

PROPOSED REGULATION ORDER

Sexually Violent Predator Standardized Assessment Protocol Regulation

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 15. Assessment of Sexually Violent Predators

Adopt new sections 4011, 4012, 4013, 4014, and 4015, title 9, California Code of Regulations to read as follows:

[NOTE: The entire text of sections 4011, 4012, 4013, 4014, and 4015 is new language to be added to the California Code of Regulations and is shown in plain type]

§ 4011. Evaluation Overview.

- (a) Sexually Violent Predator (SVP) evaluations conducted pursuant to Welfare and Institutions Code section 6601, subdivision (c) shall be completed pursuant to this Chapter. For the purpose of this Chapter, “Evaluator” refers to the forensic evaluator conducting the SVP evaluation, and “Individual” refers to the subject of the interview, the inmate or person being evaluated.
- (b) The evaluation shall address and provide an answer to the questions under the following Criteria titled as Criterion A, Criterion B, and Criterion C:
 - (1) Criterion A: Has the Individual been convicted of a sexually violent criminal offense against one or more victims as enumerated in Welfare and Institutions Code section 6600?
 - (2) Criterion B: Does the Individual have a Diagnosed Mental Disorder (DMD) that predisposes the Individual to the commission of criminal sexual acts?
 - (3) Criterion C: Without appropriate treatment and custody, is the Individual likely to engage in sexually violent predatory criminal acts as a result of his or her DMD?

NOTE: Authority cited: Sections 4005.1, 4027, and 4101, Welfare and Institutions Code.
Reference: Sections 6600, 6601, 6603, and 6604.9, Welfare and Institutions Code.

§ 4012. Record Review.

The Evaluator shall conduct a review of the Individual's records. The Evaluator shall use due diligence in obtaining and reviewing available records which may include but, are not limited to the California Department of Corrections and Rehabilitation (CDCR) central file, medical and psychiatric files, probation officers' reports, arrest reports, disciplinary reports, psychological evaluations, parole reports, and the record of arrests and prosecutions (RAP sheet).

NOTE: Authority cited: Sections 4005.1, 4027, and 4101, Welfare and Institutions Code.
Reference: Sections 6600, 6601, 6603, and 6604.9, Welfare and Institutions Code.

§ 4013. Interview.

- (a) The Evaluator shall review the Individual's Disability Effectiveness Communication Statement (DECS) from CDCR and make necessary accommodations to conduct the interview. If the DECS is not available for review, the Evaluator shall assess the Individual's ability to communicate by other reasonable means including but, not limited to testing the Individual's ability to comprehend and retain verbal communication. The Evaluator shall document any accommodations requested or needed. Upon the Individual's request, services of a language interpreter shall be provided to the Individual. If the Individual does not request the services of a language interpreter, the Evaluator shall assess the need to utilize a language interpreter and an interpreter shall be provided to the Individual if the Evaluator determines one is needed.

- (b) The Evaluator should make a reasonable attempt to conduct a face-to-face interview with the Individual. The Evaluator shall discuss with the Individual the nature of the evaluation process and obtain the necessary informed consent, as provided in Section 4014, subdivision (a)(1)(C), and inform the Individual that non-identifying data may be used for research by the Department of State Hospitals. Throughout the interview, the Evaluator shall maintain a position of neutrality with regard to the SVP law. The Evaluator shall not provide legal advice to the Individual regarding the Individual's decision to interview. If the Individual refuses to interview, the Evaluator shall document the refusal and inform the Individual that even without an interview, a SVP forensic report shall be written and submitted.
 - (1) The Evaluator shall make reasonable attempts to obtain informed consent. The Evaluator shall explain to the Individual the limits of confidentiality and the Evaluator's professional and legal obligation as a mandated reporter.
 - (2) At any point during the interview, the Evaluator shall not provide feedback to the Individual regarding the Evaluator's professional opinion about whether the Individual meets Criterion A, Criterion B, or Criterion C, or the Individual's diagnosis or risk level.

NOTE: Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code.
Reference: Sections 6600, 6601, 6603, and 6604.9, Welfare and Institutions Code.

§ 4014. Forensic Report.

The Evaluator shall write a forensic report, which shall include the following sections.

- (a) The **Identifying Information** section shall include: identifying data including the Individual's name, date of birth, CDCR number, California Information and Index (CII) number; the facility where the Individual is located; county of commitment; interview date; the date report was completed; earliest possible release date (EPRD); findings for Criterion A, Criterion B, and Criterion C; final outcome; and Evaluator name.
- (b) The **Notice of Evaluation** section shall note the date the Individual was interviewed, the location of the interview, and the duration of the interview.
 - (1) This section shall indicate how the Evaluator used DECS, or other means if the DECS was not available, to determine whether effective communication was made, and whether any modifications or accommodations were needed and utilized for the face-to-face interview.
 - (2) This section shall include whether the Individual agreed to interview.
 - (3) This section shall indicate whether the Evaluator obtained informed consent from the Individual. The content of the informed consent procedure shall include a description of the purpose of the evaluation, the potential consequences of the evaluation outcomes, the reporting mandates of licensed psychologists or psychiatrists, and the potential use of non-identifying information from the submitted evaluations for program quality improvement projects. The reporting mandate includes, but is not limited to, any form of child abuse, neglect, or exploitation as required by the Child Abuse and Neglect Reporting Act, Penal Code sections 11164-11174.3 and the Elder Abuse and Dependent Adult Civil Protection Act, Penal Code sections 15600 et. seq.
- (c) The **Sources of Information** section shall cite documents relied upon in the evaluation with document titles and dates, and origin of information.
- (d) The **Evaluation Procedures** section shall include record review, clinical interview, mental status examination, and risk instruments utilized or risk factors considered.
- (e) The **Findings** section shall have subsections each for Criterion A, Criterion B, and Criterion C.

(1) The **Criterion A** subsection shall provide an analysis and a conclusion as to whether the Individual has been convicted of a sexually violent criminal offense against one or more victims as enumerated in Welfare and Institutions Code section 6600.

(A) This subsection shall list the qualifying offenses or convictions and cite the source of the information.

1. A prior juvenile adjudication of a sexually violent offense may constitute a prior qualifying conviction if:

a. the juvenile was sixteen years of age or older at the time of the act;

b. the prior offense is a sexually violent offense specified in Welfare and Institutions Code section 6600, subdivision (b);

c. the juvenile was adjudged a ward of the juvenile court within the meaning of Welfare and Institutions Code section 6602; and

d. for the violent offense, the juvenile was committed to the Division of Juvenile Justice, a CDCR division previously known as the California Youth Authority (CYA).

(B) For all qualifying offenses or convictions under one of the Penal Code sections listed in Welfare and Institutions Code section 6600, subdivision (b), and for each qualifying victim, the Evaluator shall describe facts of the qualifying offenses or convictions and indicate the following sexually violent elements: **force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another individual, or threat to retaliate in the future against the victim or any other person**. If facts of the qualifying offense or conviction are not available, the Evaluator shall make a reasonable attempt to obtain relevant information. Without other relevant facts, as to the qualifying offense or conviction, the Evaluator may rely solely on the Individual's recollection. The Evaluator shall discuss the validity and any limitation of the information relied upon and offered.

1. **Force** means to compel a person by physical means to overcome the will of that person. In determining whether force is present in the facts, consider all evidence as to whether the physical or mental state of the victim, including but, not limited to unconsciousness or intoxication, affected the ability of the victim to exert his or her will.

2. **Violence** means the application of physical force greater than what is necessary to accomplish the act.

3. **Duress** means the use of direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a person to perform an act or submit to an act to which he or she would not otherwise submit. In determining whether duress is present in the facts, consider the totality of the circumstances, including but not limited to the age, mental state, physical stature, maturity of the victim; the victim-perpetrator relationship; and specific characteristics of the perpetrator.
 4. **Menace** means any threat, statement, or act which shows intent to inflict injury upon another person.
 5. **Fear** means the apprehension of the victim of physical harm, dread, or awareness of danger. When determining whether fear is present in the facts, consider whether the victim is actually afraid, reasonably or unreasonably, and whether the Individual is aware of and exploits the fear of the victim.
 6. **Threats to retaliate** in the future by means of inflicting future harm against the victim or any other person. In determining whether a threat to retaliate is in the facts, consider whether the victim or the other person has a belief that the Individual will execute the threat.
- (C) Pursuant to Welfare and Institutions Code section 6600.1, if the victim of an underlying offense that is specified in Welfare and Institutions Code section 6600, subdivision (b), is a child under the age of 14, the offense shall constitute a "sexually violent offense" for purposes of Welfare and Institutions Code section 6600.
- (D) The Evaluator shall conclude with a definitive, short-answer "Yes" or "No" whether the Individual has met Criterion A.
- (2) The **Criterion B** subsection shall provide an analysis and a conclusion of whether the Individual has a DMD that predisposes the Individual to the commission of criminal sexual acts pursuant to Welfare and Institutions Code section 6600. The Evaluator shall determine whether the Individual has a DMD in accordance with the following standards and definitions.
- (A) Diagnosed Mental Disorder (DMD) is defined as a congenital or acquired condition affecting the emotional or volitional capacity of the Individual that predisposes the Individual to the commission of criminal sexual acts to a degree such that the Individual is a menace to the health and safety of others. The future criminal sexual acts to which the Evaluator determines the Individual is predisposed need not be violent in nature.

- (B) This subsection shall include diagnostic tools and literature upon which the Evaluator relied upon. The Evaluator shall reference consensus-based diagnostic tools from the professions of psychiatry or psychology, including but not limited to the Diagnostic and Statistical Manual of Mental Disorders or the International Classification of Diseases. The Evaluator may also consider additional evidence in the clinical or empirical literature that is relevant to the Evaluator's assessment of psychiatric diagnoses.
- (C) This subsection shall include evidence of the nexus between the Individual's DMD, his or her emotional or volitional capacity, and criminal sexual acts.
1. Emotional capacity is defined as an understanding or appreciation of consequences. Impaired emotional capacity is a defective understanding or appreciation of consequences which may occur as the result of an intellectual or emotional impairment.
 2. Volitional capacity is defined the ability to control behavior. Impaired volitional capacity is serious difficulty controlling behavior as demonstrated by an Individual's propensity to act impulsively or an Individual's failure to conform his or her behavior to the law despite the risk of criminal punishment. An absolute lack of control is not necessary to find impaired volitional capacity
- (D) This subsection shall include the Evaluator's determination of whether the Individual has a DMD. To make that determination, the Evaluator shall review the Individual's background, including but not limited to the Individual's mental health history, medical history, and criminal history. The Evaluator may also consider the Individual's self-report and available records. It may include but is not limited to the following:
1. The Individual's developmental history, including but, not limited to early development, childhood and family dynamics, educational history, exposure to domestic or community violence, past trauma, and any history of emotional, physical, or sexual abuse or neglect;
 2. The Individual's employment history, including but, not limited to legal employment, illegal means of earning income, work disciplinary issues, and military history;
 3. The Individual's relationship history, including but, not limited to intimate relationships, current family relationships, and community supports;

4. The Individual's sexual history, including but not, limited to the sexual development, sexual relationship history, current and past sexual functioning or dysfunction, the nature of sexual fantasies and interests including atypical sexual interests or a paraphilia or paraphilic disorder;
 5. The Individual's psychiatric history, including but, not limited to, current and past psychiatric diagnoses or symptoms, current and past history of psychiatric treatment, current and past history of sex offender treatment, and current and past history of substance abuse treatment.
 6. The Individual's relevant medical history;
 7. The Individual's substance use history, including but, not limited to the age of onset; duration of use; severity or frequency of use; effects of use on functioning, including but not limited to sexual functioning, cognitive process, affective regulation, propensity for violence, and impulse control; and other substance use criteria cited in professional consensus diagnostic manuals;
 8. The Individual's juvenile and adult criminal history which may be based upon both the Individual's self-report and any available criminal history records that corroborate the Individual's self-report, including but, not limited to allegations; arrests; charges; convictions; violations of rules in institutions such as group home, jail, juvenile or adult correctional facility, or psychiatric hospital; and parole or probation violations. The Evaluator shall also note any limitations of the forensic evidence relied upon; and
 9. When feasible, the Evaluator's mental status examination of the Individual. The Evaluator may supplement his or her mental status examination with a structured mental status instrument. The mental status examination shall include but, is not limited to consideration of the Individual's physical appearance, level of alertness, awareness of their surroundings, attentional capacities, cooperation, thought organization, mood and affect, behavior, memory functioning, ability to communicate, and approach to the interview or specific interview.
- (E) This subsection shall include whether the Individual has met the criteria for a psychiatric diagnosis or a diagnosis under consideration and whether the diagnosis or diagnoses affect the emotional or volitional capacity of the Individual and predisposes him or her to the commission of criminal sexual acts to a degree such that the Individual is a menace to the health and safety of others. For the Evaluator to find that an Individual is a menace to the health and safety of others, a recent overt act while the Individual is in custody is not required.

- (F) The Evaluator shall conclude with a definitive, short-answer “Yes” or “No” whether the Individual has met Criterion B.
- (3) The Criterion C subsection shall provide an analysis and conclusion of whether the Individual, without appropriate treatment and custody, is likely to engage in sexually violent predatory criminal behavior as a result of his or her DMD. The Evaluator shall address Criterion C regardless of the Evaluator’s conclusion of Criterion B.
- (A) “Likely” means that as a result of a current mental disorder that predisposes the Individual to commit violent sex offenses, the Individual presents a substantial danger, which means a serious and well-founded risk. “Likely” does not require that the risk of re-offense must be higher than 50 percent or more likely than not. “Likely” may cover a range from possible to probable. To assess the Individual’s likelihood, the Evaluator may review all available forensic evidence, and relevant clinical information and use empirically-derived risk estimation tools or factors. There is no specific timeframe in considering the Individual’s likelihood of engaging in sexually violent criminal behavior.
- (B) This subsection shall also address whether the Individual’s sexually violent offenses are likely to be predatory, using the definition of “likely” in subdivision (e)(3)(A), and the definition of “predatory” in Welfare and Institutions Code section 6600, subdivision (e). In determining whether sexual crimes are likely to be predatory, the Evaluator may also consider the Individual’s prior sexual crimes that were not predatory.
- (C) This subsection shall address whether the Individual is amenable to voluntary treatment. The Evaluator shall use his or her professional judgment to determine whether an Individual’s expressed desire to seek supervision and treatment in the community without the SVP commitment is meaningful, sincere, and sufficiently addresses the Individual’s risk. The Evaluator shall address whether the Individual can be safely treated in the community and consider the following factors to determine whether a proposed voluntary plan, if any, provides sufficient reduction of risk to reoffend:
1. The availability, effectiveness, safety, and practicality of community treatment for the Individual’s particular DMD;
 2. Whether, despite his or her DMD, the Individual retains volitional capacity to voluntarily pursue such treatment;
 3. The intended and collateral effects of such treatment and the influence of those effects on a reasonable expectation that one would voluntarily pursue it;

4. The Individual's progress, if any, in any mandated sex offender treatment program in which the Individual has already participated; and
 5. The Individual's expressed intent, if any, to seek out and submit to any necessary treatment, whatever its effects, and any other facts bearing on the credibility and sincerity of such an expression of intent.
- (D) This subsection shall consider any factor relevant to whether, if free in the community without any conditions, supervision, monitoring, or mandatory treatment at the Department of State Hospitals, the Individual is a substantial danger to reoffend.
- (E) The Evaluator shall conclude with a definitive, short-answer "Yes" or "No" whether the Individual has met Criterion C.
- (f) The Conclusion section shall summarize the Evaluator's findings and provide a definitive, short-answer "Yes" or "No" as to whether the Individual meets the Criteria as a Sexually Violent Predator pursuant to Welfare and Institutions Code section 6600.

NOTE: Authority cited: Sections 4005.1, 4101 and 4027, Welfare and Institutions Code. Reference: Sections 6600, 6601, 6602, 6603, and 6604.9, Welfare and Institutions Code; *People v. Superior Court (Ghilotti)*, (2002) 27 Cal.4th 888; *People v. Torres* (2001) 25 Cal.4th 680; and *People v. Hurtado* (2002) 28 Cal.4th 1179.

§ 4015. Special Considerations.

(a) Where a jury has previously found that an Individual is not a SVP, the Evaluator may still provide an opinion that the Individual is a SVP so long as the following conditions are met:

- (1) The report contains information showing the Evaluator understood and accepted, for purposes of the current diagnosis, the prior jury finding as true.
- (2) The Evaluator explains why, despite the prior finding, the facts are sufficiently different so that the Individual is now a dangerous Individual who is likely to reoffend within the meaning of the Sexually Violent Predator Act.

NOTE: Authority cited: Sections 4005.1, 4027 and 4101, Welfare and Institutions Code. Reference: *People v. Turner* (2000) 78 Cal.App.4th 1131.