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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 all who ask 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 information, 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 facility's law library.

### **LIFE PAROLE SUITABILITY INFORMATION LETTER**

Updated January 2019

You are receiving this letter because you contacted our office requesting representation at your BPH parole hearing, assistance filing a petition for writ of habeas corpus, or information on parole suitability laws or court decisions. Unfortunately, we are unable to assist you. Our resources are limited and we can provide assistance to only a few individual prisoners. Any documents you sent are being returned with this letter.

Chapter 9 of *The California Prison and Parole Law Handbook (Prison Law Office, 2019)* contains information about setting parole dates for people with indeterminate sentences and the parole suitability process. It also covers early parole eligibility consideration for people who committed their crimes when they were young, people who are elderly, people serving sentences for non-violent offenses, and people who are medically incapacitated or terminally ill. The *Handbook* chapter discusses the cases, statutes and regulations through approximately the end of September 2018. We have enclosed that chapter with this letter if we thought it might be helpful to you. If the chapter is not enclosed, and you would like to receive it, please write back and we will send it to you.

In 2019, the CDCR will start giving early parole consideration to some people serving three-strikes terms for nonviolent offenses. You can request an information letter about that process and the timelines by writing to the Prison Law Office asking for the Proposition 57 letter.

Chapters of the *Handbook* and the Proposition 57 letter are also available on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com).

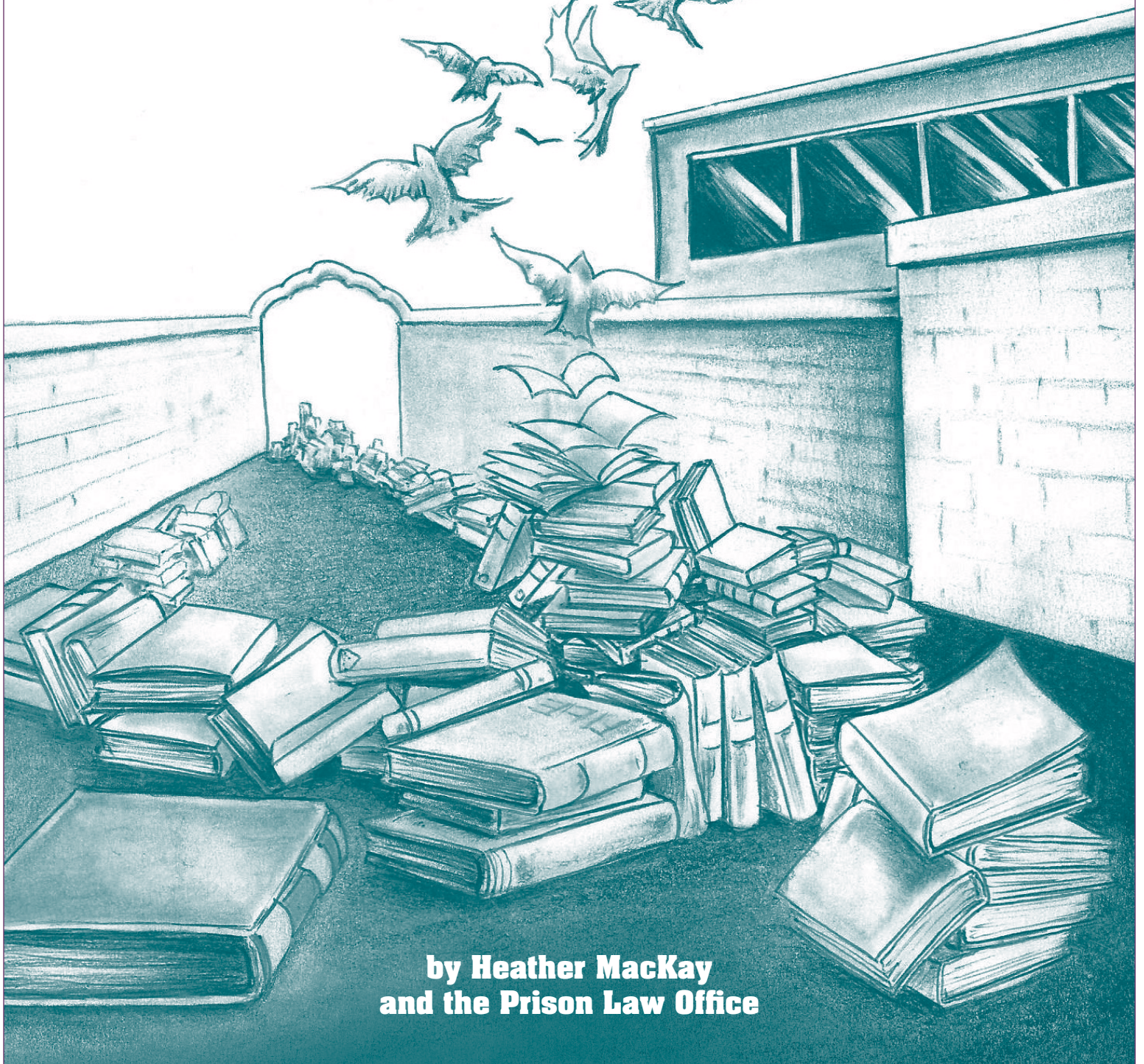
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# **The California Prison and Parole Law Handbook**



**by Heather MacKay  
and the Prison Law Office**



# THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK

BY HEATHER MACKAY  
&  
THE PRISON LAW OFFICE

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The Prison Law Office is a non-profit public interest law firm that strives to protect the rights and improve the living conditions of people in state prisons, juvenile facilities, jails and immigration detention in California and elsewhere. The Prison Law Office represents individuals, engages in class actions and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

Order forms for *The California Prison and Parole Law Handbook* are available at: [www.prisonlaw.com](http://www.prisonlaw.com) or by writing to:

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In addition, many self-help information packets on a variety of topics are available free of charge on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com) or by contacting the Prison Law Office at the address above.

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## **YOUR RESPONSIBILITY WHEN USING THIS HANDBOOK**

When we wrote *The California Prison and Parole Law Handbook*, we did our best to provide useful and accurate information because we know that people in prison and on parole often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. However, the laws are complex change frequently, and can be subject to differing interpretations. Although we hope to publish periodic supplements updating the materials in the Handbook, we do not always have the resources to make changes to this material every time the law changes. If you use the Handbook, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in a prison law library or in a public county law library.

# CHAPTER 9

## LIFE PAROLE SUITABILITY, OTHER BOARD OF PAROLE HEARINGS PROCEEDINGS, COMMUTATIONS, AND PARDONS

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## 9.1 Introduction

The Board of Parole Hearings (BPH)<sup>1</sup> decides a variety of matters related to the release of people from prison. The BPH determines whether people who are serving indeterminate sentences of life with the possibility of parole (“lifers”) are suitable for release after they reach their Minimum Eligible Parole Date (MEPD). (§§ 9.4-9.8 discuss how the MEPD is calculated.)

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<sup>1</sup> The BPH is a division of the California Department of Corrections and Rehabilitation (CDCR). Government Code § 12838.4. Prior to July 2005, it was a separate agency called the Board of Prison Terms (BPT).

The BPH is also responsible for conducting several other types of hearings or reviews to determine whether some people may safely be released earlier than their regular MEPD (for people with determinate sentences) or Earliest Possible Release Date (EPRD):

- ◆ Nonviolent offender parole reviews pursuant to Proposition 57, for people with determinate sentences (set term length) only (§ 9.40).
- ◆ Youthful offender parole hearings pursuant to Senate Bills 260, 261 and 394 for people who committed their crimes when they were under age 26 and are serving indeterminate or determinate sentences, or were under age 18 and are serving life without the possibility of parole (LWOP) (§ 9.41).
- ◆ Elderly parole hearings for people who are at least 60 years old and have served at least 25 years in prison, with either indeterminate or determinate sentences (§ 9.42).
- ◆ Medical parole hearings for people who are permanently medically incapacitated, with either indeterminate or determinate sentences (§ 9.43).<sup>2</sup>

The BPH website has information about rules and policies, hearing schedules, and reports on the number of parole hearings held and the outcomes of those hearings.<sup>3</sup>

The chapter also briefly discusses commutations and pardons by the Governor (§ 9.49).

In addition, there are possibilities for some people to get resentenced to lower terms. These include provisions for compassionate release of people who are terminally ill or medically incapacitated (§ 8.14). There are also resentencing reforms reducing some drug and theft crimes from felonies to misdemeanors (§§ 8.16-8.17), which can help some people who are sentenced as third-strikers be resentenced to lesser terms.

## **LWOP AND INDETERMINATE LIFE SENTENCES**

### **9.2 Life Without the Possibility of Parole (LWOP) Sentences**

In some particularly serious cases, a person may receive a sentence of life without the possibility of parole (LWOP). People with LWOP are not considered for release in the same way as people sentenced to terms of life with the possibility of parole. Unless a person with LWOP can overturn the conviction or sentence on direct appeal or through a petition for writ of habeas corpus, usually the only option for release is to get a pardon or commutation from the Governor (see § 9.49).

There are two exceptions that apply to some people who were sentenced to LWOP terms for crimes they committed when they were under age 18.

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<sup>2</sup> The BPH also reviews cases for Sexually Violent Predator (SVP) and Mentally Disordered Offender (MDO) commitments. These proceedings are discussed in Chapter 12.

<sup>3</sup> See CDCR/BPH website at [www.cdcr.ca.gov/BOPH](http://www.cdcr.ca.gov/BOPH).



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First, some people who have LWOP sentences for crimes they committed when they were under age 18 will be considered for youth offender parole after serving part of their sentence.<sup>4</sup> The laws for youth offender parole are discussed in § 9.41.

Second, some people who have LWOP sentences for crimes they committed when they were under age 18 can petition for re-sentencing under Senate Bill 9 after serving at least 15 years of actual time in incarceration.<sup>5</sup> There are a few crimes that make a person ineligible for re-sentencing – any crime in which the defendant tortured a victim or in which the victim was a public safety official.<sup>6</sup> To get re-sentencing, a person with LWOP must file a petition in the sentencing court asking for re-sentencing and discussing their commitment offense, criminal history, and rehabilitation efforts. The petition must make three statements:

- ◆ The person was under the age of 18 at the time of a crime for which they were sentenced to LWOP, and
- ◆ The person is remorseful and working towards rehabilitation, and
- ◆ At least one of the following is true:
  - The person was convicted under felony-murder or aiding-and-abetting murder laws;
  - The person had no juvenile felony adjudications (meaning a juvenile court “conviction”) for assault or other felony crimes with a significant potential for personal harm to victims before the crime that resulted in LWOP;
  - The person committed the offense with at least one adult codefendant; or
  - The person has performed acts that show rehabilitation and evidence of remorse.<sup>7</sup>

If the petition satisfies the basic requirements, the court will hold a hearing and consider various factors in deciding whether to keep the LWOP term or reduce it. If re-sentencing is granted, the LWOP term will become a term of 25 years to life. The person will be granted credit for time served and, upon reaching the MEPD, will go before the BPH for parole consideration.<sup>8</sup> If the court denies the petition, the person can file a direct appeal (see Chapter 14). The person can also file new re-sentencing petitions after serving 20 and 25 actual years.<sup>9</sup> Further information about SB 9 resentencing and a sample petition are available on the Prison Law Office’s resources webpage at

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<sup>4</sup> Penal Code § 3051.

<sup>5</sup> Penal Code § 1170(d)(2). In addition, pursuant to recent court decisions, people who were sentenced to LWOP for crimes committed when they were under age 18 can file petitions for writ of habeas corpus asking for re-sentencing consideration if the sentencing court did not consider factors related to their youthfulness. See *Miller v. Alabama* (2012) 567 U.S.460 [132 S.Ct. 2455; 183 L.Ed.2d 407]; *Montgomery v. Louisiana* (2016) 577 U.S. \_\_\_ [136 S.Ct. 718; 193 L.Ed.2d 599]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1379 [171 Cal.Rptr.3d 421]; *In re Kirchner* (2017) 2 Cal.5th 1040 [216 Cal.Rptr.3d 876].

<sup>6</sup> Penal Code § 1170(d)(2)(A).

<sup>7</sup> Penal Code § 1170(d)(2)(B).

<sup>8</sup> Penal Code § 1170(d)(2)(C)-(G).

<sup>9</sup> Penal Code § 1170(d)(2)(H).

www.prisonlaw.com, and can also be requested by writing to the Prison Law Office, General Delivery, San Quentin, CA 94964.

### 9.3 Indeterminate Sentences of Life with the Possibility of Parole

Since July 1, 1977, California criminal sentences have been governed by The Uniform Determinate Sentence Act of 1976 (the DSL).<sup>10</sup> Under the DSL, most people are sentenced to set-length or “determinate” terms, as described in §§ 8.3-8.10 (which also described the general sentencing process for all felony defendants). However, some crimes still carry “indeterminate” sentences of life with the possibility of parole. There are also alternative sentencing provisions and enhancements that carry indeterminate life terms for particular conduct (such as some sex crimes, gang crimes, and crimes in which discharge of a firearm caused death or serious injury). There are also some life-term provisions for people with repeated offenses, such as the Three Strikes Law. As of 2017, there were about 34,000 people serving indeterminate life sentences in California.<sup>11</sup> The BPH determines if and when these people are released from prison.<sup>12</sup>

## MINIMUM ELIGIBLE PAROLE DATE (MEPD) CALCULATION

### 9.4 Overview

Once an indeterminate life term starts running, a person must serve a minimum number of years before they can be considered for release on parole.<sup>13</sup> The date when parole becomes possible is known as the Minimum Eligible Parole Date (MEPD). The MEPD is calculated based on three factors: the length of the minimum statutory term for the life offense, minus any pre-sentence credits, minus any in-prison good conduct credits. The general calculation strategy is the same as that set forth in the worksheet at § 8.2, except that the resulting date is the MEPD on which the person will be considered for parole suitability (rather than the EPRD on which a person with a determinate sentence must be released). The CDCR issues a Legal Status Summary (LSS) notifying the person of the MEPD. The initial parole suitability hearing will be roughly 11 months before the MEPD.

### 9.5 Consecutive Determinate Terms

Some people with a life sentence may also be serving determinate sentences that run consecutive to (separate from) the life term. In such a case, the person must serve the determinate term first. Any pre-sentence or in-prison credits earned will be allotted toward the determinate term until the determinate term is fully served. The time served on the determinate term does not count toward the life term.<sup>14</sup> There is an exception – if a person with a life sentence receives a consecutive

<sup>10</sup> Prior to July 1, 1977, California criminal sentences were governed by the Indeterminate Sentence Law (the ISL). Under the ISL, the court sentenced all defendants to a range of years; some ISL sentences were as vague as “one year to life.” The parole board then determined the exact length of term the person would serve. A few people who were sentenced to life terms under the ISL still remain in prison.

<sup>11</sup> CDCR, *Offender Data Points: Offender Demographics for the 24-month period ending December 2017*, available at [cdcr.ca.gov](http://cdcr.ca.gov).

<sup>12</sup> Penal Code § 3040.

<sup>13</sup> See §§ 9.40-9.43 for situations in which some people with life sentences may be considered for earlier parole.

<sup>14</sup> *People v. Grimble* (1981) 116 Cal.App.3d 678 [172 Cal.Rptr. 362]; Penal Code § 669.

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determinate term for crimes committed in prison, the life term continues to run and the determinate term will be served after the effective date of a grant of parole for the indeterminate sentence.<sup>15</sup>

### 9.6 The Minimum Statutory Sentence

The first factor in determining the MEPD is the sentence the person received. At sentencing, the court will specify the minimum term, such as “15 years to life” or “25 years to life,” according to the statute under which the person has been convicted. If the statute does not say a minimum date, then the minimum term is seven calendar years.<sup>16</sup> If a person has multiple indeterminate life sentences or has indeterminate life enhancements that run consecutively, the minimum terms will be added together, such that a person can end up with a term of “40 years to life,” “50 years to life,” or more.

### 9.7 Pre-Sentence and Pre-Prison Credits

A person with a life sentence who was in jail prior to conviction and sentencing is entitled to MEPD-reducing credit for the actual time served on the case. Some people with life sentences are also entitled to credits for good conduct during their pre-sentence custody. These credits should be calculated and awarded by the sentencing judge. This information can be found on the Abstract of Judgment from the sentencing court.

In addition, people with life sentences are entitled to credit for time in jail after sentencing and prior to arrival in the CDCR. It is the CDCR’s duty to calculate and apply credits for this period of time.<sup>17</sup> The actual days in custody for such periods are referred to as “post-sentence” credits. People are entitled to credit for actual days served; if they were eligible for pre-sentence conduct credits, then they will continue to earn such conduct credits until they arrive in the CDCR.<sup>18</sup>

More information about pre-sentence/pre-prison credit eligibility and calculation is in §§ 8.18-8.26. Information about challenging pre-sentence or pre-prison credit errors made by the courts or the CDCR is in §§ 8.41-8.42.

### 9.8 In-Prison Time Credits

§§ 8.27-8.40 discuss in detail the laws and regulations that govern earning, forfeiting, and restoring credits for good conduct and programming in prison. This section discusses how in-prison credits affect an MEPD and the special rules that bar some people from earning in-prison credits or limit the amount of credits that can be earned.

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<sup>15</sup> Penal Code § 1170.1(c); *In re Thompson* (1985) 172 Cal.App.3d 256 [218 Cal.Rptr. 192]; *In re Coleman* (2015) 236 Cal.App.4th 1013 [186 Cal.Rptr.3d 922].

<sup>16</sup> Penal Code § 3046(a).

<sup>17</sup> Penal Code § 2900.5(e).

<sup>18</sup> Penal Code § 4019(f).

Many people can reduce their MEPDs by earning credits for good conduct and programming. It is the responsibility of the prison case records staff to calculate and apply any good conduct or programming credits.<sup>19</sup>

Note that there are also laws that prohibit people with a life sentence from earning credits that reduce an indeterminate term below a certain minimum number of actual years. For example, no credit reduction may be applied which would result in a person with a life sentence serving less than seven calendar years.<sup>20</sup> For some types of crimes, a person must actually serve at least 15 or 20 calendar years of actual time prior to parole consideration, no matter how many in-prison credits are earned.<sup>21</sup>

Eligibility to earn MEPD-reducing credits generally is determined by the sentencing and credit laws in effect at the time the crime was committed.<sup>22</sup> These laws are complex and have changed frequently over time. Moreover, effective May 1, 2017, new CDCR regulations pursuant to sentencing reforms enacted by Proposition 57 override many prior statutory limitations on credit-earning for people with life sentences.

The following list summarizes Good Conduct Credit eligibility for most categories of people with life sentences due time served before and after May 1, 2017. If a person falls into more than one category, the most severe credit limitation applies.<sup>23</sup>

**On and After May 1, 2017 – One day of credit for every four days served (20%)<sup>24</sup>  
Before May 1, 2017 – No credits (0%):**

- ◆ People convicted of any first- or second-degree murder committed on or after June 3, 1998.<sup>25</sup>
- ◆ People sentenced to life terms for gang crimes, torture, kidnapping for ransom, robbery or rape or during a carjacking, train-wrecking, aggravated assault by a person with a life sentence, or bombing.<sup>26</sup>

<sup>19</sup> *In re Dayan* (1991) 231 Cal.App.3d 184 [282 Cal.Rptr. 269].

<sup>20</sup> Penal Code § 3046; *People v. Carpenter* (1979) 99 Cal.App.3d 527, 535-536 [160 Cal.Rptr. 386].

<sup>21</sup> See, e.g., Penal Code § 186.22(b)(5) (certain people in with “street gang offenses” are not eligible for parole for at least 15 years); Penal Code § 667.7(a)(1) (people listed as “habitual offenders” are not eligible for parole for at least 20 years).

<sup>22</sup> Generally, a person with an indeterminate-sentence is not eligible for MEPD-reducing in-prison credits unless the sentencing statute for the crime provides for application of the prison credit laws, Article 2.5 (commencing with § 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

<sup>23</sup> *People v. Jenkins* (1995) 10 Cal.4th 234 [40 Cal.Rptr.2d 903].

<sup>24</sup> 15 CCR 3043.2(a)(2).

<sup>25</sup> Penal Code § 190(e); Penal Code § 2933.2. The former prohibition on conduct credits applied even if the murder conviction was stayed. *People v. Duff* (2010) 50 Cal.4th 787, 794-795 [114 Cal.Rptr.3d 233].

<sup>26</sup> Penal Code § 186.22(b)(4) (gang crimes); Penal Code § 206.1 (torture); Penal Code §§ 209-209.5 (kidnappings); Penal Code § 219 (train-wrecking); Penal Code § 4500 (aggravated assault by person with life sentence); Penal Code § 12310(b) (bombing); see also 70 Ops.Cal.Atty.Gen. 49, Opinion 86-1102 (Mar. 24, 1987).

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- ◆ People sentenced to life terms for certain types of sex offenses or as “habitual sex offenders” for crimes committed on or after September 20, 2006.<sup>27</sup>
- ◆ People sentenced to life terms under the Three Strikes Law.<sup>28</sup>
- ◆ People convicted of second-degree murder on or after January 1, 1986, who have served a prior prison term for first- or second-degree murder.<sup>29</sup>
- ◆ People convicted of second-degree murder of a police officer committed on or after June 8, 1987.<sup>30</sup>
- ◆ People who (1) have two or more prior felony convictions, (2) have served two or more separate prior prison terms and (3) are currently serving prison terms for certain crimes, including murder, voluntary manslaughter, mayhem, kidnapping, assault with acid, rape, sodomy, various sex crimes with children, use of explosives with intent to injure, or any other felony in which the defendant personally inflicted great bodily injury, committed on or after January 1, 1991.<sup>31</sup>

**On and After May 1, 2017 – One day of credit for every four days served (20%)<sup>32</sup>  
Before May 1, 2017 – 15% credits:**

- ◆ People convicted of a violent felony.<sup>33</sup>
- ◆ People committed to life terms for certain types of sex offenses or “habitual sex offenses” prior to September 20, 2006.<sup>34</sup>
- ◆ People with life term enhancements for discharging a gun causing great bodily injury or death.<sup>35</sup>

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<sup>27</sup> Penal Code § 667.51(c); Penal Code § 667.61; Penal Code § 667.71. *People v. Adams* (2018) 28 Cal.App.5th 170 [239 Cal.Rptr.3d 2].

<sup>28</sup> Penal Code § 667(c)(5), (e)(2)(A); *In re Cervera* (2001) 24 Cal.4th 1073, 1080 [103 Cal.Rptr.2d 762].

<sup>29</sup> Penal Code § 190.05 (making no reference to Penal Code § 2930 et seq.).

<sup>30</sup> Penal Code § 190(b).

<sup>31</sup> Penal Code § 2933.5. (eff. Sept. 21, 1994). Violent felonies are listed in Penal Code § 667.5(c).

<sup>32</sup> 15 CCR 3043.2(a)(2).

<sup>33</sup> Penal Code § 2933.1.

<sup>34</sup> Former Penal Code § 667.61; Former Penal Code § 667.71.

<sup>35</sup> Penal Code § 12022.53(d), (i).

**On and After May 1, 2017 – One day of credit for every two days served (33.3%)<sup>36</sup>  
Before May 1, 2017 – One day of credit for every two days served (33.3%):**

- ◆ People convicted of murder committed prior to June 3, 1998.<sup>37</sup>
- ◆ People sentenced as “habitual sex offenders,” for crimes prior to January 1, 1987.<sup>38</sup>

**On and After May 1, 2017 – One day of credit for every day served (50%)<sup>39</sup>  
Before May 1, 2017 – One day of credit for every day served (50%):<sup>40</sup>**

- ◆ Those few people sentenced as “habitual offenders” under various laws not already listed above and who do not fall into any other categories listed above.<sup>41</sup>

**On and After May 1, 2017 – two days of credit for every day served (66.6%):<sup>42</sup>**

- ◆ People serving sentences for non-violent offenses and otherwise eligible for 50% credit, who are in Minimum A and Minimum B custody.
- ◆ People serving sentences for non-violent offenses and otherwise eligible for 50% credit, who complete firefighter training or are assigned to a fire camp.

Effective January 25, 2010, some people incarcerated in California prisons could earn additional “Milestone Credits” for participating in some types of academic, vocational, and therapeutic programs. However, very few people with life sentences were eligible for Milestone Credits because among the groups of people excluded from such credits were people convicted of offenses that require sex offender registration, people serving a term for a violent felony, and people sentenced under the Three Strikes Law.<sup>43</sup> Effective August 1, 2017, these restrictions were removed and all people with life

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<sup>36</sup> See 15 CCR 3043.2(a)(3).

<sup>37</sup> Some people who were convicted of murder and served time in prison prior to April 1, 1987 may have half-time credits from that period. Prior to that date, the policy was to award such people full half-time credits. This ended when the Attorney General issued an opinion holding that only one-for-two credits were available. Although courts agreed with the Attorney General’s view of the law, the state was barred from taking away the credits that people had already earned. *In re Monigold* (1988) 205 Cal.App.3d 1224 [253 Cal.Rptr. 120]; *Miller v. Rowland* (9th Cir. 1993) 999 F.2d 389.

<sup>38</sup> Former Penal Code § 667.51(c); Former Penal Code § 667.7.

<sup>39</sup> 15 CCR 3043.2(a)(4). Note that the CDCR’s titles for the various credit categories are *not* internally consistent. “15%,” means that a person gets credit for that percentage of the time actually served. BUT “33.3% credit does not mean a person gets that percent of credit; rather they get one day of credit for two days served and end up serving “50%” credit does NOT mean a person gets credit for 50% of days actually served. Rather, a person gets credit for 100% of days served (day-for-day) and the person ends up serving 50% of the actual time imposed (sometimes called doing “half-time”) Similarly, CDCR’s “66.6%” credit does NOT mean a person gets credit for 66.6% of days actually served. Rather, a person gets credit for 200% of days served (two-for-one) and the person ends up serving about 33.3% of the actual time imposed.

<sup>40</sup> 15 CCR 3043.2(a)(2).

<sup>41</sup> See Penal Code § 191.5(d); Penal Code § 217.1(b); Penal Code § 667.51(d) (after Jan. 1, 1987 and before Sept. 20, 2006); Penal Code § 667.7(a) (effective Jan. 1, 1987); Penal Code § 667.75; See also 70 Ops.Cal.Atty. Gen. 49, Opinion 86-1102 (Mar. 24, 1987).

<sup>42</sup> 15 CCR 3043.2(a)(5).

<sup>43</sup> Penal Code § 2933.05; former 15 CCR § 3043(c).



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sentences can earn Milestone Credits up to a maximum of 12 weeks of credit in a 12-month period; excess credits will be rolled over to the following year.<sup>44</sup>

Effective August 1, 2017, people including those with life sentences can earn “Rehabilitative Achievement Credits” for participation in self-help and volunteer public service activities. People can earn one week of Rehabilitation Achievement Credits for every 52 hours of participation, with a maximum of four weeks’ credit per year.<sup>45</sup>

People (including those with life sentences) can also earn “Education Merit Credit” earning high school diplomas, GEDs, or higher education degrees, or completing the Offender Mentor Certification Program available at several CDCR prisons. People in prison must earn at least 50 percent or more of the degree or diploma during their current term to receive Education Merit Credits. Those who earn GEDs or high school diplomas get 90 days of credit and people who earn other degrees or an Offender Mentor Certification get 180 days credit. These credits took effect in August 2017, but will be applied retroactively. Education Merit Credits also apply to people serving California sentences who are housed out-of-state, in federal prison, or in state hospitals.<sup>46</sup>

Information about challenging credit errors made by the CDCR is in §§ 8.41-8.42.

## FACTORS FOR DETERMINING PAROLE SUITABILITY

### 9.9 Statutory and Regulatory Parole Suitability Standards

The governing statute for determining whether a person shall be found suitable for parole states: “The Board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.”<sup>47</sup>

The BPH regulations similarly state that a person will be found unsuitable if the BPH finds they would “pose an unreasonable risk of danger to society if released from prison.”<sup>48</sup> A decision regarding parole suitability shall take into account all relevant and reliable information.<sup>49</sup> The BPH

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<sup>44</sup> 15 CCR 3043.3.

<sup>45</sup> 15 CCR § 3043.4.

<sup>46</sup> 15 CCR § 3043.5.

<sup>47</sup> Penal Code § 3041(b).

<sup>48</sup> 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a).

Note that BPH has separate series of regulations that apply to various groups of people with life sentences. 15 CCR §§ 2300-2329 (offenses committed before July 1, 1977); 15 CCR §§ 2280-2292 (offenses committed on or after July 1, 1977, except those covered by other regulations); 15 CCR §§ 2400-2411 (1st and 2nd degree murder committed on or after Jan. 1, 1978); 15 CCR §§ 2430-2439 (people with sex offenses sentenced under Penal Code § 667.51); 15 CCR §§ 2420-2429 (people listed as “habitual offenders” sentenced under Penal Code § 667.7); 15 CCR §§ 2400-2411 (attempted murder of a peace officer or firefighter committed on or after Jan. 1, 1987). Despite this confusing array of regulations, the standard for parole suitability and the factors considered are essentially the same for all groups.

<sup>49</sup> 15 CCR §§ 2281(b); 15 CCR § 2316; 15 CCR § 2402(b).

regulations also set forth factors that it must consider in determining whether a person is likely to pose a danger to society if released from prison.

**Factors that tend to indicate unsuitability for parole include:**

- ◆ The person committed the offense in an especially heinous, atrocious or cruel manner. Examples include attacking multiple victims, carrying out the offense in a dispassionate or calculated manner, demonstrating an exceptionally callous disregard for human suffering, or committing a crime for a motive that is inexplicable or very trivial in relation to the offense.
- ◆ The person has a previous record of violence.
- ◆ The person has a history of unstable or tumultuous relationships with others.
- ◆ The person has previously sexually assaulted someone in a manner to inflict unusual pain or fear.
- ◆ The person has a history of severe mental problems related to the offense.
- ◆ The person has committed serious misconduct in prison or jail.<sup>50</sup>

**Factors that tend to show suitability for parole include:**

- ◆ The person does not have a juvenile record of assault or crimes with the potential of causing personal harm to the victims.
- ◆ The person has a history of reasonably stable relationships with others.
- ◆ The person has demonstrated remorse and understanding of the magnitude of the offense.
- ◆ The person committed the crime as a result of significant life stress.
- ◆ The crime appears to be the result of victimization that caused the person to suffer from Intimate Partner Battering.
- ◆ The person lacks any significant history of violent crime.
- ◆ The person's current age reduces the probability of recidivism.
- ◆ The person has realistic plans for release or has developed job skills that can be put to use upon release.

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<sup>50</sup> 15 CCR § 2281(c); 15 CCR § 2402(c); 15 CCR § 2422(c); 15 CCR § 2432(c); see also *Menefield v. BPH* (2017) 13 Cal.App.5th 387 [220 Cal.Rptr.3d 442] (rejecting claims that regulations allowing BPH to consider “serious misconduct in prison or jail” were too unclear or vague). Note that a statute bars the BPH from using evidence of intimate partner battering to support a finding that the person lacks insight into the crime. Penal Code § 4801.

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- ◆ The person’s behavior in prison demonstrates an ability to comply with the laws upon release.<sup>51</sup>
- ◆ If the crime was committed before the person turned age 26, the BPH must consider the diminished culpability of youth, the hallmark features of youth, and any subsequent growth and increased maturity of the person.<sup>52</sup>

### 9.10 Court Cases on Parole Suitability Standards

The statutory language directing the BPH to “normally” grant parole does not require a parole grant in any case if the BPH determines that the person presents a risk to public safety.<sup>53</sup> In the 1990s and through 2010, the BPH very rarely granted parole, and even when the BPH found a person suitable for parole, the Governor usually reversed the decision. As of 2016, the BPH has been granting parole in about 30 percent of cases, and the Governor reverses about 13.5 percent of those grants.<sup>54</sup>

The BPH may deny parole based on public safety concerns arising from the commitment offense if it “reasonably believes” that the “particular circumstances” of the commitment offense indicate that the individual currently poses an unreasonable continuing risk to public safety. However, an offense must be “particularly egregious” to justify the denial of parole. A determination that a crime is “particularly egregious” requires the BPH to point to evidence that the violence or viciousness of the crime was “more than minimally necessary to convict him of the offense for which he is confined.”<sup>55</sup>

In 2008, the California Supreme Court placed further limits on the BPH’s and the Governor’s determinations as to parole suitability. The Court discarded as “unworkable” its previous decisions holding that a finding that the commitment crime was “particularly egregious” could be the sole justification for parole denial.<sup>56</sup> The nature of the commitment offense or other historical facts may be a basis for denying parole only if the BPH or the Governor can articulate a rational “nexus” (connection) between the offense or other past event and a finding of current dangerousness.<sup>57</sup> In deciding whether the person is a current danger to public safety, the BPH and the Governor must consider the whole record, including the current demeanor or mental state, whether the person shows

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<sup>51</sup> 15 CCR § 2000(b); 15 CCR § 2281(d); 15 CCR § 2402(d); 15 CCR § 2422. Intimate Partner Battering (sometimes called Battered Womens Syndrome or BWS) is “evidence of the effects of physical, emotional or mental abuse upon the beliefs, perceptions or behavior of domestic violence where it appears the criminal behavior was the result of that victimization.” In addition, in determining suitability for parole, the BPH must consider any evidence that the person experienced intimate partner battering at the time of the crime, and give great weight to such evidence, if the offense occurred prior to August 29, 1996. Penal Code § 4801; 15 CCR § 2830.

<sup>52</sup> Penal Code § 4801(c); *In re Perez* (2016) 7 Cal.App.5th 65, 92-97 [212 Cal.Rptr.3d 441]

<sup>53</sup> *In re Dannenberg* (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417].

<sup>54</sup> BPH, *Workload Summary for the Calendar Year 2016*; Young, Mukamal, and Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California’s Lifer Inmates* (2016) 28 Federal Sentencing Reporter 4, pp. 268-277.

<sup>55</sup> *In re Dannenberg* (2005) 34 Cal.4th 106, 1071, 1084, 1088, 1095 [23 Cal.Rptr.3d 417]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 683 [128 Cal.Rptr.2d 104].

<sup>56</sup> *In re Lawrence* (2008) 44 Cal.4th 1181, 1218-1221 [82 Cal.Rptr.3d 169], overruling in part *In re Rosenkrantz* (2002) 29 Cal.4th 616 [128 Cal.Rptr.2d 104] and *In re Dannenberg* (2005) 34 Cal.4th 1061 [23 Cal.Rptr.3d 417].

<sup>57</sup> *In re Lawrence* (2008) 44 Cal.4th 1181, 1212, 1226-1227 [82 Cal.Rptr.3d 169].

remorse, the efforts toward rehabilitation, and the behavior while incarcerated. In one case, the California Supreme Court found there was no such nexus, overturning the BPH's finding of current dangerousness.<sup>58</sup> In a companion case, the Court found there was such a nexus due to the continued "lack of insight" into the abusiveness that preceded and resulted in the crime, upholding the Governor's decision that the person remained a threat to public safety.<sup>59</sup>

Parole may not be denied based solely on a refusal to admit guilt, absent a showing that the person poses a current risk of danger to public safety. Refusal to admit guilt, without more, cannot support a conclusion that a person lacks insight into the crime, lacks remorse, or has failed to take responsibility; an "implausible" denial of guilt, however, may support a finding of current dangerousness if it is factually unsupported or otherwise lacking in credibility.<sup>60</sup>

## PAROLE SUITABILITY HEARING PROCEDURES

### 9.11 Consultation Hearings

During the sixth year before the person's MEPD, month after a life term starts, a BPH commissioner or deputy commissioner must meet with the person to review their activities and behavior in prison and make recommendations regarding their programming. This is called a "consultation hearing."<sup>61</sup>

### 9.12 Scheduling the Initial Suitability Hearing

A person's first parole consideration or "suitability hearing" must be held one year before the Minimum Eligible Parole Date (MEPD).<sup>62</sup> Special rules allow earlier suitability hearings for some people who were convicted of crimes they committed as juveniles or young adults, are elderly, or are medically incapacitated (see §§ 9.40-9.43 respectively).

The following sections set forth the procedures for BPH parole suitability hearings.<sup>63</sup> The rules regarding initial suitability hearing are generally the same as those for subsequent hearings.

<sup>58</sup> *In re Lawrence* (2008) 44 Cal.4th 1181, 1212, 1228 [82 Cal.Rptr.3d 169].

<sup>59</sup> *In re Shaputis* (2008) 44 Cal.4th 1241 [82 Cal.Rptr.3d 213].

<sup>60</sup> Penal Code § 5011(b); 15 CCR § 2236; *In re Perez* (2016) 7 Cal.App.5th 65, 87-88 [212 Cal.Rptr.3d 441]; *In re Swanigan* (2015) 240 Cal.App.4th 1 [192 Cal.Rptr.3d 172]; *In re Jackson* (2011) 193 Cal.App.4th 1376, 1388, 1391 [123 Cal.Rptr.3d 486]; *In re McDonald* (2010) 189 Cal.App.4th 1008 [118 Cal.Rptr.3d 145]; *In re Shaputis* (2011) 53 Cal.4th 192, 216 [134 Cal.Rptr.3d 86].

<sup>61</sup> Penal Code § 3041(a).

<sup>62</sup> Penal Code § 3041(a). The BPH sometimes fails to provide timely hearings; during one period in which the BPH accumulated a large backlog of overdue hearings, a court intervened to force the BPH to eliminate the backlog. *In re Lugo (Rutherford)* (Marin Superior Ct. Aug. 8, 2011) No. SC135399A, Order (dismissing case after BPH eliminated backlog).

<sup>63</sup> Information about hearing procedures and timelines is available on the BPH website, [www.cdcr.ca.gov/BOPH/](http://www.cdcr.ca.gov/BOPH/).

### 9.13 Psychological Evaluation and Risk Assessment

Prior to most parole hearings, in the months leading up to the scheduled hearing date, a psychologist employed by the BPH's Forensic Assessment Division (FAD) will conduct a psychological evaluation of the person, known as a Comprehensive Risk Assessment (CRA). Upon interviewing the person and reviewing their records, the FAD psychologist will prepare a written report discussing the social history and family background, prior juvenile and adult criminal record, mental health and substance abuse history, disciplinary and programming record in prison, and any documented parole plans. The psychologist will also report on the person's demeanor and attitude toward the commitment offense and other pertinent events, and will assess whether the person meets DSM-5 criteria for any personality or mental disorders. Perhaps most importantly, the psychologist will evaluate the person's potential to commit future violent crimes, assessing whether the release would pose a "low," "moderate," or "high" risk of violence relative to other people with life sentences. The psychologist's conclusion regarding a risk of future violence is supposed to be based on the application of formal tools such as the HCR-20 Version 3 and PCL-R (and, in cases involving a sex offense, the Static-99 as well).

The BPH is supposed to train commissioners about how to use the CRA reports, although commissioners are authorized to give these reports as much or as little weight as they deem fit (and in some rare cases may opt to disregard the report entirely). The CRA report used at a person's suitability hearing can be no more than three years old.<sup>64</sup>

A person scheduled for a parole hearing should receive a copy of the CRA report at least 60 days before the scheduled parole hearing for which the evaluation was conducted, and their attorney of record should also receive a copy of the report. Upon receiving the CRA report, the person and their attorney should promptly review it to identify any factual errors. In order to request that the BPH correct these errors before the scheduled hearing, the person or their attorney should submit a written objection to the BPH Chief Counsel no less than 30 calendar days before the hearing, clearly marked: "Attention: BPH Chief Counsel/Risk Assessment Objection." After submitting a timely objection, the person or their attorney should receive a written response from the BPH no less than 10 days before the hearing. If an objection to a factual error in a CRA is untimely, the Chief Counsel may instead refer the objection to the hearing panel.<sup>65</sup>

A person has a right to decline to participate in a CRA interview. However, the BPH may then rely on older psychological evaluations and use the lack of participation against the person in evaluating suitability for parole.<sup>66</sup>

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<sup>64</sup> 15 CCR § 2240; *Johnson v. Shaffer* (E.D. Cal. Sept. 10, 2015) No 2:12-CV-1059 Stipulated Settlement.

<sup>65</sup> 15 CCR § 2240(e)-(i). As of late 2017 the definition of a "factual error" to which people in prison and their attorneys can object, and which the BPH must correct, is disputed. Also in dispute are the deadlines for people in prison and attorneys to file objections regarding factual errors prior to a scheduled parole hearing, and for the BPH to respond in writing to such objections. See *Johnson v. Shaffer* (E.D. Cal. Oct. 6, 2017) No 2:12-CV-1059, Order.

<sup>66</sup> *In re Shaputis* (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86]; *In re Mims* (2012) 203 Cal.App.4th 478 [137 Cal.Rptr.3d 682].

## 9.14 Notice of the Hearing Date and Documents to Be Considered

The BPH should give a person at least 60 days' advance notice of a scheduled parole suitability hearing, to allow them adequate time to prepare for the hearing.<sup>67</sup> The BPH posts its parole hearing schedule for the next six months on its website.<sup>68</sup>

The BPH will also provide the person with a BPH Form 1003 Hearing Rights Form (included as Appendix 9-A). The person should submit this form to the prison's BPH Desk to indicate (1) whether they plan to attend their hearing, (2) whether they request a Board-appointed attorney or will hire their own attorney, (3) if hiring a private attorney, who that attorney is, (4) if not attending hearing, whether they want to waive or postpone the hearing. If the person submits the Form 1003 and then wants to change the information, they can file another Form 1003.

The person's attorney should receive access to the Master BPH Packet (discussed in § 9.19) at least 60 days prior to the scheduled hearing date. The "Master Packet" – formerly called the Board Packet – contains the key documents from the person's Central File that the BPH panel will consider at the suitability hearing. These documents should also be made available to the district attorney's representative from the county where the person was convicted. The Master Packet is compiled and distributed by the prison's BPH Desk, sometimes called the Lifer Desk, which coordinates all parole suitability hearings at that prison.

Often, new information develops after the Master Packet has been finalized and distributed by the BPH Desk. This new information is typically put together in a follow-up packet, called the "Ten-Day Packet," that the BPH Desk must distribute to the hearing panel, the person's attorney, and the D.A.'s representative at least ten days before the scheduled hearing (see § 9.19).

Upon receiving access to the Master Packet, the person and/or their attorney should determine whether any important documents are missing, and should promptly contact the BPH Desk to ensure that the missing documents (if any) will be included in the Ten-Day Packet.

Any person in prison has a right to review all non-confidential materials in their Central File that will be available to the BPH hearing panel; they can exercise this right by sending an "*Olson* review" request to their correctional counselor.<sup>69</sup>

More specifically, under what is sometimes called the "ten-day rule," the person has the right to review all documents that the BPH hearing panel will consider (including written statements from the prosecutor, police, or victims) no later than ten days prior to the hearing.<sup>70</sup> If documents are placed in the person's file after the ten-day cut-off date or are produced for the first time at the hearing, the person or their attorney can object to the documents and ask that the panel either not consider the documents or postpone the hearing. The person or their attorney can argue that they did not receive proper notice, and that the chances of being found suitable for will be prejudiced (harmed) if the hearing goes forward and the documents are considered. Note: it may be difficult to show prejudice if the late-arriving material is essentially the same as other material already in the file (for example, a

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<sup>67</sup> 15 CCR § 2246.

<sup>68</sup> [www.cdcr.ca.gov/BOPH/Proceedings\\_Schedules.html](http://www.cdcr.ca.gov/BOPH/Proceedings_Schedules.html).

<sup>69</sup> DOM §§ 13030.16-13030.16.3; *In re Olson* (1974) 37 Cal.App.3d 783 [112 Cal.Rptr. 579].

<sup>70</sup> Penal Code § 3041.5(a)(1).



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late-arriving letter from the prosecutor may be similar to letters the prosecutor submitted at prior hearings). Sometimes, the hearing panel may take a recess in order to permit the person and their attorney to review a new document before proceeding.

### 9.15 Waiving the Hearing or Stipulating to Unsuitability

A person who is certain that parole will be denied due to recent misconduct, lack of preparation, lack of access to self-help programs, or some other reason, and who does not want to go through with a scheduled parole suitability hearing, may voluntarily waive the right to that hearing or may stipulate to unsuitability. Waiving the hearing is usually the wisest option because a waiver does not require a person to stipulate (admit) to being unsuitable for parole. In contrast, a person who stipulates to unsuitability is admitting that they pose a current danger to public safety.

To voluntarily waive a hearing, a person must submit a written waiver request stating the reason for the request. The person may choose to waive the parole consideration hearing for 1, 2, 3, 4, or 5 years. The request should be submitted to the BPH no later than 45 calendar days before the scheduled hearing date; however, the BPH can grant a late request if the person shows good cause why the request was not submitted on time. A person may waive no more than three consecutive hearings.<sup>71</sup>

There is also the option of entering a stipulation to unsuitability, but people should beware that it is almost always a disadvantage to stipulate to unsuitability, even if the person is sure that the BPH panel would not grant parole at the time. Nonetheless, a person may offer to stipulate to unsuitability for 3, 5, 7, 10, or 15 years from the date of the scheduled hearing. The offer must be submitted to the BPH in writing, and should give the reasons why the person is stipulating to unsuitability. The offer may be submitted at any time prior to the hearing. The BPH has discretion to accept or deny the stipulation offer.<sup>72</sup>

If a person offers to waive the hearing or stipulate to unsuitability during the week of the scheduled hearing, the case will still go before a BPH panel and the district attorney and the victim or victim's representatives will still have the opportunity to give statements which will be considered by the BPH panel at future hearings.<sup>73</sup>

Any BPH hearing that is held to consider a waiver or stipulation request will be recorded, just like a regular parole suitability hearing.

### 9.16 Postponing or Continuing the Hearing

A hearing may be postponed to a later date either by the BPH or by the person scheduled for a hearing. The BPH may postpone a hearing for various reasons – for example, because no commissioners are available; because timely notice of the hearing has not been given to all necessary parties; because documents are missing or were not timely produced; because the person had not been

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<sup>71</sup> 15 CCR § 2253(b).

<sup>72</sup> 15 CCR § 2253(c).

<sup>73</sup> 15 CCR § 2253(b)(4), (c)(2).

provided with appropriate disability accommodations; or because of unexpected circumstances such as the illness of an attending party, a natural disaster, or a prison emergency.

A person in prison may request postponement for the same reasons, or simply for the reason that they need more time to prepare or to hire an attorney. The postponement request should be submitted no less than 45 calendar days prior to the scheduled hearing; the BPH can consider a request submitted after this deadline but will not postpone the hearing unless there is good cause why the postponement request was submitted late. In addition, a person may present other reasons that provide good cause to postpone the hearing. If the person is asking for a postponement to obtain additional documents or evidence, they must have made diligent efforts to obtain the essential documents or other material information or evidence in a timely fashion. The person must also show that they made the postponement request as soon as they knew or could have known about the need for postponement.<sup>74</sup>

When a hearing is postponed, the case will not be reheard until at least six months later, as the BPH will already have a schedule set for the next six months.

A continuance of a hearing to a later date may occur when a hearing has begun, but the proceedings cannot be completed due to reasons that were not known and could not reasonably have been known before the hearing began.<sup>75</sup> The party requesting the continuance must show good cause for not completing the hearing. If the hearing is continued, the district attorney, the victim and the victim's representatives will be allowed to give statements on the record before the hearing is continued, instead of when the hearing resumes.<sup>76</sup>

If a hearing is postponed or continued, the person's attorney should contact both the BPH Scheduling Analysts (BPHLiferAnalyst@cdcr.ca.gov) and the BPH headquarters in Sacramento to get the hearing back on the calendar as soon as possible, usually no later than six months after the original hearing. The BPH will try to reconvene the hearing before the same panel of commissioners. However, if those commissioners are not available, the BPH will start the whole hearing over in front of a new panel.

Any BPH hearing that is held to consider a postponement or continuance request will be recorded, just like a regular parole suitability hearing.

## **9.17 Right to Representation by an Attorney**

Every person has the right to be represented by an attorney at their suitability hearings. If the person has hired an attorney, they should state that information on their BPH Form 1003. It is necessary to do this to ensure the attorney gets timely access to all the person's files, and all hearing-related notices from BPH.

If the person cannot hire an attorney due to lack of funds, and the person fills out the section of the BPH Form 1003 to request an appointed attorney, then the BPH will appoint an attorney who

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<sup>74</sup> 15 CCR § 2253(b).

<sup>75</sup> 15 CCR § 2253(d).

<sup>76</sup> 15 CCR § 2253(e)(3).

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will be paid by the state. The attorney must be appointed at least 120 days before the hearing.<sup>77</sup> To qualify for appointment of an attorney, the person must either have less than \$1,500 in their prison trust account and any other bank accounts *or* be able to show that they are unable to hire an attorney for \$1,500.<sup>78</sup>

Unfortunately, BPH-appointed parole hearing attorneys are paid a very low rate of \$550 per hearing, which is supposed to cover preparation, visits, and travel.<sup>79</sup> Also, the BPH typically appoints one attorney to represent many (if not all) of the people who have hearings scheduled during a given week at a CDCR institution. This arrangement means that the attorney's ability to prepare thoroughly for each hearing will be limited.

At the very minimum, the attorney must review the Master BPH Packet (see § 9.19) and interview the person more than 45 days prior to the hearing. The attorney should inform the person of their rights regarding the parole hearing, discuss the pros and cons of going to the hearing or choosing some other course of action, and provide an overview of the hearing format.

Usually, the attorney will also want to review the CDCR's full Central File on the person; the attorney should be sent an electronic copy of the Central File about 45 to 60 days prior to the hearing (§ 9.20). An attorney may also want to obtain other documents concerning the commitment offense(s) and prior history, as well as assist the person in developing parole plans and obtaining letters of support. In addition to meeting with the person at least a couple months before the hearing to go over the Master Packet and/or Central File, an attorney should also arrange to meet with the person on the day of the actual hearing – no later than an hour before the hearing's scheduled start time – to discuss any last-minute developments, questions, or concerns. Of course, the attorney should also be familiar with the statutes, regulations, and cases governing parole suitability.

### 9.18 Disability and Language Accommodations

The BPH must ensure that a person with a physical, mental, or developmental disability is provided any accommodations that are required under the Americans with Disabilities Act (ADA).<sup>80</sup> Accommodations may be required both for hearing preparation and at the hearing itself. Examples of accommodations include Braille or reading assistance for a person with vision impairments, assistance in communicating for a person with developmentally disabilities, sign language interpretation for a person with hearing impairments, or an accessible hearing room for a person who has mobility impairments.

When a person is notified that a parole hearing has been scheduled, the correctional counselor should provide the person with BPH Form 1073 to request disability accommodations for the BPH proceedings. If the person requests a disability accommodation for the hearing, the correctional

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<sup>77</sup> Penal Code § 3041.7; 15 CCR § 2256.

<sup>78</sup> 15 CCR § 2256(c).

<sup>79</sup> See [www.cdcr.ca.gov/BOPH/docs/Attorney\\_Orientation/Panel\\_Attorney\\_Program\\_Guide.pdf](http://www.cdcr.ca.gov/BOPH/docs/Attorney_Orientation/Panel_Attorney_Program_Guide.pdf)

<sup>80</sup> *Armstrong v. Davis* (N.D. Cal. Aug. 4, 2000) No. C94-2307, Stipulation and Order Approving Defendant's Policies and Procedures, VIII.A; 15 CCR § 2251.5(a).

counselor should submit the form to the BPH's ADA Unit Coordinator.<sup>81</sup> If the BPH denies the request for accommodation, the person can appeal the issue prior to the hearing by filing a BPH Form 1074.<sup>82</sup> Copies of BPH Forms 1073 and 1074 are attached as Appendices 1-J and 1-K. Further information about rights for people with disabilities can be found in § 2.29. More information about BPH disability-related administrative appeals can be found in § 1.38.

At the start of any parole hearing, the presiding BPH commissioner will inquire about any disability needs, and may ask the person to verify that any needs have been accommodated. The person's attorney should advise the BPH panel of any specific accommodations needed and whether such accommodations have been provided. In many cases, the BPH panel will appoint the attorney to provide the accommodation.

The BPH also makes some language-related accommodations for people who are not fluent in written or spoken English. Although the BPH will not translate documents into other languages, a person can use the BPH Form 1073 to request assistance with reading and understanding their documents before the hearing, as well as in-person interpreter services at the hearing itself. In addition, the attorney can request access to the BPH's telephone interpreter service when scheduling legal visits.

## 9.19 The Master Packet and Ten-Day Packet

In the months leading up to a scheduled hearing, the BPH Desk (sometimes called the Lifer Desk) at the prison will compile a Master Packet. Formerly known as the Board Packet, the Master Packet contains the main documents from the person's Central File that the BPH commissioners will consider at the suitability hearing. Roughly 65 days before the hearing date, the Master Packet is made available to the attorney and to the district attorney representing the county in which the person was convicted.

Although the Master Packet generally contains documents that the CDCR staff believe most relevant to the hearing process, people in prison and their attorneys should never assume it contains *all* the necessary documents. The person or their attorney should obtain any other relevant documents from the central file (see § 9.20), from other agencies, or from the person's family and friends, so that those documents can be presented to the hearing panel.

### **The Master Packet typically includes the following materials:**

- ◆ The Checklist is a cover sheet with an itemized list of all the documents in the packet.
- ◆ The Case Summary contains a Legal Status Summary showing a chronological history of every transfer or major classification change since the person has been incarcerated in CDCR. The summary will also show any changes in the MEPD and the date and outcome of any previous parole hearings. Also included here is the Probation Officer's Report (POR), which the hearing panel typically treats as a definitive factual account of the commitment offense, and police/arrest reports related to the commitment offense or

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<sup>81</sup> *Armstrong v. Davis* (N.D. Cal. Aug. 4, 2000) No. C94-2307, Stipulation and Order Approving Defendant's Policies and Procedures, VIII.A.

<sup>82</sup> 15 CCR §§ 2251.5(b)-2215.7.

other incidents. This section may include statements made by witnesses or co-defendants, and/or the person’s confession or denials of responsibility.

- ◆ The Legal section includes further official documents concerning the person’s criminal history and commitment offense. The abstract of judgment showing the sentence will be in this section, as will any appellate court decision reviewing the conviction, which contains a statement of facts that the panel may also treat as a definitive account. Sometimes a sentencing transcript will also be included here.
- ◆ The Classification section contains a Classification Chrono (CDCR Form 128G) documenting the person’s most recent annual classification review. It may also contain Confidential Information Disclosures (CDCR Form 1030s) summarizing the nature of any confidential materials that have been added to the person’s file.
- ◆ The Disciplinary section includes any Rule Violation Reports (115s) the person has incurred for serious misconduct in prison. Sometimes it also includes Custodial Counseling Chronos (128As), which are issued for less serious forms of misconduct.
- ◆ General Chronos include recent laudatory chronos documenting participation in self-help programs, educational programs, work assignments, or other positive activities. Some laudatory chronos may document the positive impressions of CDCR staff regarding the person’s character or behavior. The Master Packet typically includes in this section only chronos earned since the most recent prior parole hearing, if any.
- ◆ The Miscellaneous section usually includes certificates earned for vocational training, educational milestones, self-help participation, and contributions to charity. The Master Packet typically includes a large array of certificates earned throughout the entire span of the person’s incarceration in CDCR.
- ◆ The BPH (Board of Parole Hearings) section includes various administrative BPH documents regarding the receipt of official notice for the hearing, the person’s opportunity to review the central file, any disabilities requiring accommodation, and other miscellaneous decisions by the BPH.

Importantly, this section contains the most recent prior *parole suitability hearing transcript* in its entirety, the *Decision Face Sheet* from that hearing, and any *Comprehensive Risk Assessments* (as described in § 9.13) that have been prepared since 2009. If the most recent parole hearing resulted in a suitability finding that the Governor reversed, the *Governor’s reversal decision* will be here, too. (To obtain older parole hearing transcripts not included in the Master Packet, attorneys should contact the BPH Transcripts Team via email at [BPHSuitabilityHearingTrans@cdcr.ca.gov](mailto:BPHSuitabilityHearingTrans@cdcr.ca.gov). Complete instructions are posted at [www.cdcr.ca.gov/BOPH/psh\\_transcript.html](http://www.cdcr.ca.gov/BOPH/psh_transcript.html).)

This section may contain older *Life Prisoner Progress Reports (BPH 1004)*, summaries of a person’s behavior prepared by correctional counselors. These reports are no longer generated for parole hearings, and the old ones usually carry little weight – in part because they are often incomplete, and in part because panels are more likely to turn to the most recent CRA for a summary of institutional behavior.

Also included here are copies of *required notices* the BPH has sent to certain parties with an immediate interest in the commitment offense – the victim’s family, prosecutor, police, defense attorney, and sentencing judge – letting them know of the upcoming hearing and inviting them to provide input.<sup>83</sup> Any *written responses* submitted by these parties are also included in this section. The attorney should receive copies of any responses submitted by prosecutors, judges, or police and share them with their client.<sup>84</sup>

Finally, this section should contain any letters of support for parole that the BPH has received from the person’s family, friends, and acquaintances – and from anyone else offering housing, employment, or other resources and services upon release. If any support letters are missing from the Master Packet, the person or their attorney should send copies to the prison’s BPH Desk and the BPH Scheduling Analysts, and also bring the letters to the hearing.

- ◆ The Confidential section sometimes includes a CDCR Form 810 that catalogs documents contained in the confidential portion of a person’s file (if there are any). The Form 810 should provide a log of every confidential document ever placed in the file, indicating the type of document it is, the date it was placed in the file, and the reason it is deemed confidential. For safety and security reasons, these confidential documents are not provided to the person or their attorney, but the BPH can still consider them.<sup>85</sup> Documents classified as confidential typically involve a person’s co-defendants, gang affiliations, in-prison misconduct, or similarly sensitive matters.

BPH commissioners do not always know about the Form 810, and this form is not always properly included in the Master Packet, so attorneys should inquire about whether all pertinent confidential information has been identified. Since the information that people in prison receive is so limited, they will have to try to remember what was going on around the time the document was added to their file in order to figure out how to address the information.

About ten days before the scheduled hearing date, the BPH Lifer Desk will distribute a Ten-Day Packet to the person’s attorney, the district attorney, and the hearing panel. The Ten-Day Packet is basically an update to the Master Packet and is typically much less voluminous. Usually, this packet contains any new chronos, disciplinary reports, and letters of support or opposition that have been added to the file since the Master Packet was distributed. If any confidential information has been newly added to the file, the Ten-Day Packet may also include a CDCR memorandum summarizing that information in generic terms.

In the months leading up to the hearing, the person should work with a correctional counselor to ensure that important supporting documents – such as letters of support, parole plans, and new chronos or certificates – are timely added to the central file so that the BPH Desk will include them in the Master Packet. However, since the BPH Desk is likely to overlook some supporting documents when compiling the Master Packet, the person and their attorney should plan to send whatever is

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<sup>83</sup> Penal Code §§ 3041.7-3043(a); 15 CCR § 2029.

<sup>84</sup> 15 CCR § 2030(c).

<sup>85</sup> At the beginning of the parole hearing, the BPH panel members should inform the person whether any of the confidential information might be considered. 15 CCR § 2235.



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missing from the Master Packet to the BPH Desk about two full weeks before the hearing, so that they will be included in the Ten-Day Packet. Furthermore, since the process of compiling the Ten-Day Packet is also subject to errors, the person and their attorney should also bring extra copies of all supporting documents to the hearing.

### 9.20 Reviewing Central File Documents

The BPH hearing panel members, the attorney, and the district attorney have access to the person's entire Central File before and during the hearing. The Central File contains much more extensive information regarding the sentencing and prison programming and behavior than the materials in the Master Packet (and Ten-Day Packet). Therefore, the person's attorney should review the Central File to find all possible material that could show that the person is suitable for parole. Because the hearing panel may not otherwise be aware of information that is in the Central File, the attorney should introduce and discuss all beneficial documents in the written hearing memorandum (discussed in § 9.22) and at the hearing. The attorney should also object to the consideration of any information that prison staff have deemed unreliable.

The person in prison has the right to review their Central File at least 10 days prior to the hearing.<sup>86</sup> Also, an electronic version of the Central File is typically made available to the person's attorney about 60 days prior to the hearing, along with the Master Packet, through a secure online system called Watchdox. However, it may be preferable for the attorney and client to review the file at the prison several months before the scheduled hearing. This will provide more time for the attorney to prepare for the hearing, and to obtain additional beneficial documents from other sources as needed.

The person should arrange with their correctional counselor to review the Central File, and the attorney should make arrangements by contacting the prison's BPH Desk. For the attorney, one possible benefit of reviewing the Central File together with the client is that the client can provide clarifying comments on documents, and may also know if beneficial documents are missing or if damaging documents that should have been removed. However, if a joint Central File review is not permitted, the attorney should first meet with the person to determine which portions of the file merit the most attention. It may also be helpful for the attorney to do a follow-up interview with the client after reviewing the file. The attorney is entitled to review and receive copies of any materials in the Central File, except materials specifically withheld as confidential.<sup>87</sup>

A list showing the documents that usually are in the Central File and how those documents are supposed to be organized can be found in Appendix 19-B. Documents in the Central File that may be relevant to the parole hearing include:

- ◆ Documents regarding the commitment offense, such as the criminal information or indictment, transcripts of plea and/or sentencing hearings, the probation officer's pre-

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<sup>86</sup> 15 CCR § 2247; see also *In re Olson* (1974) 37 Cal.App.3d 783 [112 Cal.Rptr. 579]; DOM § 13030.22.

<sup>87</sup> If there is any reason to believe that the confidential materials may not be useful or relevant at the parole hearing, the person or attorney may ask a judge to review the documents "*in camera*" to determine whether the state has improperly deemed any of the documents to be confidential or reliable. (See § 5.7 regarding further rules as to confidential documents.)

sentence report, police and arrest reports, and any correspondence or statements from defense counsel, the judge, the prosecutor or other parties pertaining to the case.

- ◆ Chronos or other memoranda written by custodial, educational, psychological and vocational staff. Particularly helpful are recent laudatory chronos documenting good work or school performance or other positive programming efforts.
- ◆ Rule Violation Reports and counseling chronos documenting disciplinary incidents or other misconduct. The attorney and client will want to be prepared to address these reports at the hearing.
- ◆ Classification chronos regarding positive or negative changes in security level, and related placement and programming matters such as segregation housing, gang validation, protective needs, psychiatric needs, or other management problems.
- ◆ Comprehensive Risk Assessments and older psychological evaluations assessing the person's mental state, rehabilitative progress, and estimated risk of violence.
- ◆ Decision pages and face sheets from prior parole suitability hearings (if any), as well as any administrative decisions by the BPH and/or reversal decisions by the Governor.
- ◆ Administrative appeal forms (CDCR Form 602, CDCR Form 602-HC, or CDCR Form 1824) filed by the person, including documents attached to the appeals as evidence, and any institutional responses.

## **9.21 Gathering Other Documents and Statements**

The person's attorney should work with their client to create parole plans and get letters of support from family, friends, or organizations to confirm the plans. It is important that all letters of support include the person's full name and CDCR number, the date, and the writer's contact information and signature. In some cases, it can also be helpful to gather statements providing favorable information on any part of the person's prior social history, commitment offense, other criminal history, prison behavior, continued support in the community, or parole plans.

Written statements and other supporting documents should be submitted to the BPH in advance – ideally, at least two full weeks before the scheduled hearing, so that they will be included in the Ten-Day Packet (as described in § 9.19). If this is not possible, the attorney may submit these documents at the hearing. Note that the Board has imposed a 20-page limit on new documents presented at the hearing, although that limit does not apply to letters of support.

## **9.22 Written Hearing Memorandum**

A person's attorney usually is not permitted to make an opening statement at the hearing. However, the attorney can submit a written hearing memorandum. The attorney should email an electronic copy to the prison's BPH Desk and the BPH Lifer Scheduling Analysts as soon as possible and bring three copies to the hearing. The ten-day rule for presentation of documents to be considered at the hearing does not apply to the person whose hearing it is (although some commissioners may incorrectly apply it to people in prison), and the memorandum can even be presented for the first time

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at the hearing.<sup>88</sup> However, the BPH commissioners are more likely to give the memorandum greater consideration if they receive it well in advance.

A suggested format is to start with an introduction presenting the person's strongest points and an overall theme, followed by sections that address specific suitability and unsuitability factors. If the person has had prior suitability hearings, the attorney should address the reasons for the denials at those hearings and state what the person has done to address the prior hearing panels' concerns or recommendations. In some cases, it may be useful to summarize briefly any testimony to be presented at the hearing or any additional documents the person wishes the panel to consider. Copies of any additional documents should be attached to the memorandum.

The hearing memorandum can briefly set forth governing case law and statutes, but legal arguments should not be the focus. Most BPH commissioners are not lawyers, and many will be confused or alienated by too much legal jargon. Instead, the memorandum should present the facts that may lay the groundwork for raising legal arguments in a later court challenge to a denial of parole.

### 9.23 The Suitability Hearing: An Overview

When there is a backlog of overdue parole hearings, the BPH is allowed to conduct hearings with two-person panels; one panel member must be a commissioner and the other may be a deputy commissioner. If there is no backlog, the BPH is supposed to use three-person panels, with two commissioners and one deputy commissioner.<sup>89</sup> If it is feasible, the hearing panel is supposed to include at least one member of the panel from the person's prior hearing.<sup>90</sup> To comport with due process, the panel must be "free from bias and prejudice" on an individual basis.<sup>91</sup>

The person has a right to appear in person at the parole suitability hearing; appearance via telephone does not satisfy this right, even if the person is housed out-of-state.<sup>92</sup>

It is typical for a representative from the district attorney's office to appear at the hearing. The victim, victim's next-of-kin, and two members of the victim's immediate family or two representatives may choose to provide input – by attending in person; by submitting a statement via audio-tape, writing, or videotape; or by counsel. In addition to the victim of the life-term offense, the victims (or victims' family members or representatives) of any other felony for which the person has been convicted may appear at the hearing. In addition, a victim, victim's next-of-kin, or immediate family member may also bring one other person to the hearing for support.<sup>93</sup>

Most of the discussion during the hearing will be based on information in the Master Packet and Ten-Day Packet. The panel members will typically recite information and ask questions

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<sup>88</sup> 15 CCR § 2249.

<sup>89</sup> Penal Code § 3041(d).

<sup>90</sup> Penal Code § 3041(a).

<sup>91</sup> *In re Minnis* (1972) 7 Cal.3d 639, 649 [102 Cal.Rptr. 749]; *O'Bremski v. Maass* (9th Cir. 1990) 915 F.2d 418, 422; *Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781, 790-791 [171 Cal.Rptr. 590]; see also 15 CCR § 2250; *Hornung v. Superior Court (San Diego)* (2000) 81 Cal.App.4th 1095 [97 Cal.Rptr.2d 382].

<sup>92</sup> Penal Code § 2911(e); *In re J.G.* (2008) 159 Cal.App.4th 1056, 1065-1068 [72 Cal.Rptr.3d 42].

<sup>93</sup> Penal Code §§ 3043-3043.3.

concerning the commitment offense, prior social history and family background, any prior juvenile or criminal record, conduct in prison, Comprehensive Risk Assessments (psychological evaluations), and plans for release. If the hearing is not the initial suitability hearing, the panel will focus on new information that has developed since the most recent hearing.

The person should be given an opportunity to raise any facts the panel fails to mention; for example, there may be certain letters of support or vocational certificates that the panel misses, and the person and their attorney should be prepared to bring the overlooked items to the panel's attention. In addition, the person and their attorney should be familiar with what was discussed at prior hearings (especially the most recent hearing), because the panel may search prior hearing transcripts to find statements that are inconsistent with current information or statements.

Once the panel has finished its discussion and questions, the district attorney's representative will be allowed to make a statement and propose clarifying questions for the BPH panel to ask the person. The district attorney's questions may also lead the panel to ask questions of their own.

The person has a due process right to present evidence at the hearing.<sup>94</sup> After any presentation by the district attorney, the person's attorney will be allowed to ask clarifying questions for the person to answer. This provides an opportunity to discuss any important issues that have not yet been discussed, to clarify points of confusion, and to address issues the panel seems to have concerns about.

After clarifying questions, the district attorney, attorney, and person in prison will be allowed to make closing statements, in that order. If any victims or victims' next-of-kin are present, they too will have the opportunity to make statements. The hearing panel will then deliberate in private, and then will finally state its decision before all the parties who participated in the hearing.

Note that the rules of evidence for criminal and civil proceedings do not apply to parole hearings. There are no restrictions on the materials that the panel may consider, so long as the information is "relevant and reliable."<sup>95</sup> The panel can even consider and rely on hearsay, although hearsay evidence alone is insufficient to justify a decision in an administrative hearing governed by the state Administrative Procedures Act.<sup>96</sup> The person should use any available beneficial hearsay evidence and attack the reliability of any damaging hearsay statements.

## 9.24 Suitability Hearing Discussion: Prior Criminal and Social History

Although practices vary somewhat among commissioners, the hearing panel often starts by discussing the person's social and criminal history prior to the commitment offense – commonly called "pre-conviction factors." Although this information can be found in various documents, including the probation officer's report and prior hearing transcripts, hearing panels have increasingly relied heavily on the summaries presented in the most recent Comprehensive Risk Assessment (psychological evaluation). The person and their attorney should be prepared to correct or rebut any inaccurate or particularly damaging statements about the person's prior history, keeping in mind the BPH

<sup>94</sup> *Pedro v. Oregon Parole Board* (9th Cir. 1987) 825 F.2d 1396, 1399.

<sup>95</sup> 15 CCR § 2281; 15 CCR § 2316; 15 CCR § 2402; 15 CCR §§ 2422-2432.

<sup>96</sup> Government Code § 11513.

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regulations on factors related to criminal or social history that tend to show suitability or unsuitability, set forth in § 9.9.

### **9.25 Suitability Hearing Discussion: The Commitment Offense**

Following discussion of the pre-conviction factors, the panel typically moves next to the commitment offense or “life crime.” With extremely few exceptions, the facts of the crime will almost always carry great weight with the hearing panel. The person should be prepared to describe the details of the crime and surrounding circumstances, explain the contributing factors that led to the crime (including “internal” factors related to the person’s motives and personality), and answer questions about any discrepancies between the person’s current account and what appears in the record.

The California Supreme Court has decided that the BPH is no longer required to apply its matrices to calculate a person’s base term for the initial parole hearing, and base terms no longer play a defined role in determining anyone’s release date.<sup>97</sup>

Usually, prior to discussing the crime, the panel will announce that it is adopting the statement of facts from the probation officer’s report, the appellate decision in the case, and/or the most recent Comprehensive Risk Assessment (psychological evaluation). If there was a trial, the panel will assume that the facts found by the jury or judge are true. If the conviction was by a guilty or no contest plea, the person’s attorney should make sure that the panel does not rely on purported facts that were not admitted in the plea.

Because the facts of the crime carry so much weight with the panel, it is important to correct any misrepresentations about the crime that may show up in the file, and to clear up any related misunderstandings that may arise during the hearing itself. The person’s attorney should be prepared to rebut misleading or unsupported allegations about the crime and to present alternative sources for the statement of facts. Alternative sources could include prior CRAs or psychological evaluations, prior parole hearing transcripts, trial or plea hearing transcripts, or the sentencing hearing transcript. Additional documents might include statements of the trial attorney, judge, prosecutor, co-defendant, eyewitnesses, or the person’s family members.

It is also important for the person and their attorney to highlight any aspects of the person’s background, or any circumstances surrounding the crime, that will allow the panel to gain a complete sense of why the crime occurred. This is particularly true regarding aspects of a person’s motives that are not obvious in the official record. In many cases, for example, the actual motives may have differed from those suggested by the prosecutor at trial.

In discussing the crime, the person and their attorney should keep in mind the BPH regulations on factors related to the commitment offense that tend to show suitability or unsuitability, set forth in § 9.9.

### **9.26 Suitability Hearing Discussion: Prison Behavior and Programming**

Generally, after discussing the commitment offense, the hearing panel moves on to “post-conviction factors,” starting with the person’s behavior and programming in prison. The BPH

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<sup>97</sup> *In re Butler* (2018) 4 Cal.5th 728 [230 Cal.Rptr.3d 736].

regulations set forth factors related to prison behavior that tend to show suitability or unsuitability (§ 9.9).

A person should be prepared to show how they have taken advantage of every opportunity to be involved in education, vocations, job assignments, charitable activities, and self-help programs. A person who has actively participated and performed well in such activities will be a much stronger candidate for parole than one who has not. However, beyond simply providing documentation of such activities, especially self-help programs, a person should be prepared to describe which activities they have found most beneficial, and what they have gained from them. For example, a person who has participated in 12-step meetings will probably be asked to verify understanding of those programs by discussing how they apply some of the 12 steps. In addition, any person who has a history of substance abuse will be expected to prepare and discuss a personalized “relapse prevention plan” detailing their triggers to substance abuse and how they plan to respond. If a person has had very good in-prison behavior, the attorney should emphasize that fact, especially if the person was young at the time of their offense and has matured over time.

On the other hand, if a person has a record of disciplinary violations, poor performance in work or school, or refusal to participate in self-help programs, the panel will look unfavorably on such behavior, and the person and their attorney will have some explaining to do. The person should be prepared to accept responsibility and express remorse for all past misconduct, and to explain why and how they have made a turnaround since the last documented behavioral issue. The person may also want to present a statement explaining their most recent rule violation and what they have learned or changed since then (although it is much more important that the person be prepared to answer questions about these matters in person). The person’s attorney, in turn, should do their best to explain why such behavior problems do not show that the person is currently dangerous. If the disciplinary violations are mostly in the distant past, and/or entirely non-violent, it is helpful for the attorney to highlight such facts.

The attorney should also be ready to intervene if the panel imposes any programming recommendations or expectations that are impossible or unnecessary for the person to fulfill. For example, if a person is unable to participate in certain programs due to a disability, the panel should not hold that against the person.<sup>98</sup> In addition, while the panel can request completion of some form of substance abuse programming, which may include self-study readings and book reports, it is improper to require participation specifically in programs based on religious principles, such as Alcoholics Anonymous and Narcotics Anonymous.<sup>99</sup>

## 9.27 Suitability Hearing Discussion: Parole Plans

The hearing panel’s final area of discussion will be the parole plans. The panel will want to know whether the person has made realistic plans for post-release life and has developed marketable skills that can be put to use upon release.<sup>100</sup> The panel will want specific information about where the

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<sup>98</sup> *Armstrong v. Davis* (N.D. Cal. Aug. 4, 2000) No. C94-2307, Stipulation and Order Approving Defendant’s Policies and Procedures, VIII.C.

<sup>99</sup> *Turner v. Hickman* (E.D. Cal. 2004) 342 F.Supp.2d 887.

<sup>100</sup> *In re Andrade* (2006) 141 Cal.App.4th 807, 817-818 [46 Cal.Rptr.3d 317] (where it was highly probable that person with immigration hold would be deported to Mexico upon release, it was error for the BPH to deny parole because the person did not have parole plans in both Mexico and California).



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person will live, work, and – if relevant – continue treatment related to substance abuse or other mental health issues. Accordingly, the person should be prepared to gather, present, and discuss as much specific information as possible, including letters of support confirming specific offers of residence, employment, and treatment. Indeed, the panel is very likely to deny parole to a person who presents no such documentation regarding parole plans.

Generally, a hearing panel will feel more comfortable granting parole if a person has confirmed arrangements to live in a transitional housing program for at least six months after they are released. Otherwise, the person may have to demonstrate to the hearing panel that their expected living environment will be stable, safe, and crime-free.

If the person has any firm or potential job offers, they should obtain letters or written statements from the prospective employers. If the person doesn't have any job offers, they should highlight any job training, work experience, or education – whether acquired before or during incarceration – that will help them find employment. In addition, it is helpful to present proof of any savings, assets, or expected public benefits that they can use to cover living expenses upon release.

Evidence of strong family and other community support networks can also help support parole suitability. Letters of support from family or friends can help by describing specific forms of support that these individuals will make available to the person upon release, including financial aid, emotional support, transportation, or housing. The hearing panel may also favorably consider information that shows an existing pattern of support, such as past visits or correspondence with family members or other supporters during incarceration.

If the person has an ICE (immigration) hold and is likely to be deported, they should present verified parole plans both for the country of deportation and for the United States, in case they are not deported. (Information on deportation upon release from CDCR is in Chapter 13.)

### 9.28 Presenting Testimony

The person who is being considered for parole has the right to speak on their own behalf and to ask and answer questions at the hearing.<sup>101</sup> However, the person also has a right to decline to answer questions or testify at the hearing. Although the panel is not supposed to hold that decision against the person as a matter of law, the panel is allowed to take into account that the record pertaining to the person's current state of mind is incomplete, and may rely on other sources of information, including past statements by the person.<sup>102</sup> Alternatively, a person may agree to discuss other matters but refuse to admit guilt or discuss the facts of the crime; the law forbids the panel from holding such refusals against the person.<sup>103</sup> The person and their attorney should carefully consider whether or not the person should testify or answer questions about any or all topics.

Generally, unless there is a clear reason not to testify, a person should be prepared to testify and to answer difficult questions, such as “How do we know you won't commit another crime?” Direct testimony can play an important role in creating rapport between the person and the panel.

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<sup>101</sup> Penal Code § 3041.5(a)(2); see also *Pedro v. Oregon Parole Board* (9th Cir. 1987) 825 F.2d 1396, 1399.

<sup>102</sup> *In re Shaputis* (2011) 53 Cal.4th 192, 211-212 [134 Cal.Rptr.3d 86]; *In re Mims* (2012) 203 Cal.App.4th 478 [137 Cal.Rptr.3d 682].

<sup>103</sup> Penal Code § 5011; 15 CCR § 2236.

Even though the BPH is legally barred from citing a person's refusal to testify as a reason to deny parole, the hearing panel will generally frown on a person's choice not to testify, and may interpret this as a decision to be uncooperative or less than fully honest with the panel.

Even so, in some situations, it may be in the person's best interest to refrain from discussing certain topics, or to refrain from testifying at all. One such situation is when the conviction is still being challenged in court, and any admissions the person makes at the parole hearing might be used in a future re-trial. Also, declining to discuss the crime may be in the person's best interest if they are innocent of the crime or have a radically different view of the facts than what is in the official record before the panel. In such a case, the testimony may create more questions than answers. In addition, the person and their attorney should take into account whether the person is likely to come across as angry, frustrated, insincere, or irrational if they testify.

### 9.29 Presenting Other Witness Testimony

In theory, live witness testimony could be presented at a parole suitability hearing; indeed, the BPH has the power to issue subpoenas and arguably to have depositions taken.<sup>104</sup> In practice, however, BPH commissioners are extremely reluctant to permit such testimony.

If a witness can offer important favorable testimony, the person's attorney should ask the person to testify at the hearing. The attorney should submit to the BPH Headquarters in Sacramento a declaration explaining why the presence of a particular witness is important, along with an application asking the BPH to allow the witness to appear at the hearing. It may also be useful for the attorney to send a copy to the Classification and Parole Representative (C&PR) at the prison. These documents should be submitted at least 10 days before the hearing, preferably much earlier. A few days after submitting the application, the attorney should start calling the BPH's Sacramento office to ask for a decision.

If the request is denied, the attorney should present the witness's written statement and remind the hearing panel – in writing and at the hearing – that the witness was willing to testify in person.

### 9.30 Making Legal Objections

BPH commissioners often do or say things that are not consistent with a person's legal rights. Nonetheless, an attorney should be careful in determining whether and when to object, in order to avoid angering or alienating a hearing panel.

In cases where rights violations have become apparent to the attorney *before* the upcoming hearing (for example, a failure by BPH to correct known errors in a psychological evaluation), one potentially less confrontational way to present major objections is to raise them before the hearing by submitting them in writing to the BPH's Executive Officer in Sacramento. Even if the BPH does not rule on the objections before the hearing, at least the panel commissioners should have more time to consider the objection when they are reviewing the record.

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<sup>104</sup> *In re Carroll* (1978) 80 Cal.App.3d 22, 34 [145 Cal.Rptr. 334]; 15 CCR §§ 2676-2677; and Government Code § 11181 et seq.

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Typically, at the outset of the parole hearing, the panel will ask whether the person or their attorney have any preliminary objections. Any objections previously submitted in writing should be addressed at this time, as well as any others that are likely to come into issue during the hearing.

As the panel discusses materials in the Master Packet and Ten-Day Packet, the attorney may object to the consideration of information outside the scope of the statutes or the regulations. For example, if the district attorney brings up information that is not already in the hearing record, the attorney should object to the lack of 10 days' prior notice of the information.

If the attorney makes objections that involve thorny legal issues, such as the impact of a court order on the hearing, the panel may take a recess during the hearing to call the BPH's legal department in Sacramento for guidance. Indeed, if the panel members seem confused or misinformed about a legal issue, the person or attorney should request that the panel call the legal department.

### 9.31 Closing Statements

All parties at the hearing will be allowed to present closing statements. The district attorney will have the opportunity to speak first. (The district attorney's statement is often inflammatory, relying on old unfavorable statements from the trial or prior hearing.) The person's attorney will speak next, followed by the person whose hearing it is. If any victims, next-of-kin, or representatives are present, they will speak last.

In closing, the attorney should reiterate the points in favor of suitability, and address the key issues that have been discussed at the hearing. The attorney should also respond to the district attorney's statements, if only to point out where they are not supported by the record or current evidence. The attorney may want to conclude the closing statement with reminders of the theme or strongest parts of the case.

After the attorney makes a statement, the panel will ask the person if they want to make a closing statement. Some people choose to read a written statement, which can be a good approach for someone who has difficulty expressing themselves under stress. The person can use this opportunity to express remorse for the crime and assure the panel that they are motivated and capable of succeeding on parole. This is not the time to add new information or raise an important issue for the first time. Generally, it is best for the person to make the closing statement short and sweet.

Lastly, the victims, victims' next-of-kin, and/or victims' representatives will have an opportunity to address the panel.<sup>105</sup> They may testify in person, by telephone, or by videoconference; they may also submit their comments in the form of a written statement, audio recording, or video recording.<sup>106</sup> A victim, next-of-kin, or representative may express their views about both the commitment offense and the person's other criminal history, the crime's impact on the victim and

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<sup>105</sup> Penal Code § 3043.6. Although the laws have been amended over the years to expand the rights of victims and their representatives to present testimony and statements, it is probably not an *ex post facto* application of law to apply these provisions to people convicted prior to the date of the amendments. See U.S. Constitution, Article I, § 10; *People v. Huber* (1986) 181 Cal.App.3d 601, 635-636 [227 Cal.Rptr. 113] (finding no *ex post facto* violation in applying new procedural statute allowing victims to speak at criminal sentencing hearings).

<sup>106</sup> Penal Code §§ 3043.2-3043.25.

their family, and the person's suitability for parole.<sup>107</sup> A victim's representative may also make a statement, even if the victim or next-of-kin provides their own testimony or written statement.<sup>108</sup> The person and their attorney have no right to ask questions of the victims or their representatives.<sup>109</sup> The person is not allowed to look at the victim or next-of-kin during the hearing. The hearing panel is required to consider the statements of these persons in deciding whether to release the person on parole.<sup>110</sup> In addition, victims and their representatives can require that transcripts of their statements be provided to every future hearing panel that considers the person for parole suitability.<sup>111</sup>

The hearing panel is supposed to make sure that the district attorney and victims do not make statements that are inaccurate or irrelevant. In theory, the commissioners may even allow the person to rebut inaccurate statements;<sup>112</sup> in practice, such rebuttals are rarely allowed.

### 9.32 The Panel's Decision: Overview

After closing statements, the BPH commissioners will send everyone else out of the room so they can deliberate. Deliberations can take from a few minutes to more than an hour. The commissioners will then call the parties back into the hearing room and state their decision along with their reasoning. The decision will either be a grant of parole, a denial of parole, or a tie vote.

The commissioners must provide a Decision Face Sheet, which concisely summarizes the reasons for the decision and the statements, recommendations, and materials upon which the panel relied.<sup>113</sup> The BPH should send the written decision to the person within 20 days of the hearing.<sup>114</sup> A transcript will be produced about 30 days after the hearing and will be sent to the person. The attorney needs to request the transcript from the BPH transcripts department.<sup>115</sup>

### 9.33 The Panel's Decision: Parole Granted

If the hearing panel finds the person to be suitable for release, it will grant parole. However, the parole grant will not become final for 120 days, to allow review of the matter by the full BPH and, in some cases, another 30 days to allow review by the Governor.<sup>116</sup> The BPH's review is discussed in § 9.36 and Governor's review is discussed in § 9.38.

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<sup>107</sup> Penal Code § 3043(b).

<sup>108</sup> Penal Code § 3043(c).

<sup>109</sup> Penal Code § 3041.5(a)(2); Penal Code § 3043(d).

<sup>110</sup> Penal Code § 3041.5(a)(2); Penal Code § 3043(d).

<sup>111</sup> Penal Code § 3041.5(c).

<sup>112</sup> Penal Code § 3043.6.

<sup>113</sup> *In re Sturm* (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361]; Penal Code § 3042(c)-(d); 15 CCR § 2255.

<sup>114</sup> Penal Code § 3041.5(b)(2).

<sup>115</sup> Information on requesting transcripts is on the BPH website at [www.cdcr.ca.gov/BOPH/psh\\_transcript.html](http://www.cdcr.ca.gov/BOPH/psh_transcript.html); 15 CCR § 2254.

<sup>116</sup> Penal Code § 3041(b)(2).

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As of 2016, a person who is granted parole will be released on the MEPD or, if the MEPD has passed, as soon as the parole grant becomes final (unless the person has additional time to serve for a new criminal conviction received while in custody).<sup>117</sup>

### 9.34 The Panel's Decision: Parole Denied

If the hearing panel denies parole, it must decide when the next parole suitability hearing will occur. In the past two decades, the California legislature has increased the permissible number of years between suitability hearings several times.<sup>118</sup> Under current law, the BPH will schedule the next hearing as follows:

- ◆ In 15 years, unless the BPH finds by “clear and convincing” evidence that public safety does not require a longer denial.
- ◆ In 10 years, unless the BPH finds by “clear and convincing” evidence that that public safety does not require a longer denial.
- ◆ In 3, 5, or 7 years, where consideration of the public and victim’s safety does not require a longer denial.<sup>119</sup>

When deciding on the period between hearings – commonly called the “length of denial” – the BPH is required to consider certain factors, including the number of victims and other factors that mitigate or aggravate the commitment offense.<sup>120</sup> The BPH must also consider the views and interests of the victims before scheduling a subsequent parole consideration hearing.<sup>121</sup>

The BPH can later decide to hold the next parole hearing sooner if there is a change in circumstances or new information showing a reasonable likelihood that public safety does not require longer incarceration. In cases where the BPH has issued a three-year denial, the BPH will automatically review the case for possible advancement one year after the hearing; this is commonly called the BPH’s “auto-review” or “administrative review” process. A favorable decision results in the next hearing being scheduled within 6 months of the review – or about 18 months earlier than the three-year mark.<sup>122</sup> Hearings are more likely to be advanced if the person has a low risk psychological evaluation, has been programming, and hasn’t had any new rule violations.

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<sup>117</sup> Penal Code § 3041(a)(4).

<sup>118</sup> The courts have held that it does not violate the federal constitutional prohibition against ex post facto laws (U.S. Constitution, Article I, § 10, cl. 1) to apply such increased denial periods to people who were sentenced at a time when hearings had to be provided more frequently. *In re Vicks* (2013) 56 Cal.4th 274 [153 Cal.Rptr.3d 471]; *Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007; *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 [155 S.Ct. 1597; 131 L.Ed.2d 588]; *In re Jackson* (1985) 39 Cal.3d 464 [216 Cal.Rptr. 760]; see also *Garner v. Jones* (2000) 529 U.S. 244 [120 S.Ct. 1362; 146 L.Ed. 236]; *Moor v. Palmer* (9th Cir. 2010) 603 F.3d 658, 664-665 (no ex post facto violation in retroactively applying Nevada statute requiring psychological evaluation as precondition to release).

<sup>119</sup> Penal Code § 3041.5(b)(3).

<sup>120</sup> Penal Code § 3041(a); Penal Code § 3041.5(b).

<sup>121</sup> Penal Code § 3041.5(b)(3).

<sup>122</sup> Penal Code § 3041.5(b); see also information at [www.cdcr.ca.gov/BOPH/](http://www.cdcr.ca.gov/BOPH/).

In all other parole denial cases, as well as in three-year denial cases where the auto-review does not result in an advancement, a person may send a written request to the BPH once every three years asking to advance the next hearing date and describing the changed circumstances or new information.<sup>123</sup> This request should be made using BPH Form 1045(A) Petition to Advance Hearing Date (attached as Appendix 9-B). A BPH decision denying a request to advance the hearing may be overturned by a court, but only if the decision is a “manifest abuse of discretion.”<sup>124</sup>

### 9.35 The Panel’s Decision: Split Decision

The decision to grant or deny parole must be made by a majority of the commissioners on the hearing panel. If the hearing panel consists of only two panel members, there may be a “split” decision if the commissioners disagree on whether the person is suitable for parole. Panel members can also disagree on the appropriate parole denial period. In either situation, the case will be sent for an “*en banc*” review by the full group of BPH commissioners, who will decide whether to grant or deny parole (see § 9.37).

## REVIEW OF THE PAROLE SUITABILITY DECISION

### 9.36 Regular Decision Review by the BPH

The BPH’s Decision Review Unit reviews every decision granting parole, and also reviews a random sample of the decisions denying parole. The Decision Review process must be completed within 120 days after the suitability hearing.<sup>125</sup>

The purpose of review is to determine whether the panel made any factual or legal errors, or whether there is additional or new information that should be considered. The reviewers will also consider whether there is a substantial likelihood that correcting the errors or presenting the new information would change the panel’s decision. If there is new information that would hurt the person’s case, the person and their attorney should be given an opportunity to submit a written response. Upon review, the Decision Review Unit can either affirm the panel’s decision, modify the decision in a manner favorable to the person, or order a new hearing.<sup>126</sup>

### 9.37 *En Banc* Review by the BPH

There are three situations in which a parole suitability case must be reviewed by the complete group of BPH commissioners sitting *en banc*:

- ◆ a two-member panel reaches a split decision in which the two commissioners do not agree on whether to grant parole or, alternatively, on the length of the denial period (see § 9.34);

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<sup>123</sup> Penal Code § 3041.5(d).

<sup>124</sup> Penal Code § 3041.5(d)(2).

<sup>125</sup> Penal Code § 3041(b).

<sup>126</sup> Penal Code § 3041(b); 15 CCR §§ 2041(h)-2042.

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- ◆ a member of the hearing panel requests *en banc* review, even if there is not a tie vote;<sup>127</sup> or
- ◆ the Governor refers the case for *en banc* review. The Governor has the authority to make such a referral only in a case in which the BPH has granted parole to a person convicted of a crime other than murder. Upon such a referral, the BPH must schedule a rescission hearing (see § 9.38) unless a majority of the BPH commissioners vote to affirm the parole grant.<sup>128</sup>

In the first two situations, the *en banc* review must take place within 60 days following the parole hearing. In the third situation, the *en banc* review must occur within 60 days following the Governor's referral.<sup>129</sup> An *en banc* review must be conducted by nine randomly selected commissioners or deputy commissioners.<sup>130</sup> The BPH's regulations require that at least five commissioners participate in an *en banc* review.<sup>131</sup>

*En banc* hearings take place at the monthly BPH Executive Board meetings in Sacramento.<sup>132</sup> Members of the public, including the attorney for the person whose parole is on review, can speak to the panel of commissioners for five minutes each. The decision is announced at the end of the day.

### 9.38 Review by the Governor

The Governor has the authority to review BPH decisions. The type of action the Governor may take upon review depends on the person's commitment offense.

If the person was convicted of murder, the Governor may reverse or modify a BPH decision granting or denying parole.<sup>133</sup> The Governor is not required to hold a hearing before reversing a grant of parole; the Governor's decision is based on written materials only.<sup>134</sup> The Governor should act within 30 days after the BPH decision becomes final (120 days after the hearing).<sup>135</sup> In deciding whether to reverse a parole decision, the Governor must consider the same factors that the BPH

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<sup>127</sup> Penal Code § 3041(a).

<sup>128</sup> 15 CCR § 2044(b); Penal Code § 3041.1.

<sup>129</sup> 15 CCR § 2044(a).

<sup>130</sup> Penal Code §§ 3041(e)-3041.1.

<sup>131</sup> 15 CCR § 2000(b)(49).

<sup>132</sup> Agendas for BPH Executive Meetings are posted on the BPH website at [www.cdcr.ca.gov/BOPH](http://www.cdcr.ca.gov/BOPH) about a week before the hearing.

<sup>133</sup> California Constitution, Article V, § 8; Penal Code § 3041.2. The prohibition on *ex post facto* laws (U.S. Constitution, Article I, § 10) is not violated by allowing the Governor to reverse parole grants of people whose crimes were committed before the effective date of the amendments that give the Governor review (November 9, 1988). *In re Rosenkrantz* (2002) 29 Cal.4th 616, 651 [128 Cal.Rptr.2d 104]; *Biggs v. CDCR* (9th Cir. 2013) 717 F.3d 678; *Gomez v. Johnson* (9th Cir. 1996) 92 F.3d 964. Also, the Governor's review does not violate the separation of powers doctrine. *In re Rosenkrantz* (2002) 29 Cal.4th 616, 666 [128 Cal.Rptr.2d 104].

<sup>134</sup> *Styre v. Adams* (9th Cir. 2011) 645 F.3d 1106.

<sup>135</sup> California Constitution, Article V, § 8; Penal Code § 3041.2; see *In re Tokhmanian* (2008) 168 Cal.App.4th 1270 [86 Cal.Rptr.3d 250] (Governor's 30-day review period began after court reinstated parole grant that had been wrongly reversed on BPH review).

considers in determining suitability; and, likewise, any decision by the Governor to reverse a parole grant must be supported by “some evidence.”<sup>136</sup> If the Governor reverses a parole grant, the person will automatically be scheduled for a new parole hearing in 18 months.

If the person was convicted of any type of life-term offense (including murder), the Governor may review the BPH’s decision at any time up until 90 days before the person’s scheduled release date. The Governor does not have authority to reverse BPH decisions in non-murder cases, but the Governor can refer a case back to the BPH to reconsider the decision via an *en banc* review (see § 9.37).<sup>137</sup>

When the BPH forwards a parole decision to the Governor for review, the BPH provides the Governor with an Executive Case Summary (ECS).<sup>138</sup> People and their attorneys may submit letters and other written materials to the Governor supporting the parole grant, but they are not allowed to meet with the Governor’s staff to discuss the case. Technically, the Governor should not consider any information that was not presented to the BPH hearing panel.<sup>139</sup>

### 9.39 Rescission Hearings

The BPH can hold a hearing to decide whether to rescind (take away) the parole grant before the person is actually released on parole.<sup>140</sup> There are three main types of situations in which rescission hearings are held:

- ◆ The person is charged with violating prison rules after the parole grant decision becomes final.<sup>141</sup> The BPH panel must first determine whether there is “good cause” to believe the rule violation occurred. It must then decide whether the violation shows that the person is unsuitable for parole.<sup>142</sup> If the charges are dismissed or if the person is found not guilty, the parole grant must stand.<sup>143</sup>
- ◆ Information received after the parole grant indicates that the person is suffering from mental deterioration that now raises questions about their suitability for parole.<sup>144</sup>
- ◆ The Governor refers the case for *en banc* review and the BPH decides to hold a rescission hearing (see § 9.36 and § 9.38) Public concerns may “trigger reconsideration of a parole

<sup>136</sup> *In re Rosenkrantz* (2002) 29 Cal.4th 616, 626 [128 Cal.Rptr.2d 104].

<sup>137</sup> Penal Code § 3041.1.

<sup>138</sup> *In re Elkins* (2006) 144 Cal.App.4th 475, 502, fn.12 [50 Cal.Rptr.3d 503].

<sup>139</sup> Penal Code § 3041.2(a); *In re Dannenberg* (2005) 34 Cal.4th 1061, 1086 [23 Cal.Rptr.3d 417]; *In re Arafiles* (1992) 6 Cal.App.4th 1467, 1478 [8 Cal.Rptr.2d 492].

<sup>140</sup> 15 CCR § 2450. The BPH’s authority to hold parole rescission hearings was not affected by statutory amendments making a BPH parole suitability decision final 120 days after the parole hearing. *Schoenfeld v. Board of Parole Hearings* (2010) 191 Cal.App.4th 1324 [120 Cal.Rptr.3d 177].

<sup>141</sup> 15 CCR § 2451(a)-(b), (d).

<sup>142</sup> 15 CCR § 2467(b).

<sup>143</sup> 15 CCR § 2468.

<sup>144</sup> 15 CCR § 2451(a)-(b), (d).



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granting decision and an inquiry into whether the decision was an abuse of discretion.”<sup>145</sup> However, parole may be rescinded only if “fundamental errors occurred, resulting in the improvident granting of a parole date.”<sup>146</sup> A fundamental error means that the findings and conclusions of the granting panel (1) cannot be reconciled with the evidence, (2) misstate the facts, or (3) specifically decline to consider “information germane to the gravity of the crimes.” Neither the existence of some evidence tending to show unsuitability nor mere disagreement as to the suitability determination can justify rescission of a parole grant.<sup>147</sup> Also, rescission of parole may be unconstitutional if it is done vindictively due to a person’s exercise of their rights or legal challenges.<sup>148</sup>

The BPH is not constitutionally required to hold the rescission hearing before the pending parole date.<sup>149</sup>

People facing rescission hearings are entitled to a panel composed of three members, two of which must be BPH commissioners.<sup>150</sup> People have all the same procedural rights at parole rescission hearings as at parole suitability hearings.<sup>151</sup> People also have additional due process rights at rescission hearings similar to those for parole revocation hearings, including the right to call witnesses.<sup>152</sup> People have the right to counsel and, if the person is indigent, an attorney shall be appointed at state expense.<sup>153</sup> It might be the same attorney or a different attorney than represented the person in the suitability hearing

In the fact-finding phase of a rescission hearing, the BPH panel considers whether there is good cause to find that the person committed the rule violation or is suffering from mental deterioration, or to find that the original hearing panel committed a fundamental error when it granted parole. If the panel finds no good cause exists, it will affirm the parole grant. If the panel finds good cause, it will proceed to the disposition phase of the hearing. At this point, the panel will decide whether to rescind the parole grant and, if so, how far in the future to schedule the next parole suitability hearing (see § 9.34).<sup>154</sup> At the rescission hearing, it is important for a person or their attorney to present both a defense in the fact-finding phase and mitigating evidence in the disposition phase.

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<sup>145</sup> *In re Powell* (1988) 45 Cal.3d 894, 902 [248 Cal.Rptr. 431].

<sup>146</sup> 15 CCR § 2451(c); *In re Caswell* (2001) 92 Cal.App.4th 1017, 1029 [112 Cal.Rptr.2d 462].

<sup>147</sup> *McQuillion v. Duncan* (9th Cir. 2002) 306 F.3d 895; see also *Caswell v. Calderon* (9th Cir. 2004) 363 F.3d 832; *In re Caswell* (2001) 92 Cal.App.4th 1017, 1029 [112 Cal.Rptr.2d 462].

<sup>148</sup> *Bono v. Benov* (9th Cir. 1999) 197 F.3d 409.

<sup>149</sup> *In re Prewitt* (1972) 8 Cal.3d 470, 474 [105 Cal.Rptr. 318].

<sup>150</sup> 15 CCR § 2467(b). People sentenced under ISL only have the right to a hearing panel of two deputy commissioners. 15 CCR § 2467(b).

<sup>151</sup> *In re Prewitt* (1972) 8 Cal.3d 470 [105 Cal.Rptr. 318]; *Gee v. Brown* (1975) 14 Cal.3d 571 [122 Cal.Rptr. 231]; Penal Code § 3041.7; 15 CCR §§ 2450-2472.

<sup>152</sup> Penal Code § 3041.5; Penal Code § 3041.7.

<sup>153</sup> *In re Johnson* (1995) 35 Cal.App.4th 160 [41 Cal.Rptr.2d 449]. People sentenced under ISL have the right to request an attorney, but the BPH is not required to appoint one unless an attorney is necessary for fundamental fairness. 15 CCR §§ 2690-2701.

<sup>154</sup> See Penal Code § 3041.5(a).

If parole is rescinded, the BPH must provide the person with a written explanation for the decision within 10 days.<sup>155</sup>

## SPECIAL PAROLE CONSIDERATION PROCEEDINGS

### 9.40 “Nonviolent Offender” Parole Reviews

Proposition 57, passed by California voters in November 2016, authorizes early parole consideration for people convicted of nonviolent felony offenses.<sup>156</sup> In the summer of 2017, the CDCR started using new rules providing for earlier parole consideration for some “determinately sentenced nonviolent offenders.”<sup>157</sup>

The process starts with CDCR staff reviewing each person for eligibility within 60 days after they arrive in the CDCR and again whenever there is a change to their sentence, they get a new sentence, or they come within one year of being considered for Youth Offender Parole or Elderly Parole.<sup>158</sup> A person will be screened out as ineligible if they will be eligible for a Youth Offender Parole or Elder Parole consideration hearing within the upcoming year or if they have an initial Youth Offender Parole or Elder Parole hearing already scheduled.<sup>159</sup> The CDCR staff will also determine whether the person qualifies as a “Nonviolent Offender” and meets other eligibility criteria set by the CDCR. A person will be screened out as ineligible if any of the following are true:

- ◆ the person is serving a sentence of death or life without the possibility of parole (LWOP); OR
- ◆ the person is currently serving an indeterminate sentence of life with the possibility of parole for a violent felony (these are listed in Penal Code § 667.5(c)); OR
- ◆ the person is currently serving a determinate sentence for a violent felony; OR
- ◆ the person is currently serving a determinate term for either a violent or nonviolent felony prior to beginning a term of life with the possibility of parole for a violent felony; OR
- ◆ the person is currently serving a determinate term for a nonviolent felony prior to beginning a term for an in-prison offense that is a violent felony, OR
- ◆ the person is currently serving a term for a nonviolent felony after completing a concurrent determinate term for a violent felony (the exception is that a person who has finished serving a term for a violent offense and is now serving a fully separate consecutive term for a nonviolent in-prison offense *is* eligible). (The regulations do not say whether a person is ineligible for parole consideration when a person has *consecutive determinate sentences for a mix of violent and nonviolent crimes* -- with the nonviolent terms

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<sup>155</sup> 15 CCR § 2470.

<sup>156</sup> California Constitution, Article I, § 32.

<sup>157</sup> 15 CCR §§ 2449.1-2449.7; 15 CCR §§ 3490-3493.

<sup>158</sup> 15 CCR § 3491(c)-(d).

<sup>159</sup> 15 CCR § 3491(b)(2).

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calculated at 1/3 of the normal base term -- and has finished serving the part of the term that is for the violent offense; there may be legal disputes about whether such people are eligible for parole consideration.); OR

- ◆ the person has a past or current conviction for an offense that requires sex offender registration under Penal Code § 290.<sup>160</sup>

A person should get a notice of the result of their eligibility review within 15 business days after a review is completed.<sup>161</sup> A person who is screened out by the CDCR can challenge the screening decision by filing a CDCR Form 602 administrative appeal.<sup>162</sup>

If CDCR staff decide the person appears to be eligible, the CDCR will determine their Nonviolent Parole Eligible Date. This is the date on which the person will have served the “full term” of their “primary offense,” *not* counting any good conduct or programming credits earned pre-sentence, post-sentence, or in CDCR. “Primary offense” means the crime for which the court imposed the longest prison term, without taking into account enhancements, alternative sentences, or consecutive sentences. “Full term” means the time imposed by the court for the primary offense without considering good conduct and programming credits earned in prison.<sup>163</sup>

The CDCR will do a second “public safety screening” at least 35 days before the person’s Nonviolent Parole Eligible Date to decide whether to refer the person to the BPH for nonviolent parole consideration. At this point, the CDCR will consider whether the person is has a regular Earliest Possible Release Date (EPRD) in the near future (see § 8.2 for discussion of how an EPRD is calculated) and whether the person has behaved well in prison. The following factors will make a person ineligible for referral to the BPH:

- ◆ the Nonviolent Parole Eligible Date is less than 180 days before their regular EPRD or their EPRD is less than 210 days in the future.
- ◆ a current Security Housing Unit (SHU) term or assessment of a SHU term in the past five years (unless for the person’s own safety);
- ◆ a Level A-1 or A-2 serious rule violation in the past five years;
- ◆ placement in Work Group C in the past year;
- ◆ two or more serious rule violations of any level within the past year;

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<sup>160</sup> 15 CCR § 3490(a)-(c); 15 CCR § 3490(b). The exclusion of people with nonviolent sex offenses is being challenged in *Alliance for Constitutional Sex Offense Laws v. CDCR* (3rd Dist. Ct. of Appeal) No. C0872948; as of Fall 2018, there is no final decision. The rules previously excluded all people with indeterminate sentences from nonviolent offender parole consideration. A court of appeal held that this policy violated Proposition 57. *In re Edwards* (2018) 26 Cal.App.5th 1181 [237 Cal.Rptr.3d 673]. The CDCR has announced that it is developing new rules to allow at least some non-violent third strikers to be considered; the new rules are expected to be available in January 2019.

<sup>161</sup> 15 CCR § 3491(f).

<sup>162</sup> 15 CCR § 3491(g).

<sup>163</sup> 15 CCR § 3490(d)-(f). 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 or any enhancements.

- ◆ a drug-related rule violation or refusal to provide a urine sample in the past year; or
- ◆ a rule violation with a nexus to a Security Threat Group (STG) in the past year.<sup>164</sup>

The CDCR should notify the person of the result within 15 business days after the screening.<sup>165</sup> If a person passes this screening, the CDCR will refer them to the BPH within five business days.<sup>166</sup> When a person is referred to the BPH, the person should be notified that they can submit a written statement to the BPH explaining why they will not pose a risk of violence if released.<sup>167</sup> The person can also ask family, friends, potential employers, or other supportive people to submit statements to the BPH. A person who is deemed ineligible based on any of the behavior-related circumstances listed above will be screened again for eligibility after serving one more year.<sup>168</sup> A person who is screened out by the CDCR can challenge that decision by filing a CDCR Form 602 administrative appeal.<sup>169</sup>

The matter will then go to the BPH. Within 15 calendar days after a CDCR referral, BPH staff do a jurisdictional review to confirm the person is eligible to be considered for nonviolent parole. The person should be notified of the outcome of this review within 15 business days. If the BPH finds the person is not eligible, the person can challenge the decision by writing the BPH within 30 days after they are notified of the decision (they should *not* use the CDCR Form 602 process).<sup>170</sup>

If the person passes the jurisdictional screening, the BPH will have five business days to notify the crime victims and prosecuting agencies about the pending parole review and will give those parties 30 calendar days to submit written statements.<sup>171</sup>

Within 30 calendar days after the notification period ends, a BPH hearing officer will review the case on the merits and decides whether to approve or deny release. There will not actually be an in-person hearing, just a review of the relevant documents – including the Central File and criminal history records, and written statements by the person, their supporters, the crime victims, and/or the prosecutor. The hearing officer shall consider all the circumstances, including the nature of the person’s current conviction, prior criminal record, in-prison behavior and programming, and any input from the person, victims, and prosecutor. Parole will be denied if the hearing officer finds the person poses a “current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.” Parole will be granted if the hearing officer finds the person does not pose such a risk. If a parole grant will result in the person being released two or more years prior to the regular Earliest Possible Release Date (EPRD), a second BPH hearing officer must also approve the grant. The person should be notified in writing of the outcome within 15 days after the decision.<sup>172</sup>

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<sup>164</sup> 15 CCR § 3492(a)-(c).

<sup>165</sup> 15 CCR § 3492(f).

<sup>166</sup> 15 CCR § 3492(d).

<sup>167</sup> 15 CCR § 3492(f).

<sup>168</sup> 15 CCR § 3492(e).

<sup>169</sup> 15 CCR § 3492(g).

<sup>170</sup> 15 CCR § 2449.2.

<sup>171</sup> 15 CCR § 2449.3.

<sup>172</sup> 15 CCR § 2449.4; see also 15 CCR § 2449.5 (factors to be considered).

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Higher level BPH staff can review any of the BPH staff decisions based on an error of fact, an error of law, or if the BPH receives new information that would have affected the parole decision. The review must be completed within 30 calendar days. Also, any time prior to release, the BPH can vacate a parole grant if the person becomes no longer eligible for nonviolent offender parole, such as due to subsequent crimes or prison rule violations.<sup>173</sup> Unlike some other types of parole, the Governor does not have authority to review a decision granting nonviolent offender parole.

If person is granted nonviolent offender parole, and the decision is not vacated or overturned by the BPH, the CDCR shall release the person 60 calendar days after the BPH decision, unless the person has an additional term left to serve for an in-prison crime). If the person has an additional term to serve for an in-prison offense, the additional term shall start 60 days after the BPH decision.<sup>174</sup> The person will presumably serve the normal parole or post-release community supervision (PCRS) period that applies to their case.

A person who is found not suitable for nonviolent offender parole by the BPH can request a review of the decision by writing to the BPH within 30 calendar days after they receive notice of the decision (they should *not* use the CDCR Form 602 process). A BPH officer who was not involved in the decision will conduct a review within 30 calendar days after the request is received. The hearing officer will either uphold the parole denial or vacate the parole denial and issue a new decision. The person should be notified in writing of the outcome.<sup>175</sup>

### 9.41 Youth Offender Parole Hearings

Some people who were sentenced to indeterminate life terms or long determinate terms for crimes they committed when they were 25 years old or younger are eligible for early parole consideration as “youth offenders.” Also, some people who were sentenced to LWOP for crimes they committed when they were under age 18 are eligible for youth offender parole.<sup>176</sup>

Youth Offender Parole does not apply to people who were sentenced under the Two or Three Strikes Law (Penal Code § 667(b)-(i)), or under the “One Strike” rape law (Penal Code § 667.61). Also, a person is not eligible for early parole if, after reaching age 26, they committed another offense with an element of malice aforethought or with a life-term sentence.<sup>177</sup>

Eligible people with long determinate sentences for crimes committed as juveniles will be considered for parole in their 15th year of actual incarceration. People serving indeterminate sentences of less than 25 years to life for crimes committed as juveniles will be considered for parole in their 20th actual year. People serving LWOP or terms of 25 years to life (or more) for juvenile crimes will be considered for parole in their 25th actual year.<sup>178</sup> Because the youth parole dates are based on actual

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<sup>173</sup> 15 CCR § 2449.6.

<sup>174</sup> 15 CCR § 3493.

<sup>175</sup> 15 CCR § 2449.7.

<sup>176</sup> Penal Code § 3051. The BPH is developing regulations for Youth Offender Parole. 15 CCR §§ 2440-2446.

<sup>177</sup> Penal Code § 3051(h).

<sup>178</sup> Penal Code § 3051(b).

time served, they are not affected by any pre-sentence, post-sentence, or in-prison credits the person earns.

There is an administrative appeal procedure for challenging a BPH decision finding that a person is not eligible for a youth offender parole hearing (see § 1.37). The person must fill out a form (attached as Appendix 1-I) and mail it to the BPH.

Youth Offender Parole documentation and consideration hearings are conducted in basically the same manner as regular parole hearings.<sup>179</sup> The standard for release is also the same as for regular parole: the BPH “shall” grant parole unless consideration of public safety requires a longer period of incarceration (see § 9.9).<sup>180</sup> The BPH is required to give “great weight” to the diminished culpability of people with juvenile offenses and to any subsequent growth or maturity, both in the BPH risk assessment (psychological evaluation) and at the parole hearing.<sup>181</sup>

A person who is found suitable for Youth Offender Parole will be released if and when the BPH decision becomes final (after review by the full BPH or, in some cases, review by the Governor).<sup>182</sup>

If the BPH denies parole, it should set a date for the next parole hearing under the rules that apply to other people with life sentences (see § 9.34.), with consideration of the special traits of juveniles.<sup>183</sup>

## 9.42 Elderly Parole Hearings

Some people with life sentences who are 60 years or older and have been incarcerated 25 actual years on their current sentence are eligible for early consideration for parole under the Elderly Parole Program. Elderly Parole applies to both indeterminate sentences and determinate sentences.<sup>184</sup>

A person is not eligible for elderly parole if they were sentenced to LWOP or death, sentenced under the Two or Three Strikes Law (Penal Code § 667(b)-(i)), or convicted of most varieties of first degree murder of a peace officer.<sup>185</sup>

The same general procedures and legal standards that apply to regular parole suitability hearings apply to Elderly Parole hearings. This means the BPH may deny parole if a person’s release

<sup>179</sup> Penal Code § 3041(a); Penal Code § 3051(c).

<sup>180</sup> Penal Code § 3041(b); Penal Code § 3051(d).

<sup>181</sup> Penal Code § 3051(f); Penal Code § 4801(c); *In re Palmer* (2018) 27 Cal.App.5th 120 [238 Cal.Rptr.3d 59].

<sup>182</sup> *In re Trejo* (2017) 10 Cal.App.5th 972 [216 Cal.Rptr.3d 855] (person found suitable under youth parole entitled to release when parole grant became effective, notwithstanding consecutive four-year term imposed for an in-prison offense); *In re Jensen* (2018) 24 Cal.App.5th 266 [233 Cal.Rptr.3d 868]. *In re Williams* (2018) 24 Cal.App.5th 794 [234 Cal.Rptr.3d 600]

<sup>183</sup> Penal Code § 3051(g); Penal Code § 4801(c).

<sup>184</sup> Penal Code § 3055(a).

<sup>185</sup> Penal Code § 3055(g)-(h). These exclusions were created when Penal Code § 3055 became effective on January 1, 2018. However, there were no such exclusions in the original Elderly Parole Program adopted in 2014 by the BPH as part of court-ordered reforms to reduce the prison population. See BPH, *Memorandum: Elderly Parole Program* (June 16, 2014). It is not known how the conflict between Penal Code § 3055 and the court-ordered program will be resolved.

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would pose an unreasonable risk of danger to public safety. However, both in the risk assessment (psychological evaluation) and at the hearing, the BPH should consider how age, time served, and diminished physical condition, if any, reduce the elderly person's risk for future violence.<sup>186</sup>

People who are found suitable for Elderly Parole will be released if and when the parole grant becomes final (after review by the full BPH and, in some cases, review by the Governor).<sup>187</sup>

If the BPH denies Elderly Parole, it should set a date for the next parole hearing under the rules that apply to other people with life sentences (see § 9.34.), with consideration of the whether the person meets the Elder Parole consideration criteria.<sup>188</sup>

### 9.43 Medical Parole Hearings

Some very ill people may be released from prison on “medical parole.” People who are sentenced to death or to life without parole (LWOP), or who were convicted of first-degree murder of a peace officer, are not eligible for medical parole.<sup>189</sup> Note that there is also a process for people who are medically incapacitated or terminally ill to get resentenced by a court and released early; these “compassionate releases” are discussed in § 8.14.

The CDCR rules state that to be eligible for medical parole, a person must be permanently incapacitated with a medical condition that renders the person permanently unable to perform activities of basic daily living and in need of 24-hour care; the incapacitation must not have existed at the time of sentencing.<sup>190</sup> Eligibility for medical parole includes (1) people who are physically or cognitively debilitated or incapacitated due to a significant and permanent condition, disease, or syndrome, and (2) people who qualify for placement in a licensed health care facility, as determined by a Resource Utilization Guide IV (RUG IV) Assessment Tool.<sup>191</sup>

A request for medical parole can be made by the person, their family or attorney, or by medical staff.<sup>192</sup> Within 30 days of receiving a request for medical parole, the primary care physician should evaluate the person's medical condition, and the chief medical officer (CMO) or chief medical executive (CME) should decide whether the person meets the medical criteria. If the person does meet the criteria, CDCR staff should prepare an evaluation report and placement plan.<sup>193</sup>

The case will then be sent to the BPH to determine whether the release would “reasonably” pose a threat to public safety.<sup>194</sup> The BPH will conduct a medical parole hearing in front of a two-member panel; the structure of the hearing is the same as a regular parole suitability hearing, but the

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<sup>186</sup> Penal Code § 3055(c), (e).

<sup>187</sup> Penal Code § 3055(e).

<sup>188</sup> Penal Code § 3055(d), (f).

<sup>189</sup> Penal Code § 3550(b); 15 CCR § 3359.1.

<sup>190</sup> Penal Code § 3550(a); Penal Code § 3559.1(a).

<sup>191</sup> BPH, *Memorandum: Expanded Medical Parole* (June 16, 2014).

<sup>192</sup> 15 CCR § 3359.1(b).

<sup>193</sup> Penal Code § 3550(c)-(d); 15 CCR § 3359.2.

<sup>194</sup> Penal Code § 3559.1(d); 15 CCR § 3359.1(d).

hearing may be held without the person present. If there is a tie vote, the matter will be referred to the full BPH for a decision.<sup>195</sup>

If medical parole is approved, the BPH panel will specify the licensed health care facility requirements necessary for the person's placement not to pose an unreasonable risk to public safety. The CDCR will have 120 days to find space in an available licensed health care facility that meets these requirements. If no facility can be found, the medical parole grant will expire and the person will remain in a CDCR facility.<sup>196</sup> The CDCR can enter into agreements with health care providers and reimburse those providers for medical care costs that are not covered by Medi-Cal.<sup>197</sup>

A person on medical parole is subject to supervision and must comply with any conditions of parole. Special conditions of parole may include GPS monitoring and examinations by a doctor to determine if the person remains medically incapacitated.<sup>198</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, does not comply with conditions, or is a threat to self, another person, or public safety. A person on medical parole can also be returned to prison if the licensed health care facility no longer meets the BPH's requirements.<sup>199</sup>

Unless a person is removed from medical parole, a person with a determinate sentence can remain on medical parole until their normal prison release date, at which point any regular parole period begins. A person with an indeterminate sentence will become eligible for consideration under regular parole suitability provisions once they reach the MEPD (see §§ 9.4-9.8).<sup>200</sup>

## LEGAL CHALLENGES TO PAROLE SUITABILITY DECISIONS

### 9.44 Obtaining the Hearing Transcript

Obtaining a copy of the transcript of the BPH hearing is one of the first steps in bringing a legal challenge to a parole denial, reversal, or rescission. The transcript of a parole hearing must be made available to the general public no later than 30 days after the hearing.<sup>201</sup> People in prison are not “members of the public” and the BPH need only provide transcripts to them within a “reasonable” time after the hearing;<sup>202</sup> in practice, however, people in prison usually receive their hearing transcripts in about a month.

Transcripts in an electronic format can be obtained for free by sending an email request to the BPH's Transcripts Team (BPHSuitabilityHearingTrans@cdcr.ca.gov); full instructions are posted

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<sup>195</sup> Penal Code § 3550(d)-(g); BPH, *Memorandum: Expanded Medical Parole* (June 16, 2014).

<sup>196</sup> BPH, *Memorandum: Expanded Medical Parole*, dated June 16, 2014.

<sup>197</sup> Penal Code § 2065.

<sup>198</sup> Penal Code § 3550(h); 15 CCR § 3359.3; 15 CCR § 3359.5.

<sup>199</sup> 15 CCR § 3359.6; BPH, *Memorandum: Expanded Medical Parole* (June 16, 2014).

<sup>200</sup> Penal Code § 3550(h).

<sup>201</sup> Penal Code § 3042(b).

<sup>202</sup> *In re Bode* (1999) 74 Cal.App.4th 1002 [88 Cal.Rptr.2d 536].



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online ([www.cdcr.ca.gov/BOPH/psh\\_transcript.html](http://www.cdcr.ca.gov/BOPH/psh_transcript.html)). The BPH charges for the copying and mailing of paper transcripts, which can be obtained by sending a request to:

Board of Parole Hearings  
P.O. Box 4036  
Sacramento CA, 95812-4036  
Attention: DPU Transcript Request

### 9.45 Appeals to the BPH

The BPH does not have a formal administrative appeals process, except for a few specific grievance processes regarding (1) disability accommodations; (2) factual errors in CRAs (psychological reports); and (3) denial of “nonviolent offender” parole (see §§ 1.37-1.38). Although people in prison or their attorneys may write letters to the BPH requesting that errors in parole procedures or decisions be corrected, such informal appeals are rarely successful.

### 9.46 State Court Petitions for Writ of Habeas Corpus

A petition for writ of habeas corpus filed in state court is usually the best legal action for challenging a parole suitability-related decision, policy, or practice by the BPH or the Governor. A state habeas corpus petition challenging a BPH parole decision must be filed in the superior court of the county in which the person was convicted and sentenced, not the county in which the person is incarcerated.<sup>203</sup> Both federal and state law issues can be raised in a state court habeas corpus petition, and many types of claims can potentially be raised in parole cases. State habeas corpus procedures are discussed in Chapter 15. This section discusses issues most commonly raised in parole suitability habeas petitions.

The most common argument raised in parole cases is a claim that the parole denial, reversal, or rescission violates the state constitutional right to due process (California Constitution, Article I, § 7 and § 15).<sup>204</sup> In such cases, courts cannot conduct their own assessment of the person’s parole suitability by assessing the credibility of witnesses or by re-weighting the evidence.<sup>205</sup> Instead, courts must apply a “highly deferential” “some evidence” standard according to which they will affirm the BPH’s or the Governor’s decision so long as there is a “modicum of evidence” in the parole hearing record supporting the conclusion that the person would pose a current danger to public safety if

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<sup>203</sup> *In re Roberts* (2005) 36 Cal.4th 575 [31 Cal.Rptr.3d 458].

<sup>204</sup> Broader challenges were raised in the 1990s and early 2000s, when the BPH and Governor’s policies resulted in fewer than a handful of people being paroled each year. People argued that these were unlawful “no-parole” policies that violated the presumption in favor of parole and due process rights to an unbiased decision-maker using non-arbitrary standards. However, the state courts rejected such challenges. *In re Rosenkrantz* (2002) 29 Cal.4th 616, 685-686 [128 Cal.Rptr.2d 104]; *In re Lewis* (2009) 172 Cal.App.4th 13, 28-29 [91 Cal.Rptr.3d 72]; but see § 9.47 regarding federal court cases raising similar challenges.

<sup>205</sup> *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 [128 Cal.Rptr.2d 104].

released.<sup>206</sup> The nature of the commitment offense or other historical facts may provide “some evidence” if the BPH or the Governor can articulate a rational “nexus” (connection) between the offense or other past event and the finding of current dangerousness.<sup>207</sup> Put another way, the BPH’s or the Governor’s decision must be upheld unless it is “arbitrary or procedurally flawed.” “Only when the evidence reflecting the person’s present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the BPH or the Governor.”<sup>208</sup>

There are numerous cases reviewing individual parole suitability decisions under the “some evidence” standard as it is currently interpreted. Denials of parole have been upheld where the courts found that the BPH’s or the Governor’s decision met the “some evidence” standard.<sup>209</sup> In other cases,

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<sup>206</sup> *In re Lawrence* (2008) 44 Cal.4th 1181, 1218-1221 [82 Cal.Rptr.3d 169]; see also *In re Johnson* (1995) 35 Cal.App.4th 160 [41 Cal.Rptr.2d 449] (some evidence standard also applies in court review of parole rescission); *In re Powell* (1988) 45 Cal.3d 894, 903 [248 Cal.Rptr. 431] (rejecting claim that higher standard should apply to parole rescissions); *In re Martínez* (2012) 210 Cal.App.4th 800, 811-814, 820-824 [148 Cal.Rptr.3d 657] (applying some evidence standard to overturn denial of medical parole where there was no support for BPH determination that person who is quadriplegic would pose an unreasonable threat to public safety).

<sup>207</sup> *In re Lawrence* (2008) 44 Cal.4th 1181, 1212, 1226-1227 [82 Cal.Rptr.3d 169].

<sup>208</sup> *In re Shaputis* (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86].

<sup>209</sup> See, e.g., *In re Shaputis* (2011) 53 Cal.4th 192 [134 Cal.Rptr.3d 86] (some evidence supported finding that petitioner lacked insight; where petitioner decided to limit the evidence available to the BPH, failure to credit the evidence petitioner chose to present was not arbitrary or improper); *In re Shaputis* (2008) 44 Cal.4th 1241 [82 Cal.Rptr.3d 213] (some evidence where person had a lack of insight into abusiveness that resulted in the crime.); *In re Busch* (2016) 246 Cal.App.4th 953 [201 Cal.Rptr.3d 237] (some evidence where claim of innocence and explanation for child’s injuries were implausible); *In re Butler* (2014) 231 Cal.App.4th 1521 [180 Cal.Rptr.3d 912] (some evidence where person lacked insight into reasons for his execution-style murders); *In re LeBlanc* (2014) 226 Cal.App.4th 452 [172 Cal.Rptr.3d 128] (lack of insight and mental instability showed current dangerousness); *In re Stevenson* (2013) 213 Cal.App.4th 841 [152 Cal.Rptr.3d 457] (some evidence where person with long history of alcohol and drug abuse minimized his commitment offense and had a deficient substance abuse relapse plan, with up to a moderate risk for future violence); *In re Davidson* (2012) 207 Cal.App.4th 1215 [144 Cal.Rptr.3d 283] (some evidence of unreasonable risk to safety based on record of drunk driving, alcoholism, and previous relapse); *In re Montgomery* (2012) 208 Cal.App.4th 149 [145 Cal.Rptr.3d 109] (evidence supported parole denial where person had possessed prohibited substance in prison); *In re Mims* (2012) 203 Cal.App.4th 478 [137 Cal.Rptr.3d 682] (parole unsuitability due to lack of insight into crime; person refused to participate in new psychological evaluation or answer questions at the hearing, the BPH correctly relied on prior psychological evaluations); *In re Shigemura* (2012) 210 Cal.App.4th 440 [148 Cal.Rptr.3d 230] (some evidence supported finding of lack of insight where person minimized role in murder plot); *In re Tapia* (2012) 207 Cal.App.4th 1104 [144 Cal.Rptr.3d 190] (rational nexus between failure to take full responsibility for the crime until the day before the hearing and being an unreasonable threat to public safety); *In re Hare* (2010) 189 Cal.App.4th 1278 [118 Cal.Rptr.3d 1] (disciplinary violation for possession of dangerous contraband supported finding that person remained dangerous); *In re Taplett* (2010) 188 Cal.App.4th 440 [115 Cal.Rptr.3d 565] (lack of insight into circumstances surrounding offense supported parole denial); *In re Shippman* (2010) 185 Cal.App.4th 446 [110 Cal.Rptr.3d 326] (nature of offense, as well as his past control issues, showed unreasonable risk of danger to society); *In re Criscione* (2009) 180 Cal.App.4th 1446 [103 Cal.Rptr.3d 549] (current dangerousness where offense was particularly heinous, person had history of instability, and psychological report was inconclusive); *In re Cerny* (2009) 178 Cal.App.4th 1303 [101 Cal.Rptr.3d 200] (insufficient plan for residency and employment supported finding of current dangerousness); *In re Rozzo* (2009) 172 Cal.App.4th 40 [91 Cal.Rptr.3d 85] (some evidence to deny parole where person committed especially aggravated offense and continued to deny that offense was racially motivated despite strong evidence to the contrary); *In re Smith* (2009) 171 Cal.App.4th 1631 [90 Cal.Rptr.3d 400] (some evidence of dangerousness based on aggravated circumstances of commitment offense and lack of insight); *In re Reed* (2009) 171 Cal.App.4th 1071 [90 Cal.Rptr.3d 303] (minor rules violation of leaving work without permission supported parole denial where it occurred two months after BPH directed person not to violate rules).

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courts have overturned parole denials and reversals due to a lack of evidence bearing the required nexus to current dangerousness.<sup>210</sup>

Upon finding that a BPH denial of parole is not supported by some evidence, courts generally will direct the BPH to conduct a new parole suitability hearing that complies with due process of law;

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<sup>210</sup> E.g., *In re Lawrence* (2008) 44 Cal.4th 1181, 1212, 1228 [82 Cal.Rptr.3d 169] (no nexus between crime and finding of current dangerousness, given extensive rehabilitation); *In re Perez* (2017) 7 Cal.App.5th 65, 87-88 [212 Cal.Rptr.3d 441] (denial based on lack of insight into criminal conduct and disciplinary history in prison, was unsupported by some evidence of current dangerousness); *In re Stoneroad* (2013) 215 Cal.App.4th 596 [155 Cal.Rptr.3d 639] (BPH failed to give due consideration to suitability factors, and evidence did not show person was currently dangerous); *In re Pugh* (2012) 205 Cal.App.4th 260, 266 [140 Cal.Rptr.3d 194, 199] (although person's version of the crime was different than prosecutors, it was not inherently unbelievable and comments during psychological evaluations demonstrated remorse and insight); *In re Denham* (2012) 211 Cal.App.4th 702 [150 Cal.Rptr.3d 177] (person was found at low risk of recidivism by a psychologist and BPH largely relied on incorrect factual contentions and its own guesswork); *In re Hunter* (2012) 205 Cal.App.4th 1529 [141 Cal.Rptr.3d 350] (no evidence that person's mental state indicated current dangerousness or that his description of the crime was inaccurate, and BPH had not articulated rational nexus between a disciplinary event and risk of future violence); *In re Morganti* (2012) 204 Cal.App.4th 904 [139 Cal.Rptr.3d 430] (BPH's decision that person lacked insight into his drug abuse was not supported); *In re Sanchez* (2012) 209 Cal.App.4th 962 [147 Cal.Rptr.3d 330] (minor discrepancies in person's version of crime did not demonstrate rational nexus to current dangerousness, and social history and probation failures did not demonstrate that he continued to pose an unreasonable risk to safety); *In re Young* (2012) 204 Cal.App.4th 288 [138 Cal.Rptr.3d 788] (no support for parole denial based on findings that person had tumultuous relationships and did not remember offense, and speculative doubts about whether the victim assaulted the person); *In re Martinez* (2012) 210 Cal.App.4th 800 [148 Cal.Rptr.3d 657] (evidence did not show unreasonable threat to public safety where person who was permanently medically incapacitated would not physically be able to commit a crime similar to his commitment offense); *In re Ryner* (2011) 196 Cal.App.4th 533 [126 Cal.Rptr.3d 380, 392] (refusal to accept evidence showing understanding and remorse is not sufficient basis to conclude person lacked insight into crime); *In re Gomez* (2010) 190 Cal.App.4th 1291 [118 Cal.Rptr.3d 900] (finding of lack of insight was not supported by the record, which showed that person accepted responsibility for his actions); *In re Twinn* (2010) 190 Cal.App.4th 447 [118 Cal.Rptr.3d 399] (no support for finding of had insufficient parole plans in light of record showing person had a job offer, and no support for finding of lack of insight based on inconsistent statements regarding the offense because person's "version of the crime was not physically impossible and did not strain credulity"); *In re McDonald* (2010) 189 Cal.App.4th 1008 [118 Cal.Rptr.3d 145] (person's insistence that he is innocent cannot be a basis for denying parole); *In re Powell* (2010) 188 Cal.App.4th 1530 [116 Cal.Rptr.3d 432] (parole denial improperly based on post-release plan to attend substance abuse program far from his house); *In re Moses* (2010) 182 Cal.App.4th 1279, 1303 [106 Cal.Rptr.3d 608] (Governor failed to articulate rational nexus between circumstances of commitment offense or prior criminal history, and current dangerousness); *In re Loesch* (2010) 183 Cal.App.4th 150, 153 [107 Cal.Rptr.3d 331] (reversal of parole grant improper where it rested solely on speculation person could relapse and commit future acts of violence); *In re Juarez* (2010) 182 Cal.App.4th 1316, 1339 [106 Cal.Rptr.3d 648] (BPH improperly denied parole based on rote recitation of unsuitability factors that were not probative of current dangerousness); *In re Dannenberg* (2009) 173 Cal.App.4th 237 [92 Cal.Rptr.3d 647] (Governor conceded he relied solely on nature of commitment offense); *In re Rico* (2009) 171 Cal.App.4th 659 [89 Cal.Rptr.3d 866] (finding based solely on gravity of commitment offense); *In re Vasquez* (2009) 170 Cal.App.4th 370 [87 Cal.Rptr.3d 853] (Governor's decision based entirely on nature of person's commitment offense); *In re Gaul* (2009) 170 Cal.App.4th 20 [87 Cal.Rptr.3d 736] (no evidence person posed unreasonable risk to society); *In re Singler* (2008) 169 Cal.App.4th 1227 [87 Cal.Rptr.3d 319] (same); *In re Aguilar* (2008) 168 Cal.App.4th 1479 [86 Cal.Rptr.3d 498] (no evidence person posed current danger to public); *In re Burdan* (2008) 169 Cal.App.4th 18 [86 Cal.Rptr.3d 549] (same); see also *In re Ross* (2009) 170 Cal.App.4th 1490 [88 Cal.Rptr.3d 873] (failure to articulate nexus between old facts and current dangerousness or to cite mental state evidence required remand); *In re Criscione* (2009) 173 Cal.App.4th 60 [92 Cal.Rptr.3d 258] (no connection articulated between findings and determination person posed current risk to public safety); *In re Lazor* (2009) 172 Cal.App.4th 1185 [92 Cal.Rptr.3d 36] (BPH failed to connect unsuitability factors to current dangerousness).

courts should not place improper limitations on the type of evidence the Board is obligated to consider.<sup>211</sup>

The California Supreme Court has opined that when the Governor’s reversal is not supported by some evidence, the proper remedy is to remand the case to give the BPH an opportunity to consider any recent developments that might cause it to rescind the parole grant.<sup>212</sup>

People are not entitled to credit toward their parole periods for extra time spent in prison as a result of an erroneous parole denial, rescission, or reversal by the BPH or the Governor.<sup>213</sup>

People also can attack parole denials, reversals, or rescissions that violate their plea bargains. However, a person must show that some specific promise made during the plea proceedings has been broken.<sup>214</sup>

## 9.47 Federal Court Petitions for Writ of Habeas Corpus

For many years, most people who lost their state court habeas cases could then pursue their federal law claims by filing petitions for writ of habeas corpus in federal court. Indeed, the federal courts issued some habeas decisions that were quite favorable to people in prison.

However, in 2011, the United States Supreme Court greatly restricted the parole suitability issues that can be raised in a federal habeas petition. The court stated that the correct application of the “some evidence” standard in parole cases is a matter of state law only, and is not protected by the federal constitution’s Due Process Clause. Thus, federal courts *cannot* review parole cases to consider arguments that a parole decision by the BPH or the Governor was not supported by some evidence.<sup>215</sup> The federal right to due process is satisfied so long as the person had an opportunity to examine the

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<sup>211</sup> *In re Prather* (2010) 50 Cal.4th 238, 244, 255, 257 [112 Cal.Rptr.3d 291]; see also *In re Sena* (2015) 236 Cal.App.4th 1270 [183 Cal.Rptr.3d 152]; but see *In re Trejo* (2017) 10 Cal.App.5th 972 [216 Cal.Rptr.3d 855] (person classified as “youth offender” who was found suitable for parole must have parole supervision period reduced for the time he was improperly required to serve additional determinate sentence).

<sup>212</sup> *In re Lira* (2014) 58 Cal.4th 573, 582 [167 Cal.Rptr.3d 409].

<sup>213</sup> *In re Lira* (2014) 58 Cal.4th 573 [167 Cal.Rptr.3d 409]; see also *In re Chaudhary* (2009) 172 Cal.App.4th 32 [90 Cal.Rptr.3d 678] (person with lifetime parole period was not entitled to credit toward five-year parole discharge review period for time spent in prison due to governor’s unlawful parole reversal).

<sup>214</sup> *In re Deluna* (2005) 126 Cal.App.4th 585 [24 Cal.Rptr.3d 643] (district attorney was not precluded from opposing parole based on the gravity of the commitment offense where in the plea bargain did not include a promise by the prosecutor that defendant would be released on parole at any specific time or that the prosecutor would cease arguing that defendant’s crime was especially callous); *In re Honesto* (2005) 130 Cal.App.4th 81 [29 Cal.Rptr.3d 653] (parole denial based on the crime did not violate plea agreement where plea record found no evidence of a specific promise that person would be paroled in accord with BPH’s second-degree murder matrix); *In re Lowe* (2005) 130 Cal.App.4th 1405 [31 Cal.Rptr.3d 1] (plea agreement not violated by Governor’s reversal where there was no specific promise that parole would be decided by the BPH alone).

<sup>215</sup> *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859; 178 L.Ed.2d 732]; see also *Miller v. Oregon Board of Parole* (9th Cir. 2011) 642 F.3d 711, 712, 716-717. Swarthout nullified a line of Ninth Circuit cases examining application of the “some evidence” standard, including *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910; *Sass v. California Board of Prison Terms* (9th Cir. 2006) 461 F.3d 1123; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846; *Hayward v. Marshall* (9th Cir. 2010) 603 F.3d 546, 555; *Powell v. Gomez* (9th Cir. 1994) 33 F.3d 39, 40; *Jancsek v. Oregon Board of Parole* (9th Cir. 1987) 833 F.2d 1389, 1390.

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evidence in advance, had an opportunity to be heard, and received notice of the reasons why parole was denied, revoked, or rescinded.<sup>216</sup>

Even after 2011, it may be possible for people to raise some other types of federal due process issues in federal habeas cases. For example, due process principles may still guarantee the right to have a parole case heard and decided by an unbiased decision-maker.<sup>217</sup> People may also be able to raise arguments that denial of parole violates a due process right to fulfillment of the specific terms of their plea agreements.<sup>218</sup>

In addition, people can still raise other types of federal constitutional and statutory claims. For example, people have used federal habeas corpus actions to challenge changes in the laws as violating the constitutional prohibition on *ex post facto* laws (U.S. Constitution, Article I, § 10).<sup>219</sup>

The rules and procedures for federal habeas cases are discussed in Chapter 16.

### 9.48 Federal Civil Rights (§ 1983) Lawsuits

A federal civil rights (“§ 1983”) lawsuit may be brought on a parole issue only if the lawsuit does not challenge “the fact or duration of confinement.”<sup>220</sup> Even with this limitation, people have been allowed to bring various types of federal civil rights suits regarding parole issues. For example, people with life sentences have challenged the *ex post facto* application of new guidelines for determining parole suitability, where the people who filed the lawsuit were not seeking injunctions ordering speedier or immediate release.<sup>221</sup> A § 1983 lawsuit was used to establish that the BPH may not categorically exclude a group of people from consideration for parole because of their disabilities, such as a history of substance abuse.<sup>222</sup> Other § 1983 lawsuits established that the BPH violated First Amendment rights by requiring a person to participate in a drug treatment program that is

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<sup>216</sup> *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859; 178 L.Ed.2d 732]; see also *Greenholtz v. Inmates of Neb. Penal and Correctional Complex* (1979) 442 U.S. 1, 12 [99 S.Ct. 2100; 60 L.Ed.2d 668].

<sup>217</sup> See *In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623; 99 L.Ed. 942]; *O'Brenski v. Maass* (9th Cir.1990) 915 F.2d 418, 422 (person is entitled to have release date considered by a Board that is free from bias or prejudice). *Martin v. Marshall* (N.D. Cal. 2006) 431 F.Supp.2d 1038, 1048-1049 (citing with approval an unpublished case finding that a person had been denied due process because the state parole authorities had followed an unlawful “no-parole-for-murderers” policy).

<sup>218</sup> *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155 (court enforced plea bargain terms where person had relied on prosecutor’s statement during the plea discussion that the person would be released after serving half of minimum 15-year term if she did not commit any disciplinary violations); see also *Buckley v. Terbune* (9th Cir. 2006) 441 F.3d 688.

<sup>219</sup> See *Docken v. Chase* (9th Cir. 2004) 393 F.3d 1024 (ex post facto challenge to change in law extending the time been parole hearings); *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 (Oregon parole board’s retroactive application of new rules changing the standard for postponing a release date violated prohibition on ex post facto laws because there was significant likelihood that person would be incarcerated for a longer period of time).

<sup>220</sup> See, e.g., *McQuillion v. Schwarzenegger* (9th Cir. 2004) 369 F.3d 1091, 1094, applying *Heck v. Humphrey* (1994) 512 U.S. 477 [114 S.Ct. 2364; 129 L.Ed.2d 383]; see also *Brown v. Palmateer* (9th Cir. 2004) 379 F.3d 1089 (discussing the different criteria for federal habeas and federal civil rights claims)

<sup>221</sup> *Wilkinson v. Dotson* (2005) 544 U.S. 74 [125 S.Ct. 1242; 161 L.Ed.2d 253].

<sup>222</sup> *Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, 898.

“fundamentally religious” (such as Narcotics Anonymous) as a requirement for parole suitability.<sup>223</sup> The rules and procedures for federal civil rights cases are more thoroughly discussed in Chapter 17.

## COMMUTATIONS AND PARDONS

### 9.49 Governor’s Authority to Grant Commutations and Pardons

The Governor has the authority to grant a commutation or a pardon to a person in prison or on parole.<sup>224</sup> A commutation is a reduction in a sentence, while a pardon completely forgives the conviction.

State law authorizes the BPH to recommend to the Governor persons who may be eligible for a commutation of sentence or a pardon on account of good conduct, unusual term of sentence, or any other cause, including Intimate Partner Battering.<sup>225</sup>

Applications should be made directly to the Governor; at least 10 days before the application is submitted to the Governor, it must also be served on the district attorney of the county where the person was convicted.<sup>226</sup> Commutations and pardons are granted on occasion.

The Governor’s website contains information and forms for applying for a commutation or a pardon.<sup>227</sup>

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<sup>223</sup> *Turner v. Hickman* (E.D. Cal. 2004) 342 F.Supp. 887; *Inonye v. Kemna* (9th Cir. 2007) 504 F.3d 705.

<sup>224</sup> Penal Code § 4800; Cal. Constitution, Article V, § 8.

<sup>225</sup> Penal Code § 4801; 15 CCR § 2830.

<sup>226</sup> Penal Code § 4804. The “Marsy’s Law” requirements of providing crime victims with notice and an opportunity to be heard does not apply to commutations and pardons. *Santos v. Brown* (2015) 238 Cal.App.4th 398 [189 Cal.Rptr.3d 234].

<sup>227</sup> *How to Apply for a Pardon*, at [www.gov.ca.gov/docs/How\\_To\\_Apply\\_for\\_a\\_Pardon.pdf](http://www.gov.ca.gov/docs/How_To_Apply_for_a_Pardon.pdf). Another resource is a Commutation Application Guide, available from the California Coalition for Women Prisoners, 1540 Market Street # 490, San Francisco, CA 94102

**HEARING RIGHTS FORM**

**Parole Consideration, Rescission, and Reconsideration Hearings**

**INSTRUCTIONS:**

- Use this form for a parole consideration hearing, a rescission hearing, or a reconsideration hearing
- If you want your hearing to occur as scheduled, fill out sections I and II.
- If you want to waive your hearing, fill out sections I, II, and III [parole consideration hearings only]
- If you want to postpone your hearing, fill out sections I, II, and IV.

Are you trying to change a Hearing Rights Form you already submitted for your hearing?  No  Yes

**I. ATTENDANCE AT HEARING (check one box)**

I plan to attend my hearing  I do not plan to attend my hearing

Inmate Signature	CDCR Number	Date
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**II. ATTORNEY REPRESENTATION (check one box)**

I request a state appointed attorney

I have hired my own attorney

Attorney's Name	
Attorney's Address	
Attorney's Telephone Number	

I waive my right to have an attorney

I was informed on \_\_\_\_\_ (date) that I have been scheduled to appear before the Board of Parole Hearings. I was also informed of my right to be represented by an attorney at the hearing. I know that if I do not wish to retain my own attorney, the state will appoint an attorney to represent me at state expense. Knowing this, I have decided that I **DO NOT** want an attorney to represent me at my hearing.

By requesting a state appointed attorney or indicating that I have hired my own attorney, I agree the Department of Corrections and Rehabilitation and the Board of Parole Hearings can release my non-confidential records to my attorney.

Inmate Signature	CDCR Number	Date
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**III. REQUEST FOR WAIVER OF HEARING (DOES NOT APPLY TO RESCISSION HEARING)**

I choose to waive my parole consideration hearing for the reasons stated below. I ask the board to approve my request. I request to waive my hearing for: [ ] one year [ ] two years [ ] three years [ ] four years [ ] five years (choose one)

Reason(s): \_\_\_\_\_

Inmate Signature	CDCR Number	Date
Attorney Signature		Date

**IV. REQUEST TO POSTPONE HEARING**

I request that my hearing be postponed for \_\_\_\_\_ months, for the following reasons

Reason(s): \_\_\_\_\_

Inmate Signature	CDCR Number	Date
Attorney Signature		Date





