COVER SHEET

The following 6 page document is the

STANDARDIZED ASSESSMENT PROTOCOL
FOR SEXUALLY VIOLENT PREDATOR EVALUATIONS

which was issued by the Department of Mental Health on February 11, 2009

This February 11, 2009, revision to the
Standardized Assessment Protocol For Sexually Violent Predator Evaluations
is **NOT** the Protocol presently being presented to the Office of Administrative Law for promulgation pursuant to the Administrative Procedures Act.

Nevertheless, it is being included in this package to show that in the same basic time period, the DMH has issued two different versions of the Protocol required by Welfare & Institutions Code Section 6601(c).

There is one version which the DMH is presently attempting to legally promulgate as Sections 4000 and 4001 of Title 9 of the California Code of Regulations, and which was initially filed with the Office of Administrative Law (OAL) on January 30, 2009, and was accepted for filing by the OAL on February 6, 2009.

Then there is the February 11, 2009, version that the DMH has issued without attempting to promulgate pursuant to the Administrative Procedures Act, and is thus an alleged underground regulation. It is this February 11, 2009, version that is contained in the following six pages.

STANDARDIZED ASSESSMENT PROTOCOL FOR SEXUALLY VIOLENT PREDATOR EVALUATIONS

Introduction and Purpose

The Department of Mental Health is required to develop a "Standardized Assessment Protocol." (Welfare and Institutions Code Section 6601(c)). The protocol is to be used to determine whether an individual who is in custody under the jurisdiction of the California Department of Corrections and Rehabilitation and has committed a sexually violent predatory offense is a sexually violent predator as defined in Welfare and Institutions Code Section 6600 (Welfare and Institutions Code Section 6601(a)(1), (b)) (see also Part II, Definitions).

In the context of clinical evaluation, a protocol is a plan or framework that serves as a guide for evaluators in performing evaluations. This protocol sets forth the definitions and requirements in statute, regulations, and court decisions that must be followed or addressed by the evaluations. Beyond such definitions and requirements, the evaluation process and the ultimate opinions or conclusions are a matter of the exercise of independent, professional clinical judgment by the licensed psychiatrist or licensed psychologist.

This protocol cannot prescribe in detail how the clinician exercises his or her independent professional judgment in the course of performing SVP evaluations. Since the exercise of independent, professional clinical judgment is required, this evaluation protocol is not, and cannot be, a detailed, precise step-by-step procedure like the kind of procedure that might apply to the chemical analysis of an unknown substance.

I. Definitions

"**Sexually Violent Predator**" means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. "Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody. (Welfare and Institutions Code Section 6600(a)(1), (d)).

"**Sexually violent offense**" means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in WIC Section 6600, subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262,

264.1, 286, 288, 288a, or 289 of the Penal Code. (Welfare and Institutions Code Section 6600(b)).

"**Diagnosed mental disorder**" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others. (Welfare and Institutions Code Section 6600(c)).

"**Predatory**" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization. (Welfare and Institutions Code Section 6600(e)).

II. Referral Source

In accordance with Welfare and Institutions Code Section 6601(b), the Department of Corrections and Rehabilitation must refer persons to the Department of Mental Health for assessment after performing a screening process. Section 6601(b) provides in relevant part "The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense … If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections shall refer the person to the State Department of Mental Health for a full evaluation…."

III. Evaluator Prerequisites

A. Welfare and Institutions Code Section 6601(d) dictates who may perform the evaluation. The evaluation is to be performed by either:

1. Two practicing psychiatrists;

2. Two practicing psychologists; or

3. One practicing psychiatrist and one practicing psychologist.

4. The evaluators may either be state employees or independent contractors.

B. After the initial assessment, if only one of the evaluators determines that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, Welfare and Institutions Code Section 6601(g) requires that a further examination be arranged by two independent professionals selected in accordance with the following criteria:

1. The independent professional must not be a state government employee

2. The independent professional must have at least 5 years of experience in the diagnosis and treatment of mental disorders.

3. The independent professional must either be a psychiatrist or a psychologist with a doctoral degree in psychology.

IV. Pre-commitment Assessment Process

A. At the outset of the assessment, the evaluators must inform the person that the purpose of their examination is not treatment, but to determine if the person meets certain criteria to be involuntarily committed pursuant to Welfare and Institutions code Sections 6600 et seq. It is not required that the person understand this information. (Welfare and Institutions Code Section 6601(f)).

> **Please note:**
> This initial assessment is not to be confused with the post-commitment exam which must be performed at least once a year, after a person has been found to be a sexually violent predator. (Welfare and Institutions Code Section 6605(a)).

B. The following risk factors associated with reoffense must be taken into account during the evaluation pursuant to Welfare and Institutions Code Section 6601(c):

1. Criminal History
2. Psychosexual History
3. Type of Sexual Deviance
4. Degree of Sexual Deviance
5. Duration of Sexual Deviance
6. Severity of Mental Disorder

C. Each evaluator must answer the following inquiry pursuant to Welfare and Institutions Code Section 6601(d):

> Does the person being evaluated have a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody?

D. The evaluator, according to his or her professional judgment, shall apply tests or instruments along with other static and dynamic risk factors when making the assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis. The term “professional recognition or acceptance” as used in this Section means that the test, instrument or risk factor has undergone peer review by a conference, committee or journal of a professional organization in the fields of psychology or psychiatry, including,

but not limited to, the American Psychological Association, the American Psychiatric Association, and the Association for the Treatment of Sexual Abusers. (Title 9, California Code of Regulations Section 4005)

E. If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations. If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. (Welfare and Institutions Code Section 6603(c)(1))

F. Evaluators should be mindful of the following court rulings:

1. ***Kansas v. Crane*** (2001) 534 US 407 identified that a qualifying diagnosed mental disorder should show proof of "serious difficulty in controlling behavior." The Kansas decision requires that evaluators show that the offender has serious difficulty in controlling his or her behavior which causes them to be predisposed to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others. In evaluating the offender's volition consider behaviors such as poor institutional behavior, reoffending after treatment, impulsivity or reoffending quickly when released as indices of volitional difficulty. An example of this discussion is as follows:

> Mr. Doe has serious difficulty controlling his volitional capacity in that his drive to engage in coercive sexual behavior overcame obvious barriers such as his victim's protests and a history of being detected and incarcerated for such behavior in the past. Furthermore, Mr. Doe's condition affects his emotional capacity in that he is less likely to appropriately respond to the fear, protests, and resistance of his victims.

2. The California Supreme Court in ***People v. Superior Court of Marin County*** (2002) 27 Cal. 4th 888 (Patrick Ghilotti, Real Party in Interest) ruled on the meaning of **likely** within the context of evaluation for the SVP Act, that is, in the question "Is the inmate ***likely*** to engage in sexually violent predatory criminal behavior as a result of his or her diagnosed mental disorder without appropriate treatment and custody?"

The court defined **"likely"** as used in DMH evaluations to require "a determination that, as the result of a current mental disorder which predisposes the person to commit violent sex offenses, he or she presents a **substantial danger** – that is, a **serious and well-founded risk** – of reoffending in this way if free."

3. ***Turner v. Superior Court*** (2003) 105 Cal. App. 4th 1046 is an appellate decision that set forth a special requirement to be addressed in the evaluation in cases where the respondent has previously been found by a jury NOT to be an SVP. The Turner decision

requires that evaluations must acknowledge the prior jury finding and rely on post-parole facts to support the conclusions. The Turner decision offered the following statement:

> "At the very least, the prosecution's supporting reports must contain information showing the evaluating professionals understood and accepted, for purposes of the current diagnosis, the prior jury finding as true, and then explain why despite that prior finding, the facts are sufficiently different so that the individual is now a dangerous person who is likely to reoffend within the meaning of the SVPA."

Therefore, an evaluator may find that a person qualifies as a sexually violent predator even if a jury found the individual not to qualify in the past if such person had high risk behavior subsequent to the jury's finding and such behavior is noted in the evaluation. For example this may be ascertained from subsequent parole violations involving high risk behavior, the individual's admissions, or other facts that increase the individual's risk subsequent to the jury finding the individual not to meet criteria.

4. The California Supreme Court in ***Cooley v. Superior Court of Los Angeles*** (2002) 29 Cal. 4th 228 has specifically stated that evaluators must consider the offender's amenability to voluntary treatment, as opposed to involuntary treatment in determining the risk of committing sexually violent predatory criminal acts. The Evaluator should be convinced or have a high degree of confidence that the person's expressed desire to seek supervision and treatment in the community without the SVP commitment is meaningful, sincere, and sufficiently significant.

5. The above list of court decisions is not intended to be a complete or exhaustive list of existing court decisions, and there are likely to be additional published court decisions in the future that address various aspects of the SVP law, such as the definitions and the factors that must be addressed in the evaluation process. The Department of Mental Health will attempt to notify evaluators of new court decisions when they become known, but evaluators are urged to make efforts to keep up to date regarding new court decisions that may affect SVP evaluations.

V. <u>Assessment Result</u>

A. If both of the initial evaluators (or the two subsequently assigned independent evaluators, should the initial evaluators disagree) concur that the person has a diagnosable mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody (by answering the inquiry in Part IV.C. in the affirmative), then the Director of Mental Health will forward a request for a petition for commitment to the county. (Welfare and Institutions Code Section Section 6601(d) and (f)).

B. Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county who may file a petition for commitment. (Welfare and Institutions Code Section 6601 (d))

VI. Other Considerations

Anyone performing SVP evaluations should be aware that almost all cases in which the conclusion of the evaluators is that the person is an SVP will go to trial, with the evaluator being called to testify about the evaluation and the evaluator's conclusions, and there usually is cross examination in detail. In light of this, evaluators should be sure that they have adequate qualifications and have been thorough in performing the evaluation.

The testimony, both direct and cross examination, will usually cover two main areas:

1. The evaluator's qualifications, knowledge, experience, and expertise will be questioned and explored in detail. Therefore, in addition to having the minimum qualifications required by the statute, it is recommended that the evaluator be knowledgeable and familiar with literature, studies, and tests or instruments used in the field of evaluation and diagnosis of sex offenders, as well as the latest developments in these areas. DMH will attempt to notify evaluators of new developments when they become known to DMH, and DMH will provide informational trainings from time to time when resources permit. However, evaluators have primary responsibility for obtaining knowledge of new developments in the field and how and when to make use of them.

2. The information, records, and factors reviewed and considered in the evaluation and how these formed the basis for the evaluator's conclusions will also be questioned and explored in detail. Therefore, it is recommended that the evaluator obtain, review, and consider all relevant information and records that bear upon the case and be prepared to testify and undergo cross examination regarding these sources of information and how they contributed to the conclusions reached in the evaluation. Official documents of governmental agencies, particularly those that have been accepted and used in prior court proceedings, are normally accorded greater relevance and accuracy and so given greater weight and significance, while unofficial sources of documents and information are normally accorded less significance. However, the evaluator should be ready to discuss and answer questions about all documents and information, regardless of the source, that may bear on the evaluation and the ultimate conclusions.

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