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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 incarcerated people 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 the prison law library.

## **COMPASSIONATE RELEASE AND MEDICAL PAROLE FOR PEOPLE IN CDCR PRISONS**

(updated December 2020)

We are sending you this letter because you asked for information about or assistance with compassionate release or medical parole, or because we think this information might be useful to you. We are sorry we cannot send you a personal response, and we hope this letter will help answer your questions. This letter describes two ways in which people who are incarcerated in California Department of Corrections and Rehabilitation (CDCR) prisons and have very serious medical conditions may get released through either compassionate release resentencing (for people who have six months or less to live) or medical parole (for people who are permanently incapacitated). Be aware that compassionate release and medical parole have different eligibility requirements and procedures; a person may be eligible for release through one or both processes.

### **I. COMPASSIONATE RELEASE RESENTENCING**

Compassionate release allows a court to recall the sentence of someone with a fatal illness and resentence them to a lower term so that they can spend the last few months of their life in the community. Some important changes were made to the compassionate release statute effective August 6, 2020 (Penal Code § 1170(e), as amended by Senate Bill No. 118), but CDCR's regulations on compassionate releases (15 CCR §§ 3076, 3076.3-3076.5) have not yet been updated to reflect those changes. Note that people who are sentenced to serve felony terms in county jails also may get compassionate release; the county jail staff and county correctional administrator must carry out the

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same type of evaluation and court referral process using the same criteria that CDCR uses for people in state prisons.<sup>1</sup>

### **Eligibility for Compassionate Release**

A person is eligible for compassionate release if they are “terminally ill with an incurable condition caused by an illness or disease that is expected to cause death within 12 months” OR if they are “permanently medically incapacitated” with a condition that did not exist at the time of the original sentencing and makes them “permanently unable to perform activities of basic daily living” and “requiring 24-hour care” (such as a coma, persistent vegetative state, brain death, ventilator-dependency, loss of muscle control or neurological function).<sup>2</sup> In addition, release must not pose a threat to public safety.<sup>3</sup> Compassionate release is not available people who are sentenced to death or life without the possibility of parole (LWOP).<sup>4</sup>

### **The Compassionate Release Process**

An incarcerated person or their family member or advocate can request a compassionate release by contacting the Chief Medical Executive at the prison or the CDCR Secretary in Sacramento.<sup>5</sup> Also, whenever a prison doctor determines that a person meets the medical requirements, the doctor must start the compassionate release process.<sup>6</sup> The prison Warden must keep the person’s family or advocate updated on the status of the compassionate release consideration throughout the process.<sup>7</sup>

There are procedures and timelines for prison officials to decide whether to refer a person to the court for compassionate release consideration; the CDCR is supposed to complete the whole process within 30 days.<sup>8</sup> A prison doctor first determines whether the person meets the medical criteria and prepares a CDCR Form 128C Chrono describing their findings.<sup>9</sup> The prison’s Chief Medical Executive and the Statewide Chief Medical Executive must approve or reject the doctor’s

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<sup>1</sup> Penal Code § 1170(e)(11).

<sup>2</sup> Penal Code § 1170(e)(1) and (2). Prior to August 6, 2020, compassionate release required that a terminally ill person have less than 6 months to live. As of early December 2020, the CDCR regulations have not yet been updated to reflect this change.

<sup>3</sup> Penal Code § 1170(e)(1)-(2); 15 CCR § 3076.4(a).

<sup>4</sup> Penal Code § 1170(e)(12).

<sup>5</sup> Penal Code § 1170(e)(6).

<sup>6</sup> Penal Code § 1170(e)(4); 15 CCR §§ 3076.4.

<sup>7</sup> Penal Code § 1170(e)(4)-(5); 15 CCR §§ 3076.4.(c)(2).

<sup>8</sup> Penal Code § 1170(e)(6); 15 CCR §§ 3076.4.

<sup>9</sup> 15 CCR §§ 3076.4(a).

findings within 5 working days.<sup>10</sup> If approved, the case must be sent to a Classification and Parole Representative (C&PR) within 3 working days after the Statewide Chief Medical Executive's approval.<sup>11</sup> If the person is not sentenced to death or LWOP, the C&PR will have the person's correctional counselor prepare a report on public safety case factors like the person's criminal history, prison behavior, and post-release plans; the case worker has 5 working days to prepare the report.<sup>12</sup> The C&PR then has 3 working days to review the evaluation and forward the report to the prison Warden or Chief Deputy Warden.<sup>13</sup> In turn, the Warden or Chief Deputy Warden has 3 working days to review the report and forward it to CDCR headquarters.<sup>14</sup> The CDCR Secretary (or someone designated by the CDCR Secretary) then decides whether to send the person's case to the sentencing court with a recommendation for compassionate release.<sup>15</sup> A recommendation must include medical evaluations, postrelease plans, and eligibility findings.<sup>16</sup> When deciding whether to grant or deny compassionate release, CDCR officials may not rely on factors or criteria other than those in Penal Code § 1170(e); for example, it is improper to consider whether a person's period of incarceration has been proportionate to the seriousness of their crime.<sup>17</sup>

The court that imposed the prison sentence must hold a hearing within 10 days of receiving a compassionate release recommendation from the CDCR Secretary.<sup>18</sup> Although there is no direct on-point case law, there are good arguments that the hearing affects the person's substantial liberty interests, such that the court must appoint an attorney if the person cannot afford to hire one and must allow both the person and the District Attorney an opportunity to present additional information relevant to the medical and public safety issues.

If the court grants a recall and resentencing, CDCR must release the person within 48 hours after receiving the court's order, unless the person agrees to be held a longer period of time.<sup>19</sup> If the person agrees to be held a longer period of time, CDCR will request that the sentencing court order

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<sup>10</sup> 15 CCR § 3076.4(b).

<sup>11</sup> 15 CCR § 3076.4(b).

<sup>12</sup> 15 CCR § 3076.4(c)-(d); see also 15 CCR § 3076.3 (case factors to be considered when recommending for or against compassionate release).

<sup>13</sup> 15 CCR § 3076.3; 15 CCR § 3076.4(e).

<sup>14</sup> 15 CCR § 3076.4(f).

<sup>15</sup> Penal Code § 1170(e)(6); 15 CCR § 3076.4(g). Previously, the Secretary had to refer people with indeterminate life sentences to the Board of Parole Hearings (BPH) for further approval, but this part of the process was eliminated by amendments to Penal Code § 1170(e) in August 2020.

<sup>16</sup> Penal Code § 1170(e)(7); 15 CCR § 3076.4(g)(1).

<sup>17</sup> *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 595 [107 Cal.Rptr.3d 439].

<sup>18</sup> Penal Code § 1170(e)(3).

<sup>19</sup> Penal Code § 1170(e)(9); 15 CCR § 3076.4(h).

that the person be released within 30 calendar days, to allow for coordination of housing and medical needs in the community.<sup>20</sup>

### **Challenging Denial of Compassionate Release**

If a compassionate release request is not processed or is denied, the incarcerated person (or if they are not competent, their family member or advocate on their behalf) can challenge the delay or denial. The steps to take depend on the stage of the process at which the problem occurs.

If a prison doctor delays or refuses to determine whether the person has a qualifying medical condition, or if the doctor, Chief Medical Executive or Statewide Chief Medical Executive concludes that the person does not meet the medical criteria, the person can file a Health Care Grievance (CDCR Form 602-HC) within 30 days after they learn about the delay or the decision. If the person is terminally ill, the grievance should be processed as an urgent issue with faster response timelines than normal. If the grievance is denied, the person can appeal by filing the 602-HC to the highest (Headquarters) level of review.

If prison medical staff find that a person has a qualifying medical condition, but CDCR classification staff or administrative officials do not timely complete the public safety evaluation or decide not to refer the case to the sentencing court, then the person should file a regular administrative Grievance (CDCR Form 602-1) within 30 days after they learn about the delay or the decision. If the grievance is denied, the person should file an Appeal of Grievance (CDCR Form 602-2) for Headquarters level review.

After “exhausting administrative remedies” by completing the appropriate CDCR administrative grievance and appeal, a person can file a state court petition for writ of habeas corpus challenging the CDCR’s delay or refusal to process a compassionate release request, or decision not to recommend compassionate release. There is no set deadline for filing a habeas corpus petition, but a person should not delay. In a situation where immediate action is necessary, a court may be willing to hear a habeas petition even if the person has not exhausted administrative remedies. A person who is terminally ill may also want to ask the court to hear the case on a quicker than normal schedule or issue a preliminary injunction. In a habeas corpus petition, a person could argue that CDCR staff did not comply with the state statute and regulations or did not provide adequate due process.<sup>21</sup> A person could also argue that CDCR staff or officials incorrectly found that the person

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<sup>20</sup> 15 CCR § 3076.4(h).

<sup>21</sup> See, e.g., *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 582, 592 [107 Cal.Rptr.3d 439] (ordering reconsideration because correctional officials must recommend a person for compassionate release if the person meets the statutory criteria, and because officials declined to recommend release based on factors not relevant to those criteria, such as whether the person’s period of incarceration had been proportionate to the seriousness of the crime).

did not meet the medical criteria or would pose a threat to public safety; the court should overturn the CDCR decision if it is not supported by “some evidence.”<sup>22</sup>

If the problem is that the sentencing court denied compassionate release, the person may take a direct appeal to the court of appeal for the region in which the sentencing court is located.<sup>23</sup> No “exhaustion of administrative remedies” is needed. To take a direct appeal, the person should file a notice of appeal in the sentencing court within 60 days after the court issues its decision. In very limited circumstances, the court of appeal may allow the notice of appeal to be filed after the 60 day deadline. Among issues that might be raised on appeal are that the sentencing court did not provide due process because it did not appoint an attorney, allow submission of additional information, or hold a proper hearing. Another possible issue is that the sentencing court abused its discretion by denying release even though the person meets the statutory criteria.<sup>24</sup>

Free information packets on administrative appeals, state habeas corpus petitions, and direct appeals are available by writing to the Prison Law Office. Those information packets are also available on the Prison Law Office website at [www.prisonlaw.com](http://www.prisonlaw.com), on the Resources page.

## II. MEDICAL PAROLE

Medical parole allows the BPH to parole people who are permanently incapacitated by a medical condition before they reach their normal release dates. The medical parole process is set forth in Penal Code § 3550, and a BPH Memorandum on “Expanded Medical Parole,” dated June 16, 2014. There are also CDCR rules at 15 CCR §§ 3359.1-3359.6, though these have not been updated since the medical parole process was expanded in 2014. As of November 2020, CDCR reported that 152 people had been approved for medical parole since early 2014.

### **Eligibility for Medical Parole**

To be eligible for medical parole, a person must be permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living, and results in the person requiring 24-hour care, and that incapacitation did not exist at the time of sentencing. Activities of basic daily living are breathing, eating, bathing, dressing, transferring to a sitting or standing position, toileting, arm use, or physical ambulation (moving around). In addition, the conditions under which the person would be released must “not reasonably pose a danger to

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<sup>22</sup> *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 595 [107 Cal.Rptr.3d 439].

<sup>23</sup> *People v. Loper* (2015) 60 Cal.4th 1155 [184 Cal.Rptr.3d 715].

<sup>24</sup> *People v. Torres* (2020) 48 Cal.App.5th 550 [261 Cal.Rptr.3d 844] (reversing denial and ordering grant of compassionate release where sentencing court found person met statutory criteria but had denied release based on other factors).

public safety.”<sup>25</sup> However, a person is ineligible for medical parole if they are sentenced to death or LWOP, if they are convicted of first-degree murder of a peace officer who was performing their duties, or if medical parole is prohibited by an initiative statute.<sup>26</sup>

### **The Medical Parole Process**

An incarcerated person, or their family or advocate, can request medical parole consideration by contacting the prison’s Chief Medical Executive or the Statewide Chief Medical Executive. The person should then be evaluated by their CDCR Primary Care Physician to see if they meet the criteria for medical parole.<sup>27</sup> In addition, anytime a person’s CDCR Primary Care Physician believes that the person meets the criteria for medical parole, the physician must refer the case to the prison’s Chief Medical Executive.<sup>28</sup> The referral will be documented on a CDCR 7478 Medical Parole Form.<sup>29</sup>

CDCR health care staff evaluate people to determine how much help they need for activities of basic daily living using a tool called the Resource Utilization Guide IV (RUG IV). Generally, a medical condition that would make a person eligible for medical parole would be one that requires Correctional Treatment Center (CTC) level of medical care and housing in a CTC or other medical bed.

The prison’s Chief Medical Executive must approve or reject the Primary Care Physician’s recommendation within 30 days after a referral initiated by the incarcerated person (or their family, or their advocate) or within 30 days after a referral initiated by a CDCR Primary Care Physician. If the Chief Medical Executive decides the person does not meet the criteria for medical parole, they shall provide a written explanation of their reasons.<sup>30</sup> If the Chief Medical Executive approves the referral, the case will go to a Classification & Parole Representative (C&PR) for review and the C&PR will direct the person’s correctional counselor to prepare an evaluation report on public safety factors. If the C&PR approves, the C&PR will forward the case to the CDCR Headquarters Classification Services Unit, which will prepare a referral to the BPH.<sup>31</sup>

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<sup>25</sup> Penal Code § 3550(a); 15 CCR § 3359.1(a).

<sup>26</sup> Penal Code § 3550(b); 15 CCR § 3359.1(a).

<sup>27</sup> Penal Code § 3550(d); 15 CCR § 3359.1(b). A request by an incarcerated person, family member or advocate will not be considered if it has been less than 90 days since the person’s Primary Care Physician previously reviewed such a request. 15 CCR § 3359.1(c).

<sup>28</sup> Penal Code § 3550(c); 15 CCR § 3359.1(b).

<sup>29</sup> 15 CCR § 3359.2(a).

<sup>30</sup> Penal Code § 3550(c)-(d); 15 CCR § 3359.1(b)-(c).

<sup>31</sup> BPH, *Expanded Medical Parole, Memorandum*, dated June 16, 2014; see also Penal Code § 3550(c)-(e) and 15 CCR § 3359.2.

When a person is referred to the BPH for medical parole, the BPH will hold a hearing to determine whether the person's release would endanger public safety.<sup>32</sup> The BPH hearing will be in front of a two-person (or sometimes three-person) panel. The person may hire an attorney or an attorney will be appointed by the BPH to appear at the hearing. The hearing may be held without the person being present.<sup>33</sup> All other regular procedural rules for parole suitability hearings apply to medical parole hearings.<sup>34</sup>

The BPH panel shall grant medical parole if it determines the conditions under which the person would be released would not reasonably pose a threat to public safety.<sup>35</sup> Even though the BPH does not review the medical eligibility criteria, the person's RUG IV score is relevant to the public safety issue because the higher the RUG IV score (maximum = 16), the more dependent the person is on others and thus less likely to pose a risk to public safety. The BPH will review the panel's decision and either approve or disapprove it; however, it is not currently known whether the Governor can or will exercise review authority for medical parole decisions when the person is serving an indeterminate life sentence for murder.

After the panel issues its decision, CDCR health care and parole staff will attempt to find a community health care facility in which to place the person. When an appropriate facility is identified, the person will be transferred to it as a medical parolee. However, if no appropriate facility is identified within 120 days of the panel decision, the medical parole grant will lapse and the person will remain in a CDCR institution.<sup>36</sup>

As with other types of parole, a person on medical parole may be subject to special conditions. These may include GPS monitoring, doctor examinations to determine if the person remains medically incapacitated, and restrictions on visitors or types of staff that assist the person.<sup>37</sup> A person with a determinate sentence can remain on medical parole until their normal release date, at which point any normal parole or Post-Release Community Supervision (PRCS) period kicks in. A

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<sup>32</sup> Penal Code § 3550(g).

<sup>33</sup> Penal Code § 3550(f); BPH, *Expanded Medical Parole, Memorandum*, dated June 16, 2014.

<sup>34</sup> BPH, *Expanded Medical Parole, Memorandum*, dated June 16, 2014.

<sup>35</sup> Penal Code § 3550(a); 15 CCR § 3359(d).

<sup>36</sup> BPH, *Expanded Medical Parole, Memorandum*, dated June 16, 2014. The law authorizes the CDCR to enter into agreements with health care providers and to reimburse those providers for costs that are not covered by Medi-Cal. Penal Code § 2065. Unfortunately, even with this provision, it can be difficult for CDCR to find medical parole placements.

<sup>37</sup> Penal Code § 3550(h); 15 CCR § 3359.5.

person with an indeterminate sentence will become eligible for consideration under regular parole suitability provisions once the person reaches their minimum eligible parole date.<sup>38</sup>

A person on medical parole can be returned to custody if their condition improves to the extent that they no longer qualify for medical parole or if they become a threat to themselves, another person, or public safety. The person also can be returned if they violate their conditions of parole or if the community facility can no longer care for them.<sup>39</sup>

### **Challenging Denial of Medical Parole**

If a compassionate release request is not processed or is denied, the incarcerated person (or if they are not competent, their family member or advocate on their behalf) can challenge the delay or denial. The steps to take depend on the stage of the process at which the problem occurs.

In some situations, a person will have to “exhaust administrative remedies” through an administrative grievance and appeal process before they can bringing a habeas corpus case in court. Whether a person must seek an administrative remedy, and what type of administrative grievance and appeal process to use, depends on the following circumstances:

- If a CDCR prison doctor delays or refuses to evaluate the person’s medical condition, or if the doctor or prison’s Chief Medical Executive concludes that the person does not meet the medical criteria, the person can file a Health Care Grievance (CDCR Form 602-HC) within 30 days after they learn about the delay or the decision. This is also the type of grievance to use if CDCR imposes unreasonable or improper conditions of medical parole. If the grievance is denied, the person can appeal by filing the 602-HC to the highest (Headquarters) level of review.
- If prison medical staff find that a person has a qualifying medical condition, but CDCR classification staff or administrative officials do not timely complete the public safety evaluation or decide not to refer the case to the BPH, then the person can file a regular administrative Grievance (CDCR Form 602-1) within 30 days after they learn about the delay or the decision. If the grievance is denied, the person can file an Appeal of Grievance (CDCR Form 602-2) to the highest (Headquarters) level of review.
- Even if the problem is with CDCR health care or classification/administrative staff, a court might allow the person to file a court action without “exhausting administrative remedies if taking the time to complete the administrative appeals and grievance process would cause the person irreparable harm.

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<sup>38</sup> Penal Code § 3550(h).

<sup>39</sup> 15 CCR § 3359.6; BPH, *Expanded Medical Parole, Memorandum*, dated June 16, 2014.



- If CDCR refers a person to BPH for a medical parole hearing and the BPH does not schedule a timely hearing or denies parole, the person does not need to file an administrative grievance or administrative appeal before going to court. This is because the BPH does not have a general administrative grievance and appeal process.

A person can file a state court petition for writ of habeas corpus challenging any problem with the CDCR's or BPH's processing of a medical parole request or decision denying medical parole. There is no set deadline for filing a habeas corpus petition, but a person should not delay. In a habeas corpus petition, a person could argue that CDCR staff did not comply with the state statute and regulations or did not provide adequate due process.<sup>40</sup> A person could also argue that CDCR or BPH staff or officials incorrectly found that the person did not meet the medical criteria or would pose a threat to public safety; the court should overturn the CDCR or BPH decision if it is not supported by "some evidence."<sup>41</sup>

Free information packets on administrative appeals, BPH parole suitability hearings, and state habeas corpus petitions are available by writing to the Prison Law Office. Those information packets are also available on the Prison Law Office website at [www.prisonlaw.com](http://www.prisonlaw.com), on the Resources page.

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<sup>40</sup> See, e.g., *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 582, 592 [107 Cal.Rptr.3d 439] (in compassionate release case, ordering reconsideration because correctional officials must recommend a person for compassionate release if the person meets the statutory criteria, and because officials declined to recommend release based on factors not relevant to those criteria, such as whether the person's period of incarceration had been proportionate to the seriousness of the crime).

<sup>41</sup> *In re Martinez* (2012) 210 Cal.App.4th 800, 815 [148 Cal.Rptr.3d 657] (finding BPH decision not supported and ordering that person be released on medical parole).