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Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. However, the laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

LIFE PAROLE SUITABILITY INFORMATION LETTER

Updated December 2016

You are receiving this letter because you are a California life prisoner who contacted our office requesting representation at your BPH parole hearing, assistance filing a petition for writ of habeas corpus, or information on lifer parole laws or recent court decisions. Unfortunately, we are unable to assist you. Our resources are limited and we can provide assistance to only a few individual prisoners. Any documents you sent are being returned with this letter.

There is general information about the parole suitability process and setting of release dates for lifers in Chapter Five of *The California State Prisoners Handbook (4th Edition, 2008)* and Chapter Five of the *2014 Supplement* to the *Handbook*, which discuss the cases, statutes and regulations through approximately October 31, 2013. We have enclosed those chapters with this letter if we thought they might be helpful to you. If those chapters are not enclosed, and you would like to receive them, please write back and we will send them to you.

There continue to be new developments in the area of life parole suitability. This letter summarizes the most important things that have happened since the end of October 2013.

I. Under New Law, the BPH No Longer Uses a Term Matrix to Set Future Parole Dates

In the past, when the BPH granted parole, it then calculated the prisoner's term and set a release date using one of the matrices set forth in the BPH regulations. However, the Legislature has amended Penal Code § 3041(a)(4) to eliminate this practice. As of January 1, 2016, a life prisoner who is granted parole will be released on the Minimum Eligible Parole Date (MEPD) or, if the MEPD has passed, as soon as the parole grant becomes final. The new law does *not* require the BPH to grant parole at the initial suitability hearing.

II. *In re Butler* – On-going Litigation on Whether the BPH Must Calculate Base Terms at the Initial Suitability Hearing

In 2013, in response to a habeas corpus petition, the BPH agreed to calculate the length of a life prisoner's base term at the time of the initial parole suitability hearing. Under the settlement order, if a lifer had already had an initial hearing, then the base term is to be calculated at the next scheduled parole consideration hearing. The base term calculation is supposed to be performed regardless of whether the hearing results in a grant or denial of parole, a stipulated denial of parole, or a tie vote. (*In re Butler*, No. A139411, Stipulation and Order Regarding Settlement, filed Dec. 16, 2013.) This settlement order did *not* require the Board to grant parole to lifers who had served their base terms. However, lifer advocates assert that the base term reflects the maximum sentence that should be considered to be constitutionally proportionate to the lifer's crime.

The BPH failed to comply with the settlement order. The BPH then filed a motion to modify the settlement order. The BPH argued that it was no longer authorized to do base term calculations because Penal Code § 3041(a)(4) now states that a prisoner who is granted parole must be release on the MEPD or, if the MEPD has passed as soon as the parole grant becomes final (see Section I, above). The BPH also argued that the settlement order does not apply to elderly prisoner parole hearings or youthful prisoner parole hearings. In July 2016, the court of appeal denied the BPH's motion and refused to modify the settlement order. The court stated that the base term "indicates the point at which a prison term becomes constitutionally excessive," and that requiring the BPH to calculate the base term at the first suitability hearing increases the likelihood of an appropriate sentence.

The state then filed a petition asking the California Supreme Court to review the July 2016 court of appeal decision. The state also asked the court of appeal to stay (stop enforcement of) the part of the settlement order requiring it to issue new regulations until the case is resolved.

On October 21, 2016, the court of appeal granted the state's request to stay the part of the order requiring it to issue new regulation. On November 16, 2016, the California Supreme Court granted review of the case. The issue the Court will consider is: "Should the Board of Parole Hearings be relieved of its obligations arising from a 2013 settlement to continue calculating base terms for life prisoners and to promulgate regulations for doing so in light of the 2016 statutory reforms to the parole suitability and release date scheme for life prisoners, which now mandate release on parole upon a finding of parole suitability?" (*In re Butler*, No. S237014, order granting review, filed Nov. 16, 2016.) It is likely to be months or years before the Court decides the issue. In the meantime, any lifer who goes to a parole hearing and who has not previously received a base term calculation should ask that the BPH provide one.

III. *Johnson v. Shaffer* – Federal Class Action Settlement Gives Lifers Greater Protection from Improper Use of Psychological Reports

In September 2015, the lawyers in *Johnson v. Shaffer* (Eastern District of California, No. 2:12 -cv-1059 KJM) reached an agreement with the BPH aimed at protecting prisoners from the improper use of psychological reports in suitability proceedings. The settlement requires that a prisoner's Comprehensive Risk Assessment (CRA) be no more than three years old and eliminates Subsequent

Risk Assessments (SRAs). The settlement also creates an appeals process to fix errors in psychological reports before they are considered by parole commissioners, requires additional training for parole commissioners and gives the lawyers and experts for prisoners the right to evaluate any proposed changes in the psychological reports. The settlement was approved by the court on May 27, 2016. Copies of the settlement and the order approving it are available on website of Uncommon Law (www.uncommonlaw.org), which represented the prisoners in the *Johnson* case. The mail address for Uncommon Law is 220 4th Street, Suite 103, Oakland, CA. 94607.

IV. New Early Parole Processes for Some Lifers

A February 2014 court order in the *Plata v. Brown* class action overcrowding case requires the state to develop procedures for early parole of some life prisoners. Here is a summary of the new parole policies that are in effect or being developed:

Medical parole: The CDCR has developed new criteria and procedures expanding medical parole have been developed. Medical staff will first determine if a prisoner is eligible, and then those prisoners will be referred to the Board Of Parole Hearings (BPH), which will decide whether paroling the prisoner would be a risk to public safety. To be eligible, a prisoner must need assistance from staff while in bed, to eat, transfer (as from bed to a wheelchair), or with toileting. Generally, such prisoners will be at the Correctional Treatment Center (CTC) level of care and in a CTC or other medical bed. Prisoners who think they are eligible for medical parole should ask their doctor or Primary Care Provider to prepare an evaluation. On request, the Prison Law Office will send an information letter with more details about medical parole.

Release of some lifers with future parole dates: The February 2014 court order requires the State to immediately release certain inmates serving indeterminate sentences who have already been found suitable for parole by the BPH but were given future parole dates. Consistent with this order, the state amended Penal Code § 3041(a)(4), which now provides that life inmates who are granted parole are eligible for release, subject to applicable review periods, upon reaching their minimum eligible parole date.

Youth offender parole: As of January 2014, a new law made some prisoners who are serving life terms and long determinate terms for crimes they committed before they turned age 18 eligible for consideration by the BPH for early parole. The law was expanded in January 2016 to include early parole consideration for some prisoners who were under the age of 23 when they committed their crimes. Unless an exception applies, juveniles who received determinate terms are considered for parole after serving 15 years, juveniles who received indeterminate terms of less than 25 to life are considered after serving 20 years, and juveniles serving 25 years to life or more are considered after 25 years. Upon request, the Prison Law Office can provide an information letter with details on “SB 260" and “SB 261" youthful offender parole.

Elderly Prisoner Parole: Pursuant to the February 2014 court order, the CDCR and BPH have implemented a new parole process whereby inmates who are 60 years of age or older and have served at least 25 years will be referred to the BPH to determine suitability for parole. For any such hearing, the BPH will prepare an assessment of the prisoner’s risk to public safety that

specifically considers elder status. For eligible indeterminate term prisoners (lifers), elderly parole will be considered at their next regularly scheduled BPH hearing. However, lifers over age 60 who have served at least 25 years and whose next parole hearing is more than six months away can petition BPH now, asking that the hearing dated be moved up so that elderly parole can be more quickly considered. For eligible determinate term prisoners, an elederly parole hearing should be held no later than one year after the prisoner becomes eligible. On request, the Prison Law Office can send an information letter with more details on elderly prisoner parole.

V. *Gilman v. Brown* – federal court of appeals held that Propositions 9 and 89 can be applied to lifers whose crimes were committed prior to enactment of those propositions.

In late February 2014, a federal district court held that California Proposition 9 (giving the Governor power to reverse, affirm or modify grants of parole in murder cases) and Proposition 89 (increasing period of time between parole consideration hearings) violated the constitutional prohibition on ex post facto laws when applied to life prisoners who committed their crimes before the effective dates of the propositions. However, in February 2016, the Ninth Circuit Court of Appeals reversed that decision. The Ninth Circuit held that authorizing the Governor to review parole grants is only a "transfer of decisionmaking power," since the Governor is supposed to apply the same criteria as the BPH. The Ninth Circuit also held that there was insufficient evidence that Proposition 9 created a significant risk of prolonging incarceration, since there is a process by which lifers can petition to advance their hearing dates. (*Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007.)

VI. *In re Lira* – lifer not entitled to credit against parole term for time spent in prison due to Governor's erroneous parole reversal.

In 2014, the California Supreme Court held that a life prisoner was not entitled to credit toward his five-year parole term for time served in prison after the Governor erroneously reversed a parole grant. In this case, the BPH granted parole in 2008, but the Governor reversed the grant in 2009. The prisoner challenged the Governor's reversal, and a state court of appeal concluded in 2012 that the reversal was unlawful because it was not supported by "some evidence." In the meantime, the BPH and Governor had had held new suitability proceedings and the prisoner had been released in 2010. Despite the Governor's erroneous 2009 decision, the California Supreme Court concluded that the prisoner had been lawfully imprisoned until the day he was released, and was not entitled to any credit against his parole term. The court opined that the parole hearing and review process takes time, and the proper remedy for an unlawful Governor's reversal is not an order for release but a remand to give the BPH an opportunity to consider any recent developments that might cause it to rescind the parole grant. The court also ruled that granting credits would undermine the Legislature's intent that lifers serve a period of parole after release. (*In re Lira* (2014) 58 Cal.4th 573.)

VII. CDCR regulations for Long Term Offender Program (LTOP)

The CDCR has enacted new regulations for the Long Term Offender Program (LTOP), a voluntary program that provides Cognitive Behavioral Treatment and other rehabilitative programs to prisoners who will be up for BPH parole suitability hearings. The LTOP is described in 15 CCR §

3040.2. To be eligible for the LTOP, a prisoner must (1) reside in the general population and not have case factors that would preclude placement at an institution with an LTOP; (2) have a need for rehabilitative programming as identified by a needs assessment tool; (3) be serving an indeterminate sentence with the possibility of parole or a lengthy determinate sentence, and be within one to five years from a suitability hearing (although a prisoner who is already housed at an LTOP institution and who has less than one year before the parole suitability hearing may be considered on a case-by-case basis). Prisoners who are receiving mental health care at the CCCMS or EOP level may be considered for an LTOP if they meet the general eligibility criteria; however, EOP prisoners will be approved for an LTOP only on a case-by-case basis as determined by an Interdisciplinary Treatment Team. A prisoner is not eligible for the LTOP if the prisoner has been (1) found guilty of a Division A, B or C disciplinary offense in the last 12 months (with the exception of a Division C offense for inmate manufactured alcohol or possession of a controlled substance) or (2) the prisoner has had a Security Housing Unit (SHU) term and less than 12 months have passed since *either* the minimum eligible release date *or* the date the SHU term was suspended.

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Generally, if you are a California life prisoner and you want to challenge a parole denial, reversal or rescission, you should file a petition for writ of habeas corpus in state court and ask the court to appoint a lawyer to represent you. The BPH does not have a general administrative appeal procedure, so there is no need for you to "exhaust administrative remedies" prior to filing a state habeas petition challenging a life parole action. You should file your habeas petition first in the superior court in the county in which you were sentenced. (*In re Roberts* (2005) 36 Cal.4th 575.) If your petition is denied in the superior court, you can re-file it in the court of appeal and then in the California Supreme Court. If you do not have money to hire a lawyer, you are entitled to have a lawyer appointed to represent you if you request one and the court issues an order to show cause in your case. (Cal. Rules of Court, rule 4.551 (c).) More information on how to file state habeas petitions is included in the full version of *The California State Prisoners Handbook (4th Ed. 2008* plus *2014 Supplement)*. Also, you can write to the Prison Law Office to request a free manual that explains how to file and litigate a state habeas petition; that manual is also available on the Resources page at www.prisonlaw.com.

THE CALIFORNIA STATE PRISONERS HANDBOOK

A COMPREHENSIVE PRACTICE GUIDE
TO CALIFORNIA PRISON & PAROLE LAW

BY
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&
THE PRISON LAW OFFICE

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CHAPTER 5
LIFE PRISONERS

5.1 Introduction

By 2007, there were approximately 30,000 prisoners serving sentences of life with the possibility of parole, which was roughly 8,000 more than there were in 2000.[1] These prisoners are often referred to as "Life Prisoners" or "Lifers" and they are a different group from the 3,500 or so prisoners sentenced to life without the possibility of parole (or "LWOP").[2]

In July 2005, the Board of Parole Hearings (BPH) replaced the Board of Prison Terms (BPT) as the agency responsible for determining whether and when lifers are released on parole.[3] Also as part of that change, the number of commissioners appointed to conduct parole hearings increased from nine to twelve in order to keep up with the increasing number of lifers in state prisons. By the end of 2006, the BPH was scheduling nearly 7,000 parole consideration hearings each year,[4] which was an increase of 4,703 (roughly 205%) over the 2,297 hearings that were scheduled ten years earlier in 1997.[5] Unfortunately, however, up to 30 or 40 percent of scheduled hearings are postponed or canceled for a variety of reasons.[6]

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[1] CDCR, CDCR Facts and Figures (Second Quarter 2007 and Second Quarter 2000).

[2] CDCR, CDCR Facts and Figures (Second Quarter 2007); Penal Code § 190.

[3] Senate Bill 737, effective July 1, 2005 (adding Government Code § 12838.4, eliminating the Board of Prison Terms and creating the Board of Parole Hearings, which now under the umbrella of the California Department of Corrections and Rehabilitation (CDCR)).

[4] BPH, Management Information Section, Administrative Services Division, Life Prisoner Hearing and Decision Information for Calendar Year 2006, Revised Feb. 2, 2007.

[5] CDCR, Caseload Statistics, online at www.cdcr.ca.gov/Reports_Research/caseload_stats.html.

[6] BPH, Management Information Section, Administrative Services Division, Life Prisoner Hearing and Decision Information for Calendar Year 2006, Revised Feb. 2, 2007. As many as 2,235 (or 32%) of the 6,954 hearings scheduled in 2006 were postponed. This figure increased between 2006 and 2007 due mostly to the BPH's inability to obtain timely psychological evaluations for consideration at parole hearings.

Of those hearings that are actually completed as scheduled, more than 95 percent result in prisoners being denied parole.[7] Even in the five percent of cases in which parole is recommended, the recommendations are subject to further review by the BPH and the governor. By the end of the review process, less than one percent of all parole hearings result in a lifer being released on parole.[8] At the same time, roughly 500 additional lifers become eligible for parole each year, a number that will increase substantially in 2018, when the first prisoners serving life sentences for "three strikes" convictions will become eligible for parole.

In contrast to the very slim chances that a lifer will be granted parole through the normal parole consideration process, some lifers have found success in the courts. Prior to the year 2000, almost no courts were willing to grant prisoners relief in their challenges to the denial of their parole. Since that time, however, many cases have been decided that impact the parole consideration process — some negatively, but some very positively.

This chapter provides background information on the life parole process and information useful for lifers and their attorneys who are seeking to obtain either a parole date from the BPH or court order for relief when the BPH denies parole or the governor reverses a parole grant. The chapter begins with a brief discussion of the transition from the old Indeterminate Sentencing Law (ISL) to the current Determinate Sentencing Law (DSL), an overview of the types of crimes that still are punishable by indeterminate sentences (§ 5.2), information on how the minimum eligible parole date is calculated (§ 5.3), and a general overview of the means by which parole may be granted (§ 5.4). The chapter then provides an overview of the legal standards for determining parole suitability, including an overview of case law on that topic (§§ 5.5-5.7). The chapter also discusses the legal standards for determining the length of a prisoner's term if parole is granted (§§ 5.8-5.12). The following portions of the chapter discuss the process by which the BPH considers a prisoner's suitability for parole and the length of a prisoner's term, as well as specific prisoners' rights in that process; these sections also discuss how prisoners and their attorneys should prepare for parole hearings (§§ 5.13-5.30). The chapter then covers the processes through which the BPH and the governor review parole decisions (§§ 5.31-5.33). Finally, the chapter discusses legal challenges to parole decisions, including the types of actions that can be brought and an overview of some of the most commonly-raised legal claims (§§ 5.34-5.40).

It should be noted that even though the DSL replaced the former ISL 30 years ago, there are lifers still in prison who began serving their terms when the ISL was still in effect. In some instances, the rules governing parole consideration and term-setting for those prisoners differ from those that apply to DSL prisoners. The chapter will attempt to point out those differences wherever they exist.

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[7] BPH, Management Information Section, Administrative Services Division, Life Prisoner Hearing and Decision Information for Calendar Year 2006 (Feb. 2, 2007). This report shows that the BPH gave only 207 "effective" parole grants in 4,657 completed hearings in 2006.

[8] Martin, Governor Eases Off on Parole for Lifers, San Francisco Chronicle (March 19, 2007), reported that Governor Schwarzenegger reversed 90 percent of the BPH's parole recommendations in 2006, and that former Governor Davis had reversed all but six of the BPH's parole grants in his five years in office.

5.2 Crimes Carrying Life Sentences

For many decades, California criminal sentences were governed by the Indeterminate Sentence Law (ISL).[9] Under the ISL, the trial court did not specify the length of imprisonment, but sentenced the defendant to the range of years prescribed by law.[10] The predecessors to the BPH determined within those very wide statutory ranges the length of term the prisoner would actually be required to serve.[11] These determinations were subject to broad discretion, taking into consideration such factors as the nature of the prisoner's offense, felony conviction record, the probability of reformation, and the interests of public safety.[12] Any release date earlier than the maximum sentence was supposed to reflect a recognition of the prisoner's efforts at rehabilitation.[13] At its extreme, under the ISL, sentences as vague as "one year to life" were possible.[14] Some prisoners sentenced to life terms under the ISL are still in prison.

The Uniform Determinate Sentence Act of 1976 (DSL) was enacted on September 21, 1976, and became operative on July 1, 1977.[15] The purpose of the new law was to provide uniform prison terms for those convicted of the same offense under similar circumstances. The Legislature further declared that "the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion."[16]

With the DSL, the Legislature eliminated the practice of having courts sentence defendants to terms ranging from, for example, one year to life. Instead, courts in most cases must now impose a set term. For most offenses, a court can select from one of three possible sentences — the low, middle or high term. For example, for first degree burglary, the choice of sentences is two, four or six years.[17]

Under the DSL, the Community Release Board (later re-named the Board of Prison Terms and then the Board of Parole Hearings), was "created to consider parole for life prisoners, to review

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[9] Former Penal Code § 1168.

[10] Former Penal Code § 1168; In re Gray (1978) 85 Cal.App.3d 255, 259 [149 Cal.Rptr. 416].

[11] In re Lynch (1972) 8 Cal.3d 410, 415, 417 [105 Cal.Rptr. 217].

[12] In re Troglin (1975) 51 Cal.App.3d 434, 440 [124 Cal.Rptr. 234].

[13] People v. Superior Court (Gonzales) (1978) 78 Cal.App.3d 134, 141 [144 Cal.Rptr. 89].

[14] People v. Jefferson (1999) 21 Cal.4th 86, 94 [86 Cal.Rptr.2d 893].

[15] Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game (1978) 9 Pac. L.J. 5, 17-18.

[16] Penal Code § 1170 (a)(1).

[17] See, e.g., Penal Code § 461. For more information on calculating sentences under the DSL, see Chapter 4.

each determinate sentence for disparity, to revoke parole, and to apply the new law retroactively."[18] Pursuant to the DSL, the Board was required to determine how long an ISL prisoner would have been imprisoned if the prisoner had originally been sentenced under the DSL. ISL prisoners were then entitled to release on either the expiration of the DSL-calculated term or the parole date set under the ISL, whichever would result in the earlier release.[19]

Even under the DSL, some crimes still carry an indeterminate sentence of life with the possibility of parole.[20] These crimes include first-degree murder without special circumstances, some attempted first degree murders, conspiracy to commit first degree murder, second degree murder, trainwrecking, mayhem and torture, some sex offenses, some kidnappings, and injury by explosives.[21] Other crimes that carry life terms are those that involve discharge of a gun causing great bodily injury or death and certain crimes committed for the benefit of a criminal street gang.[22] In addition, various habitual offender laws, including the Three Strikes Law enacted in 1994, set forth indeterminate life sentences for people with certain prior convictions.[23]

For prisoners sentences to life with the possibility of parole (under either the ISL or DSL), the BPH is authorized to determine whether and when those "lifers" are released from prison.[24] The 17 BPH commissioners are appointed by the governor and must be confirmed by the senate within one year of appointment. Only 12 of the commissioners preside over adult cases; the other five preside over cases involving juveniles. One of these commissioners is designated by the governor to be the chairperson of the BPH. Commissioners travel throughout the state to conduct parole hearings at most prisons. The BPH also employs 60 deputy commissioners, who also sit on lifer hearing panels. In addition, the governor appoints an Executive Officer to preside over the BPH's day-to-day operations.

In some cases, a criminal defendant may receive a sentence of life without the possibility of parole (LWOP). People convicted of first degree murder with special circumstances must receive

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[18] Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game (1978) 9 Pac. L.J. 5, 25.

[19] See Penal Code § 1170.2(a); People v. West (1999) 70 Cal.App.4th 248, 257-258.

[20] See Penal Code § 1168(b). Prisoners serving indeterminate life terms or life without the possibility of parole make up about two percent of the California prisoner population, while those serving life with possibility of parole make up more than 17 percent. CDCR, Fourth Quarter 2007 Facts and Figures, www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html.

[21] Penal Code §§ 189, 190, 190.05, 206.1, 209(b), 209.5, 217.1(b), 664, 4500, and 12310(b).

[22] Penal Code § 12022.53(d)(discharge of gun causing great bodily injury or death); Penal Code § 186.22(b)(4) and (5).

[23] See, e.g., Penal Code §§ 191.5, 667(e)(2), 667.51, 667.61, 667.7, 667.71, 667.75.

[24] Penal Code § 3040.

either the death penalty or an LWOP term.[25] Some other crimes also may be punished by an LWOP term.[26] LWOP prisoners are not considered for release in the same way as prisoners sentenced to terms of life with the possibility of parole and the procedures for life parole hearings do not apply to LWOP prisoners. An LWOP prisoner's only hope for release is a pardon or commutation from the governor.[27]

5.3 Minimum Eligible Parole Dates and Sentence Time Credits

Prisoners with indeterminate life sentences must serve a certain minimum number of years before becoming eligible for consideration for release on parole. The date when parole is first possible is known as a lifer's Minimum Eligible Parole Date (MEPD). The first parole consideration hearing must be held one year before the MEPD.[28] The MEPD is calculated based on the length of the minimum statutory term for the prisoner's life offense minus any pre-sentence and in-prison time credits that can be earned. If the prisoner also has consecutive determinate sentences for other offenses, those will also affect the MEPD date.

A. The Minimum Statutory Term

The first factor in determining the MEPD is the sentence the prisoner received. The length of time lifers must serve before their MEPDs has increased over the last 30 years. Before 1978, prisoners sentenced for first degree murder had to serve seven years before becoming eligible for parole.[29] After Proposition 7 (Briggs' Death Penalty Initiative) was passed on November 8, 1978, the penalty for first degree murder increased to 25 years to life, and the penalty for most second degree murders became 15 years to life.[30] Some types of second degree murder currently carry a term of 20 years[31] or 25 years to life.[32]

The Legislature has also passed a number of "habitual offender" statutes that impose life terms on people who have committed certain prior crimes. For example, a person convicted of a crime in which he or she personally inflicted or used force sufficient to cause great bodily injury,

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[25] Penal Code § 190.2.

[26] Penal Code §§ 190(c), 190.03(a), 190.05(a), 190.25, 209(a), 218, 667.7, 4500, 12310(a); Military and Veterans Code § 1672.

[27] Penal Code §§ 4801-4802; 15 CCR § 2816. Under prior law, the Board would periodically review some LWOP cases for possible recommendations for pardon to the governor. Former 15 CCR § 2817, repealed in 1994.

[28] Penal Code § 3041(a).

[29] Penal Code § 3046.

[30] Penal Code § 190(a).

[31] Penal Code § 190(d) (2nd degree murder with a firearm from a moving vehicle).

[32] Penal Code § 190(b) (2nd degree murder of a peace officer).

who has two prior convictions for certain crimes, will receive a sentence of 20 years to life.[33] In addition, those prisoners who have life terms under the "Three Strikes Law" must be sentenced to terms of at least 25 to life.[34]

B. Pre-Sentence/Pre-Prison Time Credits

Life prisoners who were in jail while awaiting the trial and sentencing on their cases are entitled to MEPD-reducing credit for the actual time they served. Some life prisoners are also entitled additional credits for good conduct during the pre-sentence period. These credits will usually be calculated and awarded by the sentencing judge. Specific information about pre-sentence credit eligibility and calculation of credits is provided in § 4.6.

Life prisoners are also entitled to credit for the time they spend in jail after sentencing and prior to arrival in CDCR. It is the CDCR's duty to calculate and apply credits for this period of time.[35] The actual days in custody for such periods are referred to on the LSS as "Post-Sentence" credits. Prisoners are entitled to credit for actual days served; if they were eligible for pre-sentence conduct credit, then they will continue to earn such conduct credits until they arrive in the CDCR.[36] Post-sentence/pre-prison credits are discussed in § 4.7.

C. In-Prison Time Credits

Some life prisoners can reduce the MEPD through conduct credits. This means that some life prisoners who show good behavior or who work in prison can be considered for parole sooner than their statutory minimum term. For example, a prisoner who is sentenced to 15 years to life, and who earns one-for-two good behavior credits, will have to serve only about 10 years total before his or her MEPD. Although the BPH is the agency authorized to grant parole, it is the responsibility of the prison case records staff to calculate and apply good behavior and participation credits.[37]

Complex rules govern the credit that lifers can earn, and those rules have changed frequently so that, over time, a larger portion of the lifer population has become ineligible for MEPD-reducing credits.[38] For any individual, eligibility to earn in-prison credit statutes is determined by the laws as they exist at the time the prisoner's crime was committed.

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[33] Penal Code § 667.7.

[34] Penal Code §§ 667(e)(2)(A), 1170.12.

[35] Penal Code § 2900.5(e).

[36] Penal Code § 4019(f).

[37] In re Dayan (1991) 231 Cal.App.3d 184 [282 Cal.Rptr. 269].

[38] See Chapter 4 for additional information on calculating how sentence credits are applied to reduce a term.

Generally, the rule is that indeterminately-sentenced prisoners (at least those whose crimes were committed on or after the July 1, 1977, effective date of the DSL) are not eligible for MEPD-reducing conduct credits unless the applicable statute provides that they are entitled to credits under Article 2.5 (commencing with § 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code. Whether worktime credits also are available depends on whether the statute incorporates Penal Code § 2933 by virtue of having been enacted or amended after the dated that § 2933 was added to Article 2.5 (which was Jan. 1, 1983).[39] In some cases, credit ineligibility or eligibility has been more specifically written into the applicable sentencing provisions.

In addition, other laws prohibit life prisoners from earning credits that reduce an indeterminate term below a certain minimum number of actual years. For example, there is a long-standing rule that no credit reduction may be applied which would lower a lifer's minimum term to less than seven years.[40] Other sentencing laws require that certain lifers serve at least 15 or 20 years actual time prior to parole consideration, no matter how many in-prison credits might be earned.[41]

Another general rule appears to be that if a life prisoner falls into more than one category (for example a person who commits a life-term offense and who is also sentenced under a habitual offender statute), the most severe credit limitation applies.[42]

Even when a prisoner is eligible for post-conviction credits, his or her behavior and programming in prison will affect the amount of credit actually earned and applied toward the MEPD. Details about criteria for credit earning, loss, and restoration are discussed in Chapters 4 and 6.

As far as can be determined, it appears that the following summarizes credit eligibility for most categories of DSL lifers:

Ineligible for MEPD-reducing credits

- Lifers convicted of second degree murder on or after January 1, 1986, who have served a prior prison term for first or second degree murder.[43]

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[39] 70 Ops.Cal.Atty.Gen. 49, Opinion 86-1102 (Mar. 24, 1987); see also In re Monigold (1988) 205 Cal.App.3d 1224, 1227 [253 Cal.Rptr. 120].

[40] Penal Code § 3046; People v. Carpenter (1979) 99 Cal.App.3d 527, 535-536 [160 Cal.Rptr. 386].

[41] See, e.g., Penal Code § 186.22(b)(5)(certain street gang offenders not eligible for parole for at least 15 years); Penal Code § 667.7(a)(1) (habitual offender not eligible for parole for at least 20 years).

[42] People v. Jenkins (1995) 10 Cal.4th 234 [40 Cal.Rptr.2d 903; 247 893 P.2d 1224].

[43] Penal Code § 190.05 (making no reference to Penal Code § 2930 et seq.).

- Lifers convicted of second degree murder of a police officer committed on or after June 8, 1987.[44]

- Lifers convicted of any first or second degree murder committed on or after June 3, 1998.[45]

- Lifers convicted of committing gang crimes (§ 186.22(b)(4)); torture (§ 206.1); kidnapping for ransom, robbery or rape (§ 209); kidnapping during carjacking (§ 209.5); train-wrecking (§ 219); aggravated assault by a life prisoner (§ 4500); or bombing (§12310(b)).[46]

- Lifers convicted of certain sex offenses under Penal Code §§ 667.51 or 667.61, or committed as habitual sex offenders under § 667.71 (all effective Sept. 20, 2006).

- Lifers sentenced under the "Three Strikes" law set forth in Penal Code § 667(b)-(i).[47]

- All prisoners (including lifers) who (1) have two or more prior felony convictions, (2) have served two or more separate prior prison terms and (3) are currently serving prison terms for certain crimes, including murder, voluntary manslaughter, mayhem, kidnapping, assault with acid, rape, sodomy, various sex crimes with children, use of explosives with intent to injure, or any other felony in which the defendant personally inflicted great bodily injury, committed on or after January 1, 1991.[48]

Eligible for 15 percent credit (so long as the individual does not fall into any of the other categories above).

- Any prisoner (including lifers) convicted of a violent felony as defined in Penal Code § 667.5(c), committed on or after September 21, 1994.[49]

- Lifers committed as habitual sex offenders under Penal Code § 667.71 (prior to Sept. 20, 2006).

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[44] Penal Code § 190(b) (as effective June 8, 1987).

[45] Penal Code § 190(e); Penal Code § 2933.2 (as effective June 3, 1998).

[46] 70 Ops.Cal.Atty.Gen. 49, Opinion 86-1102 (Mar. 24, 1987).

[47] In re Cervera (2001) 24 Cal.4th 1073, 1080 [103 Cal.Rptr.2d 762]; People v. Stofle (1996) 45 Cal.App.4th 417 [52 Cal.Rptr.2d 82]; Penal Code § 667(c)(5) and (e)(2)(A).

[48] Penal Code § 2933.5.

[49] Penal Code § 2933.1.

- Lifers committed for crimes that involve discharging a gun causing great bodily injury or death (§ 12022.53(d)).

Eligible for one-for-two ("one-third time") credits (so long as the individual does not fall into any of the other categories above).

- Lifers convicted of murder prior to June 3, 1998.

- Lifers convicted as habitual offenders under Penal Code §§ 667.51(c) and 667.7 (for both provisions, applicable only prior to January 1, 1987).

Eligible for full one-for-one ("half time") credits under Penal Code § 2933

A very few lifers are eligible for half-time toward their indeterminate terms. Half-time eligible life prisoners include:

- Lifers sentenced as habitual offenders under Penal Code §§ 191.5(d), 217.1(b), 667.51(d) (after Jan. 1, 1987, and before Sept. 20, 2006), 667.7(a) (effective Jan. 1, 1987),[50] or 667.75, and who do not fall into any of the other categories above.

- Also, before April 1, 1987, the Board policy was to award lifers who were sentenced for murder under the provisions of Penal Code § 190 full one-for-one ("half-time") worktime credits under Penal Code § 2933. This practice ended when the Attorney General issued an opinion holding that only one-for-two ("third-time") good behavior credits were available for those prisoners.[51] Although a state court of appeal agreed with the Attorney General's interpretation of the law, the court held that the Board could not take away those work credits that prisoners had already earned.[52]

D. Consecutive Determinate Terms

Some life prisoners may also receive determinate sentences to be served consecutively to the life term. Generally, a prisoner who receives a life term and who also receives a consecutive determinate term serves the determinate term first. The time served on the determinate term does not count towards the life term.[53] However, if a consecutive determinate term is received for crimes committed in prison while already serving a life term, the determinate term does not interrupt the

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[50] 70 Ops.Cal.Atty. Gen. 49, Opinion 86-1102 (Mar. 24, 1987).

[51] Ibid.

[52] In re Monigold (1988) 205 Cal.App.3d 1224 [253 Cal.Rptr. 120]; Miller v. Rowland (9th Cir. 1993) 999 F.2d 389.

[53] People v. Grimble (1981) 116 Cal.App.3d 678 [172 Cal.Rptr. 362]; Penal Code § 669.

life term but is to be served after the life term is completed.[54] During the time that a determinate term is being served, the prisoner is eligible to earn worktime credits under the sentencing and credit laws that normally apply to a determinate term.[55]

5.4 Overview of the Parole Consideration Process

The BPH must meet with each lifer during the third year (the 36th month) of prison confinement to review the prisoner's file, document his or her activities and conduct so far, and make recommendations regarding prison programs.[56] This is called a "documentation hearing." This hearing may be conducted by either a BPH commissioner or deputy commissioner.[57]

The initial parole suitability consideration hearing is held one year before the prisoner reaches his or her MEPD (see § 5.3).[58] The main issue before the BPH at a lifer hearing is whether the prisoner should be found suitable for parole.[59]

If the BPH panel that conducts the parole consideration hearing decides that the prisoner is not suitable for parole, then the panel will also determine how many years the prisoner must wait before being re-considered for parole. In most cases, prisoners are denied parole repeatedly over the course of many years and many consideration hearings.

If the BPH panel decides to grant parole, then the BPH will calculate the term of imprisonment and parole date as described in §§ 5.8-5.12 . However, the panel decision granting parole is not the end of the matter and there will be further reviews by the BPH and/or governor before the grant of parole becomes final and takes effect (see §§ 5.31-5.32). Also, if the prisoner's calculated parole date is in the future, the BPH will hold subsequent progress hearings and may possibly act to rescind the grant of parole (§ 5.33).

The next sections will discuss the factors that are used to determine parole suitability and total term length. This chapter will then discuss the procedures and procedural rights for a parole consideration hearing.

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[54] In re Thompson (1985) 172 Cal.App.3d 256 [218 Cal.Rptr. 192].

[55] In re Monigold (1983) 139 Cal.App.3d 485 [188 Cal.Rptr. 698].

[56] Penal Code § 3041(a). As of March 16, 2001, when a prisoner appears to have suffered from intimate partner battering and its effects (often referred to, inaccurately, as Battered Woman Syndrome or "BWS"), the deputy commissioner or commissioner conducting the documentation hearing must also refer the case to the BPH executive officer for an investigation as to whether the crime was a result of intimate partner battering. 15 CCR § 2269.1(a)(2).

[57] 15 CCR § 2269.1.

[58] Penal Code § 3041(a).

[59] The initial suitability determination for parole is essentially the same under both the ISL and the DSL. In re Seabock (1983) 140 Cal.App.3d 29 [189 Cal.Rptr. 310].

FACTORS FOR DETERMINING PAROLE SUITABILITY

5.5 Statutory and Regulatory Parole Suitability Standards

The governing statute for determining whether a life prisoner shall be found suitable for parole states:

> The Board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.[60]

The decision regarding parole suitability must take into account all relevant and reliable information.[61]

The BPH has also established specific regulations to guide its parole decisions in determining whether a prisoner to likely to pose a danger to society if released from prison. A prisoner will be found unsuitable if the BPH finds the prisoner would "pose an unreasonable risk of danger to society if released from prison."[62] The specific set of rules the BPH must follow depends on when the prisoner's offense occurred and/or the category of the offense:

Offenses committed before July 1, 1977		15 CCR §§ 2300-2329
Offenses committed on or after July 1, 1977, <u>except the following offenses:</u>		15 CCR §§ 2280-2292
(a)	1st and 2nd degree murder committed on or after January 1, 1978	15 CCR §§ 2400-2411
(b)	Sex offenders sentenced under Penal Code § 667.51	15 CCR §§ 2430-2439
(c)	Habitual offenders sentenced under Penal Code § 667.7	15 CCR §§ 2420-2429
(d)	Attempted murder of a peace officer or firefighter sentenced under Penal Code § 664 committed on or after January 1, 1987	15 CCR §§ 2400-2411

[60] Penal Code § 3041(b).

[61] 15 CCR §§ 2281(b) and 2402(b).

[62] 15 CCR §§ 2281(a), 2402(a), 2422(a) and 2432(a).

The regulations specify certain factors that tend to indicate unsuitability for parole. These factors include a previous record of violence (especially at an early age), child abuse, sadistic sexual offenses, history of severe mental problems related to the offense, abuse or mutilation of the corpse, and serious misconduct while in prison.[63]

Factors tending to show suitability for parole include the lack of a juvenile record, a history of stable relationships with others, signs of remorse and taking responsibility for the crime, motivation for the crime, very stressful or traumatic conditions leading up to or at the time of the offense, lack of a criminal history, age at time of offense, plans for the future, and institutional behavior.[64]

In reality, the BPH's hearing panel has broad discretion in determining who is suitable for parole. The regulations offer guidelines for determining suitability, but the panel may consider any relevant and reliable information,[65] including the prisoner's social history, past and present mental state, past criminal history (including past criminal conduct which is reliably documented, but did not result in convictions), behavior before, during and after the crime for which the prisoner was sentenced, past and present attitude toward the crime, any conditions of treatment or control, and current community contacts outside the institution and the support of such people.[66]

5.6 Federal Court Cases on Due Process Rights Related to Parole Consideration

The Ninth Circuit federal Court of Appeals has repeatedly held that California's parole statutes provide life prisoners with a state-created due process liberty interest in parole.[67] The Ninth Circuit has also held that due process requires that BPH and governor decisions denying parole be supported by "some evidence" of unsuitability that is relevant and reliable. A court may uphold a parole denial or reversal if some of the BPH's or governor's unsuitability findings are supported by some evidence, even other cited unsuitability factors are unsupported.[68] Other requirements of due process are that the BPH and/or governor provide an individualized consideration of the prisoner's suitability (and not act pursuant to a blanket no-parole policy).[69]

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[63] 15 CCR §§ 2281(c), 2402, 2422, or 2432.

[64] 15 CCR §§ 2281(d), 2402, 2422, or 2432.

[65] 15 CCR §§ 2281(b), 2316, 2402(b).

[66] 15 CCR §§ 2281(d), 2402, 2422, or 2432.

[67] Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910; Sass v. California Bd. of Prison Terms (9th Cir. 2006) 461 F.3d 1123, 112; Irons v. Carey (9th Cir. 2007 505 F.3d 846, 853; McQuillion v. Duncan (9th Cir. 2002) 306 F.3d 902; see also Greenholtz v. Inmates of the Nebraska Penal Cod Correctional Complex (1979) 442 U.S. 1, 7, 11-12 [99 S.Ct. 2100; 60 L.Ed.2d 668] Board of Pardons v. Allen (1987) 482 U.S. 369, 373 [107 S.Ct. 2415, 96 L.Ed.2d 303].

[68] Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910, 916-917.

[69] In re Rosenkrantz (2002) 29 Cal.4th 616, 683 [128 Cal.Rptr.2d 104].

The Ninth Circuit Court of Appeal also indicated that due process may prohibit parole officials from repeatedly relying on the commitment offense and other long-past misbehavior to deny parole, stating that "[a] continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation."[70] After articulating this due process concern, the Court reviewed several cases in which it decided that there was no due process violation of this type because the prisoner had not served a sufficiently long term. In one of those cases, the Court indicated that due process would not be violated by reliance on crime and pre-crime factors until after the life prisoner had served the full minimum sentence (presumably not counting MEPD-reducing credits).[71] Since then, the Ninth Circuit Court of Appeals has overturned a parole reversal that improperly relied on the life prisoner's long-past criminal offense, which no longer provided reliable evidence of current dangerousness in light of the prisoner's history of rehabilitation.[72] Lower federal courts have reached similar conclusions.[73]

5.7 California Court Cases on Standards for Parole Considerations

The California courts have issued numerous decisions in the past few years, discussing the parole standards, due process requirements and the appropriate scope of judicial review of parole decisions. The leading recent California Supreme Court cases in the area of life parole are In re Rosenkrantz (2002) 29 Cal.4th 616 [128 Cal.Rptr.2d 104] and In re Dannenberg (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417].

In Rosenkrantz, the the California Supreme Court held that, in deciding whether to reverse a parole grant, the governor is required to consider the same factors that the BPH must consider in determining suitability, and any decision to reverse a parole grant must be supported by "some evidence."[74] When reviewing the governor's decision, a court may not conduct its own assessment of a parole application's factual merits by examining the record, assessing the credibility of witnesses, or re-weighing the evidence.[75] Instead, the court's primary inquiry is whether there is any evidence in the record that could support the governor's decision.[76]

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[70] Biggs v. Terhune (2003) 334 F.3d 910, 917.

[71] Irons v. Carey (9th Cir. 2007) 505 F.3d 846, 853-854.

[72] Hayward v. Marshall (9th Cir. 2008) 512 F.3d 536.

[73] Rosenkrantz v. Marshall (C.D. Cal. 2006) 444 F.Supp.2d 1063, 1081, 1084 (holding that "After nearly twenty years of rehabilitation, the ability to predict a prisoner's future dangerousness based simply on the circumstances of his or her crime is nil."); Martin v. Marshall (N.D. Cal. 2006) 431 F.Supp.2d 1038, 1047-1048.

[74] In re Rosenkrantz (2002) 29 Cal.4th 616, 626 [128 Cal.Rptr.2d 104].

[75] Id., at 665.

[76] Id., at 683.

In In re Dannenberg (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417], the California Supreme Court reviewed the history and language of the parole laws and decided that the statutory language directing the BPH to "normally" grant parole does not require a parole grant in any case if the BPH determines that the prisoner presents a risk to public safety. The court held that the BPH may deny parole based on public safety concerns arising from the commitment offense without comparing the prisoner's crime to other offenses or considering the BPH's regulatory "matrix" terms.

Both the Rosenkrantz and Dannenberg cases discussed matters pertaining to reliance upon the commitment offense as a reason to deny parole. The Court held that a denial of parole may be based on the nature of the commitment offense if the parole authority "reasonably believes" that the "particular circumstances" of the commitment offense indicate that the individual currently poses an unreasonable continuing risk to public safety. However,"[I]n order to prevent the parole authority's case-by-case determinations from swallowing the rule that parole should 'normally' be granted, an offense must be 'particularly egregious' to justify the denial of parole." A determination that a crime is "particularly egregious" requires the BPH to point to evidence that the "violence or viciousness of the inmate's crime" was "more than minimally necessary to convict him of the offense for which he is confined."[77]

The state courts of appeal have attempted to apply the holdings in Rosenkrantz and Dannenberg in numerous other cases. One of the issues that has been addressed is whether the BPH and governor must consider and discuss factors that tend to show suitability for parole. Some courts have held that as long as the decision maker considers the appropriate factors, he or she may not be required to discuss every possible factor.[78] Other courts have vacated parole denials or reversals because the BPH or governor failed to address suitability factors that were supported by the evidence.[79]

Several other main areas of controversy have developed. The first involves the question of whether the parole authority may support its unsuitability findings simply by citing facts in the record, or whether it must be able to explain why those facts show that the prisoner is still too dangerous to be released. The second (and related) area of inquiry involves the question of whether the BPH or the governor can legally deny parole based solely or primarily on the prisoner's commitment offense, even when the prisoner has otherwise demonstrated that the suitability factors in the parole regulations support his or her release. The state has argued, and some courts have held, that the parole authorities may support their decisions simply by citing facts in the record, without

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[77] In re Dannenberg (2005) 34 Cal.4th 106, 1071, 1084, 1088, 1095 [23 Cal.Rptr.3d 417]; In re Rosenkrantz (2002) 29 Cal.4th 616, 683 [128 Cal.Rptr.2d 104].

[78] In re McClendon (2003) 113 Cal.App.4th 315 [6 Cal.Rptr.3d 278], the courts upheld the parole decisions even though the parole authority failed to discuss factors tending to indicate the prisoner's suitability. In re Morrall (2002) 102 Cal.App.4th 280, 291 [125 Cal.Rptr.2d 391].

[79] In re Capistran (2003) 107 Cal.4th 1299 [132 Cal.Rptr.2d 872] (ordering parole authority to vacate i decision for failing to address the prisoner's heroic acts to save the lives of others); In re Smith (2003) 114 Cal.App.4th 343 [7 Cal.Rptr.3d 655] (vacating reversal of parole where the strongest unsuitability factors were not supported by any evidence and there was no consideration of the factors tending to show suitability).

any further analysis or explanation as to why long-distant facts such as the nature or the commitment offense show current dangerousness.[80] Some courts have also held that it is inappropriate to compare the prisoner's particular crime to other offenses when determining whether it is "particularly egregious."[81]

However, other courts have applied a more exacting analysis, requiring that the BPH or governor be able to show both that the criminal offense was "particularly egregious" in comparison to other crimes of the same type and that there be some sort of logical connection between the long-past crime or other misbehavior and a finding of current dangerousness. Courts following this sort of analysis have been inclined to overturn parole denials or reversals that were based largely or solely on the crime or other long-past misbehavior when the offense was not unusually severe and/or the prisoner had subsequently demonstrated an extensive period rehabilitation and exemplary behavior.[82]

As of late 2007, the California Supreme Court is in the process of considering the serious questions of (1) to what extent should the BPH and governor consider a prisoner's current dangerousness; (2) whether the BPH or the governor can legally deny parole based solely or primarily on the commitment offense, even when the prisoner has otherwise demonstrated that the suitability factors in the parole regulations support his or her release; and (3) at what point, if ever, is the gravity of the commitment offense and prior criminality insufficient to deny parole when the prisoner otherwise appears rehabilitated.[83]

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[80] In re Van Houten (2004) 116 Cal.App.4th 339 [10 Cal.Rptr.3d 406] (nature of the offense by itself justified denial of parole and Board not required to state why nature of the crime outweighed other factors supporting parole); In re Lowe (2005) 130 Cal.App.4th 1405 [31 Cal.Rptr.3d 1] (only a modicum of evidence is required to uphold governor's decision to reverse a parole grant); In re Honesto (2005) 130 Cal.App.4th 81, 97 [29 Cal.Rptr.3d 653, 665]; In re Fuentes (2005) 135 Cal.App.4th 152, 163 [37 Cal.Rptr.3d 426, 433-434].

[81] In re Tripp (2007) 150 Cal.App.4th 306, 318-320 [58 Cal.Rptr.3d 64, 72-74]; In re Andrade (2006) 141 Cal.App.4th 807, 819 [46 Cal.Rptr.3d 317, 327].

[82] In re Scott (2005) 133 Cal.App.4th 573 [34 Cal.Rptr.3d 905]; In re Elkins (2006) 144 Cal.App.4th 475 [50 Cal.Rptr.3d 503, 521]; In re Lee (2006) 143 Cal.App.4th 1400[49 Cal.Rptr.3d 931]; In re Weider (2006) 145 Cal.App.4th 570 [52 Cal.Rptr.3d 147]; In re Barker (2007) 151 Cal.App.4th 346, 376 [59 Cal.Rptr.3d 746, 768]; In re Gray (2007) 151 Cal.App.4th 379, 370-375 [59 Cal.Rptr.3d 724, 764-768]; In re Roderick (2007) 154 Cal.App.4th 242 [65 Cal.Rptr.3d 16].

[83] In re Lawrence , Cal. Supreme Ct. No. S154018 (rev. granted Sept. 19, 2007); In re Jacobson, No. S156416 (rev. granted Dec. 12, 2007).

CALCULATING THE TOTAL TERM LENGTH

5.8 Overview of How the Parole Date is Calculated

If the BPH's hearing panel decides the lifer is suitable for parole, the panel will calculate a release date by first referring to a "matrix" to set a base term,[84] and then adding enhancements for the use of a firearm or for prior and new convictions,[85] and finally subtracting post-conviction credit.[86] Because the term-setting criteria were somewhat different under the former ISL and the current DSL, there are special considerations concerning term-setting for ISL prisoners.

In reality, life prisoners rarely are found suitable for parole until long after their matrix parole dates have passed. Thus, in most cases in which parole is granted, the prisoner will be entitled to immediate release.

5.9 Setting the Base Term for DSL Prisoners

The BPH's "matrices" (the plural form of "matrix") establish three tiers of terms each type of life offense, based on how the crime was committed, the degree of injury inflicted, and the relationship between the victim and the prisoner. If no matrix is provided for a particular crime, the panel sets the base term by comparing the lifer's crime to offenses of similar gravity and magnitude of threat to the public.[87] In cases of habitual offenders or sex offenders, the base term shall be based on the circumstances of the prior and current offenses.[88] The regulations also set out particular factors in mitigation[89] and aggravation[90] related to the crime.

At the consideration hearing, the prisoner and his or her attorney should discuss with the BPH panel why the circumstances of the crime require the setting of a low base term. The transcripts from the preliminary hearing and the trial, the sentencing transcript, and abstract of judgment can provide information which will support an argument for a lower base term and a finding of mitigating circumstances. Specifically, an attorney representing a lifer should look for indications that the prisoner took a secondary, rather than a leadership role, in the crime, or justifications or explanations for the crime. For example, evidence that the person was under

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[84] 15 CCR §§ 2282 (life prisoners with pre-November 8, 1978, offenses), 2329, 2403 (15 and 25 to lifers whose offenses occurred after November 8, 1978), or 2423. There is no matrix for commitments under Penal Code § 667.51. See 15 CCR § 2433.

[85] 15 CCR §§ 2285-2286, 2406-2407, 2426-2427 or 2436-2437.

[86] 15 CCR §§ 2290, 2410, 2429, or 2439.

[87] 15 CCR §§ 2403(g), 2282(d).

[88] 15 CCR §§ 2282(d), 2423 or 2433.

[89] 15 CCR §§ 2284, 2405, 2425 or 2435.

[90] 15 CCR §§ 2283(a), (b), and (c), 2404, 2424 or 2434.

extreme temporary stress at the time of the crime, or any other extenuating or unusual circumstances, should be represented. Evidence of the prisoner's efforts after the crime to try to help the victim or to otherwise reduce the impact of the crime can also be brought forth. Information from sources outside the transcripts can also be used to support such mitigating circumstances or to refute aggravating factors.

5.10 Adding Enhancements to the Base Term Under the DSL

Once a base term is set, the BPH may add enhancements to the term for use of a firearm,[91] prior convictions, or multiple commitments (whether imposed concurrently or consecutively by the trial court).[92] In reviewing proposed enhancements, a lifer and his or her attorney should check to see whether the BPH is using the same facts to increase the sentence in different ways; such dual usage is prohibited by statute and by the Judicial Council Sentencing Rules, which are made applicable by Penal Code § 3041 and incorporated into the BPH's rules governing lifer hearings.[93]

A. Use of a Firearm During the Commitment Offense

A two-year enhancement may be imposed if the prisoner used a firearm in the commission of the crime, and the panel must state specific reasons if it decides not to add this enhancement.[94]

B. Other Convictions or Disciplinary Violations

An enhancement may also be added for each prior felony conviction and each new felony conviction since the commitment offense.[95] On top of this, an additional enhancement may be added if the panel finds a pattern of violence, numerous crimes, independent criminal activity, or crimes of increasing seriousness.[96] However, enhancements should not be imposed based on judgments that have been overturned on appeal or otherwise are not legally invalid.[97]

A prisoner should consider whether the enhancement imposed by the BPH is greater than the term that would have been imposed if the base crime had carried a determinate sentence. If so,

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[91] 15 CCR §§ 2285, 2406, 2426 or 2436.

[92] 15 CCR §§ 2286, 2407, 2427 or 2437.

[93] See, e.g., 15 CCR §§ 2288(e), 2404, 2405.

[94] 15 CCR § 2285.

[95] 15 CCR § 2286(b) and (c). Note that the regulations make no provisions for enhancements for misdemeanor convictions.

[96] 15 CCR § 2287.

[97] In re Rogers (1980) 28 Cal.3d 429 [169 Cal.Rptr. 222].

the prisoner may argue that the BPH is not carrying out its mandate to provide uniform terms[98] and that the prisoner is being denied equal protection of the law.

The panel may also impose an enhancement for serious disciplinary offenses that occurred prior to the granting of the parole date.[99]

Because the BPH has broad discretion as to whether to impose a term enhancement for other crimes or disciplinary violations, it is useful for the prisoner to present any evidence tending to explain or mitigate the seriousness of the misbehavior. Facts that a prisoner can use to attempt to mitigate the effect of the misbehavior include showing that only minor punishment was imposed, that probation or parole were successfully completed, and showing that the overall prior record an insignificant.[100]

C. Concurrent or Consecutive Sentences

The BPH may add enhancements to the term calculation for other convictions for which the prisoner was sentenced at the same time as the controlling life crime. Such other commitments may have been sentenced consecutively or concurrently. If the other commitments are not life crimes, the enhancements should be calculated according to the sentencing rules found in Penal Code § 1170.1; in many instances, that statute limits the length of consecutive sentences to one-third of the middle term normally imposed on those crimes. If the other commitment is for a life crime, the enhancement should be seven years.[101] If enhancements are given for concurrent offenses, be sure the concurrent crimes are not used to enhance the term elsewhere (for example, aggravation of the base term for multiple victims under 15 CCR § 2283(b)(7)).

Where the concurrent offense is actually the felony on which a felony murder conviction was based, there should be no enhancement at all, since only one crime (the felony) was committed, and the prisoner would then be punished for it twice — once as felony murder, and again as a concurrent enhancement.

5.11 Setting the Term for ISL Lifers

The process for setting the date of release are somewhat different for prisoners who were sentenced under the ISL. Life prisoners who were sentenced under the ISL but who did not have a release date set prior to the effective date of the DSL (July 1, 1977) were initially given release

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[98] See Penal Code § 3014; 15 CCR § 2286(b)(1).

[99] 15 CCR § 2286(d).

[100] 15 CCR § 2288.

[101] 15 CCR § 2286(b). See also 15 CCR §§ 2406, 2407, 2426, 2427, 2436, and 2437 for regulations regarding enhancements for life offenders sentenced for murder committed on or after November 8, 1978, or certain types of attempted first degree murder committed on or after January 1, 1987.

dates calculated under the DSL. However, the California Supreme Court held that this was a denial of equal protection under article I, § 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution.[102] The result is that all life prisoners who were convicted of crimes occurring before July 1, 1977, and are found suitable for parole are entitled to have their term calculated two ways — under the ISL regulations (currently at 15 CCR §§ 2317-2329) and under the newer DSL regulations. These life prisoners will receive the parole date that is the earliest of the two calculations; hearings to set parole dates in these types of cases are often called "Stanworth hearings."[103]

The DSL and the ISL each place a different emphasis on the commitment offense and on subsequent behavior and character development as factors affecting the release date. The ISL focuses more on in-prison behavior and rehabilitation, and the DSL focuses more on the crime. Thus, prisoners who committed relatively heinous crimes and whose post-conviction conduct has been exemplary should have shorter terms set under the ISL. On the other hand, prisoners whose commitment offenses were relatively ordinary and who had adjustment problems in prison should have shorter terms set under the DSL. If the BPH does not acknowledge this difference, it can be argued that this is an abuse of its discretion.

The BPH guidelines for Stanworth hearings do not require discussion of the weight of post-conviction factors or consideration of positive factors such as psychological maturation, vocational development, academic achievement, or discipline-free conduct.[104] Practices similar to these were found to violate the ISL in the 1975 case In re Stanley.[105] The Stanley case held that under the ISL, "acceptable in-prison conduct, reclamation potential, and post-release social safety are affirmative factors gravitating toward early release."[106] It can also be argued that the current BPH regulations on ISL term-setting unlawfully give "primary emphasis to the facts of prior criminality, leaving to silence and implication the factors of individual reclamation and post-release expectation."[107]

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[102] In re Stanworth (1982) 33 Cal.3d 176 [187 Cal.Rptr. 783].

[103] Ibid. See also In re Henson (1981) 123 Cal.App.3d 518, 522 n.6 [176 Cal.Rptr. 693]; In re Duarte (1983) 143 Cal.App.3d 943 [193 Cal.Rptr. 943]; and In re Seabock (1983) 140 Cal.App.3d 29 [189 Cal.Rptr. 310], comparing certain aspects of ISL and DSL lifer hearings in an ex post facto context. In re Henson (1982) 123 Cal.App.3d 518 [176 Cal.Rptr. 693] deals with equal protection for lifers who did not have parole dates set by July 1, 1977, in relation to all other ISL prisoners. In re Jackson (1985) 39 Cal.3d 464 [216 Cal.Rptr. 760] discusses procedural vs. substantive ex post facto issues in DSL vs. ISL hearings. In re Handa (1985) 166 Cal.App.3d 966 [212 Cal.Rptr. 749] affirmed the board's ISL or Stanworth term setting for a prisoner where one incorrect reason for aggravating the sentence was given, but other aggravating factors existed. See also Powell v. Ducharme (9th Cir. 1993) 998 F.2d 710 (where change in law was beneficial in the setting of a minimum term, ex post facto law was not violated).

[104] 15 CCR §§ 2320-2324.

[105] See In re Stanley (1976) 54 Cal.App.3d 1030 [126 Cal.Rptr. 524].

[106] Id., at 1039.

[107] Id., at 1040. See also Roberts v. Duffy (1914) 167 Cal. 629, 634; Ex Parte Lee (1918) 177 Cal. 690, 692; People v. Morse (1964) 60 Cal.2d 631, 642-43 [36 Cal.Rptr. 201]; In re Schoengarth (1967) 66 Cal.2d 295, 300 [57 Cal.Rptr. 600]; In re Minnis (1972) 7 Cal.3d 639, 644 [102 Cal.Rptr. 749]; In re Sturm (1974) 11 Cal.3d 258, 268 [113

The change in sentencing laws from ISL to DSL presents another issue for life prisoners sentenced under the ISL. Under the ISL, many prisoners found suitable for release were released within one year after the finding of suitability.[108] Such a result was consistent with the ISL's focus on a prisoner's recent achievements, present state of mind, and likelihood of successful reintegration into society. In contrast, under the DSL, a prisoner who is found suitable for parole might be held for several more years.[109] While it could be reasonable for a person ready for release now to be held in prison for several more years pursuant to a law that promotes uniform punishment for similar crimes, such a result flies in the face of the ISL, whose focus is on present readiness for release.[110] The legality of a Stanworth hearing decision where a prisoner convicted under the ISL and acknowledged to be ready for release was held in prison for several more years has so far been upheld by the courts.[111]

Numerous federal cases have dealt with challenges to the federal parole release guidelines adopted as an experiment in 1972 and then codified in 1976[112] as applied to persons whose crimes were committed earlier. Although it previously seemed to be settled that parole guidelines do not constitute "laws" for the purpose of the ex post facto clause,[113] this is called into doubt by more recent Ninth Circuit Court of Appeals rulings.[114]

Cal.Rptr. 361].

[108] However, in People v. James (1985) 176 Cal.App.3d 795, 797 [222 Cal.Rptr. 422], a Court of Appeal found no evidence that the law or practice at the time required prisoners to be released within a year of a suitability determination.

[109] However, in most cases, the BPH has denied the prisoner so long that, by the time parole is finally granted, the term set under the matrix has already expired, meaning the prisoner will be released as soon as the decision becomes final with the BPH and survives the governor's review.

[110] It should also be noted that Intimate Partner Battering and its Effects (formerly referred to as Battered Woman Syndrome) is now included among the mitigating circumstances which tend to lessen the seriousness of the ISL offense. See 15 CCR § 2317(c)(1)(D).

[111] See In re Holmes (1989) 214 Cal.App.3d 483 [262 Cal.Rptr. 659].

[112] The Parole Commission Offense Behavior Severity Index, promulgated pursuant to the Parole Commission and Reorganization Act of 1976 (18 U.S.C. §§ 4201-4218), creates a grid or matrix for the calculation of the presumptive parole dates. The vertical grades the severity of the offense behavior and the horizontal grades other "salient factors" such as prior convictions, age, and drug dependence.

[113] See e.g., Connor v. Estelle (9th Cir. 1992) 981 F.2d 1032; Wallace v. Christensen (9th Cir. 1986) 802 F.2d 1539, 1553; United States ex rel. Forman v. McCall (3d Cir. 1985) 776 F.2d 1156; Inglese v. United States Parole Commission (7th Cir. 1985) 768 F.2d 932; Portley v. Grossman (1980) 444 U.S. 1311 [100 S.Ct 714; 62 L.Ed.2d 723] (J. Rhenquist, Circuit Justice); Rifai v. United States Parole Commission (9th Cir. 1978) 586 F.2d 695.

[114] Weaver v. Maass (9th Cir. 1995) 53 F.3d 956 (holding state Board of Parole had violated ex post facto clause by using a regulation adopted after sentencing which was less advantageous to the inmate); United States v. Paskow (9th Cir. 1993) 11 F.3d 873, 877 (holding that in determining if there has been an ex post facto violation, a court must focus on the defendant's previous eligibility to receive a lesser sentence than a new law may permit, regardless of whether the defendant would actually have received the lesser sentence).

The ISL did not set forth specific enhancement factors or amounts. However, one state Court of Appeal upheld an additional two year extension of an ISL life prisoner's term imposed pursuant to the pre-November 8, 1978, DSL regulations currently set forth in 15 CCR § 2285. The Court noted that the parole board could reasonably consider firearm use in the array of factors influencing a prisoner's actual length of confinement.[115] However, in another case, a petitioner successfully argued that such a firearm enhancement could not be validly imposed upon his express life term, since the statutes and case law required all enhancements and consecutive sentences to merge with his life sentence so that the minimum eligible parole date for a life prisoner would remain seven years.[116] The decision was based on the decision that the ISL was designed to prevent trial courts from overriding the responsibilities of the parole board by stacking sentences in such a way that a person would be ineligible for parole for many years regardless of positive post-conviction behavior.

Because of the subtle variations between ISL and DSL rules, prisoners at ISL hearings who are not entitled to representation,[117] or attorneys challenging such hearings, should read the pre-July 1, 1977, regulations carefully, and make sure that the BPH is following those regulations in fixing the ISL term, rather than applying post-July 1, 1977, DSL regulations to the ISL term determination.[118]

5.12 Deducting Post-Conviction Credit from the Base Term

As discussed in § 5.3, some life prisoners are eligible to earn CDCR goodtime or worktime credit that will allow them to have their first suitability hearing at an earlier date. In addition, separate rules allow goodtime and worktime credits to be a factor in the BPH's calculation of the release date of a person found suitable for parole.

Once the base term and any enhancements are calculated, the BPH can apply credits to reduce that term. A prisoner can currently receive an average of four months a year of good time credit for each year spent in prison.[119] No credit will be granted to prisoners who commit serious or numerous infractions of departmental regulations, and credit may be withheld for consistent

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[115] In re Neal (1980) 114 Cal.App.3d 141 [170 Cal.Rptr. 452]. This case, which addresses a DSL term, can be argued not to apply to ISL dates set pursuant to Stanworth (1982) 33 Cal.3d 176 [187 Cal.Rptr. 783].

[116] People v. Walker (1976) 18 Cal.3d 232, 243-244 [133 Cal.Rptr. 520] (Note that this has since been superseded by statute (see People v. Polk (1982) 131 Cal.App.3d 764 [182 Cal.Rptr. 847]), so it is irrelevant to DSL convictions, but can still be cited for those sentenced under the ISL).

[117] In re DeMond (1985) 165 Cal.App.3d 932 [211 Cal.Rptr. 680].

[118] Former 15 CCR §§ 2200-2225, 2250-2253, 2300-2304, 2350-2360 dated May 22, 1976. Current 15 CCR §§ 2280-2292 are the DSL regulations in effect for offenses committed from July 1, 1977, to November 8, 1978.

[119] 15 CCR §§ 2290 or 2410. For prisoners who are also receiving ISL dates, since there are no former regulations specifying suggested amount of post conviction credit, the BPH has determined that two months per year is the average that should be granted when a prisoner performs well and receives no disciplinaries.

unsatisfactory performance in work or program participation.[120] The BPH can grant a greater amount of post-conviction credit under 15 CCR § 2290(b)(2) for work, program participation, or other conduct that exceeds general expectations. However, this credit is rarely given, usually in circumstances where the prisoner commits some heroic act such as saving a person's life.

Post-conviction credit may not advance a release date to be earlier than the minimum eligible parole date.[121] Additionally, there are restrictions in the sentencing guidelines on awarding post-conviction credit because many sentences now specify a "minimum term" to be served to which credits do not apply. For example, Penal Code § 667.7 (habitual offender) requires a 20-year minimum term.[122] Application of post-conviction credits cannot reduce the actual term below that minimum.

A lifer's attorney should review the prisoner's Central File, including the sentencing transcript, work and education reports, and chronos to develop a well-documented statement of the lifer's in-prison conduct. If there are disciplinary write-ups, any mitigating circumstances surrounding the occurrences may be presented to the panel. The BPH looks very unfavorably upon disciplinary write-ups, and the lifer's attorney should minimize them and emphasize all positive aspects of the prisoner's in-prison conduct. The usual deductions for good time credit are not automatic, so the prisoner should present all evidence showing good behavior and work performance.

PAROLE SUITABILITY HEARING RIGHTS AND PROCEDURES AND STRATEGIES FOR EFFECTIVE ADVOCACY

5.13 Overview of Procedural Rights and Goals of the Parole Consideration Hearing

Generally, lifers are entitled to basic procedural rights concerning their parole suitability hearings: notice of the scheduled hearing at least 60 days in advance;[123] an opportunity to review all non-confidential information upon which the BPH relies; an unbiased hearing panel; an opportunity to present documents for the panel's consideration; assistance in preparing for and participating in the hearing, including accommodations for any disability as defined in the Americans with Disabilities Act (ADA), if necessary; personal appearance and participation at the hearing; an opportunity to postpone, waive or continue the hearing, or to stipulate to being unsuitable; to receive

[120] 15 CCR § 2290(d).

[121] 15 CCR §§ 2290(b)(1) or 2410.

[122] 82 Ops.Cal.Atty.Gen. 242 (1999).

[123] In re Rutherford/Lugo (Marin Superior Ct.) No. SC135399A.

a verbatim transcript of the hearing; and a written statement of the panel's decision.[124] Lifers also have the right to counsel.[125]

The following sections set forth the most common procedural steps taken by the BPH during parole consideration hearings. The rules regarding the initial hearing are generally the same as those for subsequent hearings. Many of the procedures described in this chapter are not specifically required by administrative regulations, but represent the current practice of the BPH as of October 2007.

The following sections also provide information on tips and strategies that lifers and their attorneys can use to present the strongest possible case for a grant of parole. A lifer should have three goals at the parole consideration hearing. The first goal is to persuade the BPH to grant parole by demonstrating that the "suitability" factors in the BPH's regulations apply and that the "unsuitability" factors do not (see §§ 5.5 and 5.28). However, since BPH rarely finds prisoners suitable for release, prisoners should approach their hearings with two additional goals in mind. The second goal should be to obtain the shortest possible period of parole denial and/or limit the number of issues the BPH will be concerned about in the future. The third goal is to establish a strong record that will increase the chances of success if the life prisoner decides to bring a court challenge after parole is denied. Each of these goals can be pursued by presentation of testimony, documents and argument supporting parole and refuting any potential unsuitability factors.

5.14 Right to a Timely Hearing

A lifer must receive his or her first parole consideration hearing (called the "Initial") at least one year prior to the MEPD, which is determined as set forth in § 5.3.[126] If parole is denied, the prisoner should receive a subsequent hearing at the interval specified by the BPH in the denial.

In recent years, the BPH has frequently failed to provide life prisoners with timely parole hearings; the backlog of overdue parole hearings has at times exceeded several thousand cases. In order to ameliorate the backlog, the BPH adopted a practice of forcing prisoners to stipulate to being unsuitable or to postponing their hearings under the threat of receiving lengthy denials of parole if the prisoners went through with their hearings. As the result of a habeas corpus class action case, the Marin County Superior Court found that these practices violated the law. The court has also issued numerous orders to attempt to get the BPH to fulfill its duty to provide timely hearings.[127]

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[124] See 15 CCR § 2245 through 2255; In re Olson (1974) 37 Cal.App.3d 783 [112 Cal.Rptr. 579].

[125] 15 CCR § 2256(c).

[126] Penal Code § 3041(a).

[127] In re Rutherford/Lugo (Marin Superior Ct.) No. SC135399A.

5.15 Notice of Hearing and Receipt of Hearing Documents

Generally, lifers are entitled to receive notice of the scheduled hearing at least 60 days in advance.[128]

The life prisoner has the right to review all documents that will be examined by the BPH (including letters from the prosecutor, police, etc.) at least 10 days prior to the hearing.[129] If materials are placed in the file within 10 days of the hearing or are not provided until at the hearing itself, the lifer's attorney should object to the material being considered on the grounds that he or she did not receive proper notice. The lifer should try to show that his or her chances of parole will be harmed (prejudiced) if the hearing is held. However, the BPH may claim that there is no prejudice against the prisoner if the late-arriving material is essentially the same as other material already in the file. For example, the panel may accept a late-arriving letter from the District Attorney's office if there is a similar letter from prior hearings. Sometimes, the BPH may take a recess in order to permit the prisoner and attorney to review a new document before proceeding.

5.16 Stipulations, Waivers, Cancellations, Postponements and Continuances

Life prisoners may choose not to go through with a suitability hearing and instead stipulate to unsuitability or waive the right to a hearing. In addition, either the BPH or the life prisoner may move to postpone or continue the hearing to a later date. The BPH may sometimes also cancel a hearing. The BPH must document on the record any discussions about postponements, stipulations, waivers and continuances that take place during the week of the scheduled hearing.[130]

A. Stipulations

Lifers have the option of entering a stipulation instead of going through with their hearings.[131] Under the BPH regulations, a prisoner may not stipulate to unsuitability at the initial hearing, but he or she may stipulate at subsequent hearings.[132] A stipulation is treated by the BPH as an admission that the prisoner is unsuitable for parole because he or she presents an unreasonable risk to public safety. It is almost never to a prisoner's advantage to enter such a stipulation, even

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[128] This is one of several new requirements resulting from the In re Rutherford/Lugo litigation (Marin Superior Court No. SC135399A); the old rule under 15 CCR § 2246 was that prisoners would receive notice at least one month before a hearing. The BPH is expected to amend its regulations to make them consistent with this and other provisions of the Rutherford Remedial Plan.

[129] Penal Code § 3041.5(a)(1); 15 CCR § 2247.

[130] In re Rutherford/Lugo (Marin Superior Ct.) No. SC135399A.

[131] 15 CCR § 2253(d).

[132] 15 CCR § 2253(d). Note that the BPH is contemplating proposing changes to the regulations regarding stipulations in response to the litigation in In re Rutherford/Lugo (Marin County Superior Ct.) No. SC135399A.

if the prisoner has recent disciplinary violations and is sure that the BPH will find him or her unsuitable for parole.

Faced with a huge backlog of cases, the BPH at one point adopted a practice of forcing prisoners to stipulate to being unsuitable or postponing their hearings under the threat of receiving lengthy denials of parole if the prisoners went through with their hearings. A court found that these practices violated the law.[133]

B. Waivers

As a result of a class action case, In re Rutherford/Lugo (Marin County Superior Ct.) No. SC135399A, lifers may now waive their hearings for one, two, three, four or five years at a time for any reason. As of October 2007, the BPH is working on amendments to its regulations to implement this new option. The major benefit of the waiver option is that, unlike a stipulation, it does not require a prisoner to admit to being unsuitable for parole. Thus, a prisoner who is certain that parole will be denied and does not want to go through with a parole hearing should file a waiver rather than a stipulation.

In addition to putting regulations in place, the BPH will have to develop new forms to address the new waiver option. In the meantime, lifers must be careful about how they exercise the waiver option. Prisoners are sometime provided with BPH's current "waiver" form when they are notified of their hearings; this older waiver form is meant to allow a prisoner to waive personal appearance at a hearing or to waive the right to have an attorney appointed to represent the prisoner. Prisoner who want to waive the hearing altogether should not use this old form to do so.

C. Cancellations, Postponements and Continuances

For most of the last decade, the BPH has been plagued by vacancies and rapid turnover of commissioners and deputy commissioners. As a result, hearings are sometimes cancelled because no commissioners are available to conduct them. Hearings may also be cancelled because of an emergency at the prison, such as a breakout of gang violence or some infectious disease.

Hearings may be postponed by the BPH or by the prisoner because of missing documentation, inadequate notice to all the necessary parties, or because the prisoner and his or her attorney require more time to prepare.[134] Untimely or problematic psychological evaluations are one of the main causes for scheduled hearings being postponed, accounting for more than 35% of all postponements in 2007.[135] The BPH in the past sometimes tried to force prisoners to agree to

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[133] In re Rutherford/Lugo (Marin County Superior Ct.) No. SC135399A.

[134] 15 CCR § 2253(b).

[135] Information received from the attorney for prisoners in In re Rutherford/Lugo (Marin County Superior Court Case Number SC135399A), based on reports produced in that case.

postponements under the threat of receiving lengthy denials of parole if the prisoners went through with their hearings. This practice was found to be unlawful.[136]

A "continuance" of a hearing may occur when a hearing has begun, but it becomes necessary to halt the proceedings for a short period of time due to reasons that were unknown and reasonably could not have been known before the hearing began.[137]

If a hearing is cancelled, postponed or continued, a lifer and his or her attorney should contact both the "Lifer Desk" at the prison and the BPH's headquarters in Sacramento to get the hearing back on a calendar as soon as possible.

5.17 Right to Representation by Counsel

Life prisoners have the right to be represented by an attorney at suitability hearings, and an attorney will be provided at state expense if the prisoner is "indigent" and cannot afford to pay a lawyer; the lawyer must be appointed at least 120 days before the hearing.[138] In order to qualify as "indigent" for purposes of having the BPH appoint counsel, the prisoner must either have less than $1,500 in his or her trust account or other accounts. If the prisoner does have $1,500 or more, the BPH can still appoint an attorney at state expense if the prisoner can show that he or she is unable to hire an attorney for $1,500.[139]

Unfortunately, appointed parole hearing attorneys are paid very low hourly rates and are allowed to bill for very few hours. As of October 2007, a lifer's attorney may only bill for eight hours at $30 per hour of work on a parole hearing.[140] Typically, the BPH will appoint one attorney to represent all or most of the lifers who have hearings scheduled during a given week at an institution (usually 16 hearings each week). This arrangement does not give the attorney very much time to prepare for each prisoner's hearing. Prisoners may also hire attorneys to represent them in their hearings.

At the very minimum, the attorney must review the Board Packet (see § 5.19) and interview the prisoner prior to the hearing. Usually, the attorney will also want to review the prisoner's central prison file (§ 5.20) and prepare a written hearing memorandum (§ 5.21). The attorney may also want to obtain other documents concerning the commitment offenses, or prior history, or assist the prisoner in developing parole plans or obtaining letters of support. An attorney should also arrange

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[136] In re Rutherford/Lugo (Marin County Superior Ct.) No. SC135399A.

[137] 15 CCR § 2253(c).

[138] Penal Code § 3041.7; 15 CCR § 2256. The 120-day appointment rule results from the In re Rutherford/Lugo litigation (Marin Sup. Ct. No. SC135399A). The BPH is supposed to enact rules in the California Code of Regulations consistent with this and other provisions of the Rutherford Remedial Plan.

[139] 15 CCR § 2256(c).

[140] Confirmed via phone call with BPH staff in October 2007.

to meet with the prisoner at least 45 minutes or an hour before the scheduled hearing time in order to discuss any recent developments or new questions or concerns. The lifer may also need to provide the attorney with additional late-arriving support letters. The lifer's attorney should also be familiar with the cases that have discussed the meaning of due process,[141] the governing statutes, and the administrative regulations.[142]

Prisoners at ISL term-setting hearings pursuant to Stanworth are not entitled to counsel because the suitability determination will have already been made at the DSL hearing.[143] Therefore, preparation for a Stanworth hearing will be done by the prisoner, and should focus only on getting the lowest possible term set.

5.18 Disability Accommodations

If a prisoner has a disability, the BPH must ensure that the prisoner has an opportunity to request any kind of accommodation for a physical, mental or developmental disability under the Americans with Disabilities Act (ADA).[144] Accommodations may be necessary both to prepare for the hearing and at the hearing itself. Examples of possible accommodations include ensuring accessibility to the hearing room for a prisoner with mobility impairments; braille or taped documents or reading assistance for a vision-impaired prisoner; assistance in communicating for a developmentally disabled prisoner, or sign language interpretation for a hearing-impaired prisoner.

The form used for requesting such accommodations is the BPH Form 1073, which is usually presented to and signed by the prisoner when he or she is notified that the hearing has been scheduled. The correctional counselor or C&PR at the prison should do the initial paperwork and send it to the BPH's Americans with Disabilities Act Unit Coordinator for grant of denial. If the request for accommodation is denied, it can be immediately appealed prior to the hearing by using BPH Form 1074.[145] Copies of BPH Forms 1073 and 1074 are attached as Appendix 1-D. Further information about requests for accommodations at BPH hearings, and about disability rights of prisoners in general, can be found in §§ 1.26 and 2.16.

At the start of the hearing, the commissioner will inquire about any disability needs, and may ask the prisoner to read out loud a statement about the ADA. The attorney may interject when this request is made and advise the BPH either what specific accommodations the prisoner needs or that

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[141] See summaries contained in In re Stanley (1976) 54 Cal.App.3d 1030 [126 Cal.Rptr. 524]; In re Sturm (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361]; In re Rodriguez (1975) 14 Cal.3d 639 [122 Cal.Rptr. 552].

[142] See 15 CCR §§ 2232-2238, 2245-2256; Penal Code § 3041.5.

[143] In re DeMond (1985) 165 Cal.App.3d 932 [211 Cal.Rptr. 680].

[144] Armstrong v. Davis (N.D. Cal. Aug. 4, 2000) No. C94-2307CW, Stipulation and Order Approving Defendant's Policies and Procedures, VIII.A and B.

[145] Ibid; 15 CCR §§ 2251.5-2215.7.

the prisoner does not have a disability requiring an accommodation. Some commissioners will insist on having the prisoner read the ADA statement anyway.

5.19 The Board Packet

The coordinator of lifer hearings at the institution where the prisoner is incarcerated will provide the lifer's attorney with a set of documents called the "Board Packet." The Board Packet contains the main documents that will be considered by the BPH at the hearing. Note, however, that these are the documents the CDCR believes are most relevant to the hearing process. For this reason, prisoners and their attorneys should supplement the material in the Board Packet by obtaining other documents from the Central file and from the prisoner's family and friends. An attorney should never assume the Board Packet has all the documents necessary to prepare for a hearing. If the Packet is missing important information that should be considered at the hearing, the prisoner or attorney should obtain those additional documents from the Central file or elsewhere and present them to the hearing panel.

In the past, Board Packets were provided approximately one month prior to the scheduled hearing date. However, because of the Rutherford litigation, Board Packets are now due at least 60 days prior to the scheduled hearing date. This allows enough time for prisoners and their attorneys to review the packets and determine whether documents are missing, or whether they should request a postponement, stipulation or waiver.

The following subsections describe the materials that are generally includes in the Board Packet.

A. Checklist

The Packet should contain a Checklist of all the documents that should be in the packet. The prisoner or attorney must confirm they received the documents that are checked on the list. If all the documents were not provided at least 10 days prior to the hearing, and the attorney does not have time to review them or to get additional material that should have been not included in the Board Packet, then attorney should consider objecting or requesting a postponement or continuance. However, if an attorney does ask for a postponement, it could take months to get the case back on calendar.

B. Cumulative Case Summary (CDC Form 112)

The Packet should contain a chronological history of every transfer or major classification change in the prisoner's institutional history, including any changes in the prisoner's Minimum Eligible Parole Date. It also documents each parole hearing and its outcome.

C. Board Reports (Life Prisoner Evaluation Report or "LPER")

The Packet should contain all Life Prisoner Evaluation Reports that have been completed regarding the prisoner. Prior to each parole hearing, a correctional counselor reviews the central file and writes a report about what the prisoner has done — good and bad — since the previous parole hearing. This report is referred to as the "Board Report." There is also usually a summary of all previous disciplinary violations, self-help and vocational programs. These reports often omit both very recent and very old accomplishments by the prisoner. For this reason, the prisoner and/or attorney should bring to the hearing any significant certificates (GED, Vocational Certificates, etc.) or recent chronos that are not specifically mentioned in the Board Report.

The Board report may also include the counselor's assessment of the prisoner's level of dangerousness. However, correctional counselors, who have no expertise in risk assessment, are not longer authorized to make such assessments. Therefore, if the counselor's risk assessment is anything higher than "low," the prisoner and his or her attorney should object to it in the written hearing memorandum or at the hearing.

D. Psychological Evaluation (and/or Risk Assessment)

Prior to most parole hearings, either a psychologist or a psychiatrist will prepare a psychological profile of the prisoner, noting the prisoner's expressions of remorse and any psychological problems related to the offense (or not). There is also a brief discussion of the prisoner's psychosocial history and family background. Most importantly, the psychological report will include the clinician's assessment of the prisoner's danger potential, often in terms of low, moderate or high risk to public safety in comparison to other people in general or other prisoners. The question of whether the various risk assessment tools used by evaluators are valid and the question of how often a new psychological evaluation is necessary are controversial issues.

E. Prior Decisions

This section of the Board Packet includes all previous parole hearing decisions, administrative appeal decisions, miscellaneous decisions by the BPH, and any reversal statements from the governor. This section will not contain complete transcripts of prior hearings; only the "decision" pages from the prior hearing transcripts are included, along with Decision Face Sheets containing signatures of the commissioner and deputy commissioner. Complete transcripts can be obtained from the prisoner or from the case records department (BPH Desk). Recent hearing transcripts can also be obtained by contacting the BPH's Decision Processing Unit in Sacramento.

F. Notices and Responses

This section contains all of the prisoner's letters of support received for the upcoming hearing. In addition, there will be copies of the notices that the BPH sends out prior to each hearing to let the victim's family, prosecutor, police and sentencing judge know of the upcoming parole hearing, and inviting them to provide input (see § 5.23). If any written opposition (or support) is

submitted by those individuals or offices, it will be found here. If any support letters are not in this section of the file, the prisoner or his or her attorney should bring those letters to the hearing and/or attach them to any hearing memorandum.

G. Legal Documents

The documents in this section include the Probation Officer's Report (POR), which is the most common source for the statement of facts relied upon by the panel at a parole hearing. The section also may include important statements made by witnesses or co-defendants, as well as the prisoner's statements made shortly after the crime or after arrest. The abstract of judgment showing the prisoner's sentence will be in this section, as well as any appellate court decision following any appeal of the conviction. Sometimes sentencing transcripts will also be included. It is important for the prisoner and attorney to pay attention to this section prior to the initial parole consideration hearing because that hearing "sets" the statement of facts that will be used in future hearings and provides the best opportunity to set the record straight on descriptions of the crime or other facts that may be incorrect in the POR or other documents.

H. Miscellaneous

A variety of other documents can be included in this section. It typically contains copies of the notice of hearing rights provided to the prisoner, as well as a documents indicating whether the prisoner needs special accommodations for disabilities under the Americans with Disabilities Act.

I. Confidential Information

There may be documents in a prisoner's Central File that are not provided to the attorney or the prisoner for safety or security reasons. Confidential information typically involves co-defendants, gang affiliations or similarly sensitive matters. If there is such "confidential information," this section of the Packet will include a CDCR Form 810 stating generally which documents are not being disclosed and why. Also, at the beginning of the parole hearing, the panel members will inform the prisoner whether any of the confidential information will be used.[146] Commissioners do not always know about the CDCR Form 810, so attorneys should be prepared to inquire about whether all pertinent confidential information has been identified on the form.

5.20 Reviewing Central File Documents

The BPH hearing panel members do not always review the prisoner's entire Central File prior to the hearing, although the file is usually brought to the hearing room. The Central File, which contains legal information regarding sentencing and comprehensive information about in-prison programming and behavior, is much more extensive than the materials provided to the attorney in the BPH Packet. Therefore, the attorney should review the Central File to find all

[146] 15 CCR § 2235.

possible material that could show that the prisoner is suitable for parole. Because the BPH panel may not otherwise be aware of information that is in the Central File, the attorney should introduce and discuss all beneficial file documents at the hearing and in the written statement. The attorney should also take note of and object to the consideration of any material that the prison staff themselves have deemed unreliable.

The lifer and his or her attorney can arrange to review the prisoner's Central File.[147] This can usually be arranged through the prisoner's correctional counselor, although staff at the "Lifer Desk" at the prison (also sometimes called the "BPH Desk," or the "BPH Desk") will sometimes arrange these reviews. The attorney is entitled to review and receive copies of any materials within the Central File, except materials specifically withheld as "confidential." If there are confidential documents, the Classification and Parole Representative (C&PR) will indicate how many such documents have been removed and will briefly describe the withheld documents. The attorney will be notified that confidential documents have been removed and will be asked to sign an acknowledgment. That notification and acknowledgment document is the CDCR Form 810, Confidential Disclosure. If the attorney or lifer has reason to believe that these materials may be of use, he or she may seek judicial review of the documents; in such a case, a judge can be asked to make an in camera determination of whether the state has properly withheld a document as confidential.[148]

The Central File usually contains documents regarding the criminal offense,[149] including:

- the criminal complaint, information or indictment;
- transcripts of the hearings on entry of the plea and/or sentencing (but not transcripts of any trial proceedings);
- pre-sentence or probation reports;
- any pre-sentence observation reports (Penal Code § 1203.03);
- any judge and district attorney's statements (Penal Code § 1203.01);
- any correspondence pertaining to the case from defense counsel, the judge, the district attorney's office and other persons who have submitted views pursuant to Penal Code § 3043.5.

Other sections of the Central File contain "chronos," or short documents written by custodial, educational, psychological and vocational staff. It is fairly common for laudatory chronos to appear

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[147] In re Olson (1974) 37 Cal.App.3d 783 [112 Cal.Rptr. 579]; DOM § 13030.22.

[148] See § 6.10 regarding rules on withholding of confidential documents.

[149] See DOM §§ 72030.4.1-72030.4.2.

in a prisoner's file documenting good work or school performance or other positive programming efforts. The lifer's attorney should review these chronos thoroughly, and obtain copies of helpful or harmful chronos for presentation or response.

Another section of the file will contain disciplinary reports (CDCR Form 115) and counseling chronos (CDCR Form 128-A) documenting the prisoner's misconduct or rule violations. Copies of these reports and chronos should be obtained by the attorney, as they will need to be addressed at the hearing. Copies of classification chronos regarding security housing placement for non-disciplinary reasons such as alleged gang affiliation, protective needs, psychiatric needs, management problems, or suspected improper behavior should also be obtained.

Attorneys should try to arrange to review the C-file in the prisoner's presence. This allows the prisoner to add information and place documents in their proper context. The prisoner may also know if important documents are missing or if damaging documents ought to have been removed, but were not. Sometimes, however, prison staff will insist on arranging the attorney's file review at a time and location separate from the attorney's interview with the prisoner. When this happens, the attorney should meet with the prisoner first in order to narrow the focus of the C-file review to those areas deemed most important. A follow-up interview with the prisoner may also be required after reviewing the file. In any event, the interview and file review should take place months before the scheduled hearing, if possible. This provides sufficient time for the attorney to prepare, including obtaining additional documents (such as trial transcripts) from other sources.

5.21 Written Hearing Memorandum

Since lifers and their attorneys are not usually permitted to make an opening statement at the hearing, a prisoner's attorney may want to prepare a written hearing brief or memorandum. The attorney can send three copies of the memorandum to the BPH Lifer Desk or to the Classification and Parole Representative [C&PR] at the institution where the hearing is to be held. The memorandum can also be presented to the panel at the time of the hearing. The 10-day rule for presentation of documents to be considered at the hearing does not apply to prisoners;[150] nonetheless, the BPH panel is more likely to give the memorandum more consideration if the panel members receive it well in advance of the hearing.

A suggested format is to set forth an introduction in which the lifer's strongest points and overall theme are presented, followed by sections that address the issues of suitability, recommended release date, and post-conviction credits. If the lifer has had prior suitability hearings, the attorney should address the issues that arose at those hearings and state what the prisoner has done to fulfill the prior panels' recommendations. If the attorney is going to present live testimony or documentary evidence at the hearing, brief summaries of these materials should be included in the written statement. Any additional written materials the lifer wishes the panel to consider should be discussed in and attached to the memorandum.

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[150] 15 CCR § 2249.

This document should not focus on legal arguments, case law or statutes, although they can be discussed briefly. In fact, most of the commissioners are not lawyers, and many will be confused or turned off by too much legalese. Instead, the memorandum should lay the groundwork for such arguments. It is in the prisoner's best interests to keep the language of the memorandum clear and concise.

5.22 The Hearing Panel

Because there is a backlog of parole hearings that are overdue, the Legislature has authorized the BPH to conduct parole hearings with two-person panels; one member of the panel is a commissioner and the other member is a deputy commissioner. Once the backlog is eliminated, the BPH is supposed to resume using three-person panels, with two commissioners and one deputy commissioner conducting each hearing.[151]

Due process[152] requires a hearing in front of a panel that is "free from bias and prejudice."[153] However, to be a violation of due process, the bias must be on an individual basis.[154] A general prejudice against all prisoners is not enough to constitute unlawful bias.[155]

If it is feasible, the hearing panel is supposed to include at least one member from the prior panel at the next subsequent hearing.[156] Lifers and their attorneys may consider objecting if the current panel is totally different; however, it is not clear whether anything would be gained by making this objection. Whether it is worthwhile to do so may depend on the individual panel members involved.

5.23 Other Hearing Participants

At least 30 days before the hearing, the BPH sends notices about the hearing to many people, including victim or victim's next of kin, the prisoner's trial attorney, the district attorney and the police investigators who were involved in the prosecution, and the judge who sentenced the prisoner. These parties will be invited to either attend the hearing or submit written or recorded statements.

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[151] Penal Code § 3041(d).

[152] In re Minnis (1972) 7 Cal.3d 639, 649 [102 Cal.Rptr. 749].

[153] O'Bremski v. Maass (9th Cir. 1990) 915 F.2d 418, 422.

[154] Andrews v. Agricultural Labor Relations Board (1981) 28 Cal.3d 781, 790-791 [171 Cal.Rptr. 590]; see also 15 CCR § 2250.

[155] See Hornung v. Superior Court (San Diego) (2000) 81 Cal.App.4th 1095 [97 Cal.Rptr.2d 382].

[156] Penal Code § 3041(a).

The prosecutor for the county of commitment will be notified at least 30 days prior to the hearing and invited to attend.[157] There are other parties who are not invited to attend parole hearings, but who are specifically invited to provide written comments in support of or opposition to parole. These parties include the judge of the superior court of conviction, the attorney who represented the prisoner at trial, the law enforcement agency that investigated the case, and the law enforcement agency that had employed the victim peace officer in cases where the prisoner was convicted of the murder of a peace officer.[158] The prisoner and his or her attorney should receive copies of any statements submitted by the prosecutor, judges or police.[159]

In recent years, the Legislature has passed several new laws aimed at giving crime victims, their survivors or representatives a greater role in parole hearings. At least 30 days before the scheduled hearings, the BPH must notify the victim of the prisoner's crime, or the next of kin if the victim has died, if such people have requested to be notified and have provided their addresses to the BPH.[160] The victim, next of kin and two members of the victim's immediate family or two representatives designated for a particular hearing by the victim or next of kin may appear, personally or by counsel.[161] A victim, next of kin or immediate family member may bring one other person to the hearing for support.[162] If the victim or next of kin is present, that person may express his or her views about the crime and the prisoner; however, a representative may only comment on the effect of the crime on the victim.[163] Also, a representative may not testify at the hearing or submit a statement to be considered at the hearing if the victim or victim's next of kin provides testimony or a written statement.[164] It is probably neither an ex post facto application of law nor a denial of due process to apply these provisions to lifers convicted prior to the statute's enactment.[165]

Instead of appearing at the hearing, victims, next of kin or immediate family members may elect to submit their comments in writing, on audiotape, videotape, CD-ROM, DVD, or any other recording method that is accepted by a court or the BPH; a written transcript of any recorded statements must also be provided.[166] Victims, next of kin or representatives may also appear by

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[157] Penal Code § 3041.7.

[158] Penal Code § 3042.

[159] 15 CCR § 2030(c).

[160] Penal Code § 3043(a); 15 CCR § 2029.

[161] Penal Code § 3043(b).

[162] Penal Code § 3043.1.

[163] Penal Code § 3043(b).

[164] Penal Code § 3043(c).

[165] People v. Huber (1986) 181 Cal.App.3d 601, 635 [227 Cal.Rptr. 113].

[166] Penal Code § 3043.2(a)(1) and (b).

means of videoconferencing, if that method is available at the hearing site.[167] Typically, videoconferencing takes place with the victim, next of kin or representative located at the office of the district attorney, who may also participate through videoconference.

Regardless of the manner of appearance, the victim, next of kin or representative is allowed to speak last at the hearing, immediately before the panel takes a recess to deliberate.[168] The commissioner presiding over the hearing is supposed to take appropriate steps to make sure that the speaker does not make statements that are inaccurate, irrelevant, or which exceed the scope of the subject matter. These steps may include allowing the prisoner to rebut inaccurate statements;[169] in practice, such rebuttals are rarely allowed.

5.24 Evidentiary Rules

There are no restrictions on the evidence or materials that may be considered by the panel at the hearing as long as the evidence and materials are relevant and reliable.[170] In other words, the normal rules of evidence in most criminal and civil proceedings do not apply. Although hearsay evidence (a statement made by a person other than the current speaker or writer) alone is insufficient to justify a decision in an administrative hearing governed by the state Administrative Procedures Act,[171] hearsay is acceptable evidence and can be relied upon by the panel members at lifer hearings. The prisoner should both attack the reliability of damaging hearsay statements and use any available beneficial hearsay evidence. Favorable comments from prison staff, letters and declarations from witnesses or respectable persons, and a wide variety of materials indicating suitability for parole or mitigation of crimes may all be presented.

5.25 Prisoner Testimony

California law gives lifers the right to speak on their own behalf and to ask and answer questions at the hearing.[172] It is a violation of due process if a prisoner is not allowed to appear before the BPH and present evidence.[173] In other words, prisoners clearly have a right to testify at the parole hearing.

However, the lifer and his or her attorney must give careful consideration to whether or not the prisoner should testify or answer questions from the hearing panel. Factors to be weighed

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[167] Penal Code § 3043.25.

[168] Penal Code § 3043.6.

[169] Penal Code § 3043.6.

[170] 15 CCR §§ 2281, 2316, 2402, 2422, and 2432.

[171] Government Code § 11513.

[172] Penal Code § 3041.5(a)(2).

[173] Pedro v. Oregon Parole Board (9th Cir. 1987) 825 F.2d 1396, 1399.

include whether the prisoner's version of the crime is the same as that in the file, whether there is information in the file to support the prisoner's version, and what impression the prisoner will make while testifying. If he or she maintains innocence or has a radically different view of the facts, the testimony may create more questions than answers. Also, a prisoner may agree to discuss other matters but refuse to discuss the facts of the crime. The refusal may not legally be held against the prisoner.[174]

On the other hand, a prisoner's choice not to testify about the commitment offense is generally frowned upon by the BPH,[175] although a decision not to testify about the commitment offense when the case is still being appealed is one that the BPH is more likely to understand. Direct testimony can create rapport between the prisoner and the panel, and may remind the panel that the prisoner is a real human being. Generally, unless there is a clear reason not to testify, each prisoner should testify and should be prepared to answer difficult questions.

5.26 Presentation of Written Witness Statements and Hearing Testimony

The lifer's attorney should also attempt to find witnesses favorable to the lifer and get statements from them. Even if the hearing panel is favorably inclined toward the client, the panel is more likely to borrow statements and conclusions from others, rather than going out on a limb of its own. Thus, attorney should interview witnesses who can offer favorable information on any part of the prisoner's life, commitment offense, or other crimes. For example, the attorney may want to contact the authors of any favorable documents in the prisoner's Central File and obtain from them, if possible, a verbal or a written statement that they do not see the prisoner, if released, as a danger to society. It may also be worthwhile for the attorney to interview the victim of the crime or the victim's next of kin, who may be willing in some cases to give a statement indicating a lack of opposition to parole. However, a lifer's attorney must be very careful not to cause additional stress or other harm to the victim or the victim's family.

Testimony of favorable witnesses can also be presented to the hearing panel in the form of letters and declarations, which ideally should be signed under penalty of perjury. Cooperative witnesses should be asked to prepare written statements to be submitted as part of the written memorandum, or at the time of the hearing if no memorandum is submitted in advance.

If a witness can offer important favorable testimony, the lifer's attorney should ask the person to testify at the hearing. In theory, live testimony can be taken at a lifer hearing; indeed, the parole board has the power to issue subpoenas and arguably to have depositions taken.[176] In practice, the parole board is extremely reluctant to permit such testimony. There is no case or statutory law directly addressing the question of witnesses for prisoners at lifer hearings.

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[174] Penal Code § 5011; 15 CCR § 2236.

[175] For example, signs of remorse may be a factor indicating suitability for parole. 15 CCR § 2281(b).

[176] In re Carroll (1978) 80 Cal.App.3d 22, 34 [145 Cal.Rptr. 334]; 15 CCR §§ 2676, 2677; and Government Code § 11181 et seq.

It is useful for the attorney to make an effort to document in writing attempts to have persons testify. At least 10 days before the hearing, and preferably three weeks prior, the lifer's attorney should submit to the BPH a declaration explaining why presence of a particular witness is important, along with an application asking to allow the witness to appear at the hearing. The attorney should begin calling the BPH's Sacramento office and asking for a decision a few days after the submitting the application. It may also be useful for the attorney to send a copy to the Classification and Parole Representative (C&PR) at the prison.

If the request is denied, when the attorney presents the witnesses' written statements he or she should also remind the panel that the witnesses were willing to appear in front of the panel. Also, if the request for witnesses is denied, the lifer may be able to bring a court challenge to any resulting parole denial on grounds that the BPH abused its discretion.[177]

5.27 Making Legal Objections

Most BPH commissioners are not attorneys and may not be familiar with legal or administrative proceedings outside of their BPH training and experience. For this reason, they often do or say things that are not consistent with established rules governing such proceedings. However, a lifer's attorney should be careful in determining whether and when to make objections.

A good way to have major objections addressed in a manner that does not necessarily put the prisoner/attorney and the hearing panel at odds with one another is to raise them in advance of the hearing. These objections should be in writing and submitted to the BPH's Chairperson or Executive Officer in Sacramento. Even if the objections are not ruled upon before the hearing, at least the panel will be aware of the issues and will not feel as though they have been put on the spot.

Typically, the hearing panel begins the hearing by asking whether the prisoner or his or her attorney has any preliminary objections. Any objections previously submitted should be addressed at this time, as well as any objections that had not yet been made, but which become necessary once the hearing begins. Objections that involve serious legal issues, such as the impact of a court order on the hearing, often result in a recess during which the panel calls the BPH's legal department in Sacramento for guidance. In fact, if the panel members seems willing to rule on an objection they don't appear to clearly understand, the prisoner or attorney should request that the panel call the legal department.

As the panel discusses information found in the Board Packet, the attorney may object to the consideration of factors that are outside the scope of the statutes or the regulations. For example, a panel member may review each of the prisoner's prior convictions and question the prisoner regarding each one. The panel member may be discussing the priors both in terms of suitability and in terms of enhancements to the base term, but the lifer's attorney can argue the regulations allow only certain priors to be considered. For example, in the regulations, factors showing unsuitability

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[177] See People v. Ramirez (1979) 25 Cal.3d 260 [158 Cal.Rptr. 316] for a general discussion of procedural due process at lifer hearings.

include a "previous record of violence,"[178] and therefore only violent crimes ought to be examined by the panel in determining suitability. In addition, if the district attorney brings up information at the hearing that is not already in the record, the attorney should object to the lack of 10-day notice. Generally speaking, however, the panel will probably consider both arrests and actual convictions as long as they are both relevant and reliable.

5.28 Topics and Case Facts to be Discussed at the Hearing

Most of the hearing will be devoted to discussion of the various case facts that may reflect upon the prisoner's suitability for parole. The main topics to be covered are the commitment offense, the prisoner's prior criminal and social history, the prisoner's behavior in prison, the current psychological and counselor's reports, and the parole plans.

Generally, much of the hearing will be taken up by the panel members reciting the case facts and asking the prisoner specific questions. Most of the panel's recitations of fact and questions will be based on information found in the BPH Packet and elsewhere in the central file, which will usually be sitting open in front of the deputy commissioner; most of their comments will be based on information received since the last parole hearing. The lifer will be given an opportunity to add anything the panel fails to mention; therefore, if older accomplishments are not mentioned (such as vocational or educational certificates), the lifer should be prepared to inform the panel of those accomplishments. In addition, the lifer and attorney should be familiar with what has been discussed at prior hearings because the panel may search prior transcripts to find older statements that are inconsistent with any current information or statements.

Once the panel has finished its discussion and questions, the District Attorney's representative will be allowed to ask questions — through the BPH — of the prisoner. The prisoner and lawyer should have thought about whether it will be in the interests of the prisoner not to discuss certain topics. Also, since this is not officially an adversarial proceeding, the DA should be limited to asking only clarifying questions instead of raising new issues that have not already been discussed. Still, the DA's questions may lead the panel to ask additional questions of their own.

Next, the prisoner's attorney will be allowed to ask questions of the lifer. This opportunity should be used to clarify or emphasize issues the panel seems to have problems with, and to allow the lifer to discuss any important issues that he or she has not yet been able to discuss. Sometimes, there are aspects of the lifer's background or the circumstances surrounding the crime that complete the "story" of how it came about. Since the panel generally adopts a view of the facts that is limited to what was spelled out in the probation officer's report or court of appeal opinion, some of this additional information may not ever be raised by the panel unless the lifer introduces it. Also, if the lifer and attorney have identified issues causing problems in past hearings — but which have not been addressed in the present hearing, the attorney might want to ask the lifer about those.

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[178] 15 CCR § 2286(c)(1) or § 2402.

A. The Commitment Offense

The first case factor that the panel will discuss at the hearing is the criminal conviction. Usually, the panel will announce that they are adopting the statement of facts from an earlier parole hearing, the Probation Officer's Report, or a Court of Appeal decision if the lifer appealed his or her conviction. If there was a trial, the panel will assume the truth of the facts found by the judge or jury. If there was no trial, the lifer's attorney should make sure that the record clearly shows that there was no factual finding by any court regarding the underlying facts. In such instances, the lifer and his or her attorney may want to introduce additional information about the crime through witnesses (if possible) or documents relaying statements of the trial counsel, prosecutor, trial judge, crime partners or family members.

Because the facts of the crime are weighed heavily by the hearing panel, it is important to prevent the panel from basing its decision on misrepresentations about the crime. The lifer's attorney should be prepared to rebut misleading or unsupported allegations made in the probation report or by the district attorney and should suggest an alternative source for the statement of facts. For instance, the prisoner's motivation may have been different than that suggested by the prosecutor. Where available, court transcripts from the trial, plea or sentencing may be extremely useful in refuting inaccuracies in the probation report.

In discussing the crime, the prisoner and his or her attorney should keep in mind the BPH regulations on factors related to the commitment offense. For example, the Board will be considering whether factors related to the crime show a prisoner committed the offense in an "especially heinous, atrocious or cruel manner" and therefore tend to show the prisoner is unsuitable for parole. Specific facts that may show unsuitability under the regulations are that: (A) multiple victims were attacked, injured or killed; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled or mutilated during or after the offense; (D) the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; or (E) the motive for the crime is inexplicable or very trivial in relation to the offense.[179] Another factor tending to show unsuitability is if the prisoner has a lengthy history of severe mental problems related to the offense.[180]

On the other hand, some facts related to the crime may tend to show suitability. These include facts showing that the prisoner committed his crime as the result of significant stress in his or her life, especially if the stress had built over a long period of time.[181]

Facts showing that the prisoner was suffering from the effects of Battered Woman Syndrome (BWS), more accurately called Intimate Partner Battering and its Effect — also tend to mitigate

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[179] 15 CCR §§ 2281(c)(1) and 2402(c)(1).

[180] 15 CCR §§ 2281(c)(5) and 2402(c)(5).

[181] 15 CCR §§ 2281(d)(4) and 2402(d)(4).

culpability and show suitability for parole."[182] Prisoners who suffered from battering but were convicted at a time when evidence of battering was not admissible in criminal proceedings, can present such evidence to the BPH at the time of their parole hearing. If there is insufficient evidence to determine whether the crime was a result of intimate partner battering and its effects, the case must be referred for investigation by the BPH.

Another fact that may show suitability for parole is if the prisoner has shown remorse, such as by attempting to repair the damage, seeking help for or relieving suffering of the victim, or giving indications that he understands the nature and magnitude of the offense.[183]

B. Prior Criminal and Social History

The second area that the Board is likely to discuss is the prisoner's social and criminal history prior to the commitment offense. As with the offense, the panel is likely to rely heavily on the probation report. Some of the information may also come from information provided by the prisoner during the psychological evaluation. Again, the prisoner and his or her attorney should try to correct or rebut inaccurate or particularly damaging statements about the prisoner's prior history. If at all possible, these efforts should be supported by documents or witness statements.

Again, BPH regulations mention specific factors related to criminal and social history that tend to show unsuitability or suitability. For example, the list of possible unsuitability factors includes that the prisoner has a previous record of violence, a history of unstable or tumultuous relationships with others, or a history of committing sadistic sexual offenses.[184] The acknowledged suitability factors include that the prisoner has no juvenile record assaulting others or committing crimes with a potential of personal harm to victims, has a history of reasonably stable relationships with others, or lacks any significant history of violent crime.[185]

C. Prison Behavior and Programming

The life prisoner's programming in prison is usually a major topic of discussion at the parole hearing. A prisoner's attorney should show how the prisoner has taken advantage of every opportunity to be involved in education, job, charitable, and self-help programs. A prisoner with good in-prison behavior should emphasize that fact, especially if the prisoner was fairly young when the offense was committed and appears to have become more mature over time. A prisoner who

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[182] 15 CCR §§ 2000(b)(7), 2281(d)(5), and 2402(d)(5). BWS is defined as "evidence of the effects of physical, emotional or mental abuse upon the beliefs, perceptions or behavior of domestic violence where it appears the criminal behavior was the result of that victimization."

[183] 15 CCR §§ 2281(d)(3) and 2402(d)(3).

[184] 15 CCR §§ 2281(c)(2), (3)and (4) and 2402(c)(2), (3)and (4).

[185] 15 CCR §§ 2281(d)(1), (2) and (6) and 2402(d)(1), (2) and (6).

performs well in a job, vocation or education and participates in self-help groups and programs will also be a better candidate for parole.[186]

On the other hand, disciplinary violations are likely to be cited as factors supporting denial of parole.[187] Also, counseling chronos, poor work or school performance, or refusal to participate in self-help programs will likely be viewed unfavorably by the BPH. A lifer and his or her attorney should do their best to try to explain why such behavior problems do not show that the prisoner is currently dangerous. For example, the prisoner's lawyer will want to point if a prisoner's disciplinary violations are all or mostly from years past or are entirely non-violent; the prisoner may also want to explain why he or she has made a turn-around since the time of the disciplinary offenses.

The prisoner's lawyer should also be alert to any programming recommendations the BPH makes that are impossible for the prisoner to fulfill. For example, under recently-adopted rules, the BPH should not rely on failure to participate in programs that are not available to a particular person due to a disability.[188] In addition, while it may be improper for the BPH to require participation in programs based on religious principles, such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) (see § 5.39), a prisoner who claims to have participated in AA or NA for years might be asked to verify this by reciting and discussing some of the 12 steps.

D. Parole Plans

The panel will discuss the lifer's parole plans in an attempt to determine whether the prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.[189] The panel will ask specific questions about where the prisoner will live and work, and raise any concerns related to alcohol or substance abuse treatment on parole. The panel will also review the lifer's support letters to confirm offers of residence, employment and treatment. The prisoner should be prepared to answer tough questions, such as "How do we know you won't commit another crime?"

Of course, it is very difficult to predict what someone is going to be doing several years in the future, or to present concrete job offers, but it is useful for a life prisoner to gather as much specific information as possible. Any pre-prison job experience, in-prison job experience, job training or education should be highlighted. Of course, if there are any possible job offers, the prisoner should try to get letters or written statements from employers. Evidence of strong family and other community support networks can also be an important suitability factor. The prisoner will

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[186] 15 CCR §§ 2281(d)(7), (8) and (9) and 2402(d)(7), (8) and (9).

[187] 15 CCR §§ 2281(c)(6) and 2402(c)(6).

[188] Armstrong v. Davis (N.D. Cal. Aug. 4, 2000) No. C94-2307CW, Stipulation and Order Approving Defendant's Policies and Procedures, VIII.C.

[189] 15 CCR §§ 2281(d)(8) and 2402(d)(8).

have to show why his or her living environment will be stable, safe, and crime-free if he or she is released. A prisoner who is married or has family to live with upon release should stress the stability of the home environment.[190] If the prisoner has frequent visits or communication with family or friends, this should also be brought out. Recent letters of support from family or friends are extremely helpful. In fact, the BPH will often deny parole without such letters or other documentation regarding the prisoner's parole plans. If the prisoner has a significant amount of money or assets, and a reasonable explanation of how he or she obtained those, that fact is worth mentioning.

5.29 Closing Statements

The district attorney, followed by the prisoner's attorney, the prisoner and the victim (or the victim's next of kin or representative) will be allowed to make closing statements.

In addition to affirming points in favor of suitability, the prisoner's attorney should include a suggested term calculation based on the regulations and matrices. If the attorney has already addressed these issues in a written statement submitted prior to the hearing, the attorney should focus on the key parts of what has been discussed at the hearing. The attorney should also respond directly to the district attorney's statements. The attorney may want to conclude the closing statement with a plea that reminds the panel of the most appealing points of the prisoner's case.

The panel will also ask the prisoner whether he or she wants to make a closing statement, or whether he or she wants to rest on whatever the attorney said. Some prisoners choose to read a written statement, which is acceptable. In fact, it may be the best approach for prisoners who have difficulty expressing themselves verbally under stressful circumstances. The lifer will want to use this opportunity to express remorse for the crime, explain how he or she has changed in the years since the crime was committed and convince the panel that he or she is motivated and capable of succeeding on parole.

Lastly, the victim, next of kin or representative will be given an opportunity to address the panel.

5.30 The Decision

After closing statements, the panel will take a recess and send everyone else out of the room. Their deliberations can take anywhere from a few minutes to more than an hour. When they call the parties back in, they will read their decision. If any part of the decision is unclear, or could be challenged, the attorney should question the panel closely to get the lifer's objections and the panel's

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[190] Numerous studies have shown that family connections are virtually the only factor that correlates significantly with success on parole. The CDCR's own research division indicates as much. See Holt and Miller, Exploration in Inmate Family Relationships, Sacramento Research Division, State Department of Corrections, Report No. 46 (January 1972). Additionally, the Penal Code states that, "Maintaining an inmate's family and community relationships is an effective correctional technique which reduces recidivism." Penal Code § 6350(a).

answers on the record. The panel will sometimes make statements in response that will prove useful later, such as clarifying that parole is being denied primarily based on the crime itself. Typically, when a panel denies parole, the commissioners will use boilerplate language to describe the crime as "especially heinous, atrocious, or cruel" or as "demonstrating an exceptionally callous disregard for human suffering."[191] If the panel uses such language, a lifer's attorney should try to get them to articulate why those terms apply to that particular case. Again, the commissioners' answers can be useful in a subsequent court challenge.

The panel must also issue its decision in writing[192] and state the reasons for its decision and the statements, recommendations and materials relied on in reaching its decision.[193] A written statement of the decision should be sent to the prisoner with 20 days of the hearing.[194]

The decision will either be to grant or deny parole, or there may be a tie vote between the two panel members.

A. Parole Denied

By far the most common decision following a parole hearing is to find the prisoner unsuitable for parole. As part of the decision, the panel will also state when the prisoner may next be considered for parole suitability.

If parole is denied, a prisoner's next hearing may be scheduled in one year, two years, or, if the prisoner was convicted of murder, in up to five years.[195] The legislature has increased the permissible number of years between suitability hearings several times in the past two decades. The courts have conclusively held that it does not violate the federal constitutional prohibition against ex post facto laws to apply the increased denial periods to lifers who were sentenced at a time when hearings had to be provided every year.[196]

If the denial is for more than one year, the BPH must find that it is not reasonable to expect that parole would be granted the subsequent year and state reasons for this finding. The BPH must also give separate reasons for denying suitability and postponing the next hearing beyond one

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[191] 15 CCR §§ 2281(c)(1) and 2402(c)(1).

[192] 15 CCR § 2255.

[193] In re Sturm (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361]; Penal Code § 3042(c)-(d); 15 CCR § 2254.

[194] Penal Code § 3041.5(b)(2).

[195] Penal Code § 3041.5(b)(2); 15 CCR § 2268(b).

[196] Garner v. Jones (2000) 529 U.S. 244 [120 S.Ct. 1362; 146 L.Ed. 236]; California Dept. of Corrections v. Morales (1995) 514 U.S. 499 [155 S.Ct. 1597; 131 L.Ed.2d 588] (change in parole procedures only created a speculative risk of an increase in punishment); In re Jackson (1985) 39 Cal.3d 464 [216 Cal.Rptr. 760].

year.[197] Recently, a superior court held that the BPH could not issue a "multi-year denial" following a one-year denial unless the BPH explains the change in circumstances that would justify a longer period of denial; as of October 2007 that order is on appeal and has been stayed.[198]

B. Split Decision

Parole consideration hearings are currently conducted by only two panel members (see § 5.22), and sometimes the members of the panel disagree. If one panel member believes the prisoner is suitable for parole, and the other panel member votes to deny parole, there is a split decision. There will also be a split decision if the panel members cannot agree on the appropriate length of the parole denial period. In either situation, the case will then be sent for an "en banc" BPH review, as described in § 5.31B.

C. Parole Granted

If parole is granted, it means that the BPH found the lifer to be suitable for release. The BPH then turns its attention to determining how much time the prisoner should have to serve in prison before actually being released. To do this, the BPH follows the rules and procedures described in §§ 5.9-5.12. Usually, by the time the BPH grants parole, the prisoner will have served far longer than the applicable term under the BPH matrices, and his or her proper release date will be long past. Lifers and their attorneys should be aware that the decision granting parole will not be finalized, and release will not occur, until after the panel's decision has been reviewed by the BPH (§ 5.31) and, in some cases, by the governor (§ 5.32).

In rare instances, the BPH grants a lifer parole at a time when he or she has not yet served the complete term set under the matrix. In other words, a release date may be set that has not already passed. In those cases, the BPH must conduct a progress hearing at some point between the hearing at which parole is granted and the release date. At the progress hearing, the BPH must consider the prisoner's conduct in prison since the time he or she was granted parole and, assuming that conduct has been good, award additional credits that will make the release date even earlier.[199] The general rule is that a lifer is awarded four months of credits for every year actually served in prison.[200] The regulations specify when progress hearings must be scheduled, which is usually based on how far away the release date is from the date on which parole was granted.[201]

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[197] In re Jackson (1985) 39 Cal.3d 464, 477-480 [216 Cal.Rptr.760, 768-770].

[198] In re Rutherford (Marin Superior Ct., May 5, 2006) No. SC135399A, Order; In re Lugo (First Dist. Ct. of Appeal) No. A114111.

[199] 15 CCR §§ 2269 and 2290(a).

[200] 15 CCR § 2290(b).

[201] 15 CCR § 2269.

5.31 Review of the Decision by the BPH

A. Regular Decision Review

The BPH's Decision Review Unit reviews every decision granting parole, but the BPH almost never reviews decisions denying parole.[202] In fact, in late 2007, the BPH proposed a regulation to require only a random sample of denials to be reviewed,[203] thereby making official the policy that has been unofficial for some time. The Decision Review process must be completed within 120 days following the hearing.[204]

The purpose of review is to determine whether the panel made an error of law or fact, or whether new information should be presented to the BPH, and whether such matters have a substantial likelihood of changing the decision upon rehearing.[205] After review, the BPH will either affirm the panel's proposed decision, order a new hearing, or modify the decision without a new hearing. A new hearing is required if a proposed modification of the decision would result in a worse outcome for the lifer. Also, if the review uncovers additional information that would hurt the lifer's case, the lifer and his or her attorney must be given an opportunity to respond in writing.[206]

B. En Banc Review

There are several situations in which a case must be reviewed by the full BPH sitting "en banc." When a two-member panel of the BPH reaches a split decision on whether to grant parole, or on the length of the denial period, the case will be heard en banc. An en banc review may also be requested by a member of the hearing panel even when there is not a tie vote.[207] The most common reason for an en banc review, however, is a referral from the governor when a prisoner convicted of a crime other than murder has been granted parole by the BPH. In those cases, the BPH sitting en banc must decide whether to affirm the parole grant or to schedule a rescission hearing; a majority vote is required to affirm a parole grant.[208]

The en banc review must take place within 60 days following the parole hearing or with 60 days following the governor's referral.[209] The statutes require the en banc review be conducted by

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[202] 15 CCR § 2041.

[203] BPH, Notice of Proposed Rulemaking, RN 07-04.

[204] Penal Code § 3041(b).

[205] Penal Code § 3041(b); 15 CCR § 2042.

[206] 15 CCR § 2041(h).

[207] Penal Code § 3041(a).

[208] 15 CCR § 2044(b); Penal Code § 3041.1.

[209] 15 CCR § 2044(a).

nine randomly selected commissioners.[210] However, the BPH's regulations only require that at least five commissioners participate.[211]

5.32 Review of the Decision by the Governor

The governor has the authority to review and reverse or modify a decision granting parole to any prisoner who was convicted of murder. To do so, the governor must act within 30 days after the BPH conducts its review of the panel decision and makes the parole grant final.[212] In effect, these procedures give the governor very broad power to veto any grant of parole. In practice, the governor routinely reviews all parole grants to life prisoners who have ben convicted of murder. Technically, the governor may also reverse or modify a decision of the BPH denying parole;[213] however, it appear that this has never happened in any case.

In addition, the governor may review a BPH's decision regarding parole for any life prisoner convicted of an offense other than murder; the governor must act at least 90 days before the scheduled release date. However, the governor cannot directly reverse the BPH decisions in such cases. Instead, the governor may refer such cases back to the BPH to conduct an en banc review to re-consider its parole decision (see § 5.31B).

Neither lifers nor their attorneys are specifically allowed to meet with the governor or his staff to discuss the case or to ask or answer questions about the case. In addition, while lifers and their attorneys may submit letters and other materials to the governor regarding the decision as whether or not to review the case, those additional materials are technically not to be considered by the governor in deciding whether to reverse or modify the parole grant once the governor has elected to review the matter. This is because the governor's review must be limited to the information that was in front of the BPH at the time of the parole decision being reviewed.[214]

When the BPH forwards a case to the governor for review, the BPH also provides the governor with an Executive Case Summary (ECS).[215] The ECS sometimes contains information that undermines the BPH's parole grant by providing the governor with reasons to reverse it. It is also believed that the ECS may sometimes contain information that was not presented to the hearing

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[210] Penal Code § 3041(e); Penal Code § 3041.1.

[211] 15 CCR § 2000(b)(49).

[212] California Constitution, art. V, § 8; Penal Code § 3041.2.

[213] California Constitution, art. V, § 8; Penal Code § 3041.2.

[214] Penal Code § 3041.2(a); In re Arafiles (1992) 6 Cal.App.4th 1467, 1478 [8 Cal.Rptr.2d 492]; In re Dannenberg (2005) 34 Cal.4th 1061, 1086 [23 Cal.Rptr.3d 417].

[215] In re Elkins (2006) 144 Cal.App.4th 475, 502, fn.12 [50 Cal.Rptr.3d 503].

panel that granted the prisoner parole, which means the information technically should not be considered by the governor.[216]

Courts have decided that the governor's review procedure can be applied without violating the federal constitutional prohibition on ex post facto laws to prisoners whose life crimes were committed before the November 9, 1988 effective date of the constitutional amendment giving the governor the authority to review parole decisions.[217] The California Supreme Court has also held that the governor's review of parole decisions does not violate the separation of powers doctrine because the review does not "defeat or materially impair" the BPH's actions.[218]

5.33 Rescission Hearings

When a prisoner has been granted parole, and a future parole date has been set, the BPH still has the authority to hold a hearing to decide whether to rescind the grant of parole. The following subsections discuss the possible grounds for rescission, the procedures for rescission hearings, and particular legal issues related to rescission.

A. Grounds for a Rescission

1. Pending Disciplinary Charges or Mental Deterioration

The BPH conducts rescission hearings in order to determine whether there is "good cause" to rescind (take away) a previously granted parole date.[219] In the past, rescission hearings were most commonly conducted because the lifer was charged with committing a disciplinary violation after he or she was granted parole, but before the actual release date was reached. Such hearings were also conducted when information received after the parole grant indicated that the lifer had suffered mental deterioration that raised questions about his or her suitability for parole. In either event, the focus of the rescission proceedings was on information received after parole had been granted.[220]

The BPH is not constitutionally required to hold a pre-rescission hearing before the pending parole date.[221] However, current regulations require a pre-rescission hearing if the prisoner is

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[216] See In re Arafiles (1992) 6 Cal.App.4th 1467, 1478 [8 Cal.Rptr.2d 492]; In re Dannenberg (2005) 34 Cal.4th 1061, 1086 [23 Cal.Rptr.3d 417].

[217] In re Rosenkrantz (2002) 29 Cal.4th 616, 651 [128 Cal.Rptr.2d 104]; In re Arafiles (1992) 6 Cal.App.4th 1467 [8 Cal.Rptr.2d 492]; Gomez v. Johnson (9th Cir. 1996) 92 F.3d 964 (holding that allowing the governor's review is not subjecting the prisoner to a different standard of scrutiny since governor uses the same criteria as the Board)

[218] In re Rosenkrantz (2002) 29 Cal.4th 616, 666 [128 Cal.Rptr.2d 104].

[219] 15 CCR § 2450.

[220] 15 CCR § 2451(a), (b) and (d).

[221] In re Prewitt (1972) 8 Cal.3d 470, 474 [105 Cal.Rptr. 318].

scheduled to be released within 20 days, a criminal prosecution is pending, and the criminal prosecution will not terminate before the scheduled release date.[222]

At a rescission hearing involving a charged disciplinary violation, the panel must first determine whether there is "good cause" to believe that the violation occurred. If the panel finds the disciplinary charge is supported, it must then decide whether the disciplinary violation indicates that the lifer is not suitable for parole.[223] If the charges against the prisoner are dismissed or if the prisoner is found not guilty, the prisoner must be released on the scheduled release date. If that date has already passed, the prisoner must be released immediately.[224]

2. Parole Grant was in Error

More recently, the BPH has been under pressure from the governor's office to rescind previously granted parole dates for a third reason: that the original grant was in error. In the past decade or so, many lifers have had their cases scheduled for a rescission hearing after the governor referred their parole grants back to the BPH sitting en banc (see § 5.31B). This has been the primary tactic used by the governor to block the parole of lifers convicted of crimes other than murder, in which cases the governor cannot directly reverse parole grants. It is also used by the governor to block parole in murder cases where parole was granted more than 30 days before the governor's review. As long as the governor acts to refer the case back to the BPH at least 90 days prior to a scheduled release date, the BPH has no choice but to at least conduct the en banc review,[225] and many of those reviews result in rescission hearings.

Under the BPH's regulations, parole may be rescinded if "Fundamental errors occurred, resulting in the improvident granting of a parole date."[226] Rescission can only be justified when the findings and conclusions of the granting panel (1) cannot be reconciled with the evidence, (2) misstate the facts, or (3) explicitly decline to consider "information germane to the gravity of the crimes." Rescission is not justified solely because the rescinding panel finds that there was some evidence before the granting panel that could have justified a finding of unsuitability, and mere disagreement with the determination reached by the original panel is not sufficient grounds for rescission.[227] Rather, the date can only be rescinded if there was a "fundamental error" committed by the granting panel, not a mere difference of opinion.[228]

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[222] 15 CCR § 2453(a).

[223] 15 CCR § 2467(b).

[224] 15 CCR § 2468.

[225] Penal Code § 3041.1.

[226] 15 CCR § 2451(c).

[227] McQuillion v. Duncan (9th Cir. 2002) 306 F.3d 895; see also Caswell v. Calderon (9th Cir. 2004) 363 F.3d 832; In re Caswell (2001) 92 Cal.App.4th 1017, 1029 [112 Cal.Rptr.2d 462].

[228] In re Caswell (2001) 92 Cal.App.4th 1017, 1029 [112 Cal.Rptr.2d 462].

B. Procedures for Rescission Hearings

Prisoners have the same procedural rights at rescission hearings as at parole consideration hearings;[229] life prisoners also have the same due process rights at rescission hearings that parolees have at revocation hearings.[230] This includes the right to call witnesses. DSL prisoners still have the right to counsel and if the prisoner is indigent, an attorney shall be appointed at state expense.[231] ISL prisoners have the right to request the assistance of an attorney, but whether or not one is appointed is dependent on a case by case determination of fundamental fairness.[232] DSL prisoners facing rescission hearings are entitled to a panel composed of three members (two of which are commissioners of the BPH).[233] An ISL prisoner has the right to have a hearing panel composed of two deputy commissioners.[234]

The rescission hearing is conducted in two parts: a fact-finding phase and a disposition phase. In the fact-finding phase, the BPH considers whether there is good cause to find that the prisoner committed the charged misconduct or has suffered mental deterioration, or that the error alleged to have been committed by the granting panel actually did occur.

If good cause is not found, the hearing is over and the parole date should be affirmed. However, if good cause is found, the BPH will proceed to the second phase and decide whether to: (1) change the parole date (affirm it), (2) postpone the parole date, or (3) rescind the parole date. It is important for a prisoner to present both a defense in the fact-finding phase and mitigating evidence in the disposition phase of the hearing.

If a parole date is rescinded, the BPH must provide the prisoner with a written explanation for the decision within 10 days.[235]

C. Legal Issues Regarding Rescissions

Lifers who have already been granted parole have a heightened liberty interest and a specific expectation of being released.[236] Nonetheless, due process requires only that a reviewing court be

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[229] In re Prewitt (1972) 8 Cal.3d 470 [105 Cal.Rptr. 318]; Gee v. Brown (1975) 14 Cal.3d 571 [122 Cal.Rptr. 231]; 15 CCR §§ 2450-2472; see also Chapter 10.

[230] Penal Code §§ 3041.5 and 3041.7.

[231] In re Johnson (1995) 35 Cal.App.4th 160 [41 Cal.Rptr.2d 449].

[232] 15 CCR §§ 2690-2701.

[233] 15 CCR § 2467(b).

[234] Ibid.

[235] 15 CCR § 2470.

[236] McQuillion v. Duncan (9th Cir. 2002) 306 F.3d 895, 901.

able to find that the BPH had "some evidence" support a rescission of a parole date and the evidence underlying the decision has some likelihood of being reliable; a court will not overturn the BPH's decision unless it has no factual basis or is based on whim, caprice, or rumor.[237] The California Supreme Court has rejected requests to apply an independent judgment standard of review because such a standard applies only to administrative decisions affecting a vested right, and a prisoner does not have a vested right in his prospective liberty on a parole release date.[238] In addition, although the BPH may not rely on public outrage, public concerns may "properly trigger reconsideration of a parole granting decision and an inquiry into whether the decision was an abuse of discretion."[239] However, a rescission or postponement of a parole date may be unconstitutional if it is done vindictively due to a prisoner's exercise of his rights or legal challenges.[240]

LEGAL CHALLENGES TO PAROLE DECISIONS

5.34 Obtaining the Hearing Transcript

Generally, one of the first steps that any lifer needs to take in order to bring a legal challenge to a parole denial, rescission or reversal, is to obtain a copy of the transcript of the BPH hearing. Transcripts of lifer hearings must be made available to the general public no later than 30 days after the hearing.[241] However, the First District Court of Appeal has held that prisoners are not "members of the public" and therefore need not be provided with transcripts of their hearings within 30 days; rather, the BPH must provide transcripts to prisoners within a "reasonable" time after the hearing.[242]

In the past few years, the BPH has often been unable to produce hearing transcripts in a reasonable period of time. Faced with hundreds of transcripts being delayed by many months, a

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[237] Powell v. Gomez (9th Cir. 1994) 33 F.3d 39, 40; Jancsek v. Oregon Board of Parole (9th Cir. 1987) 833 F.2d 1389, 1390; In re Johnson (1995) 35 Cal.App.4th 160 [41 Cal.Rptr.2d 449]; Perveler v. Estelle (9th Cir. 1992) 11 F.3d 873; In re Powell (1988) 45 Cal.3d 894, 902 [248 Cal.Rptr. 431]. See also In re Fain (1976) 65 Cal.App.3d 376 [135 Cal.Rptr. 543]; In re Fain (1983) 139 Cal.App.3d 295 [188 Cal.Rptr. 653], and In re Fain (1983) 145 Cal.App.3d 540 [193 Cal.Rptr. 483].

[238] In re Powell (1988) 45 Cal.3d 894, 903 [248 Cal.Rptr. 431]; In re Duarte (1983) 143 Cal.App.3d 943, 946-947 [193 Cal.Rptr. 176]; In re Seabock (1983) 140 Cal.App.3d 29, 34-35 [189 Cal.Rptr. 310].

[239] In re Powell (1988) 45 Cal.3d 894, 902 [248 Cal.Rptr. 431].

[240] Bono v. Benov (9th Cir. 1999) 197 F.3d 409.

[241] Penal Code § 3042(b); In re Pratt (Marin Superior Ct. 1999) No. SC105058A, Order (requiring Board to produce transcripts within 30 days). But see In re Bode (1999) 74 Cal.App.4th 1002 [88 Cal.Rptr.2d 536] (although a prisoner has a due process right to receive a copy of the transcript, the Board need not provide a copy within 30 days of the hearing).

[242] In re Bode (1999) 74 Cal.App.4th 1002 [88 Cal.Rptr.2d 536].

superior court ordered the BPH to clear the backlog of overdue transcripts or face a fine for each transcript that remained late; as of October 2007, the order is being appealed and has been stayed.[243]

5.35 Methods for Challenging a Parole Denial, Rescission or Reversal

The BPH eliminated its administrative appeals process in 2004, with the exception of a grievance process for prisoners who believe they have been improperly denied a reasonable accommodation for a disability (see discussion in § 5.18).[244] Although lifers or their attorneys may write to the BPH requesting that certain very clear errors be corrected, this approach is very rarely successful.

In the absence of an administrative appeals process, the only formal way for a lifer to challenge a parole decisions by the BPH or governor is by filing a petition for writ of habeas corpus in state court. If a state court habeas petition is unsuccessful, a life prisoner may then file a petition for writ of habeas corpus in federal court..[245]

Generally, challenges of parole denials, rescissions or reversal may not be brought as federal civil rights ("§ 1983") lawsuits because federal civil rights suits cannot be brought in cases in which challenge the validity of a continuing confinement.[246] However, a civil rights action may be brought if the lawsuit does not challenge "the fact or duration of confinement." For example, life prisoners have been allowed to bring a federal civil rights suit challenging the ex post facto application of new, harsher guidelines for determining parole suitability, where the prisoners were not actually seeking injunctions ordering speedier or immediate release.[247]

State and federal habeas corpus grounds and procedures are thoroughly discussed in Chapter 14. However, a few points relevant to lifer petitions will be discussed in this and the following sections.

The California Supreme Court has made clear that prisoners filing state habeas corpus petitions must file in the superior court of the county in which they were convicted and sentenced,

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[243] In re Rutherford (Marin Superior Ct., May 10, 2007) No. SC135399A, Order; In re Lugo (First Dist. Ct. of Appeal) No. A118706.

[244] Armstrong v. Schwarzenegger (N.D. Cal. 2002) No. C94-2307CW.

[245] See, e.g., Docken v. Chase (9th Cir. 2004) 393 F.3d 1024 (prisoners's challenge to the refusal of the Montana parole board to provide annual suitability hearings, seeking only injunctive relief, was cognizable as a federal habeas corpus petition); Brown v. Palmateer (9th Cir. 2004) 379 F.3d 1089 (federal habeas petition was proper the vehicle for challenge alleging that the Oregon parole board violated the prohibition on ex post facto laws by retroactively applying new rules that changed the standard for postponing a release date).

[246] See, e.g., McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091, 1094, applying Heck v. Humphrey (1994) 512 U.S. 477 [114 S.Ct. 2364; 129 L.Ed.2d 383]. See also Brown v. Palmateer (9th Cir. 2004) 379 F.3d 1089 (discussing the different criteria for bringing a federal habeas and federal civil rights claims); 42 U.S.C. § 1983.

[247] Wilkinson v. Dotson (2005) 544 U.S. 74 [125 S.Ct. 1242; 161 L.Ed.2d 253].

not the county in which they are incarcerated.[248] A prisoner must pursue the state petition through the superior court, the court of appeal and the California Supreme Court before bringing a federal habeas petition challenging a parole denial. The process of going through the state courts in order to get to federal court is called "exhaustion" of state remedies.

A prisoner seeking to challenge a parole decision in a federal habeas corpus petition generally must do so within one year after the governor's or the BPH's decision becomes final. However, the one year period to get into federal court is "tolled" (meaning it doesn't run) during the time a timely and properly-filed state habeas petition is still pending. The time does run both before and after the state petition is pending; therefore, a prisoner who either waits one year before filing in state court or waits one year after the state petition is exhausted before he or she files in state court will never be able to have his or her case considered in federal court.[249] The one-year statute of limitations may also be tolled during certain delays in the state habeas proceedings after they have already been initiated.[250] The complicated time deadline and tolling rules for federal habeas cases are further discussed in § 14.31.

5.36 Due Process Challenges

By far the most common issue raised in court challenges to life parole denial is the claim that the BPH or governor's decision constitutes a denial of due process in violation of the Fourteenth Amendment of the U.S. Constitution. One type of due process argument is that the BPH or governor did not have "some evidence" to support the cited parole unsuitability factors and find the prisoner unsuitable for parole. Prisoners may also want to argue that evidence relied upon the BPH or governor is unreliable or so remote that it no longer shows the prisoner is currently unsuitable for parole, particularly if the prisoner has demonstrated years of good behavior. In some cases, it may also be beneficial to argue that the BPH or governor has not taken into consideration facts supportive of parole. The standards for parole, and the standards by which courts review parole decisions to ensure due process, are further discussed in §§ 5.6-5.9.

Several cases have raised the question of whether lifers' due process rights are violated by policies of arbitrarily applying the parole suitability criteria so that parole is denied in all but a handful of unusual cases. In one case, the California Supreme Court found that the plaintiffs had not shown that former Governor Davis had an unconstitutional "no parole" policy even though, between January 1999 through April 2001, he reversed the BPH's grants of parole in 47 out of 48 cases.[251] However, in an unpublished court case, a federal district court found that a prisoner had

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[248] In re Roberts (2005) 36 Cal.4th 575 [31 Cal.Rptr.3d 458].

[249] Redd v. McGrath (9th Cir. 2003) 343 F.3d 1077 (note that this case was decided when the Board still had an administrative appeals process, and the court held that the one-year started to run as soon as the Board denied the prisoner's appeal).

[250] Brown v. Poole (9th Cir. 2003) 337 F.3d 1155 (state habeas petition was put on hold at the petitioner's request while she was awaiting the result of a new parole hearing.)

[251] In re Rosenkrantz (2002) 29 Cal.4th 616, 685-686 [128 Cal.Rptr.2d 104];

been denied due process because the state parole authorities had followed an unlawful "no-parole-for-murderers" policy through most of the 1990s and early 2000s.[252]

Although the BPH has recently been granting parole in more cases, and Governor Schwarzenegger has let stand more parole grants, the percentage of lifers who are granted parole remains very low and prisoners may still be successful in arguing that the state continues to violate due process. For example, in a group of unpublished cases, a state superior court found that the BPH was violating due process because it arbitrarily found that the commitment offense was "especially heinous, atrocious or cruel" and used that as a reason for denying every lifer parole at least once. In reaching this decision, the court reviewed 2,690 randomly selected lifer cases. As of October 2007, that decision is on appeal and the superior court's order requiring the BPH to adopt new regulations and provide training to its staff has been stayed.[253]

In bringing due process claims, lifers should be aware that there is long-standing legal precedent that prohibits a court from inquiring into the "mental processes" of administrative decision makers like the BPH's commissioners.[254]

5.37 Challenges Based on Plea Bargain Expectations

Several cases have addressed issues concerning whether conviction by a plea bargain affects the BPH's power to repeatedly deny parole based on the alleged facts of the commitment offense. Some prisoners who pled guilty and were sentenced to a term of life with the possibility of parole may be able to argue that their continued incarceration violates the terms of their plea agreement. For example, in two cases, the Ninth Circuit Court of Appeals ordered prisoners released where specific promises by the state, coupled with the prisoners' reliance on those promises, created a contract that prevented the state from keeping the petitioners in prison for life.[255]

However, courts have thus far declined to grant relief in cases where no specific promises were made during the plea proceedings. In one case, a state Court of Appeal held that the district attorney was not precluded from opposing parole based on the gravity of the commitment offense

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[252] Coleman v. Board of Prison Terms, et al. (E.D Cal. May 19, 2005) No. Civ. S-96-0783 LKK PAN P, Order Adopting Findings and Recommendations; see also Martin v. Marshall (N.D. Cal. 2006) 431 F.Supp.2d 1038, 1048-1049 (citing Coleman with approval).

[253] Orders of the Santa Clara Superior Court dated August 30, 2007 in In re Lewis, No. 68038 (Sixth Dist. Ct. of Appeal, No. H032044); In re Bragg, No. 108543 (Sixth Dist. Ct. of Appeal No. H032045); People v. Ngo, No. 127611 (Sixth Dist. Ct. of Appeal, No. H032046); In re Jameison, No. 71194 (Sixth Dist. Ct. of Appeal, No. H032047); People v. Criscione, No. 71614 (Sixth Dist. Ct. of Appeal, No. H032048).

[254] In re Johnson (1995) 35 Cal.App.4th 160, 170 fn. 8 [41 Cal.Rptr.2d 449]; Hornung v. Superior Court (San Diego) (2000) 81 Cal.App.4th 1095 [97 Cal.Rptr.2d 382].

[255] Brown v. Poole (9th Cir. 2003) 337 F.3d 1155 (prosecutor stated during the plea discussion that the prisoner would be released after serving half of minimum 15-year term if she did not commit any disciplinary violations.); see also Buckley v. Terhune (9th Cir. 2006) 441 F.3d 688.

even though the prisoner had served longer than the term for second degree murder set forth in the BPH matrix; the court found nothing in the record indicated that the plea bargain included a promise by the prosecutor that defendant would be released on parole at any specific time or that the prosecutor would cease arguing that defendant's second degree murder was especially callous.[256] In another case, a prisoner claimed that the BPH's denial of parole based on the nature of the crime violated his plea agreement because his sole motivation for pleading no contest to second-degree murder was that he would be paroled in accord with the second-degree murder matrix; the court found no evidence of any such specific promise in the plea documents.[257] In a third case, a prisoner attacked a governor's reversal of parole by arguing that his guilty plea was based on the understanding that the parole decision would be made by the BPH alone and that the application of the governor's review, reducing the likelihood of parole, violated the plea bargain; again, the court found that no specific promise had been made and held that the governor's reversal violated neither the prohibition on ex post facto laws nor the terms of the plea bargain.[258]

5.38 Ex Post Facto Challenges

The "ex post facto" clause of the U.S. Constitution forbids the passage and application of laws that retroactively increase the punishment for criminal acts.[259] In various situations, life prisoner have argued that changes to parole laws have violated the prohibition on ex post facto laws. For example, the Ninth Circuit Court of Appeals held that the Oregon parole board violated the prohibition on ex post facto laws by retroactively applying new rules that changed the standard under which the board decided whether to postpone a release date. The court found that the new standard created a significant likelihood that the prisoner would be incarcerated for a longer period of time.[260]

There are ex post facto arguments that can be raised by some California lifers. For example, because the ISL focused on rehabilitation and individual characteristics of prisoners,[261] it can be argued that a BPH denial of parole based solely or largely on the crime is arguably both contrary to the ISL and in violation of ex post facto principles.

On the other hand, some ex post factor claims raised by California prisoners have been unsuccessful. The courts have conclusively held that it does not violate the federal constitutional prohibition against ex post facto laws to apply the increased denial periods to lifers who were

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[256] In re Deluna (2005) 126 Cal.App.4th 585 [24 Cal.Rptr.3d 643].

[257] In re Honesto (2005) 130 Cal.App.4th 81 [29 Cal.Rptr.3d 653], review denied October 12, 2005.

[258] In re Lowe (2005) 130 Cal.App.4th 1405 [31 Cal.Rptr.3d 1].

[259] U.S. Constitution, art. I, § 10, cl. 1.

[260] Brown v. Palmateer (9th Cir. 2004) 379 F.3d 1089.

[261] See People v. Morse (1964) 60 Cal.2d 631, 641-642 [36 Cal.Rptr. 201] (ISL sentences imposed in accord with the social adjustment and rehabilitation of the individual).

sentenced at a time when hearings had to be provided every year.[262] Courts have also decided that the governor's review procedure can be applied without violating the federal constitutional prohibition on ex post facto laws to prisoners whose life crimes were committed before the November 9, 1988, effective date of the constitutional amendment that gave the governor the authority to review parole decisions.[263]

5.39 Substance Abuse, Disabilities and First Amendment Violations

Some lifers have been successful in arguing that BPH and governor's decisions have violated various other constitutional and statutory rights. For example, a court has held that the BPH may not deny parole based on a petitioner's history of substance abuse; nor may the BPH categorically exclude a class of disabled people from consideration for parole because of their disabilities.[264] Similarly the BPH not violate First Amendment rights by requiring a prisoner to participate in a drug treatment program that is "fundamentally religious" (such as NA) as a requirement for parole suitability.[265]

5.40 Discovery Issues

One issue that has been litigated is whether lifer prisoners may get discovery of various BPH materials. It has been established that California courts have the authority to order discovery in habeas cases, but may do so only after an order to show cause has issued.[266] Federal courts may also grant discovery in federal habeas cases.[267]

Prisoners have been successful in gaining discovery of a variety of BPH information. For example, one prisoner was able to obtain discovery of the Executive Case Summary presented by the BPH to the governor as part of the governor's review of a grant of parole.[268] Other prisoners have been successful in getting authorization to depose BPH officials about the state's unwritten

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[262] Garner v. Jones (2000) 529 U.S. 244 [120 S.Ct. 1362; 146 L.Ed. 236]; California Dept. of Corrections v. Morales (1995) 514 U.S. 499 [155 S.Ct. 1597; 131 L.Ed.2d 588] (change in parole procedures only created a speculative risk of an increase in punishment); In re Jackson (1985) 39 Cal.3d 464 [216 Cal.Rptr. 760].

[263] In re Rosenkrantz (2002) 29 Cal.4th 616, 651 [128 Cal.Rptr.2d 104]; In re Arafiles (1992) 6 Cal.App.4th 1467 [8 Cal.Rptr.2d 492]; Gomez v. Johnson (9th Cir. 1996) 92 F.3d 964 (holding that allowing the governor's review is not subjecting the prisoner to a different standard of scrutiny since governor uses the same criteria as the Board)

[264] Thompson v. Davis (9th Cir. 2002) 295 F.3d 890, 898.

[265] Turner v. Hickman (E.D. Cal. 2004) 342 F.Supp. 887; Inouye v. Kemna (9th Cir. 2007) 504 F.3d 705.

[266] Penal Code § 1484; In re Scott (2003) 29 Cal.4th 783, 814 [129 Cal.Rptr.2d 605]; In re Avena (1996) 12 Cal.4th 694, 730 [49 Cal.Rptr.2d 413]; Board of Prison Terms v. Superior Court (Ngo) (2005) 130 Cal.App.4th 1212, 1241-1242 [31 Cal.Rptr.3d 70].

[267] 28 U.S.C. § 2254, rule 6(a).

[268] In re Elkins (2006) 144 Cal.App.4th 475, 522, fn. 12 [50 Cal.Rptr.3d 503].

2014 SUPPLEMENT

to

THE CALIFORNIA STATE PRISONERS HANDBOOK (4th ED. 2008)

A COMPREHENSIVE PRACTICE GUIDE
TO CALIFORNIA PRISON & PAROLE LAW

BY
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with

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CHAPTER 5: LIFE PRISONERS

5.1 Introduction

As of 2010, more than 32,000 inmates were serving indeterminate life sentences in California state prisons.[243]

The rate at which the Board of Parole Hearings (BPH) finds lifers suitable for parole has been climbing, reaching about 14 percent in 2012.[244] Governor Brown has also taken a more deferential approach to BPH decisions than his predecessors did. In 2012, Brown let stand 80 percent of the 470 BPH decisions granting parole that he reviewed; he reversed 91 parole grants and sent 2 cases back for reconsideration.[245]

On November 4, 2008, California voters approved Proposition 9, commonly referred to as "Marsy's Law." Proposition 9 made significant changes to the lifer parole consideration procedures, as discussed throughout this chapter.

5.2 Crimes Carrying Life Sentences

The Legislature continues to expand the types of sex offenses punishable by sentences of life with the possibility of parole.[246] The Legislature also has added certain sex offenses to the list of crimes for which a sentence of life without the possibility of parole (LWOP) will be imposed.[247]

Many juveniles who were sentenced to LWOP can now petition for resentencing in the original sentencing court after serving 15, 20, and 25 years of their terms. See § 9.3.6 for more information about such petitions.

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[243] Weisberg et. al, Life in Limbo (Stanford Law School, Sept. 2011), p. 3, at www.blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf.

[244] BPH, Lifer Scheduling and Tracking System Report, at www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2012.pdf; Weisberg et. al, Life in Limbo (Stanford Law School, Sept. 2011), p. 12, at www.blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf; see also Egelko, Brown paroles more lifers than did predecessors, San Francisco Chronicle, Apr. 29, 2011, p. A-1.

[245] News Brief, SF Daily Journal, Feb. 19, 2013, p. 5; see also Ernde, Unlike His Predecessors, Brown Defers to Parole Board Decisions, San Francisco Daily Journal, June 14, 2011, pp. 1-2.

[246] See Penal Code § 220(b)(assault with intent to commit sex crime during first degree burglary), § 269 (aggravated sexual assault) and § 288.7 (sex acts with child under age 10 by person 18 years or older).

[247] Penal Code § 667.61(j) and (l).

5.3 Minimum Eligible Parole Dates and Sentence Time Credits

Some juveniles who were sentenced to life with the possibility of parole now have opportunities for early parole consideration. Prisoners serving indeterminate sentences of less than 25 years to life will be considered for parole after serving 20 years. Prisoners serving terms of 25 years to life (or more) will be considered for parole after serving 25 years. The early parole law does not apply to juveniles who were sentenced under the Two or Three Strikes Law (Penal Code § 667(b)-(i)), under the One Strike Law for certain sex offenses (Penal Code § 667.61), or to an LWOP term. The provision also does not apply if, after turning age 18, the person commits another offense with an element of malice aforethought or for which the sentence is a life term. The BPH is required to give great weight to the diminished culpability of juvenile offenders and to any subsequent growth or maturity. If the prisoner is found suitable for parole, he or she will be released. If the BPH denies parole, it should set a date for the next parole hearing under the rules in Penal Code § 3041.5 and with consideration of the special traits of juveniles.[248]

D. Consecutive Determinate Terms

The statute prohibiting a person who is convicted of murder from earning sentence credits (Penal Code § 2933.2) also prohibits credit-earning on any accompanying determinate term, regardless of whether the terms are being served consecutively or concurrently.[249]

FACTORS FOR DETERMINING PAROLE SUITABILITY

5.5 Statutory and Regulatory Parole Suitability Standards

The BPH is now required, in determining suitability for parole, to give great weight to any evidence that the prisoner experienced intimate partner battering at the time of the crime if the offense occurred prior to August 29, 1996. Also, evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime.[250]

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[248] Penal Code § 3051. The new law was passed after the California Supreme Court held that it is cruel and unusual punishment to impose a "de facto" LWOP term that is longer than the prisoner's expected lifetime (such as 110 years to life) on a juvenile criminal defendant for a non-homicide offense. People v. Caballero (2012) 55 Cal.4th 262 [145 Cal.Rptr.3d 286]. Courts have also recently held that courts must take into account the special characteristics of children before imposing de facto LWOP terms for homicide crimes committed by juveniles. People v. Thomas (2012) 211 Cal.App.4th 987 [150 Cal.Rptr.3d 361]; People v. Argueta (2012) 210 Cal.App.4th 1478 [149 Cal.Rptr.3d 243].

[249] In re Maes (2010) 185 Cal.App.4th 1094 [110 Cal.Rptr.3d 900].

[250] Penal Code § 4801.

5.6 Federal Court Cases on Due Process Rights Related to Parole Consideration

In 2011, the United States Supreme Court held that federal habeas review is not available for a state law error and that correct application of the "some evidence" standard in lifer parole cases is a matter of state law. The court clarified that the federal Due Process Clause protects only the rights to an opportunity to be heard, to examine the evidence in advance, and to notice of the reasons why parole was denied.[251] Thus, California prisoners may no longer use federal habeas petitions to argue that an unfavorable decision by the BPH or the Governor was not supported by "some evidence."[252]

An Oregon statute placing the burden on the prisoner to prove by a preponderance of the evidence that he or she is "likely to be rehabilitated within a reasonable period of time" creates a liberty interest in parole eligibility. Following Swarthout the court held that Oregon's parole hearing procedures were sufficient to satisfy due process.[253]

5.7 California Court Cases on Standards for Parole Considerations

In In re Lawrence, the California Supreme Court opined that the standard of review for parole suitability determinations is whether "some evidence" supports an inference that the prisoner is a current threat to public safety. The Court discarded as "unworkable" the analyses described in its prior decisions in In re Rosenkrantz (2002) 29 Cal.4th 616 [128 Cal.Rptr.2d 104] and In re Dannenberg (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417] to the extent those cases had held that "particularly egregious" offenses could be the sole justification for parole denial.[254] A prisoner's commitment offense must be considered in light of other factors, such as the prisoner's current demeanor or mental state, whether the prisoner shows remorse, the prisoner's efforts (or lack thereof) toward rehabilitation, and whether the prisoner has engaged in misconduct while incarcerated. A particularly heinous, atrocious, or cruel commitment offense may be a basis for denying parole only if the BPH or Governor can articulate a rational "nexus" (connection) between the commitment offense and a finding of current dangerousness.[255]

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[251] Swarthout v. Cooke (2011) __ U.S. __ [131 S.Ct. 859; 178 L.Ed.2d 732]. Swarthout nullifies a long line of Ninth Circuit cases examining California's application of the "some evidence" standard, including Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910; Sass v. California Board of Prison Terms (9th Cir. 2006) 461 F.3d 1123; Irons v. Carey (9th Cir. 2007) 505 F.3d 846; and Hayward v. Marshall (9th Cir. 2010) 603 F.3d 546, 555.

[252] See, e.g., Roemer, Federal Courts Likely to Bow Out of State Prisoner Parole Appeals, San Francisco Daily Journal, Apr. 13, 2011, p. 5. Following Swarthout, the Ninth Circuit reversed several of its decisions. See, e.g. Pearson v. Muntz (9th Cir. 2011) 639 F.3d 1185; Roberts v. Hartley (9th Cir. 2011) 640 F.3d 1042.

[253] Miller v. Or. Board of Parole (9th Cir. 2011) 642 F.3d 711, 712, 716-717.

[254] In re Lawrence (2008) 44 Cal.4th 1181, 1218-1221 [82 Cal.Rptr.3d 169].

[255] In re Lawrence (2008) 44 Cal.4th 1181, 1212, 1226-1227 [82 Cal.Rptr.3d 169].

In In re Shaputis (I), the California Supreme Court upheld a Governor's decision that a prisoner remained a threat to public safety, despite excellent behavior while incarcerated, due to the prisoner's continued "lack of insight" into the abusiveness that preceded and resulted in the crime.[256]

In a subsequent decision involving the same prisoner, In re Shaputis (II), the California Supreme Court cautioned reviewing courts about the limits of judicial power to overturn a parole decision. When courts review a parole denial or reversal under the"highly deferential" some evidence standard, they must review the entire record to determine whether a "modicum of evidence" supports the decision. The BPH's or Governor's decision must be upheld unless it is "arbitrary or procedurally flawed." Further, the court may not reweigh the evidence. "Only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor."[257]

Just as a prisoner's commitment offense cannot be the sole reason to deny parole, neither may parole be denied based solely on a prisoner's refusal to admit guilt, absent a showing that the prisoner constitutes a current risk of danger to public safety. Refusal to admit guilt, without more, cannot be used as a proxy for a prisoner's lack of insight into the crime, failure to take responsibility, or lack of remorse.[258]

Numerous California courts have reviewed individual parole suitability decisions in light of these evolving standards. Denials of parole have been upheld where the Governor or BPH failed to

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[256] In re Shaputis (2008) 44 Cal.4th 1241 [82 Cal.Rptr.3d 213].

[257] In re Shaputis (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86].

[258] In re Jackson (2011) 193 Cal.App.4th 1376, 1388, 1391 [123 Cal.Rptr.3d 486]; In re McDonald (2010) 189 Cal.App.4th 1008 [118 Cal.Rptr.3d 145].

meet the "some evidence" standard.[259] In other cases, courts have overturned parole denials and reversals.[260]

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[259] See, e.g., In re Stevenson (2013) 213 Cal.App.4th 841 [152 Cal.Rptr.3d 457] (some evidence where prisoner with long history of alcohol and drug abuse minimized his commitment offense and had a deficient substance abuse relapse plan, and two psychological assessments ranked him at low to moderate risk for future violence); In re Davidson (2012) 207 Cal.App.4th 1215 [144 Cal.Rptr.3d 283] (some evidence of unreasonable risk to safety based on record of drunk driving, alcoholism, and previous relapse); In re Montgomery (2012) 208 Cal.App.4th 149 [145 Cal.Rptr.3d 109] (evidence supported parole denial where prisoner had possessed prohibited substance in prison); In re Mims (2012) 203 Cal.App.4th 478 [137 Cal.Rptr.3d 682] (parole unsuitability due to prisoner's lack of insight into crime; because prisoner refused to participate in a new CDCR psychological evaluation or to answer questions at the hearing, the BPH correctly relied on prior psychological evaluations); In re Shigemura (2012) 210 Cal.App.4th 440 [148 Cal.Rptr.3d 230] (some evidence supported finding of lack of insight where prisoner minimized her role in murder plot); In re Tapia (2012) 207 Cal.App.4th 1104 [144 Cal.Rptr.3d 190] (rational nexus between prisoner's failure to take full responsibility for the crime until the day before the BPH hearing 17 years later and his being an unreasonable threat to public safety); In re Hare (2010) 189 Cal.App.4th 1278 [118 Cal.Rptr.3d 1] (disciplinary violation for possession of dangerous contraband supported finding that prisoner remained dangerous); In re Taplett (2010) 188 Cal.App.4th 440 [115 Cal.Rptr.3d 565] (lack of insight into circumstances surrounding commitment offense supported parole denial); In re Shippman (2010) 185 Cal.App.4th 446 [110 Cal.Rptr.3d 326] (nature of 70-year-old prisoner's commitment offense, as well as his past control issues, showed unreasonable risk of danger to society); In re Criscione (2009) 180 Cal.App.4th 1446 [103 Cal.Rptr.3d 549] (current dangerousness where commitment offense was particularly heinous, prisoner had history of instability, and psychological report was inconclusive); In re Cerny (2009) 178 Cal.App.4th 1303 [101 Cal.Rptr.3d 200] (insufficient plan for residency and employment supported finding of current dangerousness); In re Rozzo (2009) 172 Cal.App.4th 40 [91 Cal.Rptr.3d 85] (some evidence to deny parole where prisoner committed especially aggravated offense and continued to deny that the offense was racially motivated despite strong evidence to the contrary, and where psychological evaluation failed to address his current racial attitude); In re Smith (2009) 171 Cal.App.4th 1631 [90 Cal.Rptr.3d 400] (some evidence of current dangerousness based on aggravated circumstances of commitment offense and lack of insight); In re Reed (2009) 171 Cal.App.4th 1071 [90 Cal.Rptr.3d 303] (minor rules violation of leaving work without permission was sufficient to support parole denial where violation occurred only two months after BPH had directed prisoner not to violate rules).

[260] E.g., In re Stoneroad (2013) 215 Cal.App.4th 596 [155Cal.Rptr.3d 639] (BPH failed to give due consideration to suitability factors, and evidence did not show prisoner is currently dangerous]; In re Pugh (2012) 205 Cal.App.4th 260, 266 [140 Cal.Rptr.3d 194, 199] (although prisoner's version of events leading to the murder were different than prosecutor's, prisoner's version was not inherently unbelievable and his comments during psychological evaluations demonstrated remorse and insight into crime); In re Denham (2012) 211 Cal.App.4th 702 [150 Cal.Rptr.3d 177] (prisoner was found at low risk of recidivism by a psychologist and BPH largely relied on "incorrect factual contentions and its own guesswork" in denying parole); In re Hunter (2012) 205 Cal.App.4th 1529 [141 Cal.Rptr.3d 350] (no evidence that prisoner's mental state indicated current dangerousness or that his description of the crime was inaccurate, and BPH had not articulated rational nexus between a disciplinary event and risk of future violence); In re Morganti (2012) 204 Cal.App.4th 904 [139 Cal.Rptr.3d 430] (BPH's decision that prisoner lacked insight into his drug abuse was not supported by his statements that Catholic faith and upbringing would prevent a relapse and that Narcotics Anonymous program was not essential to sobriety); In re Sanchez (2012) 209 Cal.App.4th 962 [147 Cal.Rptr.3d 330] (minor discrepancies in prisoner's version of crime did not demonstrate rational nexus to current dangerousness, and prisoner's social history and probation failures did not demonstrate that he continued to pose an unreasonable risk to safety); In re Young (2012) 204 Cal.App.4th 288 [138 Cal.Rptr.3d 788] (no support for parole denial based on findings that prisoner had tumultuous relationships and did not remember offense, and speculative doubts about whether the victim assaulted the prisoner); In re Martinez (2012) 210 Cal.App.4th 800 [148 Cal.Rptr.3d 657] (evidence did not show unreasonable threat to public safety where prisoner who was permanently medically incapacitated would not physically be able to commit a crime similar to his commitment offense); In re Ryner (2011) 196 Cal.App.4th 533 [126 Cal.Rptr.3d 380, 392] (refusal to accept evidence showing understanding and remorse is not sufficient basis to conclude prisoner

PAROLE SUITABILITY HEARING RIGHTS AND PROCEDURES AND STRATEGIES FOR EFFECTIVE ADVOCACY

5.13 Overview of Procedural Rights and Goals of the Parole Consideration Hearing

A prisoner has a right to appear in person at his or her parole suitability hearing, even when the prisoner is housed out-of-state; a telephonic appearance does not satisfy this right.[261]

A prisoner has a right to decline to participate in a psychological evaluation and in the hearing itself, and that decision may not be held against the prisoner. However, non-participation does not limit the Board's or Governor's evaluation of all the available evidence, and they may rely on older evidence and older psychological evaluations.[262]

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lacked insight into crime, as any finding must be based on a "factually identifiable deficiency in perception and understanding"); In re Gomez (2010) 190 Cal.App.4th 1291 [118 Cal.Rptr.3d 900] (finding of lack of insight because of prisoner's inconsistent statements regarding offense was not supported by the record, which showed that prisoner accepted responsibility for his actions); In re Twinn (2010) 190 Cal.App.4th 447 [118 Cal.Rptr.3d 399] (no support for finding that prisoner had insufficient parole plans in light of record showing he had a job offer and no support for finding of lack of insight based on inconsistent statements regarding the offense because prisoner's "version of the crime was not physically impossible and did not strain credulity such that his explanation was delusional, dishonest, or irrational."); In re McDonald (2010) 189 Cal.App.4th 1008 [118 Cal.Rptr.3d 145] (prisoner's insistence that he is innocent cannot be a basis for denying parole); In re Powell (2010) 188 Cal.App.4th 1530 [116 Cal.Rptr.3d 432] (parole denial improperly based on prisoner's post-release plan to attend substance abuse program far from his house); In re Moses (2010) 182 Cal.App.4th 1279, 1303 [106 Cal.Rptr.3d 608] (Governor failed to articulate rational nexus between circumstances of commitment offense or prior criminal history, and current dangerousness); In re Loresch (2010) 183 Cal.App.4th 150, 153 [107 Cal.Rptr.3d 331] (reversal of parole grant improper where it rested solely on speculation prisoner could relapse and commit future acts of violence, but record was devoid of supporting evidence); In re Juarez (2010) 182 Cal.App.4th 1316, 1339 [106 Cal.Rptr.3d 648] (BPH improperly denied parole based on rote recitation of unsuitability factors that were not probative of current dangerousness); In re Dannenberg (2009) 173 Cal.App.4th 237 [92 Cal.Rptr.3d 647] (Governor's reversal vacated where Governor conceded he relied solely on nature of commitment offense); In re Rico (2009) 171 Cal.App.4th 659 [89 Cal.Rptr.3d 866] (finding based solely on gravity of commitment offense); In re Vasquez (2009) 170 Cal.App.4th 370 [87 Cal.Rptr.3d 853] (Governor's decision based entirely on nature of prisoner's commitment offense); In re Gaul (2009) 170 Cal.App.4th 20 [87 Cal.Rptr.3d 736] (no evidence prisoner posed unreasonable risk to society); In re Singler (2008) 169 Cal.App.4th 1227 [87 Cal.Rptr.3d 319] (same); In re Aguilar (2008) 168 Cal.App.4th 1479 [86 Cal.Rptr.3d 498] (no evidence prisoner posed current danger to public); In re Burdan (2008) 169 Cal.App.4th 18 [86 Cal.Rptr.3d 549] (same); see also In re Ross (2009) 170 Cal.App.4th 1490 [88 Cal.Rptr.3d 873] (failure to articulate nexus between facts and prisoner's current dangerousness or to cite mental state evidence required remand for further proceedings); In re Criscione (2009) 173 Cal.App.4th 60 [92 Cal.Rptr.3d 258] (no connection articulated between findings and determination prisoner posed current risk to public safety); In re Lazor (2009) 172 Cal.App.4th 1185 [92 Cal.Rptr.3d 36] (BPH failed to connect unsuitability factors to prisoner's current dangerousness).

[261] Penal Code § 2911(e); In re J.G. (2008) 159 Cal.App.4th 1056, 1065-1068 [72 Cal.Rptr.3d 42].

[262] In re Shaputis (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86]; In re Mims (2012) 203 Cal.App.4th 478 [137 Cal.Rptr.3d 682].

5.14 Right to a Timely Hearing

As of July 2011, the BPH had almost eliminated its backlog of overdue parole hearings. The BPH moved to end court oversight of the hearing scheduling process, and in August 2011 the Court granted BPH's request.[263]

5.16 Stipulations, Waivers, Cancellations, Postponements and Continuances

A. Stipulations

The BPH has amended its regulations regarding life prisoners' stipulations to unsuitability. Prisoners may offer to stipulate to unsuitability for 3, 5, 7, 10 or 15 years from the date of the scheduled hearing, and may do so at any time prior to the hearing. If a prisoner offers to stipulate to unsuitability during the week of the scheduled parole hearing, the district attorney, the victim, the victim's next of kin, members of the victim's immediate family and two victim's representatives will be given the opportunity to give statements, which will be considered by the next hearing panel.[264]

B. Waivers

The BPH now allows lifers to waive their parole consideration hearings for 1, 2, 3, 4 or 5 years without having to stipulate to unsuitability. A request to waive a hearing must be made in writing no later than 45 calendar days prior to the date of the scheduled hearing and must state the reason for the request. A prisoner may waive no more than three consecutive hearings.[265]

C. Cancellations, Postponements and Continuances

The regulations concerning postponements are now at 15 CCR § 2253(d). Hearings may be postponed by the BPH or the prisoner due to the unavailability of a hearing panel; missing or untimely notice, documents, reports, or required prisoner accommodations; or exigent circumstances such as illness of attending parties, natural disasters or institutional emergencies. Postponements will be granted only if good cause is shown.[266]

The regulations concerning continuances are now at 15 CCR § 2253(e). Continuances will be granted only if "good cause" is shown and the reason for needing the continuance was unknown by the party requesting it before the hearing started. If the hearing is continued, the BPH will try to

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[263] In re Lugo (Rutherford) (Marin Super. Ct. Aug. 8, 2011) No. SC135399A, Order on Respondents' Motion to Dismiss.

[264] 15 CCR § 2253(c).

[265] 15 CCR § 2253(b).

[266] 15 CCR § 2253(d).

use the same panel members when the hearing is reconvened. In addition, the victim, the victim's next of kin, members of the victim's immediate family, and two victim's representatives will be allowed to give statements on the record before the hearing is continued, instead of giving statements when the hearing resumes.[267]

5.23 Other Hearing Participants

New laws give crime victims and their representatives a greater role in parole hearings. The BPH now must notify the victim, or next of kin if the victim has died, at least 90 days before the hearing.[268] Also, notice of the parole hearing will be sent to any victim (or victim's family member) of any felony for which the prisoner has been convicted, including crimes that are not the basis for the life term.[269]

The number of victims' family members who can attend and testify at the hearing has been increased, and their testimony may include their views on the parolee's previous convictions, the effect of the crimes on the victim and the victim's family, and the prisoner's suitability for parole.[270] The BPH is required to consider the statements of these persons in deciding whether to release the prisoner on parole, and the prisoner or parolee's attorney is not entitled to ask questions of them.[271] In addition, victims and their representatives can require that transcripts of their statements be provided to every hearing panel that considers the prisoner's parole suitability in the future.[272]

5.25 Prisoner Testimony

Although a prisoner does not have to participate in the psychological evaluation or answer questions at the hearing, this does not prevent the BPH from considering older information in the record. "In determining whether an inmate may safely be paroled, it is legitimate for the Board to take into account that the record pertaining to the inmate's current state of mind is incomplete, and to rely on other sources of information. An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public safety that a grant of parole would entail."[273]

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[267] 15 CCR § 2253(e).

[268] Penal Code § 3043(a)(1).

[269] Penal Code § 3043(a).

[270] Penal Code § 3043(b)-(c).

[271] Penal Code §§ 3041.5(a)(2) and 3043(d).

[272] Penal Code § 3041.5(c).

[273] In re Shaputis (2011) 53 Cal.4th 192, 211-212 [134 Cal.Rptr.3d 86].

5.28 Topics and Case Facts to be Discussed at the Hearing

D. Parole Plans

The BPH regulation concerning parole plans "is limited to requiring realistic plans." A Governor's finding that a prisoner had insufficient parole plans was unsupported because the petitioner had a specific job offer and other potential job prospects.[274]

When a prisoner had an immigration hold, and it was highly probable he would be deported to Mexico, it was error for the BPH to require the prisoner to have parole plans in both Mexico and California before granting parole.[275]

5.30 The Decision

A. Parole Denied

Proposition 9 made profound changes to how often life prisoners are re-considered for parole suitability. These changes were incorporated into Penal Code § 3041.5 and implemented by the BPH in 2008.[276] Courts have found that it is lawful for the BPH to apply the new timelines even to prisoners who committed their crimes before Proposition 9 took effect (see § 5.38, below).

Proposition 9 expanded the period between parole hearings following a denial. Now the BPH will schedule the next hearing as follows:

- In 15 years, unless the BPH finds by "clear and convincing" evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than 10 additional years.

- In 10 years, unless the BPH finds by "clear and convincing" evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration for the prisoner than 7 additional years.

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[274] In re Twinn (2010) 190 Cal.App.4th 447 [118 Cal.Rptr.3d 399].

[275] In re Andrade (2006) 141 Cal.App.4th 807, 817-818 [46 Cal.Rptr.3d 317].

[276] See In re Rutherford (Lugo) (Marin Super. Ct. Mar. 27, 2009) No. SC135399A, Stipulation Concerning Proposition 9's Implementation.

Before Proposition 9, a prisoner who was found unsuitable for parole was then entitled to an annual parole consideration hearing unless the BPH found that it was not reasonable to expect that parole would be granted the following year. The next hearing could be delayed up to two years in non-murder cases and up to five years in murder cases. It was within the BPH's discretion to issue a multi-year parole denial following a one-year denial, even if there had been no significant change of circumstances. In re Lugo (2008) 164 Cal.App.4th 1522, 1536 [80 Cal.Rptr.3d 521].

- In 3, 5, or 7 years, where consideration of the public and victim's safety does not require a more lengthy period of incarceration.[277]

In light of these changes, a prisoner may want to consider waiving a hearing for a period of one to five years if it is unlikely that he or she will be found suitable at the upcoming hearing.

Factors the BPH is to consider when deciding whether to shorten the period between hearings include the number of victims and "other factors in mitigation or aggravation of the crime."[278] Further, the BPH must consider the "views and interests" of the victims before scheduling a subsequent parole consideration hearing.[279]

The BPH has discretion to "advance the date" and hold a hearing sooner if there is a change in circumstances or new information showing a reasonable likelihood that public safety does not require additional years of incarceration. If the BPH has issued a three-year denial, it will review the case for possible advancement one year after the hearing.[280] Also, a prisoner may send a written request to the BPH every three years asking to advance the hearing date and describing any changed circumstances or new information.[281] Form BPH-1045(A) (attached as Supplement Appendix 5-A) is used to make this request. A court can overturn a BPH decision denying an advancement request only if the decision is a "manifest abuse of discretion."[282]

5.32 Review of the Decision by the Governor

Due process does not require the Governor to hold a separate suitability hearing before reversing a grant of parole.[283]

The Governor's 30-day period to review a grant of parole can be extended ("tolled") in certain circumstances.[284]

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[277] Penal Code § 3041.5(b)(3).

[278] Penal Code §§ 3041(a) and 3041.5(b).

[279] Penal Code § 3041.5(b)(3).

[280] BPH, 1 Year Review of All Three Year Denials, at www.cdcr.ca.gov/Victim_Services/index.html#review.

[281] Penal Code § 3041.5(b)(4) and (d).

[282] Penal Code § 3041.5(d)(2).

[283] Styre v. Adams (9th Cir. 2011) 645 F.3d 1106.

[284] In re Tokhmanian (2008) 168 Cal.App.4th 1270 [86 Cal.Rptr.3d 250] (when prisoner is granted parole by panel but BPH overturns that decision, Governor's 30-day review period begins after trial court reinstates panel's decision granting parole).

5.33 Rescission Hearings

B. Procedures for Rescission Hearings

When the BPH rescinds a previously set parole date, it must follow the Proposition 9 scheduling guidelines (see § 5.30A).[285]

The BPH's authority to hold parole rescission hearings was not affected by amendments to the parole statute that say a panel's decision finding an inmate suitable for parole becomes final within 120 days after the date of the parole hearing.[286]

LEGAL CHALLENGES TO PAROLE DECISIONS

5.35 Methods for Challenging a Parole Denial, Rescission, or Reversal

In 2011, the United States Supreme Court held that federal habeas review is not available for a state law error and that correct application of the "some evidence" standard is a matter of state law. Thus, a California prisoner who has been unsuccessful in state court may no longer file a federal habeas petition arguing that an unfavorable decision by the BPH or the Governor was not supported by "some evidence."[287]

5.36 Due Process Challenges

A state court of appeal held that the BPH's former practice of finding virtually all life-term offenses to be "especially heinous, atrocious or cruel" did not render the regulations unconstitutionally vague or violate the separations of powers doctrine, because the record did not show how the Board had analyzed all of the suitability and unsuitability factors in those cases.[288]

The Due Process Clause of the U.S. Constitution's Fourteenth Amendment protects only the rights of life prisoners to have an opportunity to be heard, to examine the evidence in advance, and to receive notice of the reasons why parole was denied.[289]

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[285] See Penal Code § 3041.5(a).

[286] Schoenfeld v. Board of Parole Hearings (2010) 191 Cal.App.4th 1324 [120 Cal.Rptr.3d 177].

[287] Swarthout v. Cooke (2011) __ U.S. __ [131 S.Ct. 859; 178 L.Ed.2d 732].

[288] In re Lewis (2009) 172 Cal.App.4th 13, 28-29 [91 Cal.Rptr.3d 72].

[289] Swarthout v. Cooke (2011) __ U.S. __ [131 S.Ct. 859; 178 L.Ed.2d 732].

5.38 Ex Post Facto Challenges

The portion of Proposition 9 that greatly increased the length of time between parole hearings does not violate the ex post facto clauses of the federal and state constitutions, because the new law does not create a significant risk that a prisoner's incarceration will be longer than under the prior law.[290]

The provision that allows the Governor to review BPH decisions for prisoners convicted of murder also is not an ex post facto law when applied to prisoners whose crimes occurred prior to the enactment of the Governor review provision in 1988.[291]

5.40 Discovery Issues

In a proceeding challenging a parole denial, a court does not have authority to order the warden to either disclose or not rely on confidential information from prison informants. Instead, the court should allow the warden to file the confidential information under seal and then hold an in camera hearing to determine how much can be disclosed to the prisoner's attorney without revealing the identity of the informants.[292]

5.41 Issues Concerning the Proper Remedy When Relief Granted

The California Supreme Court has addressed the question of what the remedy should be when a BPH denial of parole is not supported by "some evidence" that the prisoner's release would be a current threat to public safety. Courts "generally should direct the BPH to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." Confining the BPH's consideration to new evidence or ordering the prisoner's release improperly infringes on the BPH's discretion.[293]

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[290] In re Vicks (2013) 56 Cal.4th 274 [153 Cal.Rptr.3d 471]; Gilman v. Schwarzenegger (9th Cir. 2011) 638 F.3d 1101; see also Moor v. Palmer (9th Cir. 2010) 603 F.3d 658, 664-665 (in case involving Nevada parole proceeding, there was no ex post facto violation in retroactively applying a statute requiring a psychological evaluation as a precondition to release); see also U.S. Const., art. I, § 10.

[291] Biggs v. California Dept. of Corrections and Rehabilitation (9th Cir. 2013) 717 F.3d 678.

[292] Ochoa v. Superior Court (2011) 199 Cal.App.4th 1274 [132 Cal.Rptr.3d 233].

[293] In re Prather (2010) 50 Cal.4th 238, 244, 255, 257 [112 Cal.Rptr.3d 291].

Previously, courts had fashioned a variety of remedies. See, e.g., In re Masoner (2009) 172 Cal.App.4th 1098, 1110-1111 [91 Cal.Rptr.3d 689] (remanded to BPH with order to find suitability unless new evidence supported denial); In re Rico (2009) 171 Cal.App.4th 659, 689 [89 Cal.Rptr.3d 866] (same); In re Gaul (2009) 170 Cal.App.4th 20, 41 [87 Cal.Rptr.3d 736] (same); Milot v. Haws (C.D. Cal. 2009) 628 F.Supp.2d 1152, 1172-1173 (same); In re Singler (2008) 169 Cal.App.4th 1227, 1245 [87 Cal.Rptr.3d 319] (same); Ledesma v. Marshall (E.D. Cal. 2009) 658 F.Supp.2d 1155, 1188 (prisoner ordered released within 10 days); Board of Parole Hearings v. Superior Court (Portee) (2008) 170

On the other hand, the California Supreme Court has not specifically described the remedy when Governor's reversal is not supported by some evidence. Many appellate courts have held that the parole grant should be reinstated and that remand to the Governor for another review is not appropriate.[294] The California Supreme Court has affirmed such an order in one case.[295]

As of October 2013, the Supreme Court is considering whether a life prisoner is entitled to custody credit against his parole period for the time he spent incarcerated after the Governor improperly reversed a grant of parole.[296] Other courts have issued mixed decisions regarding credit issues after unlawful parole denials. In some cases, courts have granted credit against determinate-length parole periods for time spent in custody due to unlawful parole denials or reversals.[297] However, a life prisoner who with a determinate parole period was not entitled to credit toward his parole term for time he spent in custody that exceeded the base term set by the BPH where part of the delay in finding him suitable for parole was lawful.[298] Also, a prisoner who was subject to lifetime parole under Penal Code § 3000.1 was not entitled to credit toward his five-year parole discharge review period for time spent in prison pending legal challenges to the Governor's unlawful parole reversal decision.[299]

Cal.App.4th 104, 110 [87 Cal.Rptr.3d 498] (improper to order BPH to explain what instances of the commitment offense would not qualify for invocation of any unsuitability criteria).

[294] In re Pugh (2012) 205 Cal.App.4th 260 [140 Cal.Rptr.3d 194]; In re Copley (2011) 196 Cal.App.4th 427, 433, 435 [126 Cal.Rptr.3d 265]; In re Nguyen (2011) 195 Cal.App.4th 1020 [125 Cal.Rptr.3d 751]; In re Ryner (2011) 196 Cal.App.4th 533 [126 Cal.Rptr.3d 380]; In re Gomez (2010) 190 Cal.App.4th 1291 [118 Cal.Rptr.3d 900]; In re Twinn (2010) 190 Cal.App.4th 447 [118 Cal.Rptr.3d 399]; In re McDonald (2010) 189 Cal.App.4th 1008, 1023-1025 [118 Cal.Rptr.3d 145]; In re Kler (2010) 188 Cal.App.4th 1399, 1404-1405 [115 Cal.Rptr.3d 889]; In re Loresch (2010) 183 Cal.App.4th 150, 165 [107 Cal.Rptr.3d 331]; In re Moses (2010) 182 Cal.App.4th 1279, 1315 [106 Cal.Rptr.3d 608]; In re Masoner (2009) 179 Cal.App.4th 1531 [102 Cal.Rptr.3d 463]; see also In re Burdan (2008) 169 Cal.App.4th 18, 39 [86 Cal.Rptr.3d 549]; but see In re Ross (2010) 185 Cal.App.4th 636, 641 [110 Cal.Rptr.3d 811] (remand to the Governor appropriate because record contained some evidence of current dangerousness, but Governor's pre-Lawrence decision failed to articulate nexus to current dangerousness).

[295] In re Lawrence (2008) 44 Cal.4th 1181, 1229 [82 Cal.Rptr.3d 169].

[296] In re Lira, No. S204582, previously published at (2012) 207 Cal.App.4th 531 [143 Cal.Rptr.3d 491]; In re Batie, No. S205057, previously published at (2012) 207 Cal.App.4th 1166 [144 Cal.Rptr.3d 248].

[297] McQuillion v. Duncan (9th Cir. 2003) 342 F.3d 1012; Martin v. Marshall (N.D. Cal. 2006) 448 F.Supp.2d 1143; Ledesma v. Marshall (E.D. Cal. 2009) 658 F.Supp.2d 1155; Milot v. Haws (C.D. Cal. 2009) 628 F.Supp.2d 1152; see also In re Bush (2008) 161 Cal.App.4th 133, 139 [74 Cal.Rptr.3d 256]; but see In re Miranda (2011) 191 Cal.App.4th 757 [120 Cal.Rptr.3d 461] (habeas petition challenging BPH finding of parole unsuitability was moot because prisoner was released after the BPH found him suitable for parole in a subsequent hearing; there was no credit issue to resolve because if petition had been heard, the remedy would have been a new hearing).

[298] In re Bush (2008) 161 Cal.App.4th 1133, 142-143 [74 Cal.Rptr.3d 256].

[299] In re Chaudhary (2009) 172 Cal.App.4th 32 [90 Cal.Rptr.3d 678].