

1 KEITH WATTLEY, SBN 203366
2 UnCommon Law
3 220 4th Street, Suite 103
4 Oakland, CA 94607
5 Telephone: (510) 271-0310
6 Facsimile: (510) 271-0101
7 Email: kwattley@theuncommonlaw.com

8 Attorney for Plaintiff

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

11
12
13 SAM JOHNSON,

14 Plaintiff,

15 v.

16
17 JENNIFER SHAFFER,

18 Defendant

)
) **Case No.:**

)
) **CIVIL COMPLAINT FOR**
) **DECLARATORY AND**
) **INJUNCTIVE RELIEF**

19
20 **INTRODUCTION**

21 1. This is a civil rights complaint by state prisoner Sam Johnson seeking
22 declaratory and injunctive relief under constitutional, statutory and regulatory law against
23 officials of the California Department of Corrections and Rehabilitation (CDCR) and its
24 Board of Parole Hearings (BPH) for applying unlawful procedures to consider his
25 suitability for parole.
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JURISDICTION AND VENUE

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2 2. Plaintiff brings this action to redress the deprivation of rights secured to him
3 by the Fourteenth Amendment to the United States Constitution. This action also arises
4 under Section 7 of Article 1 of the California Constitution, as well as the statutory and
5 regulatory law of the State of California.
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7 3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331
8 and 1343, and 42 U.S.C. § 1983. The United States Supreme Court has expressly held that
9 prisoners challenging parole consideration procedures may bring suit in federal court under
10 § 1983. *Wilkinson v. Dotson*, 544 U.S. 74 (2005). This Court also has supplemental
11 jurisdiction over Plaintiff’s state law claims pursuant to 28 U.S.C. § 1367.
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14 4. Venue is proper in this judicial district under 28 U.S.C. § 1391 because the
15 defendants are employed in the County of Sacramento, which is in this judicial district.
16

THE PARTIES

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18 **A. Plaintiff**

19 5. Sam Johnson (“Johnson”) is a prisoner incarcerated at San Quentin State
20 Prison. He is serving a sentence of 25 years to life, plus four years, following his 1991
21 conviction for first degree murder, robbery and assault. He has always maintained his
22 innocence of these crimes.
23

24 **B. Defendants**

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

3 7. Defendant MATTHEW CATE (“CATE”) is the Secretary of the California
4 Department of Corrections and Rehabilitation (“CDCR”), the umbrella organization under
5 which the BPH was formed.
6

7 8. Defendant EDMUND G. (JERRY) BROWN, Jr. is Governor of the State of
8 California and the Chief Executive of the state government. He is sued in his official
9 capacity. As Governor, Mr. Brown is responsible for the appointment of Defendant
10 Secretary of the CDCR and, subject to State Senate confirmation, every Commissioner of
11 the Board of Parole Hearings (“BPH”). The Governor also appointed the Defendant
12 Executive Officer of the BPH. The Governor, in union with those whom he appoints, and
13 by and through those persons employed by the other defendants, controls and regulates
14 plaintiff’s custody.
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18 9. Defendant CLIFF KUSAJ, Psy. D., (“KUSAJ”) is the head of the BPH’s
19 Forensic Assessment Division (“FAD”), through which BPH prepares psychological
20 evaluations and risk assessments for consideration by BPH Commissioners in determining
21 prisoners’ suitability for parole.
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23 10. Defendant RICHARD HAYWARD, Ph.D., (“HAYWARD”) is a
24 psychologist employed by the FAD. Dr. Hayward authored the report utilized to deny
25 Plaintiff parole at his April 21, 2010, parole hearing.
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1 11. Defendant THOMAS POWERS (“POWERS”) is or was at some time
2 relevant to this complaint a Commissioner of the Board of Parole Hearings. As a
3 Commissioner, Defendant Powers is responsible for the operation and policy making of the
4 BPH and he presides or presided over hearings to determine whether to release prisoners on
5 parole. Defendant Powers presided over Plaintiff’s parole hearing on April 21, 2010.
6

7 12. Defendant AL FULBRIGHT (“FULBRIGHT”) is or was at some time
8 relevant to this complaint a Deputy Commissioner of the Board of Parole Hearings.
9 Defendant Fulbright presided along with Defendant Powers at Plaintiff’s parole hearing on
10 April 21, 2010.
11

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

15 **STATEMENT OF THE FACTS**

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

3 15. BPH actually established the FAD in 2006, long before BPH attempted to
4 promulgate regulations that might authorize such action. Furthermore, when BPH *did*
5 attempt to promulgate such regulations, it did so by providing false and misleading
6 statements to the state agency responsible for certifying compliance with applicable
7 rulemaking procedures. In the period since 2006, including in connection with Plaintiff's
8 parole consideration hearing in April 2010, BPH has established a pattern or practice of
9 utilizing the FAD to prejudice BPH commissioners against granting parole to eligible
10 prisoners.
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14 16. Plaintiff's Comprehensive Risk Assessment ("CRA") was conducted by FAD
15 psychologist Richard Hayward, Ph. D., in February 2009. This CRA provides
16 approximately three pages of single-spaced, detailed history covering Plaintiff's childhood
17 and adolescence, family history, education, development, relationships, leisure activities,
18 employment history, and post-parole plans – all of which appear void of any significant red
19 flags. Next, the clinical assessment section reviewed Plaintiff's mental health, medical, and
20 substance use history – again, all of which appear void of significant problems. The
21 evaluator stated that Plaintiff was "cooperative" during the interview, that he "displayed a
22 full range of affect," that his mood was "neutral," and that there were "no signs of any
23 thought disturbances."
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1 17. Surprisingly, Dr. Hayward diagnosed Plaintiff as having Antisocial
2 Personality Disorder – an Axis II disorder within the Diagnostic and Statistical Manual of
3 Mental Disorders (“DSM-IV-TR”). Dr. Hayward stated that the disorder was attributable
4 “to the committing offense, the history of community offenses and arrests and the rule
5 violations noted.” However, reviewing Section 301.70 of the DSM-IV-TR, it does not
6 appear that Plaintiff meets most of the diagnostic criteria.
7

8 18. Dr. Hayward also utilized the three risk assessment tools currently employed
9 by the FAD to project Lifers’ risk to the public. According to Dr. Hayward, Plaintiff’s
10 score on the Psychopathy Checklist-Revised (PCL-R) placed him in the “higher range of
11 the clinical construct of psychopathy when compared to other male offenders” –
12 specifically, higher than fifty-seven percent of those offenders assessed using this
13 instrument. Similarly, Dr. Hayward claimed that Plaintiff’s scores on the 20-item
14 Historical, Clinical, Risk Management tool (HCR-20) placed him in the “high range for
15 violent recidivism,” and the Level of Service/Case Management Inventory (LS/CMI)
16 placed him in the “high category,” above thirty-three percent of “the North American
17 sample of incarcerated male offenders.”
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22 19. Plaintiff and his attorney made numerous attempts to address and correct Dr.
23 Hayward’s report because it contained numerous conclusions that were either unsupported
24 by the record or directly contrary to other statements in the report itself. Plaintiff’s counsel
25 wrote to the BPH more than two months before the April 2010 hearing, raising nine
26 separate substantial errors Dr. Hayward made. Among those errors were the following:
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- 1 a. Dr. Hayward’s report claimed a “substantial history of impaired impulse
2 control,” “impaired behavioral control,” and “negative attitudes.” However,
3 Plaintiff had no history of violence, no juvenile record and only three
4 misdemeanor convictions prior to the commitment offense. He maintained
5 steady employment (including strong leadership positions) both prior to and
6 throughout his nineteen years of incarceration. His sole rule violation report
7 in prison was six years prior to the hearing and was categorized as only a
8 Division “F” offense.
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11 b. Although Dr. Hayward acknowledged that Plaintiff has no mental illness, has
12 never received mental health treatment in prison and has no history of any
13 problems with drugs or alcohol, he nevertheless concluded there was
14 evidence of “a lack of responsiveness to treatment” that increased Plaintiff’s
15 risk to the public if released.
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18 c. Dr. Hayward claimed that Plaintiff “had significant problems with previous
19 violence, psychopathy (sic) and Antisocial Personality Disorder” prior to the
20 commitment offense, none of which is true.
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22 d. Dr. Hayward relied on the following factors in determining that Plaintiff
23 scored in the higher range on the PCLR: “Superficial Charm, Pathological
24 Lying, Shallow Affect, Poor Behavioral Controls, Impulsivity,
25 Irresponsibility.” However, there was no evidence anywhere in the
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1 assessment supporting a finding that Plaintiff is a pathological liar, nor is
2 there evidence that he has poor behavior control.

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

11 i. The assessment contains no legitimate explanation or information regarding
12 Dr. Hayward's methodology in evaluating Plaintiff's risk to the public if
13 paroled. Dr. Hayward states: "Ultimately, whether an inmate will engage in
14 future violence is a function of a variety of factors that include history,
15 personal disposition, and situational variables. The evaluator has taken these
16 factors into consideration in determining how much weight to allot to each of
17 the measures and in formulating an overall estimate of risk." Unfortunately,
18 from this the Board was unable to determine which of the many factors relied
19 on by Dr. Hayward – many of which were invalid or unsupported by the facts
20 – were used to determine Plaintiff's level of risk. In light of the fact that the
21 findings and assessment in this report are so far at odds with the prior
22 findings and assessment in this report are so far at odds with the prior
23 findings and assessment in this report are so far at odds with the prior
24 findings and assessment in this report are so far at odds with the prior
25 findings and assessment in this report are so far at odds with the prior
26 findings and assessment in this report are so far at odds with the prior
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28 findings and assessment in this report are so far at odds with the prior

1 psychological report for Plaintiff, the findings in this report required
2 considerable explanation.

3 20. The FAD's psychological protocol required the Board to conduct a new
4 evaluation if Dr. Hayward's report contained even *one* substantial error. Yet, the BPH
5 responded to Plaintiff in March 2010, refusing to remove Dr. Hayward's report and finding
6 no administrative or substantive errors in the report even though Plaintiff identified *nine*
7 separate substantial errors. Ironically, the hearing panel actually agreed with Plaintiff that
8 Dr. Hayward's report contained some substantial errors, yet the panel still relied on the
9 report to deny Plaintiff parole.
10 report to deny Plaintiff parole.

11 21. Since BPH now requires the FAD to conduct a psychological evaluation
12 and/or risk assessment prior to every single parole consideration hearing, all Life prisoners
13 are directly impacted by these unlawful patterns and practices once they are eligible for
14 parole consideration.
15 parole consideration.

16 22. Defendants failed to alert the April 2010 hearing panel to the controversy
17 regarding Dr. Hayward's psychological evaluation despite the exchange of correspondence
18 during the two months leading up to the scheduled hearing. In fact, presiding
19 commissioner Powers had never even seen Plaintiff's February 19, 2010 letter highlighting
20 the nine substantial errors in the evaluation until Plaintiff's counsel provided him with a
21 copy of it after the hearing had already begun.
22 copy of it after the hearing had already begun.

23 23. Despite the provisions in California Penal Code Section 2081.5 and
24 California Government Code § 11181, subdivisions (e) and (f), which direct Defendants to
25 California Government Code § 11181, subdivisions (e) and (f), which direct Defendants to
26 California Government Code § 11181, subdivisions (e) and (f), which direct Defendants to
27 California Government Code § 11181, subdivisions (e) and (f), which direct Defendants to
28 California Government Code § 11181, subdivisions (e) and (f), which direct Defendants to

1 make psychological evaluators available for questioning in parole consideration hearings,
2 Plaintiff is informed and believes that Defendants never grant requests that such evaluators
3 appear and testify in parole consideration hearings. Defendants failed to even respond to
4 Plaintiff's request prior to and during his April 2010 hearing.
5

6 24. Defendants denied Plaintiff's counsel's request for the raw data and risk
7 assessment scores that purportedly supported Dr. Hayward's findings.
8

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

12 26. As long as the challenged report remains in Plaintiff's prison file, Defendants
13 will continue to rely on it at Plaintiff's next parole consideration hearing and all future
14 hearings unless and until he is released on parole, regardless of whether subsequent risk
15 assessments are conducted and reported.
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17 27. Defendants refuse to record and transcribe meetings between FAD
18 psychologists and the prisoners they evaluate, even though such meetings are not
19 confidential and such recordings and transcripts would easily resolve the majority of
20 disputes raised regarding statements recorded in the written reports.
21

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

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

9
10 30. Injunctive relief including but not limited to an order enjoining Defendants'
11 policies, practices, regulations, actions and omissions such as are alleged herein, and
12 requiring the repeal or reformation of Defendants' policies, practices, regulations, actions
13 or omissions so as to prevent their impermissible effect, is therefore appropriate and
14 necessary to avoid irreparable harm to Plaintiff and to effectuate the purpose of the United
15 States and California Constitutions and the other statutes and laws referenced herein as the
16 subject of Plaintiffs' claims for relief.
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19 **FIRST CAUSE OF ACTION**

20 31. Plaintiff realleges and incorporates by reference paragraphs 1 through 30 of
21 this complaint as though fully set forth herein.
22

23 32. California's parole scheme creates for Plaintiff a constitutionally protected
24 liberty interest in being released on parole.
25

26 33. Defendants are utilizing invalid tools and inadequate or improper training to
27 produce impermissibly elevated assessments for Plaintiff and others like him. Defendants
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1 utilize the Psychopathy Checklist – Revised (PCL-R), the 20-item Historical, Clinical, Risk
2 Management Test (HCR-20) and the Level of Service, Case Management Inventory
3 (LS/CMI). However, none of these risk-assessment tools have been found to be valid
4 predictors of future violence for a population akin to California’s Lifers. Furthermore,
5 most psychological and criminal justice experts – including the majority of the expert panel
6 Defendants convened to consider the question, and including the author of one of the
7 principal tools himself – agree that these instruments are not valid predictors of future
8 violence for this population. Nevertheless, Defendants utilized these tools in Plaintiff’s
9 parole hearing, as they have in most hearings conducted since 2006 and nearly all hearings
10 held since January 2009.

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14 34. Reliance on evidence lacking sufficient indicia of reliability to establish
15 Plaintiff’s risk to public safety violates his right to due process under the Fourteenth
16 Amendment.

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18 **SECOND CAUSE OF ACTION**

19 35. Plaintiff realleges and incorporates by reference paragraphs 1 through 34 of
20 this complaint as though fully set forth herein.

21
22 36. In their efforts to justify the development of the FAD and its use of the
23 current psychological evaluation methodology and tools, Defendants made numerous false
24 and misleading statements to the public and to the California Office of Administrative Law
25 regarding the process for establishing the FAD and selecting the three risk assessment tools
26 currently being utilized by the FAD to predict risk. For example, they falsely claimed a
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1 consensus among an expert panel Defendants convened to consider the use of various risk
2 assessment tools, and they falsely cited a court mandate to establish the FAD and select the
3 invalid tools.

4
5 37. Defendants' misconduct and reliance on invalid instruments violated
6 Plaintiff's right to due process under the Fourteenth Amendment.

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8 **THIRD CAUSE OF ACTION**

9 38. Plaintiff realleges and incorporates by reference paragraphs 1 through 37 of
10 this complaint as though fully set forth herein.

11 39. Any respectable process through which written reports are considered in a
12 manner that impacts a person's liberty interest must also provide a mechanism for
13 correcting errors in those reports so as not to unjustly harm the subject of the report. Here,
14 the protocol and subsequent regulation Defendants developed establishing the FAD and its
15 methodology require the removal or correction of FAD psychological reports when they
16 contain at least one substantial error or at least three administrative errors. However,
17 Defendants refused to remove or in any way correct Dr. Hayward's report even though it
18 contained nine substantial errors – some of which Defendants even acknowledged.
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22 40. Defendants' reliance on evidence lacking sufficient indicia of reliability to
23 establish Plaintiff's risk to public safety violates his right to due process under the
24 Fourteenth Amendment.
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FOURTH CAUSE OF ACTION

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2 41. Plaintiff realleges and incorporates by reference paragraphs 1 through 40 of
3 this complaint as though fully set forth herein.

4
5 42. At a minimum, California Lifers have a constitutional right to notice of the
6 evidence being used to consider their suitability for parole. While Defendants provided
7 Plaintiff with Dr. Hayward's report, they refused his request for the raw data and
8 underlying scores Defendants claim supported the statements in the report. They also did
9 not provide Plaintiff or his counsel with any recording, transcript or other notes from his
10 interview with Dr. Hayward. Dr. Hayward's report may only be considered by Defendants
11 to evaluate Plaintiff's suitability for parole if the report's contents are both relevant and
12 reliable. However, Plaintiff has absolutely no way to evaluate the relevance and reliability
13 of Dr. Hayward's conclusions without access to the raw data and underlying scores from
14 his evaluation. Indeed, this raw data is the *actual* evidence that either supports or does not
15 support the ultimate conclusion of whether Plaintiff presents a current risk to the public.

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18 43. Defendants' refusal to provide the underlying data they claim supported Dr.
19 Hayward's conclusions deprived Plaintiff of due process.
20

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22 **FIFTH CAUSE OF ACTION**

23 44. Plaintiff realleges and incorporates by reference paragraphs 1 through 43 of
24 this complaint as though fully set forth herein.

25
26 45. At a minimum, California Lifers have a constitutional right to have an
27 opportunity to be heard during their parole consideration hearings. Defendants' refusal to
28

1 provide Plaintiff with the raw data underlying Dr. Hayward's report deprived him of the
2 knowledge of all the information to which he needed to respond to protect his rights. For
3 example, without the basis for Dr. Hayward's conclusions, Plaintiff was unable to address
4 the new diagnosis of Antisocial Personality Disorder or the claims of impulsivity or failure
5 to benefit from treatment. Indeed, none of these claims had ever before been made in
6 Plaintiff's life, so their basis at this time remains a complete mystery.
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8
9 46. Defendants' unfounded diagnosis of Antisocial Personality Disorder here is
10 consistent with its practice of over-diagnosing the alleged disorder using these risk
11 assessment tools, even though a large number of prisoners, like Plaintiff, do not meet the
12 diagnostic criteria.
13

14 47. Defendants' refusal to provide the underlying data they claim supported Dr.
15 Hayward's conclusions deprived Plaintiff of his right to be heard and therefore violated due
16 process.
17

18 **SIXTH CAUSE OF ACTION**

19 48. Plaintiff realleges and incorporates by reference paragraphs 1 through 47 of
20 this complaint as though fully set forth herein.
21

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

4
5 50. Defendants' reliance on evidence lacking sufficient indicia of reliability to
6 establish Plaintiff's risk to public safety violates his right to due process.

7 **SEVENTH CAUSE OF ACTION**

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9 51. Plaintiff realleges and incorporates by reference paragraphs 1 through 50 of
10 this complaint as though fully set forth herein.

11 52. At least two of the risk assessment tools Defendants utilize as part of FAD's
12 psychological evaluation process – the PCL-R and the LS/CMI – yield percentile rankings
13 that compare the subject of the evaluation to a sample of other incarcerated persons, though
14 typically the sample is comprised of inmates with mental disorders. In their reports, FAD
15 clinicians interpret these rankings as falling within either the low, moderate or high risk
16 categories, although sometimes the categories are combined to produce low/moderate,
17 moderate/high or some similar combination. However, there are no standards used by the
18 FAD in distinguishing between the various categories. As a result, in practice, the clinicians
19 lack any consistency in their labeling, even though the resulting label plays perhaps the
20 most significant role of any aspect of these evaluations in parole consideration. Indeed, on
21 information and belief, no prisoner labeled as a "high" risk on one of the FAD's reports has
22 ever been granted parole.
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NINTH CAUSE OF ACTION

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

4
5 58. Defendants deny Plaintiff and all other Lifers the opportunity to meet with,
6 question or investigate FAD psychologists once their reports have been written. Indeed,
7 California law even requires Defendants to make these psychologists available to testify at
8 parole consideration hearings if requested. Cal. Penal Code, § 2081.5; Cal. Govt. Code, §
9 11181. However, on information and belief, there are no instances in which a FAD
10 psychologist has testified regarding his or her report in a parole consideration hearing.
11 Defendants refused to even respond to Plaintiff's multiple requests before and during his
12 April 2010 parole hearing.

13
14
15 59. Defendants' denial of at least the limited right to confront and cross examine
16 these putative experts violates due process, particularly given the heightened liberty interest
17 at stake and the prominent status of these evaluations in the parole consideration process.

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19 **TENTH CAUSE OF ACTION**

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

22
23 61. Defendants' psychological evaluation protocol and regulation provide that a
24 new psychological evaluation may be ordered if there is at least one substantial error and/or
25 three or more administrative errors in a FAD report. However, Defendants routinely
26 overlook or discount errors and omissions contained in negative psychological evaluations
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1 but they emphasize errors and omissions found in otherwise positive psychological
2 evaluations in order to discredit their conclusions. Here, prior to the parole hearing,
3 Defendants summarily dismissed all nine of Plaintiff's allegations of substantial errors in
4 Dr. Hayward's report. During the hearing, Defendants simply overlooked the substantial
5 errors they reluctantly acknowledged.
6

7 62. Defendants' practice of overlooking substantial and administrative errors in
8 otherwise negative reports while emphasizing such errors in otherwise positive reports
9 deprives Plaintiff and others like him of the unbiased decision maker to which they are
10 entitled. This practice therefore violates due process under the Fourteenth Amendment.
11

12 **ELEVENTH CAUSE OF ACTION**

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

16 64. California's parole statute mandates that parole be normally granted at a
17 prisoner's first parole consideration hearing. Cal. Pen. Code, § 3041 (parole "shall
18 normally" be granted at the first hearing). However, in practice, the Board grants parole to
19 less than 1% of prisoners appearing for their initial hearings. This bias against granting
20 parole cannot be reconciled with the statutory mandate and therefore violates due process
21 under the Fourteenth Amendment.
22

23 **TWELFTH CAUSE OF ACTION**

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25 65. Plaintiff realleges and incorporates by reference paragraphs 1 through 64 of
26 this complaint as though fully set forth herein.
27

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

20 67. The right to call witnesses, even adverse witnesses, is afforded to *parolees*
21 facing the possible revocation of their parole and return to prison, and it is afforded to
22 prisoners facing *disciplinary* charges that might result in the loss of good-time credits.
23 However, Defendants deny Plaintiff and others like him the right to call witnesses,
24 including adverse witnesses at their parole hearings.
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1 80. California law requires Defendants to make FAD psychologists available to
2 testify at parole consideration hearings if requested. Cal. Penal Code, § 2081.5; Cal. Govt.
3 Code, § 11181. However, on information and belief, Defendants have never or almost
4 never required a FAD psychologist to answer questions about his or her evaluation during a
5 parole consideration hearing.
6

7 81. Defendants' failure to comply with these statutory provisions also violated
8 Plaintiff's right to due process under the California Constitution.
9

10 **PRAYER FOR RELIEF**

11 Wherefore, Plaintiff prays for the following relief:

- 12 1. Declare that Defendants have denied Plaintiff's rights under the due process and
13 equal protection clauses of the state and federal Constitutions;
14
15 2. Declare that the regulation governing the FAD and its psychological evaluations,
16 Cal. Code Regs., tit. 15, § 2240, is void and unenforceable;
17
18 3. Declare that Plaintiff has a constitutionally protected liberty interest in parole;
19
20 4. Declare that due process provides at least a limited right to confront and cross
21 examine adverse witnesses when a parole decision rests substantially on expert
22 reports;
23
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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- 1 6. Issue a preliminary and permanent injunction requiring Defendants to discontinue
- 2 application of its rules governing the FAD, Cal. Code Regs., tit. 15, § 2240, on the
- 3 grounds that the regulation was fraudulently and unlawfully promulgated;
- 4
- 5 7. Order Defendants to remove Dr. Hayward's report from Plaintiff's file and prohibit
- 6 its consideration in conjunction with Plaintiff's suitability for parole;
- 7
- 8 8. Award costs and attorneys fees incurred in this action; and
- 9 9. Order such other and further relief as may be just and proper.

10 Dated: April 20, 2012

11 Respectfully Submitted,

12 UNCOMMON LAW

13 /s/ Keith Wattley

14 By: _____
15 Keith Wattley
16 Attorney for Plaintiff
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