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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**

11
12
13 SAM JOHNSON,

14 Plaintiff,

15 v.

16 JENNIFER SHAFFER, et al.,

17 Defendants.
18

)
) **Case No.: 2:12-cv-1059 GGH P**
)
) **FIRST AMENDED CIVIL**
) **COMPLAINT FOR**
) **DECLARATORY AND**
) **INJUNCTIVE RELIEF**

19
20 **INTRODUCTION**

21 1. This is a first amended civil rights complaint by state prisoner Sam Johnson
22 seeking declaratory and injunctive relief under constitutional, statutory and regulatory law
23 against officials of the State of California, including the Governor, the Secretary of the
24 California Department of Corrections and Rehabilitation (CDCR) and various officials of
25 the Board of Parole Hearings (BPH) for their unconstitutional bias in implementing a
26 system of fabricated evidence to support their decisions to deny parole.
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1 2. The Court granted Defendants' motion to dismiss the original complaint on the
2 grounds that Plaintiff had not alleged sufficient facts to support his claim of unlawful bias
3 as reflected in Defendants' current utilization of psychological evaluations in the parole
4 consideration process. This amended complaint identifies the timing and genesis of BPH's
5 development of the Forensic Assessment Division (FAD). It specifically alleges that the
6 BPH actually determined that it was improper and impossible for psychologists to predict
7 violence risk or to assess a prisoner's insight and remorse, that their own experts
8 vehemently opposed the FAD protocol, and that these determinations were made only
9 *months* before they initiated the FAD process. BPH's irreconcilable and inexplicable
10 change in position is specifically aimed at protecting its parole decisions from judicial
11 scrutiny of its practices.

12 3. This amended complaint makes clear that BPH's actions were directly intended
13 to maintain its impermissibly low rate of granting parole by fabricating evidence that would
14 support its unlawful decisions.

JURISDICTION AND VENUE

15 4. Plaintiff brings this action to redress the deprivation of rights secured to him by
16 the Fourteenth Amendment to the United States Constitution. This action also arises under
17 Section 7 of Article 1 of the California Constitution, as well as the statutory and regulatory law
18 of the State of California.

19 5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and
20 1343, and 42 U.S.C. § 1983. The United States Supreme Court has expressly held that
21 prisoners challenging parole consideration procedures may bring suit in federal court under §
22 1983. *Wilkinson v. Dotson*, 544 U.S. 74 (2005). This Court also has supplemental jurisdiction
23 over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

24 6. Venue is proper in this judicial district under 28 U.S.C. § 1391 because the
25 defendants are employed in the County of Sacramento, which is in this judicial district.
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THE PARTIES

A. Plaintiff

7. Sam Johnson (“Johnson”) is a prisoner incarcerated at San Quentin State Prison. He is serving a sentence of 25 years to life, plus four years, following his 1991 conviction for first degree murder, robbery and assault. He has always maintained his innocence of these crimes.

B. Defendants

8. Defendant JENNIFER SHAFFER (“Shaffer”) is the Executive Officer of the Board of Parole Hearings (“BPH”). As the administrative head of the agency, she is responsible for the day-to-day operations of the BPH, including oversight and supervision of its Forensic Assessment Division. She is sued in her official capacity only.

9. Defendant MATTHEW CATE (“CATE”) is the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”), the umbrella organization under which the BPH was formed. For years, Secretary Cate has been aware of the problems with the FAD protocol, yet he has not acted to address them. He is sued in his official capacity only.

10. Defendant EDMUND G. (JERRY) BROWN, Jr. is Governor of the State of California and the Chief Executive of the state government. He is sued in his official capacity. As Governor, Mr. Brown is responsible for the appointment of Defendant Secretary of the CDCR and, subject to State Senate confirmation, every Commissioner of the Board of Parole Hearings (“BPH”). The Governor also appointed the Defendant Executive Officer of the BPH. The Governor, in union with those whom he appoints, and by and through those persons employed by the other defendants, controls and regulates Plaintiff’s custody. The Governor has also endorsed reliance on Defendants’ FAD protocol to deny prisoners parole.

11. Defendant CLIFF KUSAJ, Psy. D., (“KUSAJ”) is the head of the BPH’s Forensic Assessment Division (“FAD”), through which BPH prepares psychological evaluations and risk assessments for consideration by BPH Commissioners in determining prisoners’ suitability for parole. He is responsible for reviewing, approving and defending psychological evaluations prepared as part of the FAD protocol. He is sued in his official capacity only.

1 12. Defendant RICHARD HAYWARD, Ph.D., (“HAYWARD”) is a psychologist
2 employed by the FAD. Dr. Hayward authored the report utilized to deny Plaintiff parole at his
3 April 21, 2010, parole hearing. He is sued in his official capacity only.

4 13. Defendant THOMAS POWERS (“POWERS”) is or was at some time relevant to
5 this complaint a Commissioner of the Board of Parole Hearings. As a Commissioner,
6 Defendant Powers is responsible for the operation and policy making of the BPH and he
7 presides or presided over hearings to determine whether to release prisoners on parole.
8 Defendant Powers presided over Plaintiff’s parole hearing on April 21, 2010. He is sued in his
9 official capacity only.

10 14. Defendant AL FULBRIGHT (“FULBRIGHT”) is or was at some time relevant to
11 this complaint a Deputy Commissioner of the Board of Parole Hearings. Defendant Fulbright
12 presided along with Defendant Powers at Plaintiff’s parole hearing on April 21, 2010. He is
13 sued in his official capacity only.

14 15. Plaintiff is informed and believes, and on that basis alleges, that at all times
15 mentioned in this complaint each individual Defendant was acting under color of state law.

16 STATEMENT OF THE FACTS

17 Background

18 16. The BPH is charged with determining whether and when indeterminately-
19 sentenced prisoners (“Lifers”) in California are suitable to be released on parole. The BPH is
20 responsible for promulgating rules, policies and regulations to effectuate the statutory mandate
21 to normally grant parole to Lifers when they first become eligible for parole. Cal. Penal Code,
22 § 3041. The BPH is required to grant parole as long as the Lifer being considered does not
23 present an unreasonable risk to public safety. BPH and its predecessor entities have established
24 regulations setting forth the criteria to be considered in determining a prisoner’s suitability for
25 release on parole. Recently added to those regulations are new procedures requiring
26 psychological evaluations to be conducted and reported by the FAD for every single Lifer at
27 every single parole consideration hearing for him or her. Cal. Code Regs., tit. 15, § 2240.

28 17. Approximately 32,000 California prisoners are serving life sentences with the
possibility of parole. Some 10,000 of these prisoners have already served their minimum terms

1 of seven, 15 or 25 years and are therefore eligible for parole consideration by the BPH. Courts
2 have consistently held that California's parole scheme creates a constitutionally protected
3 liberty interest in parole, and the controlling statute presumes that parole will be granted most
4 of the time. However, over the past 30 years, parole officials have implemented various
5 policies making parole a virtual impossibility when prisoners first appear before the BPH.
6 Indeed, despite their constitutionally- protected liberty interest in parole and the statutory
7 mandate that parole *normally* be granted when they first become eligible, less than 1% are
8 actually granted parole at their initial parole hearings, and less than 20% are granted parole at
9 any subsequent hearings.

10 **The Changing Role of Psychological Evaluations**

11 18. The BPH and its predecessors have long utilized psychological evaluations when
12 considering prisoners' suitability for parole, even though such evaluations have never been
13 authorized for more than a limited class of lifers: "When the diagnostic study of any inmate
14 committed under subdivision (b) of Section 1168 so indicates, the director shall cause a
15 psychiatric or psychological report to be prepared for the [parole board] prior to the release of
16 the inmate. The report shall be prepared by a psychiatrist or psychologist licensed to practice in
17 this state." Cal. Pen. Code, § 5068. BPH's orders for psychological evaluations for most lifers
18 are not supported by a diagnostic study indicating such evaluations to be necessary or
19 appropriate.

20 19. Prior to 2007, psychological evaluations were routinely conducted and reported by
21 mental health professionals who are on staff at the institutions where parole hearings occur.
22 Although the purpose of these evaluations was to identify any existing mental illness that might
23 impact a prisoner's risk to public safety, some of the reports began to include assessments of
24 prisoners' "insight" into or "remorse" for their offenses. By November 2005, BPH sought to
25 clarify and limit the role of these reports to focus on the presence or absence of mental illness.
26 Specifically, the Board determined that these evaluations should not assess a prisoner's insight
27 because "neither clinical psychologists nor psychiatrists are able to accurately decipher an
28 inmate's level of insight into the causative factors of the Life Crime." Instead, the Board
determined that *commissioners* "should make their own independent determination of the

1 matter.” For the same reason and at the same time, the Board determined that these evaluations
2 should not assess a prisoner’s remorse for the commitment offense.

3 20. By January 2006, the Board went even further and admitted that there was no
4 legitimate basis for continuing to obtain psychological evaluations for parole consideration
5 hearings at all, concluding that “these reports have been used for purposes for which they were
6 not intended,” which was “especially true for those inmates who are not part of the Mental
7 Health Services Delivery System (MHSDS).” In fact, the Board issued a directive that month
8 that “Psychological reports shall not be ordered for the purposes of evaluating parole suitability
9 of non-MHSDS inmates.”

10 21. Later in 2006, BPH inexplicably changed its mind and proposed not only that all
11 Lifers would receive a psychological evaluation but that three risk assessment tools should be
12 administered to each Lifer to predict their risk of future violence. These tools were the
13 Psychopathy Checklist-Revised (PCL-R), the 20-item Historical, Clinical, Risk Management
14 tool (HCR-20), and the Level of Service/Case Management Inventory (LS/CMI).

15 **BPH Experts Reject these Tools**

16 22. The PCL-R is a list of traits associated with a stereotypical psychopathic
17 personality. Critics complain that the focus on historical factors has the effect of
18 overdiagnosing psychopathy and is not useful in predicting future violence. Specifically, this
19 instrument is considered “ill suited for tracking any changes in an inmate’s risk during
20 incarceration.” Nevertheless, to lay observers, like BPH commissioners, the “psychopath”
21 label leads directly to negative implications for future violence. Researchers have observed,
22 “For members of the lay public, the term psych path evokes images of such notorious serial
23 killers as Theodore Bundy, Charles Manson, and John Wayne Gacy” and, “At a basic level,
24 psychopathy seems to connote extreme and predatory violence.” Yet, the PCL-R has been
25 found to be only modestly predictive of future violence. Even the creator of this instrument has
26 expressed disappointment over its reckless use by inadequately-trained and inexperienced
27 psychologists to predict violence.

28 23. The HCR-20 is a research instrument but not a formal measurement instrument. It
is comprised of ten **Historical**, unchanging items; five **Clinical**, dynamic items; and five **Risk**

1 **Management** items. This instrument was validated primarily on forensic patients, civil
2 psychiatric patients and mentally disordered offenders. The Clinical items include “insight”
3 and “impulsivity,” but the instrument contains no behavioral or conceptual anchors for
4 assessing these items. The Risk Management items require evaluators to guess the future
5 circumstances in which the subject will find himself or herself. Furthermore, evaluators have
6 no guidance or consistency in coding the individual items, either in rating them as 0, 1 or 2 or
7 in characterizing them as low or high. There are also no published norms to aid in interpreting
8 the test results of a person or group in relation to a defined population. Lastly, this tool does
9 not structure how individual items are to be combined to produce an overall assessment of risk.
10 Because of the lack of guidance in interpreting raw scores on the HCR-20, psychologists are
11 essentially left to predict future violence based on their clinical judgment, which is considered
12 no more accurate than flipping a coin. These limitations are compounded when the instrument
13 is administered by relatively inexperienced, untrained psychologists like those working for the
14 FAD.

15 24. The LS/CMI is an instrument that utilizes dozens of items separated into a series
16 of risks needs factors. BPH’s Senior Psychologist has admitted that this tool has not been
17 established to predict *violence* in any population, and it only moderately predicts *general*
18 recidivism. Furthermore, those who developed the LS/CMI caution against reliance solely on
19 the combined scores of the assessed risk factors to produce an overall risk; yet, that is generally
20 how the FAD now utilizes this tool.

21 25. In August 2006, BPH convened a panel of forensic psychologists and other
22 experts to assess the validity of these three tools for use in California’s parole consideration
23 process. The invited participants in this meeting argued against the BPH’s use of these tools,
24 criticizing them for their overreliance on historical, static factors and for the fact that they had
25 never been validated for predicting violence among long-term prisoners like California’s lifers.
26 Shockingly, not only did BPH move forward with these tools anyway, but BPH officials lied to
27 the public and to the state’s regulatory agency by saying there was a consensus among these
28 experts, and that they agreed that these tools were appropriate.

1 26. The experts have vehemently denied endorsing these tools and deny that there was
2 anything close to a consensus. At least one expert was adamant and very clear:

3 This is a misrepresentation of the meeting that I attended; the panel reached no
4 such consensus, and I continue to disagree with the administration of these risk
5 assessment tools to term-to-life prisoners. [¶] Neither the LS/CMI nor the HCR-
6 20/PCL-R has been validated for a population such as California's term-to-life
7 prisoners. These risk assessments were designed primarily to identify those people
8 who have been convicted of crimes but who do not need incarceration and can be
9 better managed in the community; there were not created to predict future
10 violence of people who have matured in age while serving long sentences in
11 prison. Data has shown that the California lifer population has an extremely low
12 recidivism rate – under 2% according to most observers – and the LS/CMI and
13 HCR-20/PCL-R tend to over-predict the failure rate for these prisoners,
14 classifying their risk of violence as higher than it truly is.

15 27. Nevertheless, by the 2006/2007 Budget Year, BPH was requesting more than \$3.5
16 million annually for psychological evaluations – which months earlier the Board admitted
17 were unnecessary and being misused. This figure nearly doubled to more than \$6 million by
18 2008. In the meantime, in April or May 2007, BPH issued a memo forbidding prison-based
19 psychologists from conducting any more lifer evaluations, choosing instead to have its new
20 FAD team handle all of them.

21 **FAD Assumes New Prominence Solely to Exploit Judicial Loophole**

22 28. The bias toward these invalid tools and against granting parole is even more
23 apparent when considering that BPH's increased emphasis in these reports on the presence or
24 absence of insight and remorse (factors with no statistical correlation to risk in this population)
25 occurred in the midst of a continuing trend of judicial opinions criticizing the parole authority's
26 decision making, particularly its findings that were directly at odds with those of psychologists
27 working at the institutions. See, e.g., *In re Lawrence*, 44 Cal.4th 1181, 1223-1224 (2008).
28 Indeed, in the period since the California Supreme Court issued an opinion affirming the parole
authority's reliance on a prisoner's lack of insight when denying him parole (*In re Shaputis*, 44
Cal.4th 1241 (2008)), BPH has found a lack of insight in every prisoner whose parole the BPH
denies, and FAD evaluators are the primary tool in making this finding – again, findings BPH
had already acknowledged these psychologists cannot make.

1 29. In the year after *Shaputis* was decided, a purported “lack of insight” was cited in
2 twice as many appellate opinions as had been the case in the *31 years* before *Shaputis*.
3 Similarly, the Governor cited a lack of insight in only 12% of his decisions blocking parole in
4 the year preceding *Shaputis*, but he did so in a whopping 78% of his decisions the year after
5 *Shaputis* was decided. Overall, the Governor cited FAD evaluations in nearly 90% of his
6 decisions blocking parole in 2009, a rate that continued into 2011. In other words, BPH’s
7 implementation of the FAD protocol has clearly had its intended effect of prejudicing
8 commissioners and the Governor against granting parole. The primary purpose of establishing
9 the FAD and implementing its new protocol was to prejudice lifers appearing before the Board
10 by making it harder for them to obtain a favorable psychological evaluation, harder to obtain a
11 favorable parole determination and harder to establish a favorable administrative record for
12 challenging parole decisions in court.

13 30. In summary, the BPH hired its own team of FAD psychologists to prepare
14 evaluations because those prepared by prison-based clinicians were too favorable to prisoners
15 and too often supported judicial rejection of BPH decisions; they did this after admitting that
16 the evaluations themselves were unnecessary and being misused; they ordered their new FAD
17 team to utilize risk assessment tools their own experts said were invalid and unjustifiably
18 produce elevated assessments; they ordered their FAD team to assess insight and remorse
19 immediately after admitting that these clinicians are distinctly incapable of assessing such
20 matters; and these evaluations are cited for their elevated risk assessments and their
21 assessments of insight and remorse every time parole is denied.

22 31. BPH actually established the FAD years before attempting to promulgate
23 regulations that might authorize it. Furthermore, when BPH *did* attempt to promulgate such
24 regulations, it did so by lying to the state agency responsible for certifying compliance with
25 applicable rulemaking procedures, primarily citing the nonexistent consensus among its expert
26 panel.

1 **FAD Protocol Affects All Lifers but Escapes External Scrutiny**

2 32. Over the past six years – including before, during and since Plaintiff’s April 2010
3 parole hearing – BPH has established a pattern or practice of utilizing the FAD to prejudice
4 BPH commissioners against granting parole to eligible prisoners. In fact, Plaintiff’s counsel has
5 been contacted by lifers at 27 of California’s 32 prisons housing lifers (84%), including all
6 eight of the prisons housing the highest concentrations of parole-eligible lifers. Plaintiff’s
7 specific challenges to the FAD protocol (detailed below) exemplify the complaints these
8 prisoners make.

9 33. BPH has effectively shielded both the nature and scope of its FAD deficiencies
10 and biases from public scrutiny. In July 2010, California’s Office of the Inspector General
11 (OIG) issued a Special Report on BPH’s Psychological Evaluations, in which the OIG
12 determined that BPH has no system for tracking or otherwise monitoring the number of errors
13 in psychological evaluations, no system for determining whether FAD psychologists are
14 assessing higher levels of risk than were found in previous evaluations of the same prisoners,
15 an inadequate oversight system for senior FAD psychologists to review the reports of FAD
16 staff psychologists, and inadequate training of its psychologists. In essence, senior
17 psychologists routinely rubber-stamp staff psychologists’ reports without verifying the validity
18 of anything written. Due to these deficiencies, the OIG was unable to conduct the kind of
19 review requested by the California Legislature, which provides oversight for BPH
20 appointments and operations.

21 **Plaintiff’s Case**

22 34. Plaintiff is serving a life sentence for first degree murder at San Quentin State
23 Prison. He is currently in his third term as Chairman of San Quentin’s Men’s Advisory
24 Council, a role in which he regularly interacts with hundreds of prisoners of all races,
25 ethnicities and ages, and he acts as the liaison between these prisoners and prison officials to
26 resolve disputes and inform policy decisions.

1 35. Plaintiff's Comprehensive Risk Assessment ("CRA") was conducted by FAD
2 psychologist Richard Hayward, Ph. D., in February 2009. The CRA provides approximately
3 three pages of single-spaced, detailed history covering Plaintiff's childhood and adolescence,
4 family history, education, development, relationships, leisure activities, employment history,
5 and post-parole plans – all of which appear void of any significant red flags. Next, the clinical
6 assessment section reviewed Plaintiff's mental health, medical, and substance use history –
7 again, all of which appear void of significant problems. The evaluator stated that Plaintiff was
8 "cooperative" during the interview, that he "displayed a full range of affect," that his mood was
9 "neutral," and that there were "no signs of any thought disturbances." Prior to the FAD
10 protocol, this would have been the entirety of the assessment because no mental disturbances
11 were identified. Because of the FAD protocol, the evaluation went further.

12 36. Surprisingly, Dr. Hayward diagnosed Plaintiff as having Antisocial Personality
13 Disorder – an Axis II disorder within the Diagnostic and Statistical Manual of Mental
14 Disorders ("DSM-IV-TR"). Dr. Hayward stated that the disorder was attributable "to the
15 committing offense, the history of community offenses and arrests and the rule violations
16 noted." However, reviewing Section 301.70 of the DSM-IV-TR, it does not appear that
17 Plaintiff meets most of the diagnostic criteria.

18 37. Dr. Hayward also utilized the three risk assessment tools currently employed by
19 the FAD to project Plaintiff's future risk. According to Dr. Hayward, Plaintiff's score on the
20 PCL-R placed him in the "higher range of the clinical construct of psychopathy when
21 compared to other male offenders" – specifically, higher than fifty-seven percent of those
22 offenders assessed using this instrument. Similarly, Dr. Hayward claimed that Plaintiff's scores
23 on the HCR-20 placed him in the "high range for violent recidivism," and the LS/CMI placed
24 him in the "high category," above thirty-three percent of "the North American sample of
25 incarcerated male offenders." Predictably, Dr. Hayward wrote that Plaintiff had "a lack of
26 insight, negative attitudes, impulsivity and a lack of responsiveness to treatment." He did not
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1 offer any basis for his finding of a “lack of insight.” Also predictably, the BPH hearing panel
2 cited a lack of insight and understanding of the crime as the basis for denying Plaintiff parole.

3 38. Plaintiff and his attorney made numerous attempts to address and correct Dr.
4 Hayward’s report because it contained numerous conclusions that were either unsupported by
5 the record or directly contrary to other statements in the report itself. Plaintiff’s counsel wrote
6 to the BPH more than two months before the April 2010 hearing, raising nine separate
7 substantial errors Dr. Hayward made. Among those errors were the following:

- 8 a. Dr. Hayward’s report claimed a “substantial history of impaired impulse control,”
9 “impaired behavioral control,” and “negative attitudes.” However, Plaintiff had no
10 history of violence, no juvenile record and only three misdemeanor convictions
11 prior to the commitment offense. He maintained steady employment (including
12 strong leadership positions) both prior to and throughout his nineteen years of
13 incarceration. His sole rule violation report in prison was six years prior to the
14 hearing and was categorized as only a Division “F” offense.
- 15 b. Although Dr. Hayward acknowledged that Plaintiff has no mental illness, has
16 never received mental health treatment in prison and has no history of any
17 problems with drugs or alcohol, he inexplicably concluded there was evidence of
18 “a lack of responsiveness to treatment” that increased Plaintiff’s risk to the public
19 if released.
- 20 c. Dr. Hayward claimed that Plaintiff “had significant problems with previous
21 violence, psychopathy (sic) and Antisocial Personality Disorder” prior to the
22 commitment offense, none of which is true.
- 23 d. Dr. Hayward relied on the following factors in determining that Plaintiff scored in
24 the higher range on the PCLR: “Superficial Charm, Pathological Lying, Shallow
25 Affect, Poor Behavioral Controls, Impulsivity, Irresponsibility.” However, there
26 was no evidence anywhere in the assessment supporting a finding that Plaintiff is
27 a pathological liar, nor is there evidence that he has poor behavior control.
- 28

- 1 e. In discussing the Clinical, or more dynamic, aspects of the HCR-20, Dr. Hayward
2 generically asserted that there was *evidence* of “a lack of insight, negative
3 attitudes, impulsivity and lack of responsiveness to treatment.” Yet, nowhere did
4 Dr. Hayward explain any evidentiary basis for this substantial finding.
- 5 f. The assessment stated that Plaintiff’s parole plans indicated problems in the area
6 of personal support and compliance with remediation attempts. Yet, Dr. Hayward
7 found “generally feasible” Plaintiff’s plans to live with his wife and children and
8 to seek a job in the restaurant industry where he was successfully employed for
9 roughly 15 years prior to his incarceration. These contradictory statements were
10 never reconciled.
- 11 g. Factors that purportedly increased Plaintiff’s risk of recidivism were a “reduced
12 level of pro-social family support, a reduced level of constructive leisure
13 activities, associations with criminally oriented companions, a pro-criminal
14 orientation and an antisocial pattern.” However, these statements directly
15 contradict the findings elsewhere in the report that Plaintiff maintains a positive
16 relationship with his two surviving family members and his wife’s family, is
17 married to the mother of two of his children, has completed his Associate’s
18 Degree in prison and has been chair of the Men’s Advisory Council for years.
- 19 h. There were multiple instances in the assessment where Dr. Hayward relied on a
20 claimed lack of remorse and/or insight into the commitment offense as a factor
21 demonstrating an increased risk to public safety if released. These statements were
22 based on the fact that Plaintiff has always steadfastly maintained that he is
23 innocent of this crime. However, Defendants are prohibited from finding
24 unsuitability based on a prisoner’s refusal to admit guilt (see Penal Code section
25 5011 and Section 2236 of Title 15 of the California Code of Regulations). More
26 importantly, Plaintiff has expressed deep and sincere remorse for his role in the
27 events that led up to the commitment offense.

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1 i. The assessment contains no legitimate explanation or information regarding Dr.
2 Hayward’s methodology in evaluating Plaintiff’s risk to the public if paroled. Dr.
3 Hayward states: “Ultimately, whether an inmate will engage in future violence is a
4 function of a variety of factors that include history, personal disposition, and
5 situational variables. The evaluator has taken these factors into consideration in
6 determining how much weight to allot to each of the measures and in formulating
7 an overall estimate of risk.” Unfortunately, from this the Board was unable to
8 determine which of the many factors relied on by Dr. Hayward – many of which
9 were invalid or unsupported by the facts – were used to determine Plaintiff’s level
10 of risk. In light of the fact that the findings and assessment in this report are so far
11 at odds with the prior psychological report for Plaintiff,¹ the findings in this report
12 required considerable explanation.

13 **BPH Ignores its own FAD Rules**

14 39. The FAD’s psychological protocol required the Board to conduct a new
15 evaluation if Dr. Hayward’s report contained even *one* substantial error. Yet, Plaintiff
16 identified *nine* separate substantial errors and BPH responded in March 2010 by refusing to
17 remove Dr. Hayward’s report and finding no administrative or substantive errors in the report.
18 Ironically, the hearing panel actually agreed with Plaintiff that Dr. Hayward’s report contained
19 substantial errors, yet the panel still relied on the report to deny Plaintiff parole.

20 40. Defendants failed to alert the April 2010 hearing panel to the controversy
21 regarding Dr. Hayward’s psychological evaluation despite the exchange of correspondence
22 during the two months leading up to the scheduled hearing. In fact, presiding commissioner
23 Powers had never even seen the original letter highlighting the nine substantial errors in the
24

25 _____
26 ¹ The prior report, written by a staff psychologist at the prison, not by the FAD, found that
27 Plaintiff “showed better than average insight into himself and his difficulties” and he “seems
28 capable of exercising good judgment.” That report did not diagnose antisocial personality disorder
and found that Plaintiff’s “potential for violence at this time appears to be therefore lower than
average.”

1 evaluation until Plaintiff's counsel provided him with a copy of it after the hearing had already
2 begun.

3 41. Despite the provisions in California Penal Code Section 2081.5 and California
4 Government Code § 11181, subdivisions (e) and (f), which direct Defendants to make
5 psychological evaluators available for questioning in parole consideration hearings, Plaintiff is
6 informed and believes that Defendants never grant requests that such evaluators appear and
7 testify in parole consideration hearings. Defendants failed to even respond to Plaintiff's request
8 prior to and during his April 2010 hearing.

9 42. Defendants denied Plaintiff's counsel's request for the raw data and risk
10 assessment scores that purportedly supported Dr. Hayward's findings.

11 43. Defendant's April 2010 parole decision became final on August 19, 2010.
12 Plaintiff is due to have his subsequent parole consideration hearing no later than April 21,
13 2013.

14 44. As long as the challenged report remains in Plaintiff's prison file, Defendants will
15 continue to rely on it at Plaintiff's next parole consideration hearing and all future hearings
16 unless and until he is released on parole, regardless of whether subsequent risk assessments are
17 conducted and reported.

18 45. Defendants have refused numerous requests to record and transcribe meetings
19 between FAD psychologists and the prisoners they evaluate, even though such meetings are not
20 confidential and such recordings and transcripts would easily resolve the majority of disputes
21 raised regarding statements recorded in the written reports.

22 **Need for Injunctive Relief**

23 46. BPH now requires the FAD to conduct a psychological evaluation prior to every
24 single parole consideration hearing. Accordingly, all of the roughly 10,000 Life prisoners who
25 have served their minimum terms and are therefore eligible for parole consideration are directly
26 impacted by these unlawful patterns and practices.

1 47. Defendants' policies, practices, conduct, and acts alleged herein have resulted and
2 will continue to result in irreparable injury to Plaintiff, including but not limited to violations of
3 his constitutional rights. Plaintiff has no plain, adequate or complete remedy at law to address
4 the wrongs described herein. Defendants will continue to conduct unconstitutional parole
5 consideration hearings unless enjoined by this Court.

6 48. An actual controversy exists between Plaintiff and Defendants in that Plaintiff
7 contends that the policies, practices and conduct of Defendants alleged herein reflects an
8 unlawful and unconstitutional bias, whereas Plaintiff is informed and believes that Defendants
9 contend that said policies, practices and conduct are lawful and constitutional. Plaintiff seeks a
10 declaration of rights with respect to this controversy.

11 49. Injunctive relief including but not limited to an order enjoining Defendants'
12 policies, practices, regulations, actions and omissions such as are alleged herein, and requiring
13 the repeal or reformation of Defendants' policies, practices, regulations, actions or omissions
14 so as to prevent their impermissible effect, is therefore appropriate and necessary to avoid
15 irreparable harm to Plaintiff and to effectuate the purpose of the United States and California
16 Constitutions and the other statutes and laws referenced herein as the subject of Plaintiffs'
17 claims for relief.

18 **FIRST CAUSE OF ACTION**

19 50. Plaintiff realleges and incorporates by reference paragraphs 1 through 49 of this
20 complaint as though fully set forth herein.

21 51. California's parole scheme creates a constitutionally protected liberty interest in
22 having Plaintiff's parole application duly and fairly considered and in being released on parole.

23 52. Defendants are utilizing tools their own experts determined are invalid and
24 produce impermissibly elevated assessments. They also direct their FAD team to assess
25 matters (insight and remorse) Defendants already admitted they are incapable of assessing.
26 Defendants applied these tools in Plaintiff's parole hearing, as they have in most hearings
27 conducted since 2006 and nearly all hearings held since January 2009. The primary reason for
28

1 the FAD protocol is to fabricate evidence that will protect BPH decisions from judicial scrutiny
2 so that BPH can maintain its impermissibly low rate of granting parole, particularly when
3 Lifers first appear before the BPH.

4 53. Defendants' obvious bias against granting parole denied Plaintiff a fair hearing
5 and violates his right to due process under the Fourteenth Amendment.

6 **SECOND CAUSE OF ACTION**

7 54. Plaintiff realleges and incorporates by reference paragraphs 1 through 53 of this
8 complaint as though fully set forth herein.

9 55. In their efforts to justify the development of the FAD and its use of the current
10 psychological evaluation methodology and tools, Defendants lied to the public and to the
11 California Office of Administrative Law regarding the process for establishing the FAD and
12 selecting the three risk assessment tools currently being utilized by the FAD to predict risk.
13 They falsely claimed a consensus among their expert panel and falsely claimed that these tools
14 were valid.

15 56. Defendants' intentional misconduct and reliance on invalid instruments violated
16 Plaintiff's right to due process under the Fourteenth Amendment.

17 **THIRD CAUSE OF ACTION**

18 57. Plaintiff realleges and incorporates by reference paragraphs 1 through 56 of this
19 complaint as though fully set forth herein.

20 58. Any respectable process through which written reports are considered in a manner
21 that impacts a person's liberty interest must also provide a mechanism for correcting errors in
22 those reports so as not to unjustly harm the subject of the report. Here, the FAD protocol
23 requires the removal or correction of FAD reports when they contain at least one substantial
24 error or at least three administrative errors. However, Defendants refused to remove or in any
25 way correct Dr. Hayward's report even though it contained nine substantial errors – some of
26 which Defendants even acknowledged.

1 59. Defendants’ intentional disregard for their own rules and their reliance on
2 evidence lacking sufficient indicia of reliability to consider Plaintiff’s suitability for parole
3 violates his right to due process under the Fourteenth Amendment.

4 **FOURTH CAUSE OF ACTION**

5 60. Plaintiff realleges and incorporates by reference paragraphs 1 through 59 of this
6 complaint as though fully set forth herein.

7 61. At a minimum, California Lifers have a constitutional right to notice of the
8 evidence being used to consider their suitability for parole. While Defendants provided
9 Plaintiff with Dr. Hayward’s report, they refused his request for the raw data and underlying
10 scores Defendants claim supported the statements in the report. They also did not provide
11 Plaintiff or his counsel with any recording, transcript or other notes from his interview with Dr.
12 Hayward. Dr. Hayward’s report may only be considered by Defendants to evaluate Plaintiff’s
13 suitability for parole if the report’s contents are both relevant and reliable. However, Plaintiff
14 has absolutely no way to evaluate the relevance and reliability of Dr. Hayward’s conclusions
15 without access to the raw data and underlying scores from his evaluation. Indeed, this raw data
16 is the *actual* evidence that either supports or does not support the ultimate conclusion of
17 whether Plaintiff presents a current risk to the public. These concerns are heightened by the
18 internal inconsistencies in the report itself, some of which the hearing panel even
19 acknowledged.

20 62. Defendants’ refusal to provide the underlying data they claim supported Dr.
21 Hayward’s conclusions denied Plaintiff access to the information being used against him in
22 violation of due process under the Fourteenth Amendment.

23 **FIFTH CAUSE OF ACTION**

24 63. Plaintiff realleges and incorporates by reference paragraphs 1 through 62 of this
25 complaint as though fully set forth herein.

26 64. At a minimum, California Lifers have a constitutional right to have an opportunity
27 to be heard during their parole consideration hearings. Defendants’ refusal to provide Plaintiff
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1 with the raw data underlying Dr. Hayward's report deprived him of the knowledge of all the
2 information to which he needed to respond to protect his rights. For example, without the basis
3 for Dr. Hayward's conclusions, Plaintiff was unable to address the new diagnosis of Antisocial
4 Personality Disorder or the claims of impulsivity or failure to benefit from treatment. Indeed,
5 none of these claims had ever before been made in Plaintiff's life, so their basis at this time
6 remains a complete mystery.

7 65. Defendants' unfounded diagnosis of Antisocial Personality Disorder here is
8 consistent with its practice of over-diagnosing the alleged disorder using these risk assessment
9 tools, even though a large number of prisoners, like Plaintiff, do not meet the diagnostic
10 criteria.

11 66. Defendants' refusal to provide the underlying data they claim supported Dr.
12 Hayward's conclusions deprived Plaintiff of his right to be heard and therefore violated due
13 process.

14 **SIXTH CAUSE OF ACTION**

15 67. 48. Plaintiff realleges and incorporates by reference paragraphs 1 through 66 of
16 this complaint as though fully set forth herein.

17 68. Defendants refuse to record and transcribe psychological interviews between FAD
18 clinicians and prisoners, even though the meetings are not confidential and such recordings or
19 transcripts would instantly resolve the frequent disputes regarding whether certain statements
20 were or were not made during these meetings. Here, a recording or transcript of Plaintiff's
21 meeting with Dr. Hayward would reveal whether or not there was any basis for the conclusions
22 Dr. Hayward made that were completely at odds with prior reports and with everything else in
23 Plaintiff's file. Absent such recordings or transcripts, the FAD reports are unreliable.

24 69. Defendants' reliance on evidence lacking sufficient indicia of reliability regarding
25 Plaintiff's suitability for parole violates his right to due process under the Fourteenth
26 Amendment.

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1 **SEVENTH CAUSE OF ACTION**

2 70. Plaintiff realleges and incorporates by reference paragraphs 1 through 69 of this
3 complaint as though fully set forth herein.

4 71. At least two of the risk assessment tools Defendants utilize as part of FAD’s
5 psychological evaluation process – the PCL-R and the LS/CMI – yield percentile rankings that
6 compare the subject of the evaluation to a sample of other incarcerated persons, though
7 typically the sample is comprised of inmates with mental disorders. In their reports, FAD
8 clinicians interpret these rankings as falling within either the low, moderate or high risk
9 categories. However, there are no standards used by the FAD in distinguishing between the
10 various categories. As a result, in practice, the clinicians lack any consistency in their labeling,
11 even though the resulting label plays perhaps the most significant role of any aspect of these
12 evaluations in parole consideration. Indeed, on information and belief, no prisoner labeled as
13 an overall “high” risk in one of the FAD’s reports has ever been granted parole.

14 72. The use of standardless, arbitrary and inconsistent interpretations of numerical
15 scores on these assessments renders them unreliable. Moreover, Defendants have always been
16 aware of these deficiencies, yet they use the reports anyway. Their use denied Plaintiff a fair
17 hearing in violation of his right to due process under the Fourteenth Amendment.

18 **EIGHTH CAUSE OF ACTION**

19 73. Plaintiff realleges and incorporates by reference paragraphs 1 through 72 of this
20 complaint as though fully set forth herein.

21 74. Defendants’ rules ostensibly provide an opportunity for prisoners to submit
22 written comments and objections to FAD psychological evaluations and anything else in the
23 file to be considered at the parole hearing. However, Defendants frequently neglect to provide
24 those written comments and objections to the panel of Commissioners and Deputy
25 Commissioners presiding over the hearings that are the subjects of those comments. This case
26 is a perfect example. After months of exchanged correspondence between Plaintiff’s counsel
27 and Defendants, the hearing panel was completely unaware of the nature and extent of the
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1 disputes regarding Dr. Hayward's report. Having already prepared for the hearing and shown
2 up at San Quentin on hearing day, their unwillingness to postpone the hearing in order to fully
3 consider those disputes was clear. Indeed, even though the panel agreed with Plaintiff on some
4 of his substantive challenges to Dr. Hayward's evaluation, the panel relied on its findings
5 anyway.

6 75. Defendants' misconduct here exemplifies the FAD deficiencies identified by
7 California's Office of the Inspector General, including the rubber-stamping of FAD evaluations
8 without any substantive review. Defendants' refusal to provide any meaningful review of the
9 many assertions of error raised here denied Plaintiff a fair hearing in violation of his right to
10 due process under the Fourteenth Amendment.

11 **NINTH CAUSE OF ACTION**

12 76. Plaintiff realleges and incorporates by reference paragraphs 1 through 75 of this
13 complaint as though fully set forth herein.

14 77. Defendants deny Plaintiff and all other Lifers the opportunity to meet with,
15 question or investigate FAD psychologists once their reports have been written. Indeed,
16 California law even requires Defendants to make these psychologists available to testify at
17 parole consideration hearings if requested. Cal. Penal Code, § 2081.5; Cal. Govt. Code, §
18 11181. However, on information and belief, there are no instances in which a FAD
19 psychologist has testified regarding his or her report in a parole consideration hearing.
20 Defendants refused to even *respond* to Plaintiff's multiple requests before and during his April
21 2010 parole hearing. These state law violations reflect a clear bias in favor of these invalid
22 tools and against full disclosure and scrutiny of their utilization.

23 78. Defendants' denial of at least the limited right to confront and cross examine these
24 putative experts violates due process under the Fourteenth Amendment, particularly given the
25 heightened liberty interest at stake and the prominent status of these evaluations in the parole
26 consideration process.

TENTH CAUSE OF ACTION

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2 79. Plaintiff realleges and incorporates by reference paragraphs 1 through 78 of this
3 complaint as though fully set forth herein.

4 80. Defendants' FAD protocol requires a new or revised evaluation if there is at least
5 one substantial error and/or three or more administrative errors in a FAD report. However,
6 Defendants routinely overlook or discount errors and omissions contained in negative
7 psychological evaluations but they emphasize errors and omissions found in otherwise positive
8 psychological evaluations in order to discredit their conclusions. Here, prior to the parole
9 hearing, Defendants summarily dismissed all nine of Plaintiff's allegations of substantial errors
10 in Dr. Hayward's report. During the hearing, Defendants simply overlooked the substantial
11 errors they reluctantly acknowledged.

12 81. Defendants' practice of overlooking substantial and administrative errors in
13 otherwise negative reports while emphasizing such errors in otherwise positive reports reflects
14 a clear bias against Plaintiff and others like him, which denies the unbiased decision maker to
15 which they are entitled. This practice therefore violates due process under the Fourteenth
16 Amendment.

ELEVENTH CAUSE OF ACTION

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18 82. Plaintiff realleges and incorporates by reference paragraphs 1 through 81 of this
19 complaint as though fully set forth herein.

20 83. California's parole statute mandates that parole be normally granted at a
21 prisoner's first parole consideration hearing. Cal. Pen. Code, § 3041 (parole "shall normally"
22 be granted at the first hearing). However, in practice, the Board grants parole to less than 1% of
23 prisoners appearing for their initial hearings. In the face of increasing judicial scrutiny of BPH
24 parole decisions, BPH developed the FAD protocol to fabricate a basis for continuing this
25 impermissibly low grant rate while withstanding judicial scrutiny. This demonstrable bias
26 against granting parole denies Plaintiff fair treatment of the liberty interest created by Section
27 3041 and therefore violates due process under the Fourteenth Amendment.

TWELFTH CAUSE OF ACTION

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2 84. Plaintiff realleges and incorporates by reference paragraphs 1 through 83 of this
3 complaint as though fully set forth herein.

4 85. California law creates a constitutionally protected liberty interest in parole.
5 California respects the significance of this liberty interest by providing several significant
6 protections, including: (1) the right to be provided with advance notice of the hearing (Pen.
7 Code, § 3042; Cal. Code Regs., tit. 15, § 2246); (2) the right to an opportunity to review and
8 respond to all documents being considered at the hearing (Cal. Code Regs., tit. 15, § 2247); (3)
9 the right to be present, speak, and ask and answer questions (Cal. Code Regs., tit. 15, § 2247);
10 (4) the right to not admit guilt to the commitment offense (Pen. Code, § 5011); (5) the right to
11 not discuss the circumstances of the offense during the hearing and to not be penalized for
12 invoking that right (Cal. Code Regs., tit. 15, § 2236); (6) the right to present supporting
13 documents (Cal. Code Regs., tit. 15, § 2249); (7) the right to appear before an impartial hearing
14 panel (Cal. Code Regs., tit. 15, § 2250); (8) the right to have the assistance of an interpreter, if
15 necessary; (9) the right to receive a verbatim transcript of the hearing; (10) if denied parole, the
16 right to receive a statement of the specific reasons for denying parole (Pen. Code, § 3041.5,
17 subd. (a)(4), and § 3042; Cal. Code Regs., tit. 15, § 2255); and (11) the right to be represented
18 by counsel. Pen. Code, § 3041.7.

19 86. The right to call witnesses, including adverse witnesses, is afforded to *parolees*
20 facing the possible revocation of their parole and return to prison, and it is afforded to prisoners
21 facing *disciplinary* charges that might result in the loss of good-time credits. However,
22 Defendants deny Plaintiff and others like him the right to call witnesses, including adverse
23 witnesses at their parole hearings.

24 87. Defendants' refusal to allow Plaintiff and other Lifers to call FAD psychologists
25 or other witnesses in their parole hearings denies them due process and equal protection under
26 the Fourteenth Amendment.

THIRTEENTH CAUSE OF ACTION

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2 88. Plaintiff realleges and incorporates by reference paragraphs 1 through 87 of this
3 complaint as though fully set forth herein.

4 89. California law creates a constitutionally protected liberty interest in parole.
5 California respects the significance of this liberty interest by providing several significant
6 protections, including: (1) the right to be provided with advance notice of the hearing (Pen.
7 Code, § 3042; Cal. Code Regs., tit. 15, § 2246); (2) the right to an opportunity to review and
8 respond to all documents being considered at the hearing (Cal. Code Regs., tit. 15, § 2247); (3)
9 the right to be present, speak, and ask and answer questions (Cal. Code Regs., tit. 15, § 2247);
10 (4) the right to not admit guilt to the commitment offense (Pen. Code, § 5011); (5) the right to
11 not discuss the circumstances of the offense during the hearing and to not be penalized for
12 invoking that right (Cal. Code Regs., tit. 15, § 2236); (6) the right to present supporting
13 documents (Cal. Code Regs., tit. 15, § 2249); (7) the right to appear before an impartial hearing
14 panel (Cal. Code Regs., tit. 15, § 2250); (8) the right to have the assistance of an interpreter, if
15 necessary; (9) the right to receive a verbatim transcript of the hearing; (10) if denied parole, the
16 right to receive a statement of the specific reasons for denying parole (Pen. Code, § 3041.5,
17 subd. (a)(4), and § 3042; Cal. Code Regs., tit. 15, § 2255); and (11) the right to be represented
18 by counsel. Pen. Code, § 3041.7.

19 90. The right to call witnesses, including adverse witnesses, is afforded to *parolees*
20 facing the possible revocation of their parole and return to prison, and it is afforded to prisoners
21 facing *disciplinary* charges that might result in the loss of good-time credits. However,
22 Defendants deny Plaintiff and others like him the right to call witnesses, including adverse
23 witnesses at their parole hearings.

24 91. Defendants' refusal to allow Plaintiff and other Lifers to call FAD psychologists
25 or other witnesses in their parole hearings denies them due process and equal protection under
26 the California Constitution.

1 **FOURTEENTH CAUSE OF ACTION**

2 92. Plaintiff realleges and incorporates by reference paragraphs 1 through 91 of this
3 complaint as though fully set forth herein.

4 93. In their efforts to justify the development of the FAD and its use of the current
5 psychological evaluation methodology and tools, Defendants lied to the public and to the
6 California Office of Administrative Law regarding the process for establishing the FAD and
7 selecting the three risk assessment tools currently being used to predict risk.

8 94. Defendants' intentional misconduct and reliance on invalid instruments reflects an
9 unlawful bias against granting parole and the denial of Plaintiffs right to a fair hearing, thereby
10 violating due process under the California Constitution.

11 **FIFTEENTH CAUSE OF ACTION**

12 95. Plaintiff realleges and incorporates by reference paragraphs 1 through 94 of this
13 complaint as though fully set forth herein.

14 96. In their efforts to justify the development of the FAD and its use of the current
15 psychological evaluation methodology and tools, Defendants violated the notice and timeliness
16 requirements of California's Administrative Procedures Act. First, Defendants unlawfully
17 implemented their statewide psychological evaluation protocol years before providing the
18 required notice to the public or attempting to comply with the administrative procedures act.
19 Second, after California's Office of Administrative Law declared the FAD protocol to be an
20 unauthorized "underground regulation," Defendants lied to the public and to the Office of
21 Administrative Law, failed to address the vast majority of substantive public comments and
22 objections, and ultimately enacted regulations in a clandestine manner that appeared to violate
23 applicable timeliness and filing requirements. As a result, Defendants continue applying a
24 regulation and protocol that are invalid and unauthorized.

25 97. Defendant's intentional misconduct conduct in promulgating Section 2240 of Title
26 15 of the California Code of Regulations violated California's Administrative Procedures Act

1 and reflects a clear bias toward using these invalid tools to produce elevated risk assessments.
2 These actions denied Plaintiff due process under the California Constitution.

3 **SIXTEENTH CAUSE OF ACTION**

4 98. Plaintiff realleges and incorporates by reference paragraphs 1 through 97 of this
5 complaint as though fully set forth herein.

6 99. California law requires Defendants to make FAD psychologists available to testify
7 at parole consideration hearings if requested. Cal. Penal Code, § 2081.5; Cal. Govt. Code, §
8 11181. However, on information and belief, Defendants have never required a FAD
9 psychologist to answer questions about his or her evaluation during a parole consideration
10 hearing. The consistent violation of these state law requirements reflects Defendants' bias
11 against providing Plaintiff and those similarly situated with a fair consideration of their
12 suitability for parole.

13 100. Defendants' failure to comply with these statutory provisions also violated
14 Plaintiff's right to due process under the California Constitution.

15 **PRAYER FOR RELIEF**

16 Wherefore, Plaintiff prays for the following relief:

- 17 1. Declare that Defendants have denied Plaintiff's rights under the due process and
18 equal protection clauses of the state and federal Constitutions;
 - 19 2. Declare that the regulation governing the FAD and its psychological evaluations,
20 Cal. Code Regs., tit. 15, § 2240, is void and unenforceable;
 - 21 3. Declare that Plaintiff has a constitutionally protected liberty interest in parole and
22 that due process requires an opportunity to confront and cross examine adverse
23 witnesses when a parole decision rests substantially on expert reports;
 - 24 5. Declare that due process requires Plaintiff to have access to the raw data and scores
25 underlying FAD's psychological evaluations;
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- 6. Issue a preliminary and permanent injunction requiring Defendants to discontinue application of its rules governing the FAD, Cal. Code Regs., tit. 15, § 2240, on the grounds that the regulation was fraudulently and unlawfully promulgated;
- 7. Order Defendants to remove Dr. Hayward’s report from Plaintiff’s file and prohibit its consideration in conjunction with Plaintiff’s suitability for parole;
- 8. Award costs and attorneys fees incurred in this action; and
- 9. Order such other and further relief as may be just and proper.

Dated: November 15, 2012

Respectfully Submitted,
UNCOMMON LAW

/s/ Keith Wattley
KEITH WATTLEY

Attorney for Plaintiff
Sam Johnson

CERTIFICATE OF SERVICE

Case Name: **Sam Johnson v. Jennifer Shaffer, et al.**

Case No: **2:12-cv-1059 GGH P**

I hereby certify that on November 15, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INUNCTIVE RELIEF**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 15, 2012, at Oakland, California.

/s/ Ritika Aggarwal

RITIKA AGGARWAL