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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: “NONVIOLENT OFFENDER” PAROLE CONSIDERATION (Updated January 2022)

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 time credits for good conduct and programming 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 time credits 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.

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I. EARLY PAROLE CONSIDERATION FOR SOME PEOPLE SERVING TERMS FOR NONVIOLENT OFFENSES

Proposition 57, passed by California voters in November 2016, authorizes earlier parole consideration for people who are convicted of nonviolent offenses and sentenced to state prison.¹ Pursuant to this law, the BPH and CDCR rules 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. The rules on early parole for people with *indeterminate* (*life with the possibility of parole*) sentences are 15 CCR §§ 2449.30-2449.34 and 15 CCR §§ 3495-3497. (See *In re Edwards* (2018) 26 Cal.App.5th 1181 [striking down prior rule barring third strikers from eligibility].) In November 2021, CDCR reported that the Board of Parole Hearings (BPH) had granted parole in about 17% of the hearings for people with determinate sentences and 28% of the hearings for people with indeterminate sentences.

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. (See *In re Canady* (2020) 57 Cal.App.5th 1022 [upholding definition of full term as not including credits].) 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 the ordinary base term (without the doubling). 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.

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

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.

indeterminate sentences, though there are a few differences. The person should be notified within 15 business days about the decision made at each of these steps.

The final parts of the process are a BPH review to confirm whether the person is eligible for Nonviolent Offender Parole consideration and then a review to decide whether the person's release would pose an unreasonable risk to public safety. The type of public safety 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; however, 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 anytime there is a change to the sentence or a new sentence is imposed. 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.

CDCR deems a person to be **ineligible** for Nonviolent Offender 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));
- The person is currently serving a *determinate sentence* for a *violent felony* (violent felonies are listed in Penal Code § 667.5(c));
- CDCR rules also make ineligible some people who are serving a current term for a non-violent felony if they have additional terms for violent felonies. Those who are ineligible are: (1) a person currently serving a *determinate term* for a *nonviolent felony prior to beginning an indeterminate life term for a violent felony* or a *term for an in-prison violent felony*, (2) a person currently serving a *determinate term* for a *nonviolent felony after completing a concurrent determinate term for a violent felony*. The exception is that a person who has completed a term for a violent felony and is currently serving a separate term for a non-violent in-prison felony IS eligible for Nonviolent Offender Parole consideration.

NOTE: In *In re Mohammad* (Jan. 3, 2022) No. S259999, ___ Cal.5th ___, the California Supreme Court decided that a person with a *determinate sentence for a non-violent primary offense and consecutive violent offenses* is not eligible for early parole consideration upon serving the full term for the primary offense. The Court found that the language of Proposition 57 is ambiguous about whether it applies to people with mixed-offense cases, and that Proposition 57 ballot materials show the voters did not intend to allow people to be considered for early parole if they are serving a term for a violent offense. The Court concluded "that the Department acted within its discretion when it promulgated section 3490, subdivision (a)(5) of the California Code of Regulations excluding individuals currently serving a sentence for a violent felony from early parole consideration."

However, there are still unresolved issues as to whether CDCR is violating Proposition 57 by making people who have a mix of *violent and non-violent offenses* ineligible for Nonviolent Offender Parole consideration. The Supreme Court in the *Mohammad* case did *not* address whether Proposition 57 requires early parole consideration when a person with mixed offenses has served the violent offense portion of their sentence. The majority justices and two concurring justices referred to a court of appeal justice's observation in another case that Proposition 57's early parole provision (unlike time credit laws) may require CDCR to break a consecutive sentence into separate parts to determine when a person with mixed offenses starts serving time for only non-violent felonies and becomes eligible for early parole consideration. The Supreme Court did not express an opinion on whether such an interpretation is correct or incorrect, and did not discuss whether good conduct credits would count toward service of the violent offense terms. These issues may be the subject of further court actions.

- 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.
- Under a former rule, CDCR excluded people from Nonviolent Offender Parole eligibility if they had *any past or current conviction for an offense that required sex offender registration under Penal Code § 290*. This rule was struck down by the California Supreme Court in *In re Gadlin* (2020) 10 Cal.5th 915 because this exclusion violated Proposition 57. Effective April 29, 2021, CDCR put in place emergency rules complying with *Gadlin*; now CDCR cannot exclude people based on a sex offense conviction unless it is a current conviction for a violent felony. The emergency rules set deadlines for CDCR to make parole referrals for people who became eligible for parole consideration under *Gadlin* and who have already passed their Nonviolent Parole Eligible Date (NVPED):
 - People with determinate sentences were to be referred to the BPH for parole consideration by July 1, 2021; however, people whose regular Earliest Possible Release Date (EPRD) was on or before November 1, 2021 were not to be referred.
 - People with indeterminate sentences were to be referred to the BPH for parole consideration by July 1, 2021, unless they previously had been scheduled for another type of parole hearing or will be eligible for another type of parole hearing within 12 months. After a referral, the BPH shall schedule parole hearings: (1) no later than July 1, 2022 for people who as of April 1, 2021 had been incarcerated for 20 years or more and were within 5 years of their regular Minimum Eligible Parole Date (MEPD) and (2) no later than December 31, 2022 for all other people whose Nonviolent Parole Eligible Date is on or before December 31, 2022.

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

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 grievance/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 grievance/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. 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. One court of appeal has found the policy to be lawful. (*In re Kavanaugh* (2021) 61 Cal.App.5th 320.) Another case on the same issue is currently pending in another court of appeal. *In re Flores* (No. C089974).

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. (*In re McGhee* (2019) 34 Cal.App.5th. 902) The state did not appeal. CDCR stopped doing public safety screenings in July 2019.

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 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, 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 any time 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 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 have held hearings by 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 grievance or 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 I CHALLENGE THE PROPOSITION 57 PAROLE RULES OR HOW THEY ARE BEING APPLIED TO ME?

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

If you pursue an administrative grievance/appeal or a request for review, and are not satisfied with the responses, you can send the grievance/appeal or request and the 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 grievance/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 decisions regarding eligibility and suitability for Nonviolent Offender Parole, Proposition 57 does not give courts any new authority to independently recall commitments and resentence people. (*People v. Dynes* (2018) 20 Cal.App.5th 523.) Also, CDCR is immune from federal civil rights damages lawsuits for harm caused by prior unlawful rules barring parole eligibility to certain groups of nonviolent offenders. (*Jones v. Allison* (9th Cir. 2021) 9 F.4th 1136.)

Free manuals on How to File a CDCR Administrative Grievance/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.