Andrews & Bonta, 1995); PCL-R = Psychopathy Checklist-Revised (Hare, 2003); PCL:SV = Psychopathy Checklist: Screening Version (Hart et al., 1995); SAPROF = Structured Assessment of Protective Factors (de Vogel et al., 2007); START = Short-Term Assessment of Risk and Treatability (Webster et al., 2009); V-RISK-10 = Violence Risk Screening-10 (Hartvig et al., 2007); VRAG = Violence Risk Appraisal Guide (Quinsey et al., 2006); VRS = Violence Risk Scale (Wong & Gordon, 2009). Frequency use was measured using a six-point Likert scale (0 = *Almost never*; 5 = *Always*).