

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND REGULATION**
FROM: MICHAEL GEORGE ST.MARTIN, Petitioner
DATE: January 9, 2008

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

1. Identifying Information: Petitioner

Your Name: **MICHAEL GEORGE ST.MARTIN
CO-000414-3, RRU-7**

Your Address: **P.O. Box 5003, Coalinga, CA 93210**

Your Telephone Number: **(559) 934-0391 or (559) 934-0392**

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2. State Agency or Department being challenged:

California Department of Mental Health ("DMH")

3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

Description of alleged Underground Regulation

The DMH issued the CLINICAL EVALUATOR HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL (hereinafter "Protocol") without following the requirements of the Administrative Procedures Act. The DMH has revised this Protocol several times, most recently in August 2007. Petitioner is including a copy of the 2007 revision. The covers of both the 2004 edition and the 2007 revision are identical and contain the following:

**SEX OFFENDER COMMITMENT PROGRAM (SOCP)
WIC 6600 (SEXUALLY VIOLENT PREDATOR)**

**CLINICAL EVALUATOR HANDBOOK
AND
STANDARDIZED ASSESSMENT PROTOCOL
AUGUST 2007
California Department of Mental Health
Sacramento, California**

The Protocol (2004) is a 34-page manual, and the Protocol (2007) is a 38-page manual, each with several additional pages of appendices. Throughout the Protocol, the words "Must" and "Required" are used repeatedly. These are mandatory words, and when used in the language of the Protocol, create a mandatory instruction, criterion, or manual, which is a Standard of General Application utilized for the entire class of persons subject to Civil Commitment under the SVPA

Statute. Furthermore, the Protocol is replete with references to the Sexually Violent Predator Act and thus the Protocol implements, interprets, or makes specific the SVPA.

Petitioner alleges the entire Protocol is an underground regulation, as there is no evidence that any portion of this mandatory directive has been promulgated pursuant to the Administrative Procedures Act.

A true and correct copy of the
Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)
is attached hereto as EXHIBIT A.

**The Clinical Evaluator Handbook and Standardized Assessment Protocol
Is a Regulation Within the Meaning of the APA**

Welfare & Institutions Code section 6601(c) requires the Director of the Department of Mental Health (DMH) to develop a standardized assessment protocol for evaluations of persons considered for commitment pursuant to the Sexually Violent Predator Act (SVPA):

"(c) The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . The Standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder."

Thus in 1996, the California Department of Mental Health was instructed by the California Legislature to develop and update a standardized assessment protocol. However, the Department has failed or refused to adopt, in substantive compliance with the Administrative Procedures Act, any version of their Clinical Evaluator Handbook and Standardized Assessment Protocol upon which Psychological Evaluations for persons considered for Civil Commitment must be based.

Prior to implementation, or revision thereof, the Department was required to adopt the Protocol, or any revision thereof, but failed to do so, and thus, pursuant to the law the current Protocol being utilized is invalid and an "Underground Regulation."

Though the Director may prescribe rules and regulations such as the mandated protocol of section 6601(c), they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has promulgated the Standardized Assessment Protocol, Evaluator's Handbook (either 2004, or 2007) pursuant to the APA.

The protocol is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption, amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

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

Syngenta Crop Protection, Inc. V. Helliker (2d Dist. 2006) 138 Cal.App. 4th 1135, 1175-77, 42 Cal.Rptr.3d 191, 221-222, quotes Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 59 Cal.Rptr.2d 186, which explains:

"[The APA] establishes 'minimum procedural requirements' for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . " (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Govt. Code § 11340.5(a).)

"A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)"

"A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided . . . Second, the rule must 'implement, interpret, or make specific, the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency

proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes."(Emphasis added.) (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)"

Morning Star Co. v. State Bd. Of Equalization (2006), 38 Cal. 4th 324, 333-334, 42 Cal.Rptr.3d 47, 53-54, confirms the Syngenta/Tidewater analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency's procedure.

The protocol is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California. It declares how this certain class of cases will be decided. Its use by all state evaluators is mandatory. They must prepare the reports which are utilized to support their professional opinions that the person examined is an SVP pursuant to the Protocol. Thus the mandate the Protocol implements, enforces or otherwise makes specific is the language of the Sexually Violent Predators Act (SVPA). The following excerpts from the Protocol mandate specific actions and make clear that the Evaluators Handbook & Standardized Assessment Protocol is a regulation:

1. "Evaluator Panel," (2004, p.2) (2007, p.2) "Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook . . . "
2. "Standardized Assessment Protocol," (2004, p.2) (2007, p.2) "This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law is the required standardized assessment protocol."
3. "Special requests from Courts & Attorneys," (2004, p.4) (2007, p.4) "DMH expects that evaluators will notify the SOCP [Sex Offender Commitment Program] Unit in Sacramento of all Court Orders and Attorney Requests that do not conform to these policies and procedures. DMH will then direct the evaluator in his/her response to such orders/requests."
4. "The Clinical Interview," (2004, pp. 8-10) (2007, pp. 9-11) "These evaluations need to provide the courts with more than just a summary of professional conclusions." (This entire section instructs the evaluator how to conduct the interview.)
5. "Historical Information," (2004, p.10) (2007, p.11) "Reliable history and prior clinical evaluations from the inmate's records should be used to provide a basis for decision making in SVP evaluations."
6. "Subpoenas & Depositions," (2004, p.12) (2007, p.14) "If you receive such a subpoena, notify DMH who will advise you how to proceed."
7. "Psychological Testing," (2004, p.19) (2007, p. 20) "While evaluators may organize their risk assessment in their own unique way, they must rely on the guidelines of this protocol and include the following elements of risk assessment."

8. Protocol (2004, pp.19-29) (2007, pp. 18-32) Contains detailed mandatory instructions in every facet of the clinical evaluation.

9. Protocol (2004, p. 32, ¶ 1) (2007, p. 35, ¶ 1) "Since the person has been committed as an SVP by the court for 'appropriate treatment' (Welf. & Inst. Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is required to consult with the department on their conclusion."

This is a mandated determination that the person meets the SVPA criteria if he has not completed all five phases of treatment – a determination that is for the jury to decide. This mandated determination is in direct conflict with the controlling statute's requirement that, "The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." (Welf & Inst. Code § 6604.) Such a mandate also violates the guarantee of Due Process Under the Laws of both the California and Untied States Constitutions.

10. Protocol (2004, p. 9) (2007, p. 10) "In 'update' or 'replacement' interviews, the court may issue an order that the evaluation be tape recorded, and/or an attorney by allowed to be present. The evaluator should comply with that order. Court ordered tape recording/attorney presence does not apply to initial interviews of prison inmates, or initial interviews of persons being evaluated for an extension of commitment."

This DMH policy, stating a court order does not apply during initial interviews of prison inmates, or the initial interviews of persons being evaluated for an extension of commitment, is in direct conflict with statutory law (CCP § 2032.530.) This policy directs the evaluators to ignore court orders for what effectively amounts to nearly all interviews conducted. Beyond initial interviews and extension of commitment interviews there are few other interviews conducted.

Throughout the Protocol, the words "Must" and "Required" are used repeatedly. When used in the language of the Protocol they create a mandatory instruction, criterion, or manual, which is a standard of general application utilized for the entire class of persons subject to civil commitment under the SVPA. Furthermore, the Protocol is replete with references to the SVPA, thus the Protocol implements, interprets, or makes specific the SVPA. Therefore the protocol is a regulation, and one which has not been adopted in compliance with the APA.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

WIC §6601(c) mandated DMH to develop and update the **Clinical Evaluator Handbook and Standardized Assessment Protocol**. The DMH published and released this handbook. WIC §6601(c) infers its use is mandatory when conducting SVP evaluations. It is used statewide by all State Evaluators when conducting SVP evaluations. Its existence and use are not in

controversy. (See January 17, 2006, letter from John Rodriguez, Deputy Director, DMH, which is attached hereto as EXHIBIT B.)

The DMH has taken the firm position that the **Clinical Evaluator Handbook and Standardized Assessment Protocol** is not a regulation subject to the provisions of the APA. (See EXHIBIT B.)

Petitioner alleges that the **Clinical Evaluator Handbook and Standardized Assessment Protocol** is a regulation within the meaning of the APA.

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.

NO EXCEPTION EXCLUDES THE PROTOCOL FROM THE APA PROCEDURES.

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:

"(d) A regulation that relates only to the internal management of the state agency

... "

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law . . . "

"(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 4 quoting from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like," and by containing them "in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins."

Armistead underlined that "[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA" (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The protocol in question here fits the above description perfectly. It is called a "Guidelines" but it contains mandatory language making it much more than a simple "Guideline." Instead, it is a forbidden underground regulation without its adoption pursuant to the Administrative Procedures Act.

THE PROTOCOL APPLIES GENERALLY THROUGHOUT THE STATE

Modesto City Schools v. Education Audits Appeal Panel, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 831, 842, holds that to be deemed an underground regulation, which

would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

Kings Rehabilitation Center, Inc. V. Premo, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

"The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4") (Emphasis added.)

The protocol is neither intended nor utilized to make specific determinations but is utilized generally throughout the state when performing SVP evaluations. Thus, the protocol is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

Morningstar reiterates, "[2] These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking. 'One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]' [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

An entire class of citizens face a potential life term of incarceration based on evaluations performed under the mandate of this alleged underground regulation. Every citizen has an interest based upon the fundamental American principles of justice and freedom to have every law, rule, regulation, policy, procedure, guideline, criterion, bulletin, manual, instruction, order, or standard used in any procedure which could aid to deprive any citizen of his liberty to be legally promulgated prior to its implementation.

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

In 2005, Mr. Klint Pheneger, AT #053148-8, Unit 23, ASH, requested that the DMH promulgate rules and regulations regarding implementation of the Sexually Violent Predator Act (SVPA). On January 17, 2006, John Rodriguez, Deputy Director, DMH, replied to Mr.

Pheneger's request with a four-page letter summarizing DMH rationale for refusing to promulgate these regulations. The essence of the DMH position is summed up as ". . . it is not necessary, appropriate, or practicable for DMH to promulgate regulations . . ." (Rodriguez letter, p. 4.)

Mr. Rodriguez states, "You do, on page three of your letter, state that 'the SVPA is not sufficiently precise' and that the 'SVPA is not a self executing enactment,' and this appears to be the basis for your assumption that regulations are necessary. However, as explained below, the SVPA is quite detailed and precise and the SVPA is self-executing." (Rodriguez letter, p. 4.)

Mr. Rodriguez devotes several paragraphs explaining why the SVPA is self-executing, and why he believes this relieves DMH from promulgating regulations. However, this completely ignores the statutory requirement of Welfare & Institutions Code section 6601(c), which states in pertinent part, "The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health . . ."

Nowhere in the SVPA is there an exemption from the requirements of the APA, nor does one of those contained in Govt. Code § 11340.9 apply.

It is not a regulation that relates only to the internal management of the state agency. (§ 11340.9(d).)

It is not a regulation that embodies the only legally tenable interpretation of a provision of law. (§ 11340.9(f).)

In fact, the Protocol contains many mandates that petitioner alleges are in direct conflict with statutory law and constitutional law.

It is not a regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state. (§ 11340.9(I).)

In fact, the Protocol is applied to all persons proposed or adjudicated to be SVPs in California. "The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.... (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 55)

Mr. Rodriguez states, "it is not appropriate or practicable for DMH to attempt to promulgate regulations regarding the details of how the clinicians exercise professional judgement in conducting SVP evaluations." (Rodriguez letter, p. 2).

After summarizing the SVPA commitment process, Mr. Rodriguez states, "Moreover, as set forth in the SVP statute, any person subject to possible commitment as an SVP has an exhaustive set of due process protections." (Rodriguez letter, p. 2).

Mr. Rodriguez does not point to, nor can petitioner find, any exception, based on a citizen having due process protections in another arena, which relieve any state agency or department from the requirements of the APA in their rulemaking.

"Since the available studies and literature is constantly being augmented, the clinical standards of the professions of psychology and psychiatry evolve over time, and DMH does not have authority to dictate or control the standards of the clinical professions of psychology and psychiatry, it is not appropriate or practicable for DMH to attempt to promulgate regulations regarding the details of how the clinicians exercise professional judgement in conducting SVP evaluations." (Rodriguez letter, p. 2).

This is an interesting statement considering that the Protocol contains detailed mandatory instructions in every facet of the clinical evaluation; and, both editions (2004 p. 32, ¶ 1) (2007, p. 35, ¶ 1) require a mandated outcome:

"Since the person has been committed as an SVP by the court for 'appropriate treatment' (Welf. & Inst. Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is required to consult with the department on their conclusion."

This provision in the Protocol mandates a professional psychological conclusion, while at the same time, Mr. Rodriguez claims the DMH does not have the "authority to dictate," how the clinicians exercise professional judgement in conducting SVP evaluations, and that "it is not appropriate or practicable" for DMH to "promulgate regulations regarding" such matters. This is yet another instance where the State of California cannot have it both ways.

Mr. Rodriguez makes repeated reference to what could be described as the evolving science and standards of the psychological profession, as making it not practical to promulgate a manual such as the Protocol into a regulation. Yet, as shown by just a few of the examples, as quoted above in Section 3 of this petition, nothing has changed between the 2004 and the 2007 editions in the categories cited as prohibiting the DMH from promulgating the Protocol as a regulation. The only substantive changes are contained in the first few pages, where new references to the 1996 legislation known as SB 1128, and the Initiative known as Jessica's Law, are incorporated, and those changes occurred after three years of no changes.

A true and correct copy of the
January 17, 2006, letter from John Rodriguez, Deputy Director, DMH,
is attached hereto as EXHIBIT B.

In a professional paper attacking the Protocol was prepared for presentation at the 22nd Annual Symposium of the American College of Forensic Psychology by Dr. Robert L. Halon, Ph.D. The DMH's Clinical Evaluator Handbook, as the Protocol is often called in professional circles, was the subject of Section 6. (Section 6, pp. 6A through 6N, *The California Department of Mental Health "Clinical Evaluator Handbook": Pointing the Way to the Demise of Psychology*, is in attached hereto as EXHIBIT C.).

[It should be noted that all of Dr. Halon's references are to the 2004 edition.]

Dr. Halon begins with the statement, "The '*Clinical Evaluator Handbook*' (Handbook) authored and published by the Department of Mental Health, significantly misrepresents the mental health issues and concepts created by Welfare & Institutions Code Section 6600 et seq."

Throughout the 14 pages of this paper, Dr. Halon describes the mandates of the Protocol using terms such as: "misrepresents"; "pseudoscientific jargon, in lieu of scientifically valid," Section II is entitled "SLEIGHT OF MIND"; "the fallacious analytic process used by evaluators who adhere to those *Handbook* instructions"; "clouds the fact"; Section IV is entitled "EXPOSING THE SHELL GAME."

"From the DSM-IV-TR, the very nosology the Handbook instructs its evaluators to use, comes categorical statements in its introduction that fly directly in the face of the Handbook instructions and interpretations," (Halon, p.6E.) [The DSM-IV-TR, published by the American Psychiatric Association, the diagnostic and statistical manual of mental disorders, is the manual used by all mental health professionals practicing in the United States.]

The *Clinical Evaluator Handbook* states at p. 8, "The role of the clinical evaluator is that of fact finder."

In regards to this sentence Dr. Halon states, "This short sentence is made up of two fallacious propositions: SVP evaluations are not *clinical* in nature, and mental health professionals acting as 'expert' witnesses are *never* 'fact finders'." (Halon, p. 6K.)

"From the DSM-IV-TR, the very nosology the Handbook instructs its evaluators to use in making a diagnosis of the statutorily-defined 'diagnosed mental disorder', comes categorical statements in its introduction that fly directly in the face of the Handbook instructions and interpretations," (Halon, p.6K.)

The *Clinical Evaluator Handbook* states at p. 10, "The evaluator needs to consider each of the three major *clinical* questions and offer clear and unambiguous opinions regarding these WIC 6600 criteria."

Dr. Halon addresses this statement as follows:

"The first question asked by the statute (i.e., whether the respondent has experienced the requisite prior convictions) is **not** *clinical*, psychiatric, psychological, medical, or scientific in nature, and cannot be answered with 'expert' information from

any of those disciplines. Legal database and legal arguments are everything needed to answer the question of priors."

"The second question posed by the statute to mental health professionals (i.e., the definition of the 'diagnosed mental disorder') is also not 'clinical' in nature, but is *forensic*. As described above, *Handbook* instructions concerning how to answer the second question are actually *impossible* to follow (i.e., use the diagnostic categories in the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition-Text Revision . . .)."

"The third question, how *likely* the respondent is to commit sexually violent predatory crimes, is actually not even a legitimate third question; i.e., in the statutorily-defined 'diagnosed mental disorder' that is made up of both the 'predisposition' to commit such crimes and 'impaired volition' in reference to acting on that predisposition, and *makes* a person commit such crimes . . . "

"Even if there were a legitimate third question, the methods the DMH Handbook instructs evaluators to use in making what they call their 'risk assessments' (a blatant euphemism for 'predictions' that everyone agrees cannot be reliably made) of future dangerousness are invalid. Actually they are nothing more than guesswork couched in pseudo-scientific jargon. Following *Handbook* instructions on how to *predict* respondents' likely dangerousness violates scientific objectivity and is a breach of professional psychological ethics. " (Halon, p. 6J.)

The *Clinical Evaluator Handbook* states at p. 10, "Clearly state definitive opinions with a yes or NO answer to each clinical question are required."

Dr. Halon states, "'**Definitive** opinions' is an oxymoron. The accuracy of professional mental health opinions is *probabilistic*. Mental health professionals acting as mental health 'expert' witnesses cannot validly nor ethically provide 'yes' or 'no' answers to the legal questions posed by statute, nor can they legitimately 'predict' what a person will do in the future." (Halon, p. 6J.)

CONCLUSION

Clearly, both those who may receive a life-time commitment following psychological evaluations performed pursuant to *The Clinical Evaluator Handbook and Standardized Assessment Protocol*, and members of the psychological profession believe the Protocol meets neither the mandate of the SVPA nor professional and ethical standards of the psychological and psychiatric communities.

"Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.] [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate *The Clinical Evaluator Handbook and Standardized Assessment Protocol*, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize such a controversial handbook, such as the Protocol, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review such as this has been prohibited from the earliest times. See *Hayburn's Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Stephen W. Mayberg, Ph.D., Director California Department of Mental Health 1600 9 th St., Suite 151 Sacramento, CA 95814 (916) 654-2413 / (916) 654-2309

I certify that all the above information is true and correct to the best of my knowledge.

MICHAEL GEORGE ST.MARTIN
PETITIONER

Date