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 March 2020)

This letter discusses the California Department of Corrections and Rehabilitation (CDCR) and Board of Parole Hearings (BPH) rules under Proposition 57 on earlier parole consideration for some people serving terms for nonviolent offenses. 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.

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.

There is ongoing litigation about some parts of the CDCR rules; the most recent developments are underlined in this letter.

Part I of this letter summarizes the Proposition 57 Title 15 rules for people with determinate (set length) terms and people serving indeterminate (life with the possibility of parole) terms. Part II describes how people can challenge the rules or how they are being applied.
I. EARLY PAROLE CONSIDERATION FOR SOME PEOPLE SERVING TERMS FOR NONVIOLENT OFFENSES

Proposition 57, passed by the voters in November 2016, authorizes earlier consideration for parole for people who are serving state prison terms for nonviolent offenses.¹ Pursuant to this law, the BPH and CDCR rules now provide early parole consideration for some people. The regulations regarding early parole for people with determinate (set length) sentences for nonviolent offenses are 15 CCR §§ 2449.1-2449.7 and 15 CCR §§ 3490-3493. As a result of a court decision in In re Edwards (2018) 26 Cal.App.5th 1181, the rules also provide early parole consideration for some people serving indeterminate-sentences (life with the possibility of parole), such as people serving three-strikes sentences for nonviolent offenses. The rules on early parole for people with indeterminate sentences are 15 CCR §§ 2449.30-2449.34 and 15 CCR §§ 3495-3497; these are in effect on an emergency basis and in the process of being permanently adopted. As of February 2020, the Board of Parole Hearings (BPH) has granted parole in about 20% of approximately 13,000 “Nonviolent Offender Parole” cases it has considered so far.

An eligible person will be considered for parole suitability prior to their “Nonviolent Parole Eligible Date,” which is the date on which they have 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 Proposition 57 adopted California Constitution, Article I, section 32, which 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.
The first parts of the nonviolent parole consideration process – a CDCR eligibility review, and CDCR referral to the BPH -- are similar for people with determinate sentences and people with indeterminate sentences, though there are a few differences. The person should be notified within 15 business days about the decision made at each step.

The final part of the process is a BPH review to confirm whether the person is eligible for Nonviolent Offender Parole consideration and then to decide whether the person’s release would pose an unreasonable risk to public safety. Currently, the type of review depends on whether a person has a determinate sentence or an indeterminate life sentence. People with determinate sentences get a “paper” review by one hearing officer; the lack of a formal in-person hearing is being challenged in the courts (see Section I-C, below). People with indeterminate life sentences get a formal in-person hearing, like a regular parole suitability 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 deemed to be 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. This rule is being challenged in the courts. The lead case is In re Gadlin, No. S254599, in which the California Supreme Court granted review in May 2019. The California Supreme Court has granted review in other cases on the same
issue (meaning no lower court decision is currently valid) and we expect the Court to do the
same with all cases on the issue, including the recent decision in *Alliance for Constitutional
California Supreme Court decides the Gadlin case, the CDCR rule prohibiting nonviolent
sex offender registrants from early parole consideration will remain in place. We do not
know when Gadlin will be decided.

- 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 Referral to the BPH**

When an eligible person approaches their parole date, CDCR will refer them to the BPH for parole consideration unless: (1) they are serving a determinate sentence and 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 review, or (2) they are serving an indeterminate life sentence and 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 review.2

A person who has concerns about the CDCR’s referral process can file a CDCR Form 602 administrative appeal and pursue it to the highest level necessary.

**C. BPH Review: “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.

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2 In the past, CDCR staff did “public safety screenings,” and refused to refer people to the BPH if they had certain types of behaviors in prison. A court of appeal held that these screenings violated Proposition 57 because it is the job of the BPH, not CDCR, to decide whether people are suitable for parole. (*In re McGhee* (2019) 34 Cal.App.5th. 902) The state did not appeal, and CDCR stopped doing public safety screenings in July 2019. Also, people who had failed the prior public screening process were to be referred to the BPH for parole consideration; the BPH is supposed to finish hearing all of these cases by March 31, 2020, unless the person is no longer eligible for Nonviolent Offender Parole.
Sub-section D, 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 CDCR refers a case to the BPH, the BPH shall 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. This type of “paper” parole review is being challenged. Several superior courts have held that the BPH must provide in-person hearings at which the person may appear and be heard, and one of the courts held that there must be two hearing officers and that the person must have an attorney. However, the state is appealing these cases, and the superior court orders are stayed pending appeal, so CDCR currently does not have to follow those orders. The cases are In re Flores (No. C089974) and In re Kavanaugh/Smith/Moren (No. D076500).

The hearing officer will first confirm that the person is eligible for Nonviolent Offender Parole. If eligibility is confirmed, the hearing officer must then decide whether 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 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, the BPH can vacate a parole grant if it is determined that the person is no
longer eligible for parole consideration. Unlike some other types of parole consideration proceedings, the Governor does not have authority to review Nonviolent Offender Parole grants.

There is a strong argument that that the BPH may not deny Proposition 57 parole unless there is a rational nexus between the factors cited by the BPH and a finding of current dangerousness. (See In re Ilasa (2016) 3 Cal.App.5th 489 [applying In re Lawrence (2008) 44 Cal.4th 1181 to CDCR’s former non-violent second striker parole process].)

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 review the matter after one 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.

D. BPH Review: 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 hearing process that applies to people serving determinate sentences who are being considered for Nonviolent Offender Parole is discussed in sub-section C, above.

When CDCR refers a person serving an indeterminate life sentence to BPH for Nonviolent Offender Parole consideration, the BPH has 15 calendar days to do a “jurisdictional review” to confirm whether the person is eligible for Nonviolent Offender Parole. The BPH should give the person a copy of the review decision within 15 business days after it is issued. If the person becomes ineligible for Nonviolent Offender Parole anytime prior to release, the BPH can review the case again and make an ineligibility finding. If the BPH decides the person is not eligible for a hearing, the person can ask for review by submitting a written request to the BPH within 30 calendar days after the decision being challenged (not by using the CDCR 602 process).

If eligibility is confirmed, 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 deadlines for holding hearings depend on the time between the referral to the BPH and the person’s Nonviolent Parole Eligible Date. If the referral to the BPH happens less than 180 days before the Nonviolent Parole Eligible Date, the hearing must be held within one year from date of the referral. If the referral to the BPH happens 180 days or more before the Nonviolent Parole Eligible Date, the hearing must be held within 60 days after the Nonviolent Parole Eligible Date.

Since the BPH did not have regulations for Nonviolent Offender Parole hearings for people with indeterminate sentences until January 1, 2019, it is working to catch up on hearings for people are already overdue for Nonviolent Offender Parole hearings. The rules require the BPH to have held hearings by December 31, 2020 for people who became 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. The rules require the BPH to had held hearings December 31, 2021 for all other people who became immediately eligible for Nonviolent Offender Parole consideration as of January 1, 2019.

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 Nonviolent Offender 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.

There is a strong argument that that the BPH may not deny Proposition 57 parole unless there is a rational nexus between the factors cited by the BPH and a finding of current dangerousness. (See In re Ilasa (2016) 3 Cal.App.5th 489 [applying In re Lawrence (2008) 44 Cal.4th 1181 to the CDCR’s former non-violent second striker parole process].)

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 SOMEONE CHALLENGE THE PROPOSITION 57 PAROLE RULES OR HOW THEY ARE BEING APPLIED?

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

If you pursue a request for review or 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 a request for review or 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 CDCR or the BPH is interpreting or applying its regulations in an unreasonable manner and/or is violating federal or state law.

Note that although courts can review CDCR and BPH decision regarding eligibility and suitability for Nonviolent Offender Parole, Proposition 57 does not give courts any new authority to independently recall commitments and resentience people. (People v. Dynes (2018) 20 Cal.App.5th 523.)

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.