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Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that people in prison often have trouble getting legal information and we cannot give specific advice to everyone who asks for it. The laws change often and can be looked at in different ways. 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 still applies to your situation. Most of the materials you need should be available in your institution's law library.

INFORMATION ON PROPOSITION 57

(Updated March 9, 2018)

NEW PRISON CREDIT RULES and NONVIOLENT OFFENDER PAROLE CONSIDERATION

This letter discusses the new California Department of Corrections and Rehabilitation (CDCR) rules on prison credits (which apply to almost all people in prison), and the new rules about early parole consideration for nonviolent determinately-sentenced people. These new rules came about as a result of Proposition 57, passed by the voters in November 2016. Proposition 57 created Article I, section 32 of the California Constitution, which requires CDCR to issue rules regarding credits and early parole.

The new rules on credits and early parole consideration were issued by CDCR on an "emergency" basis on March 24, 2017. As "emergency" rules, they are in effect on a temporary basis while the full rule-making process is underway. The CDCR heard public comments on the rules in September 2017. On November 29, 2017, the CDCR issued an amended version of the rules making a few small adjustments or clarifications, and then heard further public comments.

The CDCR "Notice of Change to Regulations" (#17-05), the November 29, 2017, "Notice of Change to Text as Originally Proposed," and other documents about the proposed regulations should be available in prison law libraries and made available to people housed in SHUs. The notices and other documents are also on the CDCR website at www.cdcr.ca.gov.

Once the CDCR decides on the final wording, the proposed regulations must be reviewed by the Office of Administrative Law (OAL), the agency that oversees compliance with California's Administrative Procedures Act (APA). The OAL will decide whether the APA requirements have been met. If the OAL approves the final regulations, they will be filed with the Secretary of State.

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There are legal disputes about whether or not the new CDCR rules are in accord with new Article I, section 32 to the California Constitution – particularly whether non-violent third-strikers and people with non-violent sex offenses can be excluded from early parole consideration. There may also be disputes about exactly what the new rules mean and how they apply.

Part I of this letter summarizes the new rules on credits. Part II summarizes the new rules on early parole consideration for nonviolent offenders. Part III describes how people in prison can challenge the new rules or how they are being applied.

I. PRISON TIME CREDITS FOR GOOD BEHAVIOR AND PROGRAMMING

The new CDCR rules regarding credits completely replace all previous California laws and CDCR rules regarding credits for good behavior and programming in prison, and appear to include all credits required by the February 2014 federal court order about reducing crowding in the prisons. Under the new rules described below, all people in CDCR custody are eligible to receive at least as much credit to reduce their prison terms as under the old laws and rules, and some people are eligible to receive more credits than before. Note that although these conduct and programming credits apply toward the Earliest Possible Release Date for determinate sentences and the Minimum Eligible Parole Date (MEPD) for indeterminate (life with the possibility of parole) sentences, they do *not* apply toward a Youth Offender Parole Eligibility Date (YPED) or Elderly Parole Eligibility Date (EPED).

1. Effective May 1, 2017, many people in prison earn more Good Conduct Credits so long as they comply with prison rules and programming duties. Good Conduct Credits are now available to all people in prison serving determinate (set-length) sentences and sentences of life with the possibility of parole, including those who are housed in Department of Juvenile Justice (DJJ) facilities or in alternative custody programs. The Good Conduct Credit rules apply also to people serving California prison sentences in out-of-state prisons, federal prisons, or state hospitals. There are different levels of credit eligibility depending on the person's offenses and sentence. (See chart on next page.)

Description of Current Offense and/or Sentence	Current CDCR Credit Rate	New CDCR Credit Rate ¹
Life without parole (LWOP) and condemned	0%	0%
Indeterminate term (lifers) not previously eligible for credits (murder, etc.)	0%	20%
Violent offense -- third striker lifers	0%	20%
Violent offense – determinate term -- 0 credits (a few other recidivists)	0%	20%
Violent offense -- determinate or indeterminate sentence	15%	20%
Non-violent offense – third striker lifers	0%	33.3%
Non-violent offense – second strikers with PC 290	20%	33.3%
Non-violent offense – second strikers	33.3%	33.3%
Lifers eligible for 1/3 credits (some crimes in 1980s & 1990s)	33.3%	33.3%
Non-violent offense – determinate sentence	50%	50%
Lifers – eligible for day-for-day (a few crimes)	50%	50%
Violent offense – determinate sentence -- firefighters or in fire camp	15%	50%
Non-violent offense -- second strikers --- firefighters or in fire camp	33.3%	66.6%
Non-violent offense – determinate sentence – firefighters or in fire camp	66.6%	66.6%
Non-violent offense –Minimum A or Minimum B custody	66.6%	66.6%

People in prison can still be placed on Zero Credit earning status for twice refusing to accept assigned housing, refusing to perform an assignment, or being a program failure (Work Group C) or due to placement in a segregation unit for a serious disciplinary offense or validation as an STG-I member or associate (D-2 status).

¹ The CDCR's titles for the various credit categories are NOT internally consistent.

- “15%” credit means a person gets credit for 15 percent of the days actually served, and ends up serving about 85% of the actual time imposed.
- “20%” credit means a person gets credit for 20% of the days actually served (one day credit for four days served) and ends up serving about 80% of the actual time imposed).
- CDCR's “33.3%” credit means a person gets credit for 33.3% of the days actually served (one day credit for two days actually served) and ends up serving about 66.6% of the actual time imposed.
- BUT CDCR’s “50%” credit does NOT mean a person gets credit for 50% of days actually served. Rather, a person gets credit for 100% of days served (day-for-day) and ends up serving 50% of the actual time imposed (sometimes referred to as "half-time")
- Similarly, CDCR’s “66.6%” credit does NOT mean a person gets credit for 66.6% of days actually served. Rather, a person gets credit for 200% of days served (two-for-one) and ends up serving about 33.3% of the actual time imposed.

People in prison can still lose Good Conduct Credits if they violate prison rules.

2. Effective August 1, 2017, all people in CDCR prisons serving determinate sentences or sentences of life with the possibility of parole are eligible to earn additional credits for successful participation in approved rehabilitative programs.

The new and revised programming credits are:

- **Milestone Completion Credits:** These credits are awarded for achieving objectives in approved rehabilitative programs, including academic, vocational, and therapeutic programs. The programs eligible for credit now include full-time rehabilitative programming, alternative custody programs, Enhanced Outpatient (EOP) mental health participation and Developmentally Disabled Program (DDP) participation. The new regulations expand Milestone Credits to 12 weeks in a 12-month period; excess credits will be rolled over to the following year. The new regulations get rid of restrictions that barred some types of people from earning Milestone Credits. Milestone Completion Credits can be lost due to rules violations.
- **Rehabilitative Achievement Credits:** These credits are for participation in self-help and volunteer public service activities. Currently, there is no credit-earning attached to self-help activities. The new regulations will give people one week of credit for every 52 hours of participation, with a maximum of four weeks credit per year, for participating in eligible self-help programs. Rehabilitative Achievement Credits can be lost due to rules violations.
- **Education Merit Credits:** These credits recognize the achievements of people who earn high school diplomas, high school equivalency, or higher education degrees, or complete the offender mentor certification program available at several CDCR prisons. A person must earn at least 50 percent or more of the degree or diploma during their current term to receive Education Merit Credits. A person who earns a high school diploma or equivalency gets 90 days of credit and a person who earns other degrees or an offender mentor certification gets 180 days credit. These credits took effect in August 2017, but will be applied retroactively for degrees earned prior to that date. Education Merit Credits apply to people serving California prison sentences who are housed out-of-state, in federal prison, or in state hospitals. Educational Merit Credits cannot be taken away due to rule violations.

II. EARLY PAROLE CONSIDERATION FOR SOME DETERMINATELY SENTENCED NONVIOLENT OFFENDERS

Proposition 57 authorizes earlier parole consideration for people in state prison who were convicted of nonviolent felony offenses.²

The new CDCR rules provide for early parole consideration for “determinately sentenced nonviolent offenders” who meet certain other criteria.³ **An eligible person will be considered for parole suitability prior to their “Nonviolent Parole Eligible Date,” which is the date on which the person has served the “full term” of their “primary offense,” minus pre-sentence credits awarded by the court and credits for time in custody between sentencing and arrival in the CDCR.** “Primary offense” means the crime for which the court imposed the longest prison term, without taking into account enhancements, alternative sentences, or consecutive sentences. “Full term” means the time imposed by the court for the primary offense without considering credits earned in prison.⁴ The CDCR started determining which people are eligible for parole consideration as of June 1, 2017 and started referring people for parole reviews on July 1, 2017.

A person must meet four criteria to get released early on nonviolent offender parole.

1. The person must be a “Nonviolent Offender,” which is defined as a person who is serving a sentence for a nonviolent felony offense. A nonviolent felony offense is any crime that is **not** listed in Penal Code § 667.5(c).

² This part of California Constitution, Article I, section 32 states:

(a)(1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

....

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

³ The new regulations are 15 CCR §§ 2449.1-2449.7 and 15 CCR §§ 3490-3493.

⁴ For example, this appears to mean that a person serving a doubled term under the two-strikes law (which is an alternative sentencing law) for a nonviolent offense is eligible for parole consideration after serving just the ordinary base term (without the doubling or any enhancements).

The new parole consideration process does **not** apply to any person who:

- is serving a death sentence or a term of life without the possibility of parole (LWOP); OR
- is serving a term of life with the possibility of parole (such as three-strikers and other lifers). The exclusion of nonviolent third strikers is being challenged as violating Proposition 57. *In re Davis*, Santa Clara Superior Court No. CC800408. The case was filed in December 2017, and no decision has been issued yet; OR
- is serving a term for a violent felony crime or enhancement that is listed in Penal Code § 667.5(c); OR
- has a past or current conviction for an offense that requires sex offender registration under Penal Code § 290. The exclusion of people with nonviolent sex offenses is being challenged in *Alliance for Constitutional Sex Offense Laws v. CDCR*, Sacramento Superior Court No. 80002581. On March 5, 2018, the court issued an order stating that the CDCR's regulations violate Proposition 57 because the voters did not intend for all sex crimes to be labeled as violent or for all people with sex offenses to be ineligible for parole consideration. The court ordered the CDCR to revise its regulations, but stated that the CDCR has broad authority define which sex offenses are violent. The court's order is not yet final -- the state may appeal the order and may ask for the order to be stayed (not in effect) during the appeal. It also unknown what any revised CDCR regulations would say. OR
- is serving a determinate term prior to beginning a term of life with the possibility of parole for a violent felony or prior to beginning a term for an in-prison offense that is a violent felony, OR
- is currently serving a term for a non-violent offense after completing a concurrent determinate term for a violent felony. (Note that the regulations do not say whether a person is ineligible for parole consideration if they have *consecutive sentences for a mix of violent and nonviolent crimes* -- with the nonviolent terms calculated at 1/3 of the normal base term -- and have finished serving the part of the term that is for the violent offense; there may be legal disputes about whether such people are or should be eligible for parole consideration.)

2. The person must not be otherwise eligible for parole or parole consideration in the near future. The person's Nonviolent Parole Eligibility Date must be at least 180 days before the their regular Earliest Possible Release Date (EPRD) and the their EPRD must be at least 210 days in the future. The person must not be eligible for a Youth Offender Parole or Elder Parole consideration hearing within a year of the nonviolent parole eligibility review or have an initial Youth Offender Parole or Elder Parole hearing already scheduled.

3. The person must have good behavior in prison. The CDCR will screen a person no later than 35 days before their Nonviolent Parole Eligible Date to decide whether they are eligible for referral to the Board of Parole Hearings (BPH) for parole consideration. The CDCR should tell the person the result of the screening.

Some circumstances will make a person **ineligible** for nonviolent offender parole:

- current Security Housing Unit (SHU) term or assessment or service of a SHU term in the past 5 years (unless for the person's own safety);
- a Level A-1 or A-2 serious rule violation in the past 5 years;
- assignment to Work Group C in the past year;
- 2 or more serious rule violations of any level within the past year;
- a drug-related rule violation or refusal to provide a urine sample in the past year; or
- a rule violation found to have a nexus to an STG group.

A person who is deemed ineligible based on any of these circumstances will be screened again for eligibility after serving 1 more year, and will be reviewed every year thereafter.

4. The Board of Parole Hearings (BPH) must decide that that person does not pose an “unreasonable risk of violence to the community.”

When a person is referred to BPH for nonviolent offender parole consideration, the person should be notified that he or she can submit a written statement to BPH. WE ADVISE PEOPLE TO SUBMIT A STATEMENT ABOUT WHY THEY SHOULD BE PAROLED EARLY, FOCUSING ON WHY THEY WILL NOT POSE A RISK OF VIOLENCE TO THE COMMUNITY IF RELEASED. IF POSSIBLE, PEOPLE SHOULD HAVE FAMILY, FRIENDS, POTENTIAL EMPLOYERS OR OTHERS WITH HELPFUL INFORMATION SUBMIT STATEMENTS TO BPH.

A BPH staff member (who is called a “hearing officer”, even though there is no actual hearing at which the person being considered for parole or anyone else can appear) will double-check to make sure the person is eligible for nonviolent offender parole consideration. If the hearing officer confirms the person is eligible, the BPH will notify the prosecutor and victim(s) that they have 30 days to submit written statements. The hearing officer will then review documents including the person's central file and criminal history records and written statements by the person, the person's supporters, the crime victims, and/or the prosecutor. Unlike lifer parole suitability hearings, there is no in-person hearing.

The hearing officer decides whether or not the person “poses an unreasonable risk of violence to the community.” The hearing officer shall consider all the circumstances, including the nature of the person's current conviction, prior criminal record, in-prison behavior and programming, and any input from the person being considered for parole, the crime victims, and the prosecutor. The regulations list numerous specific aggravating and mitigating factors to be considered. The hearing officer must issue a written decision with reasons for the decision, and a copy must be provided to the person within 15 business days after the decision is issued.

If release is granted:

Release will be granted if the hearing officer finds the person does not pose an unreasonable risk of violence to the community. If a parole grant will result in the person being released two or more years prior to the regular Earliest Possible Release Date (EPRD), a high level BPH hearing officer must review the parole grant, and can issue a new decision approving or denying the release. The person should be notified in writing of the decision.

A person who is granted nonviolent offender parole should be released 60 days after the date of the BPH decision, following any required notifications to crime victims and law enforcement agencies. If the person has an additional term to serve for an in-prison offense, the additional term shall start 60 days after the BPH decision. Also, nonviolent offender parole can be vacated for subsequent crimes or prison rule violations or if the person otherwise becomes ineligible for nonviolent offender parole during the time prior to release. The person will presumably serve the normal parole or PRCS period that would apply to their crimes.

If release is denied:

Release will be denied if the hearing officer finds the person poses an unreasonable risk of violence to the community. If release is denied or vacated, the person will be re-screened every year and, if eligible, will be re-referred to the BPH for nonviolent offender parole consideration.

A person who is denied nonviolent offender parole can request a review of the decision. This is done through a special review procedure (NOT the CDCR 602 process). The person must request review by submitting a written request to the BPH within 30 calendar days after the denial. A BPH hearing officer who was not involved in the original decision will conduct a review within 30 calendar days after the person's request is received. The hearing officer will either uphold the parole denial or vacate the parole denial and issue a new decision. The person should be notified in writing of the review decision within 15 business days after the decision.

III. HOW CAN A PERSON IN PRISON CHALLENGE THE NEW REGULATIONS OR HOW THEY ARE BEING APPLIED?

A person in prison who is having problems getting their proper credits or with having their credits taken away should file a CDCR Form 602 administrative appeal and pursue it to the highest level necessary. A person who is screened out by the CDCR as ineligible for nonviolent offender parole can challenge the screening decision by filing a CDCR Form 602 administrative appeal. A person who is denied nonviolent offender parole by a BPH hearing officer can request a review through a special procedure (NOT the CDCR 602 process), as described in Section II, above. If a person pursues their administrative appeal to the highest level of review and is not satisfied with the responses, they can file a state court habeas petition arguing that the CDCR is interpreting its regulations in an unreasonable manner and/or raising other legal issues.

A free manual on How to File a CDCR Administrative Appeal and a free manual on State Court Petitions for Writ of Habeas Corpus are available on request by writing to the Prison Law Office or on the Resources page at www.prisonlaw.com.



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ADDENDUM TO INFORMATION ON PROPOSITION 57: UPDATE ON MILESTONE CREDITS FOR EDUCATION PROGRAMS

(February 6, 2018)

This addendum to the Prison Law Office's letter on Proposition 57 has additional information about recent problems with Milestone and Education Merit Credits. We are aware that some prisoners have been awarded credits and then have had those credits taken away. Here is what we currently know about the situation.

The CDCR is taking the position that some people were improperly awarded Milestone Credits for education programs under the Proposition 57 emergency regulations that went into effect on August 1, 2017. The CDCR has taken several actions in response to these concerns. First, as of November 29, 2017, the CDCR has revised its emergency regulations to clarify its position on the requirements for earning Milestone Credits for education programs (as of January 29, 2018, the revisions are not yet in effect). Second, the CDCR has done additional training for education staff on the Proposition 57 credit rules. Third, the CDCR has been doing audits of credits that were previously awarded and is taking away credits from some people. Fourth, the CDCR imposed a temporary "freeze" on Milestone Credits; however, the CDCR has stated that it will retroactively award Milestone Credits for any time period affected by the freeze.

The CDCR has identified several concerns related to Milestone Credits awarded for education programs. The main issues appear to be:

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- The CDCR is taking the position that, under the regulations that went into effect on August 1, 2017, people should have been required to complete three requirements (coursework, teacher evaluation, and testing) to receive Milestone Credits for education programming. However, prison staff sometimes awarded credit when a person passed a GED sub-test, even if that person did not also complete a course and evaluation. The CDCR is taking Milestone Credits credit away from people in those circumstances; this is expected to affect about 900 people.¹ People whose credits have been removed as well as lawyers who represent people in prison have argued that this is unfair because the regulations were unclear and seemed to indicate that Milestone Credits could be granted to people for just passing the GED sub-tests. Note that as of November 29, 2017, the CDCR has revised the proposed regulations to state its policy that all three requirements must be met. However, the proposed regulations have not yet been finalized and are not yet in effect.
- Prior to August 1, 2017, Milestone Credits could not be awarded to people who were serving time for violent offenses or Two or Three Strikes terms, or who were required to register as sex offenders. Effective August 1, 2017, the Proposition 57 emergency regulations allow these groups of people to earn Milestone Credits. Some prison staff delayed entering classes so that people who fell into these categories ended up getting credit for classes they completed before August 1, 2017. The CDCR is taking away credits that were improperly awarded in this way.
- The CDCR also has found that some people received Milestone Credit for finishing classes when they didn't put the required amount of time into the class. The CDCR is taking away credits where there is a big difference between the amount of time the person put in and the the required amount of time.
- There have been other reports of problems at some prisons, including concerns about staff misconduct related to the award of Milestone Credits at CIW. The CDCR has been investigating these issues and taking credits away from some people.

If you have had problems with your Milestone Credits being taken away or not being properly awarded, you should file a 602 administrative appeal and pursue it to the highest level necessary. The CDCR has informed us that they are looking closely at credit-earning complaints due to the recent issues. If you pursue your 602 to the highest level of review and are not satisfied with the responses, you can file a state court habeas petition arguing that the CDCR is interpreting its regulations in an unreasonable manner and/or raising other legal issues. You can also send your 602 appeals and responses and habeas petitions to the Prison Law Office, as we are interested in making sure the CDCR applies its credit rules fairly.

A free manual on How to File a CDCR Administrative Appeal and a free manual on State Court Petitions for Writ of Habeas Corpus are available on request by writing to the Prison Law Office or on the Resources page at www.prisonlaw.com.

¹ People who pass the GED test for the first time while in prison are still entitled to Education Merit credits for passing the test. This includes people who get their GED anytime during their current term, even prior to August 1, 2017.