

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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2010 OAL DETERMINATION NO. 27
(OAL FILE NO. CTU2010-0506-03)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: MICHAEL BRODHEIM

**CONCERNING: THE BOARD OF PAROLE HEARINGS' PSYCHOLOGICAL
EVALUATION PROCESS FOR INMATES PRIOR TO LIFE
PAROLE CONSIDERATION HEARINGS**

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

On May 5, 2010, OAL received the petition of Michael Brodheim (Petitioner), challenging the Board of Parole Hearings' (Board) psychological evaluation process for life parole consideration hearings. The Petitioner indicates that he submitted two rules being challenged as underground regulations: (1) the "attempted amendment" of section 3084.1(a) of title 15 of the California Code of Regulations, precluding the appeal of adverse psychological evaluations; and, (2) the psychological evaluation process as reflected in the California Department of Corrections and Rehabilitation Board of Parole Hearings' Forensic Assessment Division Psychological Report Process (attached as Exhibit A). After reviewing the petition submitted by Petitioner and the accompanying documentation,¹ OAL accepted the petition for consideration on the following issue:

¹ The petition included copies of a completed Inmate/Parolee Appeal Form, two declarations from psychologists, copies of Comprehensive Risk Assessments and a December 1, 2008 memorandum from the Executive Officer of the Board.

Whether the document titled "California Department of Corrections and Rehabilitation Board of Parole Hearings' Forensic Assessment Division Psychological Report Process," contains underground regulations.

The California Department of Corrections and Rehabilitation Board of Parole Hearings' Forensic Assessment Division Psychological Report Process will be referred to herein as the "Psychological Report Process."

DETERMINATION

OAL determines that the challenged Psychological Report Process contains provisions that meet the definition of a "regulation" as defined in Government Code section 11342.600 and that those provisions should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

Before January 1, 2009, psychological evaluations prepared for life parole suitability hearings did not have a specific format. In January 2009, the Board adopted a standardized process for psychological evaluations prepared for parole suitability hearings.² Various provisions of this standardized process for psychological evaluations are set forth in the Psychological Report Process.

The following are some examples of the process and requirements contained in the Psychological Report Process:

1. FAD [Forensic Assessment Division] will use the following instruments to assess the potential for future violence:
 - The Historical Clinical Risk Management – 20 (HCR-20)
 - The Hare Psychopathy Checklist – Revised (PCL-R)
 - Level of Service/Case Management Inventory (LS/CMI)
 - Static 99 – (when deemed appropriate by clinician)³
2. The Comprehensive Risk Assessments,⁴ completed every five years, will include an evaluation of the prisoner's remorse, insight, and an exploration of the commitment offense, as well as the need for additional institutional programming.⁵
3. A new report will not be completed where the inmate disagrees with the assessment or an opinion provided by the psychologist. This includes the inmate challenging the facts provided by the psychologist in the report and disputed self-admissions.⁶

² Response, page 1. The response is attached as Exhibit B.

³ Quoted from page 2 of the Psychological Report Process.

⁴ A Comprehensive Risk Assessment is an instrument by a professional evaluating and opining on an inmate's potential for future violence.

⁵ Quoted from page 2 of the Psychological Report Process.

⁶ Quote from page 4 of the Psychological Report Process.

4. When an existing report is three years old, or used in a hearing resulting in a decision, it will expire and the Forensic Assessment Division (FAD) will complete a report, prior to the next hearing, utilizing the new format.⁷

In its response to the petition, the Board states that “Penal Code Section 5068 provides for the preparation of a psychological evaluation before the release of an inmate committed to a term of life with the possibility of parole. Sections 2282 and 2402 of Title 15 of the California Code of Regulations [require] that a [Board] hearing panel consider all relevant and reliable information available to the panel when determining whether an inmate is suitable for release on parole. When making its determination, a hearing panel weighs a variety of factors, including the inmates’ social history, past and present mental state, criminal history, commitment offenses, past and present attitude toward the crime, any conditions of treatment or control, and any other information bearing on the inmate’s suitability for parole.”⁸

The subject of life parole consideration hearings was at issue in a case filed in the Marin County Superior Court, captioned *In Re Rutherford*.⁹ As a result of this case, the Marin County Superior Court entered a number of orders related to life parole consideration hearings. The Board states that on April 8, 2005, the Board was ordered by the court to develop “a streamlined psychological risk assessment tool to be used in conjunction with subsequent parole consideration hearings.”¹⁰ The court also ordered the Board to develop a plan to remediate the backlog of Life Prisoner Evaluation Reports, among other things. In March 2006, further Stipulations and “ORDERS REGARDING ELIMINATION OF HEARING BACKLOG AND RELATED MATTERS” were entered by the court. The Stipulated Procedures state that “[b]y September 22, 2006, the [California Department of Corrections and Rehabilitation] must develop policies and procedures that will both eliminate the current backlog of overdue parole hearings and make sure that future hearings are conducted on time.” Other orders were entered by the court including one requiring a certain number of psychologists that the Board was to have in place to prepare the psychological evaluations for parole consideration. The court also established requirements for communication and notice to counsel for the class of inmates represented in *In Re Rutherford* so as to provide for their participation in the development of the psychological evaluation process.

OAL received the Board’s response on August 23, 2010, and the Petitioner’s reply on September 9, 2010.

UNDERGROUND REGULATIONS

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute *expressly exempts* the regulation from APA review (Government Code sections 11340.5 and 11346).

⁷ Quote from page 2 of the Psychological Report Process.

⁸ Response, page 1.

⁹ *In re Rutherford* (Marin County Superior Court, Case No. SC13599A).

¹⁰ Response, page 4.

Government Code section 11342.600 defines a regulation as “**every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.** [Emphasis added.]” Government Code section 11340.5, subdivision (a), provides that:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

Furthermore, Government Code section 11346 states:

(a) **It is the purpose of this chapter to establish basic minimum procedural requirements** for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. **This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.** [Emphasis added.]

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5, it creates an underground regulation as defined in title 1, California Code of Regulations, section 250(a).

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

Pursuant to Government Code section 11340.5, OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

OAL's legislative mandate was summarized by the court in *State Water Resources Control Board vs. The Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25], as follows:

The Legislature established the OAL as a central office with the power and duty to review administrative regulations. The Legislature expressed its reasons in no uncertain terms stating, in essence, that it was concerned with the confusion and uncertainty generated by the proliferation of regulations by various state agencies, and that it sought to alleviate these problems by establishing a central agency with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Gov. Code, §§ 11340, subd. (e), and 11340.1.) In order to further that function, the relevant Government Code sections are careful to provide OAL authority over regulatory measures whether or not they are designated "regulations" by the relevant agency. In other words, if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.

Any doubt as to the applicability of the APA, should be resolved in favor of the APA. As *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244]¹¹ states:

... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action ([*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204]), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.

Following is OAL's analysis of the Psychological Report Process assessing whether the challenged process contains underground regulations.

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a "regulation" subject to the APA. This analysis will determine (1) whether the challenged rule is a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

As previously stated, a regulation is defined in Government code section 11342.600 as:

... **every rule, regulation, order, or standard of general application** or the amendment, supplement, or revision of any rule, regulation, order, or standard **adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.** [Emphasis added.]

¹¹ *Grier v. Kizer, supra*, 219 Cal.App.3d 422, was disapproved as to an unrelated issue. It is still good law for the purpose stated.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186] (hereafter *Tidewater, supra*, 14 Cal.4th 557), the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).¹²

As stated in *Tidewater, supra*, 14 Cal.4th 557, the first element used to identify a "regulation" is whether the rule applies generally. As *Tidewater, supra*, 14 Cal.4th 557, points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.

With respect to the first element, the Psychological Report Process states:

The Board of Parole Hearings' (BPH) lack of standardization of psychological reports, and absent or untimely psychological reports, cause hearing postponements that contributes to the backlog of Life Parole Consideration Hearings. The BPH will establish guidelines for the psychological report process **as it relates to Life Parole Consideration Hearings**. [Emphasis added.]

The challenged process applies to all inmates who are committed to a term of life with the possibility of parole. Any inmate who is eligible for parole consideration must have a parole consideration hearing. Therefore, all inmates that are eligible for Life Parole Consideration Hearings are the class being affected. All inmates with a sentence of life with the possibility of parole are, and will be, subject to the requirements established by the Board in the Psychological Report Process. The class is therefore "clearly defined" as the open class of present and future life inmates who have the possibility of parole. The first element of *Tidewater, supra*, 14 Cal.4th 557, is thereby met.

The second element used to identify a "regulation" as stated in *Tidewater, supra*, 14 Cal.4th 557, is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure.

In its response, the Board states:

Penal Code Section 5068 provides for the preparation of a psychological evaluation before the release of an inmate committed to a term of life with the possibility of parole. Sections 2282 and 2402 of Title 15 of the California Code

¹² Government Code section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

of Regulations [require] that a [Board] hearing panel consider all relevant and reliable information available to the panel when determining whether an inmate is suitable for release on parole.¹³

Penal Code section 5068 provides:

The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

Upon the basis of the examination and study, the Director of Corrections¹⁴ shall classify prisoners; and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable.

...
Before the release of any inmate committed under subdivision (b) of Section 1168, the director shall provide the Community Release Board with a written evaluation of the prisoner. [Emphasis added.]

The Psychological Report Process sets forth the use of psychological reports in parole consideration hearings for life inmates with the possibility of parole, including expiration dates for the reports and Comprehensive Risk Assessments. The Psychological Report Process also establishes the format for the Comprehensive Risk Assessments and specifically designates which psychological assessment instruments will be used to assess the inmates' potential for future violence, among other things. In addition, the Psychological Report Process states when and how "requests for review" will be handled. In articulating these standards for a psychological report process for use in life parole consideration hearings, the Board indicates it is implementing Penal Code section 5068.

Additionally, as previously indicated, the Board states in its response that "[s]ections 2282 and 2402 of Title 15 of the California Code of Regulations [require] that a [Board] hearing panel consider all relevant and reliable information available to the panel when determining whether an inmate is suitable for release on parole."¹⁵

California Code of Regulations, title 15, section 2282 establishes matrixes for the "Base Term" for each inmate committed to a life term. California Code of Regulations, title 15, section 2402 establishes standards for the "Determination of Suitability" for parole for

¹³ Response, page 1.

¹⁴ Pursuant to Penal Code section 5050, as of July 1, 2005, references to the Director of Corrections refer to the Secretary of the Department of Corrections and Rehabilitation.

¹⁵ Response, page 1.

inmates committed to life sentences with the possibility of parole, including the past and present mental state of the prisoner. According to the Board, the Psychological Report Process “provides some information about an inmate’s past and present mental state for consideration by a [Board] hearing panel pursuant to Sections 2282 and 2402 of Title 15 of the California Code of Regulations.”¹⁶ Hence, the Board is implementing, interpreting or making specific Penal Code section 5068 and sections 2282 and 2404 of title 15 of the California Code of Regulations. Therefore, the second element as stated in *Tidewater, supra*, 14 Cal.4th 557, is met.

Having met both elements of *Tidewater, supra*, 14 Cal.4th 557, the challenged process meets the definition of “regulation” in Government Code section 11342.600.

EXEMPTION

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation **except to the extent that the legislation shall do so expressly.**” (Emphasis added.)

The Board states that the challenged action is exempt from the APA pursuant to Government Code section 11340.9(d).¹⁷ Government Code section 11340.9(d) states:

This chapter [Chapter 3.5 (commencing with section 11340) of the Government Code] does not apply to any of the following:

...
(d) A regulation that relates **only** to the internal management of the state agency. [Emphasis added.]

In its response, the Board indicates:

The revised process was intended only to direct the actions of BPH [Board] employees. It provides guidance to staff on how to handle the major reasons for hearing postponements related to psychological reports, including: the shelf-life (or validity period) of a [sic] psychological reports; requests from hearing panels for additional information or new psychological reports; and inmates [sic] request for a new report or inmates [sic] appeal of the contents of the report.

The internal management exception to the APA is narrow. A regulation is exempt as internal management if it:

1. directly affects only the employees of the issuing agency; **and,**

¹⁶ Response, page 2.

¹⁷ Ibid.

2. does not address a matter of serious consequence involving an important public interest.

(See *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198 [149 Cal.Rptr. 1], *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729 [188 Cal.Rptr. 130] and *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].)

As stated earlier, the requirements in the Psychological Report Process affect all life inmates that are eligible for parole. The requirements contained therein go beyond directing just the employees of the Board in their duties, but directly affect all life inmates who may be considered eligible for parole. Therefore, the Psychological Report Process does not meet the first element for the internal management exemption because it does not affect **only** the employees of the Board.

Having reached the conclusion that the first element of internal management has not been met, it is not necessary to determine whether The Psychological Report process is a matter of serious consequence involving an important public interest.

However, assuming arguendo that the Psychological Report Process only affects the employees of the Board, the Board would also have to establish the second element of the internal management exemption. The Board would have to establish that the Psychological Report Process of inmates prior to parole consideration is not a matter of serious consequence involving an important public interest. The Psychological evaluations are given to the hearing panel of the Board in consideration of their suitability for parole. The Board indicates that they are one fact in establishing the inmate's past and present mental state. A psychological evaluation that indicates an inmate has a high potential for future violence would cause the hearing panel to find the inmate not suitable for parole. Alternatively, a psychological evaluation that shows low potential for future violence by an inmate means the inmate has a higher likelihood to be paroled. Which inmates, all of whom have been convicted of serious crimes, are to be paroled is a matter of serious consequence involving an important public interest, namely public safety from the public's perspective and freedom from incarceration from the perspective of the inmate. The Psychological Report Process contains specific requirements as to what risk assessment instruments may be used in the determination of future potential for violence. Different risk assessment instruments may produce different results. The Board therefore would not be able to establish the second element if they were able to establish the fact that the challenged process only affects the employees of the issuing agency.

In that the Board has not met the first element necessary to establish an internal management exemption, the exemption is inapplicable.

The Board did not identify, nor could OAL identify, any other exemptions to the APA.

AGENCY RESPONSE

In addition to the Board's contention that the challenged action meets the requirements of the internal management exemption to the APA, the Board also contends in its response that the Board's psychological report process is not an underground policy in that the "circumstances

surrounding the development of the psychological report process demonstrate that the challenged rule is not an underground regulation.”¹⁸

The Board states that “[s]ection 270(f)(2) of Title 1 of the California Code of Regulations permits OAL to consider all the circumstances which demonstrate that a challenged rule is not an underground regulation.”¹⁹

California Code of Regulations, title 1, section 270(f) states:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.

(3) A summary disposition letter shall state the basis for concluding that the challenged rule is not an underground regulation and shall specify that the issuance of the letter does not restrict the petitioner's right to adjudicate the alleged violation of section 11340.5 of the Government Code.

(4) A summary disposition letter shall be sent to the petitioner not later than 60 days following receipt of the complete petition. [Emphasis added.]

The Board indicates that OAL “should consider all circumstances in which facts demonstrate that a challenged rule is not an underground regulation. According to Section 270(f)(2) of Title 1 of the [CCR], these circumstances are not limited to those listed in subdivisions (f)(2)(A) through (f)(2)(E).”²⁰ The Board then states that it has been working hard to eliminate the backlog of overdue life parole consideration hearings as part of the *In re Rutherford*²¹ class action lawsuit and one of the purposes of the APA is to ensure that those whom a regulation will affect have a voice in its creation. The Board further states that the Stipulated Procedures in *In re Rutherford* provide that the Board “may modify the Policies and Procedures at any time, provided that as modified the Policies and Procedures will advance the goal of providing timely hearings.”

¹⁸ Response, page 3.

¹⁹ Response, page 3.

²⁰ *Ibid.*

²¹ Marin County Superior Court, Case No. SC 135399A.

Section 270 (f) concerns factors to consider **prior to OAL's acceptance of a petition, as to whether a summary disposition is appropriate.** Prior to acceptance, OAL **did** consider whether the challenged process fits into **any** of the categories set forth in section 270(f), including the issues raised by the Board. In that the matter was not an appropriate matter for summary disposition, OAL accepted the petition for consideration of a full determination, giving the Board an opportunity to provide additional information and input.

In addition, the Board states that the report process does not require an outcome or determination about an inmate's suitability for parole and only provides "some" information about an inmate's past and present mental state for consideration by a Board hearing panel. The hearing panel weighs other factors also.

The court in *State Water Resources Control Board vs. The Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25], (hereafter *State Water Resources Control Board, supra*, 12 Cal.App.4th 697), in finding that the Water Board's actions were underground regulations, noted that the mere fact that there are other procedural requirements applicable to a matter does not alleviate an agency from the requirements of the APA.

The court stated:

The provisions of this article shall not be superseded or modified by any subsequent legislation *except to the extent that such legislation shall do so expressly.*" (Italics added.) Although section 11346 was added in 1980, after the adoption of the Porter-Cologne Act, it simply restates the provisions of Government Code former section 11420, which predated the act. The statutory language could hardly be clearer. It therefore overcomes the otherwise applicable rule that a special statute controls a general statute. (*Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) We do not agree with the Boards' argument that section 11346 somehow impermissibly limits or restricts the power of the Legislature. **If the Legislature desires to permit implied exemptions, it can amend section 11346 to so provide. Nor are we persuaded that section 11346 means something other than what it says because other courts may have recognized implied exemptions to the APA in unusual circumstances, or because the Legislature has not expressly stated otherwise. As to the last of these arguments, the Legislature has settled the issue by stating that unless expressly exempted, all administrative regulations must comply with the APA. Therefore, the mere fact that the Porter-Cologne Act has its own procedural requirements does not, in and of itself, create a conflict.** [Emphasis added.] (*State Water Resources Control Board supra*, 12 Cal.App.4th 697, at p. 704.)

The court orders referred to by the Board do not create an exemption from the APA. Even if the Board fulfilled the court ordered procedural requirements, such would not alleviate the Board from the basic APA requirements of Government Code section 11340, et seq. As required in Government Code section 11346, an exemption to the APA must be expressly

stated by the Legislature in order to be valid. The requirements articulated by the Court in *In re Rutherford* are in addition to the APA requirements and do not create an express exemption from the APA.

PETITIONER REPLY

On September 9, 2010, OAL received a reply from the Petitioner. The Petitioner states that the Board does not contend in its response that the challenged process is not regulatory and that the Board's contention "that [its] efforts 'to eliminate the backlog of overdue life parole consideration hearings as part of the *In re Rutherford* class action lawsuit'" does not merit consideration. Petitioner further contends that the matter does not fall within the "internal management" exemption to the APA and the fact that the Board may have complied with the procedural requirements of the *In re Rutherford* Stipulated Procedures does not conform to the basic minimum procedural requirements of the APA. In addition, the Petitioner asserts that the issue in *In re Rutherford* is the failure of the Board to hold timely life parole suitability hearings, "not the frequency, content, or format of psychological evaluations."²²

As noted above, OAL agrees that the internal management exemption to the APA does not apply and the orders *In re Rutherford* are in addition to the basic procedural requirements of the APA.

PUBLIC COMMENTS

OAL received two sets of comments from the public.²³ The comments received were from Donald A. Miller, Miller Consulting and Theresa Torricellas. Ms. Torricellas articulated numerous objections to the psychological evaluation process and the risk assessment instruments used by the Board. Mr. Miller, likewise, had many objections to the process and the risk assessments used and various other matters. Both contend that the use of the psychological evaluations is beyond the Board's authority. They include many exhibits, including but not limited to, a Special Report on the Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements by the Office of the Inspector General (dated July, 2010); memoranda from California Department of Corrections and Rehabilitation and the Board concerning psychological evaluations of inmates; "Guidelines for Preparation of Mental Health Evaluations for Board of Parole Hearings" (dated June 30, 2006); minutes of the September 18, 2007 Executive Board Meeting of the Board; Notice to District Attorneys, State Appointed and Private Inmate Counsel from Martin Hoshino (dated December 1, 2008); Declarations of Melvin Macomber, Ph.D. and Barbara P. Stark, Psy.D and various articles. The comments provided additional information in support of the Petitioner's contention that the psychological evaluation process should have been adopted pursuant to the APA. As stated previously, OAL agrees with the Petitioner based upon the information provided with the petition.

²² Reply, page 3.

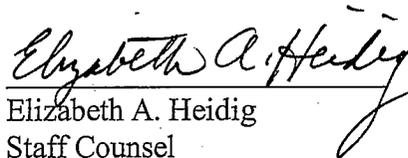
²³ A comment was also received from Life Support Alliance. However, it has not been considered in that it does not meet the requirements of section 270(g).

CONCLUSION

In accordance with the above analysis, and based upon the documents provided with the petition, OAL determines that the challenged Psychological Report Process contains provisions that meet the definition of a "regulation" as defined in section 11342.600 that should have been adopted pursuant to the APA.

Date: November 8, 2010


SUSAN LAPSLEY
Director


Elizabeth A. Heidig
Staff Counsel

copy: Martin Hoshino, Executive Officer, Board of Parole Hearings
Philip Reiser, Staff Counsel, Board of Parole Hearings
Tai Truong (OAL file number: CTU2010-0430-01)
Douglas T. Russell (OAL file number: CTU2010-0212-01)

EXHIBIT A

California Department of Corrections and Rehabilitation
Board of Parole Hearings
Forensic Assessment Division
Psychological Report Process

ISSUE

The Board of Parole Hearings' (BPH) lack of standardization of psychological reports, and absent or untimely psychological reports, cause hearing postponements that contributes to the backlog of Life Parole Consideration Hearings. The BPH will establish guidelines for the psychological report process as it relates to Life Parole Consideration Hearings.

BACKGROUND

The formation of the BPH Forensic Assessment Division (FAD) created a significant procedural change related to the psychological report which was not clearly disseminated to the Commissioners or the institutions. In addition, FAD did not have a sufficient number of psychologists to complete the psychological report workload leading to postponements and the increase of untimely Life Parole Consideration Hearings.

Hearing panel postponements were based on a variety of factors, including:

- The current psychological report did not have a definitive shelf life;
- Requests from the previous panel for additional information, or request for a new psychological report were not addressed; and,
- The inmate or the inmate's attorney requested a postponement for a new psychological report or attempted to appeal the contents of the report.

THE USE OF PSYCHOLOGICAL REPORTS IN LIFE SUITABILITY HEARINGS

The psychological report is a tool to assist Lifer panels in the determination of the prisoner's mental state, including the inmate's potential for future violence. ~~The report cannot substitute for the panel's~~ determination of the prisoner's current risk of dangerousness if released to the community. The BPH panel will consider all reliable information, including psychological evaluations, relevant to the circumstances that tend to show suitability for parole as required by the California Code of Regulations, Title 15.

In an effort to determine the best application of psychological reports in Life Parole Suitability Hearings, the BPH will create uniformity in the psychological reporting process including establishing expiration criteria for the reports, and transitioning to a standardized format that provides an assessment before each hearing. In coordination with the California Department of Corrections and Rehabilitation (CDCR) Office of Research, the BPH will simultaneously study the validity and reliability of using specific psychological assessment instruments for life term inmates. The BPH will implement the guidelines provided herein on or about January 1, 2009.

Current psychological reports considered by Lifer hearing panels follow different formats and include a variety of means to determine potential for future violence, which may or may not include recognized assessment tools. Current reports utilizing the different formats are valid. They provide relevant information to the panel regarding the inmate's potential for future violence. Existing reports,

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Psychological Report Process

irrespective of format or author, will expire after three years from the date of the report, or by attrition after use in a hearing, whichever occurs first.

When an existing report is three years old, or used in a hearing resulting in a decision, it will expire and the Forensic Assessment Division (FAD) will complete a report, prior to the next hearing, utilizing the new format. The new report is called a Comprehensive Risk Assessment (CRA). Comprehensive Risk Assessments will remain valid for five years. Thereafter, and prior to each subsequent Lifer Suitability Hearing, FAD will provide an addendum, called a Subsequent Risk Assessment, to accompany the last CRA. When the existing CRA expires after five years, the BPH will perform a new CRA. The BPH will determine the age of all reports based on the date of the signature approving the report.

New Report Format

Comprehensive Risk Assessment (Previously referred to as Full or Static evaluation)

The Comprehensive Risk Assessments, completed every five years, will include an evaluation of the prisoner's remorse, insight, and an exploration of the commitment offense, as well as the need for additional institutional programming. The clinician will also evaluate risk factors from the prisoner's history, such as the role drugs and alcohol played in the commitment offense.¹ The report will provide the clinician's opinion, based on the available data, of the prisoner's potential for future violence. FAD will use the following instruments to assess the potential for future violence:

- The Historical Clinical Risk Management – 20 (HCR-20)
- The Hare Psychopathy Checklist – Revised (PCL-R)
- Level of Service/Case Management Inventory (LS/CMI)
- Static 99 – (when deemed appropriate by clinician)

Subsequent Risk Assessment (Previously referred to as the Dynamic Evaluation)

The Subsequent Risk Assessments will address any changes in the circumstances of the prisoner's case, such as new disciplinary issues, new programming, or changes in parole plans, since the writing of the Comprehensive Risk Assessment. In the five years between Comprehensive Risk Assessments, every life inmate will have a Subsequent Risk Assessment completed prior to each parole consideration hearing.² Clinicians trained in the risk assessment instruments identified above will provide an opinion regarding potential for future violence based on their clinical judgment as follows:

- The clinician will provide empirically based conclusions from relevant sources of information.

¹ See the attached outline which shows all of the issues the psychologists address in completing the Comprehensive Risk Assessment.

² Excludes documentation, en banc, progress, 3 year reviews of 5 year denials, rescission hearings and hearing postponements. A new SRA will be done for the next subsequent hearing after a waiver.

California Department of Corrections and Rehabilitation
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- The inmate will be given a mental health assessment to determine and identify any changes in mental health status and will include the inmate's self assessment.
- Clinicians will review and evaluate the inmate's recent programming efforts, since the last assessment, to outline the inmate's vocational, educational and personal achievements.
- The clinician will address any recent disciplinary infractions.
- The clinician will review the inmate's parole plans through verbalization and verification in the central file and provide an opinion regarding feasibility.
- The clinician will give a shortened rendition of the inmate's life crime utilizing legal court documents.
- The clinician will focus on the inmate's current interpretation of the life crime and ask questions of underlying motivation or factors in commission of the crime.
- The clinician will provide a brief summary of the most recent Comprehensive Risk Assessment.
- The clinician will draw conclusions and opinions regarding potential for future violence, including increase or decrease in violence risk since the last assessment.

Review Process of Psychological Reports:

Requests made by Lifer panels to complete a new report for the purpose of clarifying information, or to delve deeper into an issue, are beyond the scope of the psychological reports. The report provides a clinician's opinion as to the prisoner's potential for future violence. In instances where the request is beyond the scope of the report, FAD will not complete a new evaluation. These types of inquiries are best left to the Lifer panel to address during suitability hearings.

FAD will consider requests made prior to the implementation of this guideline to review existing psychological reports. FAD will evaluate the Lifer panel's request to determine if the existing report addresses the issue(s) raised by the panel. FAD will also evaluate whether the issue(s) raised by the Lifer panel is within the scope of the psychological reports. Where the existing psychological report is valid, FAD will issue a secondary review letter indicating validity. Where the existing report fails to address an issue that is within the scope of psychological reports, FAD will either provide a secondary review letter that addresses the issue, or complete a new report.

After the implementation date of this guideline, requests for review made by Lifer panels are only appropriate if the report has a substantial error, or extensive administrative errors, that call into question the validity of the report. Requests for a review for all reports after the implementation of this guideline will be available to Commissioners as follows:

- **Substantial Error:** The Lifer panel will identify if there is a substantial error by comparing the facts in the report with the legal source documents, such as the Abstract of Judgment or official court transcripts. When the report contains a substantial inaccuracy, which could affect the basis for the risk assessment of potential for future violence (e.g., incorrect life crime, incorrect number of victims), FAD will review the report to determine if they need to issue a new report. FAD will either issue a new report, or provide an explanation of the validity of the existing report.

California Department of Corrections and Rehabilitation
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- **Administrative Errors:** When the panel identifies at least three administrative factual errors, FAD will review the report. FAD will either correct the administrative errors or, where the administrative errors invalidate the report, FAD will complete a new assessment. Administrative errors include: wrong name, wrong CDC#, wrong date of birth, wrong ethnicity, inaccurate disciplinary history, inaccurate family history, inaccurate documented criminal history, or any similar error.

If less than administrative three (3) errors are found in a report, the hearing panel will provide the correct information into the record as identified, utilizing other documents located in the inmate's central file. Less than three (3) administrative errors will not be good cause for a postponement, nor will FAD consider completing a new Comprehensive or Subsequent Risk Assessment.

- A new report will not be completed where the inmate disagrees with the assessment or an opinion provided by the psychologist. This includes the inmate challenging the facts provided by the psychologist in the report and disputed self-admissions.

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 correct and challenge the psychological report on the record. The inmate or the inmate's attorney can provide evidence contradicting the information asserted by the psychologist, and provide information about the prisoner's mental state, attitude towards the crime, level of remorse and risk factors.

EXHIBIT B

**BOARD OF PAROLE HEARINGS**P.O. BOX 4036
SACRAMENTO, CA 95812-4036

2010 AUG 25 PM 2: 14

OFFICE OF
ADMINISTRATIVE LAW**By email and U.S. Mail**

August 23, 2010

Ms. Susan Lapsley
Director
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento CA, 95814**RE: CTU2010-0506-03**

Dear Ms. Lapsley:

In the July 9, 2010 *Notice Register*, the Office of Administrative Law (OAL) published notice of its intent to review the April 25, 2010 petition from Michael Brodheim which alleged that the Board of Parole Hearings' (BPH) psychological report process is an underground regulation. BPH's psychological report process is not an underground policy. The challenged psychological report process is expressly exempted from the rulemaking requirements of the Administrative Procedures Act (APA). Moreover, the circumstances surrounding the development of the psychological report process demonstrate that the challenged rule is not an underground regulation.

The psychological report process is not an underground policy.

Penal Code Section 5068 provides for the preparation of a psychological evaluation before the release of an inmate committed to a term of life with the possibility of parole. Sections 2282 and 2402 of Title 15 of the California Code of Regulations requires that a BPH hearing panel consider all relevant and reliable information available to the panel when determining whether an inmate is suitable for release on parole. When making its determination, a hearing panel weighs a variety of factors, including the inmate's social history, past and present mental state, criminal history, commitment offenses, past and present attitude toward the crime, any conditions of treatment or control, and any other information bearing on the inmate's suitability for parole.

It is an established practice that psychological evaluations are prepared for parole suitability hearings. The psychological report process at issue is an outgrowth of the *In re Rutherford* class action lawsuit. See *infra*. The issues raised in the petition have already been considered by life inmates' class counsel during their monitoring of BPH's lifer process. Before January 1, 2009, psychological evaluations prepared for parole suitability hearings followed differing report formats. The BPH clearly expressed in a notice to District Attorneys, State Appointed and Private Inmate Counsel (See Petition, Response to Question 4) that it was establishing guidelines for the report process to address the lack

of standardization of psychological reports, and the absence or timeliness of those reports.

The psychological report process is expressly exempted from the rulemaking requirements of the Administrative Procedures Act (APA).

The psychological reports process at issue only provides guidance to BPH staff related to a new format for psychological reports. As such, it is expressly exempted from the APA pursuant to Government Code Section 11340.9 (d) because it "relates only to the internal management of the state agency."

The psychological report process at issue is an outgrowth of the *In re Rutherford* class action lawsuit which alleged that BPH failed to hold timely lifer parole hearings pursuant to Penal Code sections 3041 and 3041.5. See Marin County Superior Court, Case No. SC135399A. Hearings that were untimely comprised a backlog of overdue hearings. On December 20, 2007, the Marin County Superior Court ordered BPH to submit a plan to eliminate the backlog of hearings by June 1, 2009. In *Rutherford*, hearing postponements due to incomplete or untimely psychological reports were identified as one of the primary barriers to eliminating the backlog of overdue hearings. The *Rutherford* litigation is still active.

The psychological report process clearly details that the "lack of standardization of psychological reports, and absent or untimely psychological reports, cause hearing postponements that contribute to the backlog of Life Parole Consideration Hearings." The revised process was intended only to direct the actions of BPH employees. It provides guidance to staff on how to handle the major reasons for hearing postponements related to psychological reports, including: the shelf-life (or validity period) of a psychological reports; requests from hearing panels for additional information or new psychological reports; and inmate requests for a new report or inmate appeal of the contents of the report.

Moreover, the psychological report only provides some information about an inmate's past and present mental state for consideration by a BPH hearing panel pursuant to Sections 2282 and 2402 of Title 15 of the California Code of Regulations. A hearing panel considers all relevant and reliable information available when determining whether an inmate is suitable for release on parole. When making its determination, a hearing panel weighs a variety of factors, including the inmate's social history, past and present mental state, criminal history, commitment offenses, past and present attitude toward the crime, any conditions of treatment or control, and any other information bearing on the inmate's suitability for parole.

Unlike *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, where a new classification score system was not exempt from the APA because the score was employed for purposes of determining the proper level of custody and place of confinement, the psychological

report process does not require an outcome or a determination about an inmate's suitability for parole. A psychological report is only prepared for use at a parole consideration hearing and it merely provides some information or evidence about an inmate's mental state. At a parole consideration hearing, pursuant to Penal Code Section 3041.7, the inmate is entitled to be represented by counsel who may use the psychological report as evidence of the inmate's mental state and who may represent what weight, if any, the report should be assigned. Thereafter, a hearing panel will weigh the probative value of the psychological report relative to other information that will be considered at the hearing.

Section 270(f)(2) of Title 1 of the California Code of Regulations permits OAL to consider all the circumstances which demonstrate that a challenged rule is not an underground regulation.

OAL should consider all circumstances in which facts demonstrate that a challenged rule is not an underground regulation. According to Section 270(f)(2) of Title 1 of the California Code of Regulations, these circumstances are not limited to those listed in subdivisions (f)(2)(A) through (f)(2)(E).

BPH has been working hard to eliminate the backlog of overdue life parole consideration hearings as part of the *In re Rutherford* class action lawsuit. The issues raised in the petition have been an integral part of the *In re Rutherford* lawsuit. The BPH lifer process has been monitored by the inmates' class counsel and the court as BPH has worked to comply with the Stipulated Procedures and Remedial Plan in its efforts to eliminate the backlog of overdue hearings.

One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205), as well as notice of the law's requirements so that they can conform their conduct accordingly (*Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583, 588). This overriding purpose of the APA has been fulfilled in this case.

Paragraph 11 of the Stipulated Procedures in *Rutherford* provides that BPH "may modify the Policies and Procedures at any time, provided that as modified the Policies and Procedures will advance the goal of providing timely hearings. [BPH] will provide [inmates' class counsel] with a copy of the original Policies and Procedures, the modified version, and a strikeout version with the changes 30 days before implementation. [Inmates' class counsel] shall have 30 days from the time they receive the changes to meet and confer with [BPH]. [Inmates' class counsel] shall file objections, if any, through a regularly noticed motion within 30 days from the end of the meet and confer process. [BPH] may not implement any policy or procedure in dispute until the Court rules on it, but may require that [inmates' class counsel] comply with an expedited briefing scheduled." See attached March 23, 2006 Stipulated Procedures and Remedial Plan. BPH has complied with the portion of the *Rutherford* Stipulated procedures which

provided the inmate class a voice in the creation of the process and advance notice of the process.

Since this lawsuit has been initiated, the Marin County Court has issued numerous orders that affect BPH's operations relative to the psychological evaluation process:

- An April 8, 2005 order requiring BPH to develop a streamlined psychological risk assessment tool for use at parole consideration hearings;
- A September 27, 2007 order requiring BPH to have in place at least thirty-five properly trained, qualified psychologists to prepare psychological evaluations for parole consideration hearings; and,
- A February 5, 2008 order requiring BPH to produce lists of all prisoners in need of new or updated psychological evaluations for parole consideration hearings that are scheduled for them within the next 180 days.

Additionally, there are other facts which demonstrate that those persons or entities who will be affected by the psychological report process had a voice in its creation as well as notice of its requirements.

- On February 23, 2006, BPH issued a memo to all interested parties "initiating another outreach process for your constructive thoughts and suggestions...about the content and use of psychological reports in parole suitability hearings." See Donald A. Miller Public Comment, Exhibit I.
- On May 8, 2006, stakeholder's were invited to attend a briefing on "the pending issues regarding lifer hearing psychological evaluations/risk assessments" that will help BPH make "an informed decision...as to how to proceed with psychological evaluations..." See Donald A. Miller Public Comment, Exhibit J.
- An open and public Board meeting on September 18, 2007 where an overview of psychological evaluations was presented. See Donald A. Miller Public Comment, Exhibit L.
- On December 1, 2008, a letter was sent to District Attorneys, State Appointed and Private Counsel notifying them that the psychological report process would take affect on January 1, 2009 See Donald A. Miller Public Comment, Exhibit N and Michael Brodheim petition (response to Question 4).

As detailed above, the circumstances clearly demonstrate that the psychological report process is not an underground rule. In the *Rutherford* litigation, there is a procedure for the inmates' class counsel to have a voice in the creation of policy. Moreover, BPH has taken numerous other steps to involve all its stakeholders in the development of the psychological report process. OAL may appropriately rely upon 1 CCR 270(f)(2) and conclude that the challenged rule is not an underground regulation.

Sincerely,



PHILIP S. REISER
Staff Counsel

Attachment: *In re Rutherford*, Stipulated Procedures and Remedial Plan, March 23, 2006

Copy: Michael Brødheim, C46663
California Medical Facility
P.O. Box 2500
Vacaville, CA 95696-2500

1 BILL LOCKYER
Attorney General of the State of California
2 JAMES M. HUMES
Chief Assistant Attorney General
3 FRANCES T. GRUNDER
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4 ROCHELLE C. EAST
Supervising Deputy Attorney General
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7 Telephone: (415) 703-5713
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8 Attorneys for Respondent
9 SF2004400636

10
11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF MARIN

FILED

MAR 23 2006

Court Executive Officer
MARIN COUNTY SUPERIOR COURT
BY: J. CHOWFA, CLERK



APR 06 2006

Court Executive Officer
MARIN COUNTY SUPERIOR COURT
BY: T. GARDNER, CLERK

13
14
15 In re

16 JERRY RUTHERFORD (C-19059),

17 Petitioner,

18 On Habeas Corpus.

No. SC135399A

STIPULATED PROCEDURES

19 1. For all policies, procedures, forms, and plans developed under this Order, the
20 parties shall use the following process: Respondents shall meet periodically with Petitioners'
21 counsel to discuss their development of policies, procedures, forms, and plans. In preparation for
22 such meetings, Respondents will provide Petitioners' counsel with copies of the proposed
23 policies, procedures, forms, and plans in draft form no later than 21 days before the meeting. If
24 the petitioners do not agree with any element of the policy, procedure, form, or plan, they may
25 seek further orders from the court and ask the court to hear the matter on shortened time.

26 2. The California Department of Corrections and Rehabilitation (CDCR) and the
27 Board of Parole Hearings (BPH) shall develop and implement Policies and Procedures that will
28 ensure continuous compliance with all of the requirements of the attached Remedial Plan.

1 Respondent shall submit the completed Policies and Procedures to the Court no later than 180
2 days after the approval of the remedial plan.

3 3. The parties shall cooperate so that the Petitioners' counsel has access to the
4 information reasonably necessary to monitor Respondent's compliance with this Order and the
5 Policies and Procedures adopted in response thereto.

6 4. BPH shall provide Petitioners' counsel with monthly reports from existing data
7 bases and the Lifer Scheduling and Tracking System when operational, including the number of
8 inmates in the backlog, and the reasons for any canceled hearings.

9 5. The parties shall meet regularly, at least once every 90 days, to discuss
10 implementation issues.

11 6. At least once every 90 days, Respondents shall provide the Court and Petitioners'
12 counsel with a progress report on compliance with this court order/remedial plan.

13 7. The parties shall agree on a mechanism for promptly addressing concerns raised
14 by Petitioner's counsel regarding individual class members and emergencies.

15 8. The Court shall retain jurisdiction to enforce the terms of this Order. The Court
16 shall have the power to enforce the terms of this Order through specific performance and all other
17 remedies permitted by law or equity.

18 9. If at any time Petitioners' counsel asserts that Respondents are not making
19 significant and steady progress in reducing the backlog, or are not complying with any of the acts
20 required by this Order, the Remedial Plan, or Policies and Procedures produced pursuant to it,
21 they shall notify the Respondents in writing of the facts supporting their belief. Respondents
22 shall investigate the allegations and respond in writing within 30 days. If Petitioners' counsel is
23 not satisfied with Respondents' response, the parties shall conduct negotiations to resolve the
24 issue(s). If the parties are unable to resolve the issue(s) satisfactorily, Petitioners may move the
25 Court for any relief permitted by law or equity.

26 10. When the backlog has been reduced to not more than five percent (05%) of the
27 monthly hearings and remains at that level or less continuously for 12 consecutive months,
28 Respondents will be considered in compliance with this remedial plan and this Court will order

1 this matter dismissed.

2 11. Respondent may modify the Policies and Procedures at any time, provided that as
3 modified the Policies and Procedures will advance the goal of providing timely hearings.
4 Respondent will provide Petitioners' counsel with a copy of the original Policies and Procedures,
5 the modified version, and a strikeout version with the changes 30 days before implementation.
6 Petitioners shall have 30 days from the time they receive the changes to meet and confer with
7 Respondent. Petitioners shall file objections, if any, through a regularly noticed motion within
8 30 days from the end of the meet and confer process. Respondents may not implement any
9 policy or procedure in dispute until the Court rules on it, but may require that petitioner's counsel
10 comply with an expedited briefing schedule if necessary.

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1 IT IS SO STIPULATED.

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Dated: 3/22/06

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Dated: 3/22/06

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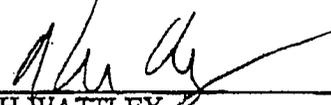
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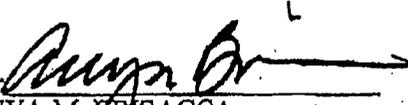
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28

DONALD SPECTER
KEITH WATTLEY
PRISON LAW OFFICE

By: 
KEITH WATTLEY
Counsel for Petitioner

BILL LOCKYER
ATTORNEY GENERAL'S OFFICE

By: 
ANYA M. EMSACCA
Counsel for Respondents

DEPARTMENT OF
CORRECTIONS AND
REHABILITATION

By: _____
JEANNE WOODFORD
Acting Secretary

1 IT IS SO STIPULATED.

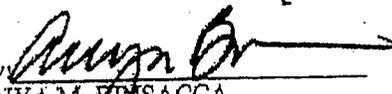
DONALD SPECTER
KEITH WATTLEY
PRISON LAW OFFICE

2
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5 Dated: _____

By: _____
KEITH WATTLEY
Counsel for Petitioner

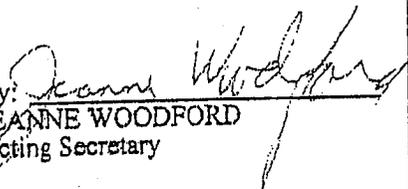
BILL LOCKYER
ATTORNEY GENERAL'S OFFICE

6
7
8
9
10 Dated: 3/22/06

By: 
ANYA M. FIMSACCA
Counsel for Respondents

DEPARTMENT OF
CORRECTIONS AND
REHABILITATION

11
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13
14
15
16 Dated: 3-22-06

By: 
JEANNE WOODFORD
Acting Secretary

ORDER

The Court adopts the parties' Stipulation and orders the California Department of Corrections and Rehabilitation to comply with the terms stated above.

IT IS SO ORDERED.

Dated: 02-23-04

Verna A. Adams
VERNA A. ADAMS
Superior Court Judge

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REMEDIAL PLAN

I. INTRODUCTION

1. Petitioner filed this action on May 26, 2004.
2. The Court certified the class on November 29, 2004.
3. On April 8, 2005, the parties stipulated that respondent was not providing timely parole consideration hearings as required by the Penal Code.
4. On February 15, 2006 the Court granted the petition.

II. PARTIES

5. The petitioner class consists of all prisoners serving indeterminate terms of life with the possibility of parole who have approached or exceeded their minimum eligible parole dates without receiving their parole consideration hearings within the times required by Penal Code sections 3041 and 3041.5.

6. The named respondent is the Acting Warden of San Quentin State Prison. However for purposes of this case, which affects and involves actions of the Department of Corrections and Rehabilitation (CDCR), the proper respondent under Penal Code sections 1474 and 1477 is the Acting Secretary of CDCR, Jeanne Woodford.

III. TERMS

7. CDCR shall develop and implement a statewide networked scheduling and tracking system (known as the Lifer Scheduling and Tracking System) for parole suitability hearings conducted pursuant to sections 3041 and 3041.5 of the Penal Code. The development of the aforementioned statewide networked lifer scheduling and tracking system shall begin with a Feasibility Study Report (FSR). The time for completion of the System will be determined by further order of the Court.

8. In August of 2005, the backlog of life parole suitability hearings was identified as approximately 3200 cases. The Board of Parole Hearings shall eliminate the backlog of parole suitability hearings within 18 months of the court's approval of the Remedial Plan. "Backlog" shall mean the group of inmates who have not received an initial or subsequent parole consideration hearing as required by Penal Code sections 3041 and 3041.5, excluding inmates who choose to forego or postpone their hearings, from the date the order is entered and forward.

9. CDCR shall maintain sufficient staffing levels and resources to meet all of the obligations of this Order.

10. BPH shall make attorney appointments for parole suitability hearings at least 120 days in advance of an inmate's scheduled suitability hearings. The time for implementing this change will be determined by further order of the Court.

11. CDCR shall make the final Board Packets, including Psychological Evaluations, available to the inmate and the inmate's attorney at least 60 days prior to the inmates scheduled parole suitability hearing. The time for implementing this change will be determined by further order of the Court.

STATE OF CALIFORNIA)
COUNTY OF MARIN)

IN RE **JERRY RUTHERFORD**

ACTION NO.: *SCI35399A*

(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON **April 6, 2006** I SERVED THE WITHIN ***CERTIFIED COPY OF STIPULATED PROCEDURES*** IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

	ATTORNEY GENERAL DEPARTMENT OF JUSTICE ATT: CORRECTIONAL LAW SECTION 455 GOLDEN GATE AVENUE SUITE 11000 SAN FRANCISCO, CA 94102-7004
KEITH WATTLEY PRISON LAW OFFICE GENERAL DELIVERY SAN QUENTIN STATE PRISON SAN QUENTIN, CA 94964	

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE:

4/6/06