STATE OF CALIFORNIA

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IN THE OFFICE OF

OFFICE OF ADMINISTRATIVE LAW

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2009 OAL DETERMINATION NO. 9
(OAL FILE # CTU 2008-1016-05)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: Donald A. Miller

CONCERNING: Rule Issued by the Board of Parole Hearings Prohibiting Inmates From Presenting Oral Witness Testimony at Parole Suitability Hearings

Determination Issued Pursuant to Government Code Section 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600[1] and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.[2] OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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[1] Government Code section 11342.600 states:

> "Regulation" means 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.

[2] California Code of Regulations, title 1, section 250, subdivision (a) defines "underground regulation:"

> "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

CHALLENGED RULE

On October 16, 2008, Donald Miller (Petitioner) submitted a petition to OAL challenging a rule issued by the Board of Parole Hearings (Board) prohibiting inmates serving an indeterminate sentence from presenting oral witness testimony at parole suitability hearings. The rule was articulated in two separate letters, attached hereto as Exhibit A:

- The first letter dated April 23, 2008, is in response to an inmate requesting that the Board permit witnesses to testify on his behalf at his parole suitability hearing. Shannon Stokes, Staff Counsel of the Board, stated: "Prisoners are not permitted to present witnesses at their parole suitability hearing."

- The second letter, dated June 10, 2008, is in response to a request from a family member of an inmate to appear as a witness on behalf of the inmate. S. LaBare, Staff Services Manager I at the Board, stated: "Relatives of the inmate are not eligible to observe or participate in parole hearings."

The Petitioner alleges that the rule meets the definition of "regulation" that should have been adopted pursuant to the APA.

DETERMINATION

OAL determines that the rule prohibiting inmates from presenting oral witness testimony at parole suitability hearings meets the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On April 23, 2008, and June 10, 2008, staff of the Board sent letters stating that inmates may not present oral witness testimony on their own behalf at parole suitability hearings.

On October 16, 2008, Petitioner submitted a petition to OAL challenging the prohibition expressed in the letters as an underground regulation. On December 9, 2008, OAL accepted the petition for consideration. The acceptance was published in the California Regulatory Notice Register on December 26, 2008.

OAL received no comments from the public.

On February 9, 2009, the Board submitted a response to the petition. The Board argues that the prohibition expressed in the letters is not an underground regulation. The response states that an inmate's rights are provided for in Penal Code section 3041.5 and in California Code of Regulations, title 15, sections 2245 through 2256. The Board points out that these sections do not include the right of the inmate to present oral witness testimony at parole suitability hearings.

On February 18, 2009, the Petitioner submitted a rebuttal to the Board's response. The Petitioner argues that the testimony provided by the friends and family of the inmate would be crucial evidence of the inmate's suitability for parole. The Petitioner further argues that the Board's response is based solely upon the rights listed in the regulations adopted by the Board and that the rights established in these regulations are not exclusive lists of inmate rights at parole suitability hearings.

UNDERGROUND REGULATIONS

Government Code Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA:

> (a) 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 [Government Code] 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 [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in California Code of Regulations, title 1, section 250.

OAL may issue a determination as to whether or not an agency issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 that should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

To determine whether an agency issued, utilized, enforced, or attempted to enforce an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency rule is a "regulation" and not exempt from the APA.

ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule is a "regulation" within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

> . . . 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

> A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) 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 (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. By their own terms, the letters expressing the challenged rule apply to all inmates who are before the Board for a parole suitability hearing. The rule also can affect family members and other persons who wish to appear as witnesses on behalf of the inmate. These inmates and other persons are a clearly defined class of persons. The first element is, therefore, met.

The second element established in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. Penal Code section 3052[3] states:

> The Board of [Parole Hearings] shall have the power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.

Penal Code section 3052 establishes the Board's responsibility to establish the procedures for all parole proceedings, including parole suitability hearings. By exercising its discretion and establishing a prohibition against inmates presenting oral witness testimony at parole suitability hearings, the Board makes specific Penal Code section 3052, the law enforced or administered by the Board.

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[3] In 2005, the Department of Corrections was reorganized into the Department of Corrections and Rehabilitation. As part of that reorganization, Government Code section 12838 abolished the Board of Prison Terms and vested "all powers, duties, responsibilities, obligations, liabilities, and jurisdiction" of the Board of Prison Terms in the Board of Parole Hearings.

The second element in *Tidewater* is, therefore, met.

Having met both elements of *Tidewater*, OAL determines that the rule prohibiting inmates from presenting oral witness testimony at parole suitability hearings meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether the prohibition against an inmate presenting oral witness testimony at a parole suitability hearing falls within an exemption from the APA. Government Code section 11346 requires that an exemption from the APA must be an express statutory exemption. The Board has not identified, nor has OAL found such an express statutory exemption

OAL, therefore, determines that the rule prohibiting inmates from presenting oral witness testimony at parole suitability hearings meets the definition of "regulation" in Government Code section 11342.600 that should have been adopted pursuant to the APA.

AGENCY RESPONSE

In its response, the Board states that prisoner parole hearing rights are set forth in Penal Code section 3041.5 and California Code of Regulations, title 15, sections 2245 through 2256. These enumerated rights do not include the right to present oral witness testimony at the parole suitability hearings. The inmate may present documentary evidence and support letters, but not oral witness testimony. Only the inmate, his or her attorney, and the victim or the victim's next of kin may present verbal testimony.

The Board states that no court has held that inmates have the right to present witnesses. We note that the Board has not conversely presented a court decision finding that an inmate does not have the right to present oral witness testimony. OAL finds the law, statutory and regulatory, to be silent on this issue. The Board notes that the regulatory scheme adopted by the Board does provide for the inmate's right to present oral witness testimony at rescission hearings[4] and revocation hearings.[5]

The fact that the law is silent on the issue of whether an inmate may present oral witness testimony at parole suitability hearings is not dispositive of the issue. As noted above, a regulation is defined in Government Code section 11342.600:

> "Regulation" means 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. (Emphasis added.)

As noted in the Board's response, Penal Code section 3041.5 establishes several rights for inmates at parole suitability hearings. For example:

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[4] California Code of Regulations, title 15, section 2465.
[5] California Code of Regulations, title 15, section 2643.

- The prisoner shall be permitted to review his or her file which will be examined by the Board and shall have the opportunity to enter a written response to any material contained in the file.

- The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his or her own behalf.

- Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections and Rehabilitation shall be present to ensure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

- The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

Additionally, the Board has adopted regulations in Title 15 of the California Code of Regulations establishing additional rights for parole suitability hearings which are not included in Penal Code section 3041.5:

- Section 2246 requires an inmate to be notified as soon as possible of the week during which the hearing shall be held, but the inmate shall be notified no later than one month before the week during which the hearing will be held.

- Section 2249 requires that documents presented to the hearing panel by the inmate should be brief, pertinent, and clearly written. They may cover any relevant matters such as mitigating circumstances, disputed facts or release planning. A copy of the documents may be placed in the prisoner's central file.

- Section 2250 entitles an inmate to a hearing by an impartial panel. This section also establishes the grounds and procedure for the disqualification of a hearing panel member.

- Section 2251 entitles the inmate to reasonable assistance in preparing for the hearing, including assistance for language difficulties or physical or mental defects.

- Section 2251.6 establishes the process for submitting a grievance pursuant to the American Disabilities Act, including the contents of the grievance, the requirement that the grievance be brief, pertinent, legible and clearly written, and a limitation on the number of pages that may be submitted and the size of the paper.

- Section 2253 establishes the right of the inmate to voluntarily waive his or her parole consideration hearing for any reason, limits the amount of time for which the hearing is waived based upon the offense of the inmate and requires that the

request for a waiver be submitted no later than 45 calendar days before the scheduled date of the hearing.

- Section 2255 requires that every inmate and his or her attorney, if applicable, receive a copy of the decision of the hearing panel specifying the decision, the information considered and the reasons for the decision.

The rights granted in California Code of Regulations, title 15, sections 2245 through 2256 are additional rights established by the Board and do not appear in Penal Code section 3041.5. The Penal Code is silent on what must be in the decision of the hearing panel or the process for disqualifying a member of the hearing panel, or when an inmate must be informed of the week of his or her parole hearing, or any of the other rights established in these sections. These rights established by the Board by regulation implement, interpret or make specific Penal Code section 3052 which gives to the Board the "power to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole."

Similarly, the Penal Code and the California Code of Regulations are silent on the issue of whether an inmate may present oral witness testimony at a parole suitability hearing. When the Board exercised its discretion and established a rule prohibiting such witnesses in all parole suitability hearings, it implemented, interpreted and made specific the authority granted in Penal Code section 3052.

PETITIONER'S REBUTTAL

On February 18, 2009, the Petitioner submitted a rebuttal to the Board's response. The Petitioner argued that the testimony provided by the friends and family of the inmate would be crucial evidence of the inmate's suitability for parole. OAL's review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" in Government Code section 11342.600. We do not have the authority to evaluate the underlying policy issues involved in the subject of this determination.

The Petitioner also argued that the Board's response is based solely upon the rights listed in the regulations adopted by the Board and that the rights established in these regulations are not exclusive lists of inmate rights. This issue was addressed above in this determination.

CONCLUSION

OAL finds that the challenged rule prohibiting inmates from presenting oral witness testimony at parole suitability hearings meets the definition of a "regulation" in

Government Code section 11342.600, does not fall within any express statutory APA exemption and therefore, it should have been adopted as a regulation pursuant to the APA.

Date: April 27, 2009

Susan Lapsley
Director

Kathleen Eddy
Senior Counsel

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Exhibit A

STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION ARNOLD SCHWARZENEGGER, GOVERNOR

BOARD OF PAROLE HEARINGS
P.O. BOX 4036
SACRAMENTO, CA 95812-4036

June 10, 2008

LaVonia Margala
1692 Carmel Circle West
Upland, CA 91784

RE: Steven Bell
J-69411

Dear Ms. Margala:

This is in response to your letter of May 29, 2008, requesting permission to witness and speak at the parole suitability hearing of your son, Steven Bell. You wish to testify as to his personal growth and rehabilitation, insights and remorse.

Relatives of the inmate are not eligible to observe or participate in parole hearings. However, you may write your comments in a support letter for Mr. Bell and send it to the institution where he is currently housed, attention "Records Office." All support letters will be placed in Mr. Bell's central file. The Board considers all support letters and material contained within the central file at the parole suitability hearings.

If you have any other questions or concerns, please contact the Board at the address above.

Sincerely,

S. LABARE
Staff Services Manager I

jls

cc: Avenal State Prison, Records Office

STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION

ARNOLD SCHWARZENEGGER, GOVERNOR

BOARD OF PAROLE HEARINGS
P.O. BOX 4036
SACRAMENTO, CA 95812-4036

April 23, 2008

Mr. Robert Steve Wells
B-93160
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960-0689

Dear Mr. Wells:

This letter is in response to your correspondence dated, March 27, 2008. In your letter you request that the Board of Parole Hearings ("Board") allow a witness to testify on your behalf at your upcoming parole suitability hearing.

A prisoner's hearing rights are set forth in Penal Code § 3041.5 and in Title 15 of the California Code of Regulations (15 CCR §§ 2245-2256). Prisoners are not permitted to present witnesses at their parole suitability hearing.

Accordingly, the Board denies your request.

Sincerely,

Shannon Stokes
Staff Counsel