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:
“NONVIOLENT OFFENDER” PAROLE CONSIDERATION
(Updated July 2019)

This letter discusses the California Department of Corrections and Rehabilitation (CDCR)
rules on earlier parole consideration for some people serving terms for non-violent offenses. These
rules are found in Title 15 of the California Code of Regulations (CCR), and 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.

The Proposition 57 rules about good conduct and programming credits are addressed in a
separate letter. If you want that letter, and we did not send it to you with this letter, please write to
us and ask for it. The letter is also on the Prison Law Office website at www.prisonlaw.com, under
the Resources tab.

The Proposition 57 Title 15 rules on early parole consideration for people serving
determinate sentences went into effect on an “emergency” basis in spring 2017. On May 1, 2018, a
final version of those rules was approved by the Office of Administrative Law. Effective January
1, 2019, the CDCR has issued new emergency regulations that allow some people serving
indeterminate life terms for non-violent crimes (i.e., some third-strikers) to be considered for early
parole. There is still ongoing litigation about some of the CDCR rules that exclude some people
from consideration for Proposition 57 parole.

The Title 15 rules should be available in prison law libraries and made available to people
in Restricted Housing. The documents are also on the CDCR website at www.cdcr.ca.gov.

Part I of this letter summarizes the Proposition 57 Title 15 rules. Part II describes how people
in prison can challenge the rules or how they are being applied.
I. EARLY PAROLE CONSIDERATION FOR SOME PEOPLE SERVING TERMS FOR NONVIOLENT OFFENSES

Proposition 57 authorizes earlier parole consideration for people in state prison who were convicted of nonviolent felony offenses.1

Since summer 2017, the CDCR Title 15 rules have provided early parole consideration for some “determinately [set length] sentenced nonviolent offenders”;2 as of the end of March 2019, CDCR reports that the Board of Parole Hearings (BPH) has granted Proposition 57 parole in about 20% of 9,000 cases considered so far. Effective January 1, 2019, the rules provide early parole consideration for some “indeterminately-sentenced nonviolent offenders;”3 this mostly applies to people serving three-strikes sentences for nonviolent offenses.

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,” counting pre-sentence credits for actual days served (as awarded by the sentencing court), credits for actual time between sentencing and arrival in the CDCR, and credits for actual days in CDCR. “Primary offense” means the one 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 good conduct or programming credits earned in jail or prison. For example, 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). For a person serving a life term under the three strikes law (which is an alternative sentencing law), the full term for the primary offense is the “maximum term applicable by the statute to the underlying nonviolent offense,” without the additional three strikes punishment or any enhancements.

1 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.

2 The regulations for determinately sentenced nonviolent offenders are 15 CCR §§ 2449.1-2449.7
   and 15 CCR §§ 3490-3493.

3 The regulations for indeterminately sentenced nonviolent offenders are 15 CCR §§ 2449.30-
   2449.34 and 15 CCR §§ 34953497. These regulations are in effect as of January 1, 2019, but are
   still undergoing the full rule adoption process, and the CDCR may make changes to the regulations
   during that process.
The first parts of the nonviolent parole consideration process are similar for people with determinate sentences and people with indeterminate sentences, though there are a few differences. There are several steps – a CDCR eligibility review, a CDCR screening, and a BPH jurisdictional review; the person should be notified promptly within 15 business days about the decision made at each step. The final part of the process is a BPH review to determine whether the person’s release would pose an unreasonable risk to public safety. The type of review at this step depends on whether a person has a determinate sentence or an indeterminate life sentence -- people with determinate sentences get a “paper” review and people with indeterminate life sentences get a formal in-person hearing.

A. CDCR Eligibility Review

CDCR staff should do an eligibility review within 60 days after a person arrives in the CDCR and again whenever there is a change to the sentence they are serving or they get a new sentence. For people with determinate sentences, a new review should also happen if they come within one year of being considered for Youth Offender Parole or Elderly Parole.

A person will be screened out as ineligible for Nonviolent Parole consideration if any of the following are true:

- The person is serving a sentence of death or life without the possibility of parole (LWOP);
- The person is currently serving an indeterminate sentence of life with the possibility of parole for a violent felony (violent felonies are listed in Penal Code § 667.5(c)); this is effective January 1, 2019;
- The person is currently serving a determinate sentence for a violent felony (these are listed in Penal Code § 667.5(c));
- The person is currently serving a determinate term for a nonviolent felony after completing a concurrent determinate term for a violent felony;
- The person is currently serving a determinate term (for either a violent or nonviolent felony) prior to beginning an indeterminate life term with the possibility of parole (for either a violent or nonviolent felony);
- The person has completed a determinate term or indeterminate life term and is currently serving a determinate term for an in-prison offense that is a nonviolent felony;
- The person has any 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. On January 28, 2019, the Second District Court of Appeal issued a decision striking down the CDCR regulations that exclude anyone with a prior conviction for a registrable sex offense under §290; however, that decision is being reviewed by the
California Supreme Court, which means the CDCR does not have to follow the Court of Appeal’s decision. (In re Gadlin, No. S254599.) On March 5, 2018, the Sacramento County Superior Court issued an order stating that CDCR rules prohibiting early parole consideration for anyone with a current conviction for a registrable sex offense violates 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. However, the state has appealed and the court of appeal has stayed the superior court order so that it is not in effect while the appeal is under consideration. (Alliance for Constitutional Sex Offense Laws v. CDCR, Third Dist. Ct. of Appeal No. C087294):

- For a person serving a determinate sentence, 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 and must not have an initial Youth Offender Parole or Elder Parole hearing already scheduled.

If the review indicates that the person is eligible, the CDCR determines their Nonviolent Parole Eligible Date (NVPED).

If the CDCR decides that a person is ineligible for nonviolent offender parole, the person can challenge the decision by filing a CDCR Form 602 administrative appeal and pursuing it to the highest level necessary.

B. CDCR Screening

*There are some important recent changes in this part of the process.* Up until recently, the CDCR’s regulations provided that when a person neared their Nonviolent Parole Eligible Date, CDCR staff did a public safety screening at least 35 days prior to the Nonviolent Parole Eligible Date (for a person with a determinate sentence) or at least 180 calendar days before the Nonviolent Parole Eligible Date (for a person with an indeterminate sentence). If the person passed the public safety screening, the CDCR referred the case to the Board of Parole Hearings (BPH) within five business days after the screening. If the person failed the public safety screening, they were not referred to the BPH for Nonviolent Parole consideration.\(^4\)

On April 29, 2019, the First District Court of Appeal, Division 4, held that the CDCR public safety screening rules violated Proposition 57 to the extent that CDCR barred people from parole

\(^4\) Under the prior CDCR rules, a person failed the public safety screening and would not be considered for Nonviolent Parole if the person: (1) had a current Security Housing Unit (SHU) term or was assessed a SHU term in the past 5 years or had served a SHU term in the past 5 years (unless for the person’s own safety); (2) had a Level A-1 or A-2 serious rule violation in the past 5 years or, for a person serving an indeterminate life sentence, they had a certain types of Level B offenses; (3) had been assigned to Work Group C in the past year; (4) had 2 or more serious rule violations of any level in the past year; (5) had a drug-related rule violation or refusal to provide a urine sample in the past year; (6) had a rule violation with a nexus to an STG group (gang) in the past year.
consideration due to factors like SHU terms, rule violations, and Work Group C classifications. The court held that it is the job of the BPH, not the CDCR, to decide whether people with such factors should be granted or denied parole. (*In re McGhee (2019) 34 Cal.App.5th 902*) As of July 2, 2019, *McGhee* decision is final. The CDCR has reported that as of July 2, 2019, it will start complying with *McGhee* and will not exclude people from BPH consideration based on public safety factors. For people who were previously excluded from BPH consideration due to public safety factors, the CDCR’s plan is to re-process those cases by the end of the year. The CDCR intends to issue new regulations and memos with more information about the details of the process.

The CDCR rules also say that a person will not be referred to the BPH if they will soon be eligible for release or parole consideration under some other process. Specifically, a person who is serving a determinate sentence will not be referred to the BPH if their Nonviolent Parole Eligible Date is less than 180 calendar days before their regular Earliest Possible Release Date (EPRD) or their EPRD is scheduled for less than 210 calendar days after the date of the CDCR screening. A person serving an indeterminate life sentence will not be referred if they previously had some other type of parole consideration hearing or will be eligible for some other type of parole consideration hearing within the next 12 months after the date of the CDCR screening. It does not appear that *McGhee* affects these types of screenout factors.

A person who has concerns about a screenout or about the CDCR’s application of *McGhee* can file a CDCR Form 602 administrative appeal and pursue it to the highest level necessary.

C. BPH Jurisdictional Review

Within 15 calendar days after a CDCR referral, BPH staff should do a “jurisdictional review” to confirm the person meets the eligibility and public safety requirements for Nonviolent Parole consideration.

If the BPH staff find that the BPH has jurisdiction to proceed, then the BPH must conduct a hearing to decide if releasing the person would pose a danger to public safety. The type of hearing and the standard applied will depend on whether the person is serving a determinate sentence or an indeterminate life sentence. A person serving a determinate sentence will get a “paper” hearing, as described in sub-section D, below. A person serving an indeterminate life sentence will get a regular in-person parole hearing, as described in subsection E, below.

If the BPH find that the BPH does not have jurisdiction to proceed, the BPH should notify the person within 15 business days after the decision. The person can seek review of the decision by writing to the BPH within 30 calendar days after they receive the notice. The person should not use the regular CDCR 602 administrative appeal process.

D. BPH Hearing on Dangerousness: Paper Review for People Serving Determinate Sentences

The information in this sub-section describes the “paper” parole hearing process that applies to people serving determinate sentences who are being considered for Nonviolent Offender Parole.
Sub-section E, below, describes the formal hearing process that applies to people serving indeterminate life sentences who are being considered for Nonviolent Offender Parole.

When a person serving a determinate sentence 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. PEOPLE SHOULD SUBMIT A STATEMENT ABOUT WHY THEY SHOULD BE PAROLED EARLY, FOCUSING ON WHY THEY WILL NOT POSE A RISK OF VIOLENCE OR CRIMINALITY. IF POSSIBLE, PEOPLE SHOULD HAVE FAMILY, FRIENDS, POTENTIAL EMPLOYERS OR OTHERS WITH HELPFUL INFORMATION SUBMIT STATEMENTS TO BPH.

Within 5 business days after the jurisdictional review confirms the person is eligible, the BPH should notify the crime victims and prosecuting agencies about the pending parole review and give them 30 calendar days to submit written statements.

Within 30 calendar days after the notification period ends, a BPH staff member will 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. The BPH staff member is called a “hearing officer” even though -- unlike other types of parole suitability proceedings -- there is no actual hearing at which the person or anyone else can appear.

The hearing officer should decide whether or not the person being considered for release poses a “current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.” 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, along with any input from the person, the crime victims, and the prosecutor. The regulations list specific aggravating and mitigating factors to be considered. If a decision to approve release will result in the person being released two or more years before their regular Earliest Possible Release Date (EPRD), the case must be reviewed by a higher level BPH officer who can either approve or deny release. The written decision should include a statement of reasons supporting the decision and the person should receive a copy of it within 15 business days after it is issued.

Any time prior to release, a higher level BPH staff can request a review of a decision that is based on an error of fact or an error of law, or if there is new information that would have affected the decision. The review must be completed within 30 calendar days after the request is received. If the original decision is overturned, a new decision and statement of reasons should be written, and the person should receive a copy of it within 15 business days after it is issued. In addition, any time prior to release, a parole grant can be vacated if it is determined that the person is no longer eligible for parole consideration or no longer passes the public safety screening criteria.

If the BPH grants release -- and does not overturn or vacate the decision -- then the person should be released 60 days after the date of the BPH release 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 release decision. After release, the person will presumably serve the normal parole or PRCS period that would apply for their crimes.

If release is denied, overturned, or vacated, the CDCR will re-screen the person after 1 year to determine whether the person should be re-referred to the BPH for Nonviolent Offender Parole consideration.

If release is denied, overturned, or vacated, the person can ask the BPH to review the decision. This is done through a special review procedure (not the CDCR 602 process). The person can ask for review by submitting a written request to the BPH within 30 calendar days after the decision being challenged. A BPH officer who was not involved in the original decision will conduct a review within 30 calendar days after the request is received. The officer will either uphold the original decision or vacate it and issue a new decision. The person should be notified in writing within 15 business days after the review decision is made.

E. BPH Hearing on Dangerousness: Formal Hearing for People Serving Indeterminate Life Sentences

The information in this sub-section discusses the formal hearing process that applies to people serving indeterminate life sentences who are being considered for Nonviolent Offender Parole. The “paper” hearing process that applies to people serving determinate sentences who are being considered for Nonviolent Offender Parole is discussed in sub-section D, above.

When a person serving an indeterminate life sentence is referred to BPH for Nonviolent Offender Parole consideration, the BPH must schedule the person for a formal parole consideration hearing. Like other formal parole consideration hearings, this will be a full in-person parole hearing in front of a panel of BPH commissioners or deputy commissions, at which the person will be represented by a lawyer. The same legal standard will apply as for other types of formal parole hearings – the BPH panel will consider whether the person’s “would pose an unreasonable risk of danger to society if release from prison.”

The BPH is expected to start conducting Nonviolent Offender Parole hearings in June 2019. The deadlines for holding hearings will be:

- December 31, 2020: for people who are immediately eligible for Nonviolent Offender Parole consideration as of January 1, 2019, have served 20 years or more, and are within 5 years of their Minimum Eligible Parole Date.
- December 31, 2021: for all other people who are immediately eligible for Nonviolent Offender Parole consideration as of January 1, 2019.

5 Unlike some other types of parole consideration proceedings, the Governor does not have authority to review Nonviolent Offender Parole grants.
Within one year from date of referral to the BPH: for people whose Nonviolent Parole Eligible Dates are less than 180 days after the referral.

Within 60 days after the Nonviolent Parole Eligible Date: for people whose Nonviolent Parole Eligible Dates are 180 days or more after the referral.

As with other types of formal parole suitability hearings, a Nonviolent Offender Parole decision will not be final for 120 days and can be reviewed by higher level BPH officials. The Governor can ask the BPH to review a parole decision *en banc*, but the Governor cannot himself overturn a BPH decision granting Nonviolent Offender Parole.

Also, as with other types of formal parole hearings, Nonviolent Offender Parole denials will be for a period of 3, 5, 7, 10, or 15 years, but a person may ask to have their next hearing date advanced if there is a change in circumstances or new information that creates a reasonable likelihood that the person will be deemed suitable for parole.

The BPH does not have an administrative appeal process for challenging denials of parole suitability.

The Prison Law Office can provide more detailed information about the formal BPH parole suitability hearing process. The information is available by writing to Prison Law Office, General Delivery, San Quentin, CA 94964, or on the Resources page at www.prisonlaw.com.

**II. HOW CAN A PERSON IN PRISON CHALLENGE THE RULES OR HOW THEY ARE BEING APPLIED?**

If you are denied Nonviolent Offender Parole, you should file the appropriate type of administrative appeal as described in Section I, above.

If you pursue an administrative appeal to the highest level of review, and are not satisfied with the responses, you can send the appeal and responses to the Prison Law Office for review: Prison Law Office, General Delivery, San Quentin, CA 94964. The Prison Law Office is interested in making sure the CDCR applies its parole rules fairly.

If you pursue an administrative appeal 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 or BPH is interpreting or applying its regulations in an unreasonable manner and/or is violating federal or state law.

Free manuals on How to File a CDCR Administrative Appeal and on State Court Petitions for Writ of Habeas Corpus are available by writing to the Prison Law Office, General Delivery, San Quentin, CA 94964 or on the Resources page at www.prisonlaw.com.