APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 21 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANDREW S. ANDERSEN,

Plaintiff-Appellant,

v.

JENNIFER SHAFFER, Executive Director at Board of Parole Hearings,

Defendant-Appellee.

No. 21-16753

D.C. No. 2:20-cv-00999-KJM-CKD
Eastern District of California,
Sacramento

ORDER

Before: SILVERMAN, WATFORD, and FORREST, Circuit Judges.

Appellant's motion for extension of time to file proof of payment (Docket Entry No. 6) is denied as moot. The record reflects appellant has paid the filing fee.

Upon a review of the record and the response to the court's November 2, 2021 order, we conclude that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

Lexis®

Document: Andersen v. Shaffer, 2021 U.S. Dist. LEXIS 186048

Andersen v. Shaffer, 2021 U.S. Dist. LEXIS 186048

Copy Citation

United States District Court for the Eastern District of California

September 27, 2021, Decided; September 28, 2021, Filed

No. 2:20-cv-0999 KJM CKD P

Reporter

2021 U.S. Dist. LEXIS 186048 * | 2021 WL 4441547

ANDREW S. ANDERSEN, Plaintiff, v. JENNIFER SHAFFER, et al., Defendants.

Prior History: Andersen v. Shaffer, 2021 U.S. Dist. LEXIS 88729, 2021 WL 1853299 (E.D. Cal., May 10, 2021)

Core Terms

findings and recommendations, magistrate judge

Counsel: **[*1]** Andrew S. Andersen, Plaintiff, Pro se, CHOWCHILLA, CA.

Judges: Kimberly J. Mueller, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Kimberly J. Mueller

Opinion

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed 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 May 10, 2021, the magistrate judge filed findings and recommendations, which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations.

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. Having reviewed the file, the court finds the findings and recommendations to be supported by the record and by the proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's request for a waiver of the page limitation (ECF No. 19), construed as a motion, is granted;

2. The findings and recommendations filed May 10, 2021, are adopted in full;

3. Plaintiff's first amended complaint (ECF No. 12) is dismissed without leave to amend; and

4. The Clerk of Court is directed **[*2]** to close this case.

DATED: September 27, 2021.

/s/ Kimberly J. Mueller

CHIEF UNITED STATES DISTRICT JUDGE

Andersen v. Shaffer, 2021 U.S. Dist. LEXIS 88729

United States District Court for the Eastern District of California

May 10, 2021, Decided; May 10, 2021, Filed

No. 2:20-cv-00999-KJM-CKD P

Reporter

2021 U.S. Dist. LEXIS 88729 * | 2021 WL 1853299

ANDREW S. ANDERSEN, Plaintiff, v. JENNIFER SHAFFER, et al., Defendants.

Subsequent History: Adopted by, Motion granted by, Dismissed by Andersen v. Shaffer, 2021 U.S. Dist. LEXIS 186048 (E.D. Cal., Sept. 27, 2021)

Prior History: Andersen v. Shaffer, 2020 U.S. Dist. LEXIS 234720, 2020 WL 7342635 (E.D. Cal., Dec. 14, 2020)

Core Terms

parole, leave to amend, amended complaint, inmates, recommendation, allegations, suitability, findings and recommendations, first amended complaint, constitutional right, regulation, screening

Counsel: **[*1]** Andrew S. Andersen, Plaintiff, Pro se, CHOWCHILLA, CA.

Judges: CAROLYN K. DELANEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: CAROLYN K. DELANEY

Opinion

ORDER and FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in the pending civil rights action filed pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302. Plaintiff has filed a first amended complaint which is now before the court for screening.

I. Screening Requirement

As plaintiff was previously advised, the court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court will independently dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

II. Allegations in the Amended Complaint

In his amended complaint, plaintiff sues the State of California, the Board of Parole Hearings ("BPH"), Governor Gavin Newsom, the Executive Director of the BPH, several individual forensic psychologists employed by **[*2]** the BPH, and two BPH Commissioners who presided at plaintiff's most recent parole hearing in 2020. ECF No. 12. The allegations in the amended complaint characterize the parole system in California as "a belief and thought control system." ECF No. 12 at 14. Plaintiff asserts five causes of action against defendants for violating his First Amendment right to freedom of speech and his Fourteenth Amendment right to due process. ECF No. 12 at 26-29. By way of relief, plaintiff seeks various forms of declaratory and injunctive relief. ECF No. 12 at 30-31.

III. Legal Standards

A. First Amendment

A prisoner's First Amendment rights are necessarily "more limited in scope than the constitutional rights held by individuals in society at large." Shaw v. Murphy, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001)(holding that prisoners do not have a First Amendment right to provide legal assistance to other inmates). Thus, an inmate retains only "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); Prison Legal News v. Cook, 238 F.3d 1145, 1149 (9th Cir. 2001).

A prison regulation that infringes on a constitutional right "is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The Supreme Court adopted a four-part standard in Turner for evaluating the constitutionality of prison regulations. **[*3]** Id. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Turner, 482 U.S. at 89 (internal citation omitted). Next, the court reviews whether alternative means for exercising the constitutional right remain open to inmates. Id. at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. Lastly, the court considers whether there exist reasonable alternatives to the prison regulation that could be implemented with a de minimis cost to the interests of the prison. Id. at 90-91.

B. Due Process

Prisoners do not have a federal constitutional right to be released on parole before the expiration of their term of imprisonment. Swarthout v. Cooke, 562 U.S. 216, 220, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). California, however, has statutorily created a liberty interest in parole. See Swarthout, 562 U.S. at 220; McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002) ("California's parole scheme gives rise to a cognizable liberty interest in release on parole."), overruled on other grounds by Swarthout, 562 U.S. 216. Accordingly, California authorities must provide some procedural protections when determining parole eligibility. Swarthout, 562 U.S. at 219. The procedures required however, are minimal--prisoners must **[*4]** be provided only an opportunity to be heard and a statement of reasons why parole was denied. Id. at 220. Outside of these procedural protections, mere errors in the application of state law do not constitute a denial of due process. See Swarthout, 562 U.S. at 222 (quoting Engle v. Isaac, 456 U.S. 107, 121, n.21, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). "[T]he responsibility for ensuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the [federal court's] business." Id.

C. Eleventh Amendment

The Eleventh Amendment serves as a jurisdictional bar to suits brought by private parties against a state or state agency unless the state or the agency consents to such suit. See Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam); Jackson v. Hayakawa, 682 F.2d 1344, 1349-50 (9th Cir. 1982). Moreover, a governmental agency that is an arm of the state is not a person for purposes of § 1983. See Howlett v. Rose, 496 U.S. 356, 365, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 928 (9th Cir. 2017) (explaining agencies of the state are immune under the Eleventh Amendment from private damages or suits for injunctive relief brought in federal court).

IV. Analysis

The court has reviewed plaintiff's first amended complaint and finds that it fails to state a claim upon which relief can be granted under federal law. First, in his amended complaint plaintiff has named the State of California and the Board of Parole Hearings as defendants. The State of California has not **[*5]** consented to suit. Accordingly, plaintiff's claims against these defendants are barred by the Eleventh Amendment and must be dismissed.

To the extent that the amended complaint challenges the scientific validity of the Comprehensive Risk Assessment ("CRA") used in determining plaintiff's suitability for parole, such allegations do not establish any constitutional claim for relief. See ECF No. 12 at 19 (stating that "[p]laintiff can point to alternative remedies that would provide greater procedural protection and save cost."). There is no federal substantive due process right that requires state parole officials to utilize any particular analytical model for determining recidivism or risk of dangerousness if released on parole. See Swarthout, 562 U.S. at 222 (emphasizing that "[b]ecause the only federal right at issue is procedural, the relevant inquiry is what process Cooke and Clay received, not whether the state court decided the case correctly."). Federal due process is limited to certain minimal procedures including the opportunity to be heard and a statement of reasons for the denial of parole. Absent these procedural due process protections, the Constitution demands nothing more. Accordingly, the amended complaint fails **[*6]** to state a cognizable due process challenge against any defendant.

Plaintiff's claims for relief under the First Amendment are entirely conclusory and are too convoluted to state a claim upon which relief can be granted. As the court understands it, plaintiff is alleging that defendants evaluated his particular "beliefs, thoughts, content of speech, and manner of speech" to opine that he was not suitable for parole because he was a risk to public safety. ECF No. 12 at 16. Plaintiff avers that the decisions to deny him parole in 2015 and 2020 had a chilling effect on his freedom of expression in violation of the First Amendment. As plaintiff was previously advised, in order to demonstrate a First Amendment violation, he must provide evidence showing that defendants "deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct.'" Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (citation omitted). ECF No. 7 at 4 (screening order). The allegations in the amended complaint do not allege that chilling plaintiff's speech was "a substantial or motivating factor" in defendants' decision that plaintiff was not suitable for parole based on his risk of recidivism. Therefore, the allegations based on the **[*7]** First Amendment fail to state a cognizable claim against any named defendant.

Plaintiff's facial challenges to the specific state statutes governing parole suitability also fail to state a claim for relief applying the four-part Turner standard. The court has no doubt that California's parole suitability standards are reasonably related to the legitimate penological interest in ensuring that violent inmates are not released into the community. Requiring inmates to have a psychological assessment to determine their risk of recidivism is logically connected to a parole suitability determination by the Board of Parole Hearings. The challenged regulations do not preclude plaintiff from learning or communicating about his alternative relapse prevention strategies in non-parole related forums within the prison setting. See Pell v. Procunier, 417 U.S. at 827-28 (finding that "in light of the alternative channels of communication that are open to prison inmates, ...this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional"). Therefore, the court finds that plaintiff's amended complaint does not state a claim for relief based on his facial challenge to California's specific parole statutes. **[*8]**

V. Leave to Amend

If the court finds that a complaint or claim should be dismissed for failure to state a claim, the court has discretion to dismiss with or without leave to amend. Leave to amend should be granted if it appears possible that the defects in the complaint could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se litigant must be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." (citation omitted). However, if, after careful consideration, it is clear that a claim cannot be cured by amendment, the Court may dismiss without leave to amend. Cato, 70 F.3d at 1105-06.

It appears to the court that further amendment would be futile because plaintiff's factual allegations do not establish any constitutional claim for relief as a matter of law even after leave to amend was previously granted. Therefore, the undersigned recommends that this action be dismissed without further leave to amend. Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to amend shall be freely given, the court does not have to allow futile amendments).

VI. Plain Language Summary

The following information **[*9]** is meant to explain this order in plain English and is not intended as legal advice.

It is recommended that your first amended complaint be dismissed because it fails to state any cognizable claim for relief. Allowing you to amend the complaint would be futile at this point. As a result, it is recommended that you not be granted leave to amend your complaint and that this civil action be closed.

If you disagree with this recommendation, you have 14 days to explain why it is not the correct result. Label your explanation as "Objections to the Magistrate Judge's Findings and Recommendations." The district judge assigned to your case will then make a final decision.

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion to expedite the screening of his amended complaint (ECF No. 13) is denied as moot in light of the recommendation to dismiss his first amended complaint for failing to state a claim.

IT IS FURTHER RECOMMENDED that:

1. Plaintiff's first amended complaint (ECF No. 12) be dismissed without leave to amend.

2. The Clerk of Court be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the **[*10]** provisions of 28 U.S.C. § 636(b)(l). Within fourteen 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 response to the objections shall be served and filed within fourteen 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: May 10, 2021

/s/ Carolyn K. Delaney

CAROLYN K. DELANEY

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

Cal Pen Code § 3041

Copy Citation

Deering's California Codes Annotated PENAL CODE (§§ 1 — 34370) Part 3 Of Imprisonment and the Death Penalty (Titles 1 — 10) Title 1 Imprisonment of Male Prisoners in State Prisons (Chs. 1 — 9) Chapter 8 Length of Term of Imprisonment and Paroles (Arts. 1 — 4) Article 3 Paroles (§§ 3040 — 3073.1)

§ 3041. Consultation with inmate to review activities and conduct pertinent to parole eligibility and postconviction credit; Setting of parole release date; Report of backlog of cases

(a)

(1) In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the sixth year before the inmate's minimum eligible parole date for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to parole eligibility. During this consultation, the board shall provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the inmate in writing.

(2) One year before the inmate's minimum eligible parole date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally grant parole as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner.

(3) In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e).

(4) Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date or elderly parole eligible date.

(5) At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole for an en banc hearing by the board. In case of a review, a majority

vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

(b)

(1) The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.

(2) After July 30, 2001, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing.

(3) A decision of a panel shall not be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting.

(c) For the purpose of reviewing the suitability for parole of those inmates eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each inmate until the time the person is released pursuant to proceedings or reaches the expiration of his or her term as calculated under Section 1170.2.

(d) It is the intent of the Legislature that, during times when there is no backlog of inmates awaiting parole hearings, life parole consideration hearings, or life rescission hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners. The board shall report monthly on the number of cases where an inmate has not received a completed initial or subsequent parole consideration hearing within 30 days of the hearing date required by subdivision (a) of Section 3041.5 or paragraph (2) of subdivision (b) of Section 3041.5, unless the inmate has waived the right to those timeframes. That report shall be considered the backlog of cases for purposes of this section, and shall include information on the progress toward eliminating the backlog, and on the number of inmates who have waived their right to the above timeframes. The report shall be made public at a regularly scheduled meeting of the board and a written report shall be made available to the public and transmitted to the Legislature quarterly.

(e) For purposes of this section, an en banc review by the board means a review conducted by a majority of commissioners holding office on the date the matter is heard by the board. An en banc review shall be conducted in compliance with the following:

(1) The commissioners conducting the review shall consider the entire record of the hearing that resulted in the tie vote.

(2) The review shall be limited to the record of the hearing. The record shall consist of the transcript or audiotape of the hearing, written or electronically recorded statements actually considered by the panel that produced the tie vote, and any other material actually considered by the panel. New evidence or comments shall not be considered in the en banc proceeding.

(3) The board shall separately state reasons for its decision to grant or deny parole.

(4) A commissioner who was involved in the tie vote shall be recused from consideration of the matter in the en banc review.

APPENDIX 6

15 CCR 2240

Copy Citation

This document is current through Register 2022, No. 32, August 12, 2022

CA - Barclays Official California Code of Regulations TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE ARTICLE 2. INFORMATION CONSIDERED

§ 2240. Comprehensive Risk Assessments

(a) 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.

(b) 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)

(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)

(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, except initial or subsequent parole consideration hearings or subsequent parole reconsideration hearings for inmates placed on medical parole supervision on the date of the hearing and for whom the board is not required to consider the results of a risk assessment under Penal Code section 3053.9.

(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.

(3) Except as required by Penal Code section 3053.9 and notwithstanding paragraph (1) of this subdivision, the board shall not be required to prepare a risk assessment for an initial or subsequent parole consideration hearing or subsequent parole reconsideration hearing that either is scheduled to occur on or between April 1, 2021, and June 30, 2022, or was previously scheduled to occur on or between April 1, 2021, and June 30, 2022, but was postponed and

rescheduled to occur on a date after June 30, 2022, if the board determines the inmate for whom the board will conduct the hearing:

(A) was designated by the department as Security Level IV as of January 1, 2021; and

(B) received two or more Rules Violation Reports classified by the department as serious, as specified in subdivision (a) of section 3315 of article 5 of subchapter 4 of chapter 1 of division 3 of this title, for which the department found the inmate guilty at a disciplinary hearing on or between January 1, 2018, and January 1, 2021.

(4) The board shall mail notice to an inmate at least 60 calendar days before the inmate's initial or subsequent parole consideration hearing or subsequent parole reconsideration hearing if the board is not preparing a risk assessment for the hearing under paragraph (3) of this subdivision.

(5)

(A) If the board did not prepare a risk assessment for an inmate's hearing under paragraph (3) of this subdivision, the inmate or inmate's attorney of record may challenge a determination the board made under paragraph (3) if the inmate or inmate's attorney of record believes the inmate does not meet the criteria identified in paragraph (3). An inmate or inmate's attorney of record must submit the challenge to the board via mail or electronic message. However, an inmate or inmate's attorney of record may not submit a challenge based on the same grounds as a previous challenge.

(B) The inmate or inmate's attorney of record shall submit the challenge in writing to the board's Chief Counsel explaining why the inmate does not meet the criteria outlined in paragraph (3) of this subdivision.

(C) The challenge must be received by the board at least 30 calendar days before the hearing to be considered timely submitted. The board will deem electronic messages received on the next business day if sent after board business hours or on a non-business day.

(D) Upon receipt of a timely submitted challenge, the Chief Counsel shall review the inmate's records, evaluate whether the inmate meets the criteria identified in paragraph (3) of this subdivision, and issue a decision described in subparagraphs (E) or (F), as appropriate.

(E) If the Chief Counsel determines the inmate meets the criteria identified in paragraph (3) of this subdivision, the Chief Counsel shall issue a decision explaining the result of the review. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(F) If the Chief Counsel determines the inmate does not meet the criteria identified in paragraph (3) of this subdivision, the Chief Counsel shall issue a decision explaining the result of the review and require that the board prepare a risk assessment under this section. The Chief Counsel may postpone the hearing if appropriate under subdivision (d) of section 2253 of article 3 of this chapter. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(G) If the board receives a challenge less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subparagraphs (D), (E), and (F) of this paragraph no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel 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 not complete the review process and shall

promptly inform the inmate or inmate's attorney of record of this determination. The Chief Counsel's determination that insufficient time exists to review an untimely challenge is not alone good cause for either a postponement or a waiver under section 2253 of article 3 of this chapter.

(6)

(A) If the board did not prepare a risk assessment for an inmate's hearing under paragraph (3) of this subdivision, the inmate or inmate's attorney of record may request the board prepare a risk assessment if, since the inmate's most recent Rules Violation Report, the inmate has experienced a change to the inmate's physical or mental health that would be relevant to determining the inmate's suitability for parole. An inmate or inmate's attorney of record must submit the request to the board via mail or electronic message. However, an inmate or inmate's attorney of record may not submit a request based on the same grounds as a previous request.

(B) The inmate or inmate's attorney of record shall submit the request in writing to the board's Chief Counsel explaining why the board should prepare a risk assessment for the inmate despite the inmate meeting the criteria identified in paragraph (3) of this subdivision. The explanation shall include a description of the inmate's physical or mental health change and how the change is relevant to determining the inmate's suitability for parole.

(C) The request must be received by the board at least 30 calendar days before the hearing to be considered timely submitted. The board will deem electronic messages received on the next business day if sent after board business hours or on a non-business day.

(D) Upon receipt of a timely submitted request, the Chief Counsel shall review the inmate's records, evaluate whether the explanation and inmate's records demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, and issue a decision described in subparagraphs (E) or (F), as appropriate.

(E) If the Chief Counsel determines the explanation and information in the inmate's records do not demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, the Chief Counsel shall issue a decision explaining the result of the review. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(F) If the Chief Counsel determines the explanation and information in the inmate's records demonstrate that a risk assessment would provide relevant information necessary for the panel to determine the inmate's suitability for parole, the Chief Counsel shall issue a decision explaining the result of the review and require that the board prepare a risk assessment under this section. The Chief Counsel may postpone the hearing if appropriate under subdivision (d) of section 2253 of article 3 of this chapter. The board shall promptly provide a copy of the decision to the inmate or inmate's attorney of record, but in no case less than 10 calendar days prior to the date the hearing is scheduled to occur.

(G) If the board receives a request less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subparagraphs (D), (E), and (F) of this paragraph no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel 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 not complete the review process and shall promptly inform the inmate or inmate's attorney of record of this determination. The Chief Counsel's determination

that insufficient time exists to review an untimely request is not alone good cause for either a postponement or a waiver under section 2253 of article 3 of this chapter.

(7) If, while conducting a hearing before which the board did not prepare a risk assessment under paragraph (3) of this subdivision, a hearing panel finds a risk assessment is necessary to reach a determination on the inmate's suitability for parole, the panel shall continue the hearing and require the board prepare a risk assessment. The finding shall constitute good cause for a continuance under subdivision (e) of section 2253 of article 3 of this chapter.

(e)

(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)

(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)

(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) 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.

APPENDIX E

15 CCR 2281

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CA - Barclays Official California Code of Regulations TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE ARTICLE 5. PAROLE CONSIDERATION CRITERIA AND GUIDELINES FOR LIFE PRISONERS

§ 2281. Determination of Suitability

(a) General. The panel shall first determine whether a prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

(b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's: social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

(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.

(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The 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 suitability include:

(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense.

(4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress had built over a long period of time.

(5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

(7) Age. The prisoner's present age reduces the probability of recidivism.

(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.