

BPH RN 18-02: NOTICE OF PROPOSED ACTION

TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 3. PAROLE RELEASE

Enactment of:

ARTICLE 14. PAROLE CONSIDERATION HEARINGS FOR YOUTH OFFENDERS

**Enactment of Sections 2440 – 2446, governing
parole consideration hearings for youth offenders.**

NOTICE IS HEREBY GIVEN that the Executive Officer of the Board of Parole Hearings (board), under the authority granted by Government Code section 12838.4 and Penal Code sections 3051, 3052, and 5076.2, authorizes the board to adopt the proposed added Sections 2440 through 2446 of the California Code of Regulations, Title 15, Division 2, concerning Parole Consideration Hearings for Youth Offenders.

AUTHORITY AND REFERENCE

Government Code section 12838.4 vests the board with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation Authority, which no longer exist.

Penal Code section 3051, subdivision (e), requires the board to review and revise existing regulations, or adopt new regulations, regarding determinations of suitability for youth offenders as defined in that section.

Penal Code section 3052 generally vests with the board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the board to promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 667 contains prior felony or “strike” sentencing requirements for persons sentenced to felonies who have already been convicted of prior violent felonies.

Penal Code section 667.61 contains “one-strike” sentencing requirements for persons sentenced to certain enumerated sex crimes committed under specified circumstances.

Penal Code section 1170.12 contains prior felony or “strike” sentencing requirements for persons sentenced to felonies who have already been convicted of prior violent felonies.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial periods.

Penal Code section 3046 establishes the requirement for youth offenders to be paroled upon receiving a grant from the board, subject to the board and Governor’s statutory decision review periods, regardless of how the board would normally calculate an inmate’s parole date.

Penal Code section 3051 establishes youth offender parole hearings and the procedures for reviewing the parole suitability of any inmate who was under the age of 26 at the time the inmate committed his or her controlling offense as defined in that section, or under the age of 18 at the time the inmate committed his or her controlling offense that resulted in a sentence of life without the possibility of parole.

Penal Code section 3051.1 establishes the timeline under which the board must complete youth offender parole hearings for inmates who became eligible for youth offender parole hearings on January 1, 2016, the effective date of this section.

Penal Code section 4801 establishes the requirement for panels to give great weight to three specified youth factors when assessing the suitability of a youth offender.

In the case *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court abolished capital punishment as a legal sentence for any juvenile offender.

In the case *Graham v. Florida* (2010) 560 U.S. 48, the United States Supreme Court abolished the sentence of life without the possibility of parole as a legal sentence for a juvenile who had committed a non-homicide crime.

In the case *Miller v. Alabama* (2012) 132 S.Ct. 2455, the United States Supreme Court prohibited courts from imposing a mandated sentence of life without the possibility of parole on a juvenile who committed a homicide crime without the court’s individual consideration of specified youth factors and whether the life-without-parole sentence was appropriate for the circumstances of the particular juvenile.

In the case *People v. Caballero* (2012) 55 Cal.4th 262, the California Supreme Court held that sentencing a non-homicide juvenile offender to a term of life with the possibility of parole with a minimum term of years that would be expected to exceed the juvenile’s natural life expectancy violated the *Graham* abolition against sentencing non-homicide juvenile offenders to life without the possibility of parole.

In the case *Moore v. Biter* (2013) 725 F.3d 1184, the Ninth Circuit Court of Appeals determined that sentencing a non-homicide juvenile offender to a determinate term of years that would be expected to exceed the juvenile’s natural life expectancy similarly violated the *Graham* abolition against sentencing non-homicide juvenile offenders to life without the possibility of parole.

In the case *People v. Franklin* (2016) 63 Cal.4th 261, the California Supreme Court concluded that the Legislature's enactment of the youth offender parole laws in Penal Code sections 3051 and 4801, subdivision (c), mooted an inmate's claim that he received an unconstitutional sentence under *Miller* because the youth offender parole process already provided an appropriate remedy.

In the case *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, the United States Supreme Court determined that the holding of the *Miller* case applied retroactively to juveniles sentenced before the date of that decision, such that juveniles with older sentences can legally challenge their sentences under that case.

In the case *In re Lawrence* (2008) 44 Cal.4th 1181, 1214, the California Supreme Court held that, when a board hearing panel conducts a parole consideration hearing, the panel members must grant the inmate's parole unless they find evidence that the inmate continues to pose a current unreasonable risk of danger to the public safety if released on parole.

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the board. **THE WRITTEN COMMENT PERIOD ON THIS PROPOSED REGULATORY ACTION WILL COMMENCE ON FRIDAY, JANUARY 4, 2019, AND WILL CLOSE AT 5:00 P.M. ON MONDAY, FEBRUARY 18, 2019.** For comments to be considered by the board, they must be submitted in writing to the board's Contact Person identified in this Notice no later than the close of the comment period.

CONTACT PERSON

Please direct requests for copies of the Initial Statement of Reasons, the Proposed Text of the Regulation, or other information upon which the rulemaking is based to:

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If Christopher Hoeft is unavailable, please contact Assistant Chief Counsel, Heather L. McCray at Heather.McCray@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 18-02**.

NO PUBLIC HEARING SCHEDULED

The board has not scheduled a public hearing on this proposed regulatory action. The board, however, will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period. Written or facsimile comments submitted during the prescribed comment period have the same significance and influence as oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive oral comments about the proposed regulations. It would not be a forum to debate the proposed regulations, and no decision regarding the permanent adoption of the proposed regulations would be rendered at a public hearing. The members of the board would not necessarily be present at a public hearing.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

In 2005, the United States Supreme Court abolished capital punishment as a legal sentence for a juvenile offender, based on significant differences in the brain development between juveniles and adults. (*Roper v. Simmons* (2005) 543 U.S. 551.) Using this same reasoning, the United States Supreme Court later abolished the sentence of life without the possibility of parole for a juvenile who had committed a non-homicide crime (*Graham v. Florida* (2010) 560 U.S. 48), and subsequently prohibited courts from imposing a mandated sentence of life without the possibility of parole on a juvenile who committed a homicide crime without the court's individual consideration of specified youth factors and whether the life-without-parole sentence was appropriate for the circumstances of the particular juvenile (*Miller v. Alabama* (2012) 132 S.Ct. 2455).

The California Supreme Court extended the United States Supreme Court's holding in *Graham* to cases in which a non-homicide juvenile offender was sentenced to a term of *life with the possibility of parole* with a minimum term of years that would be expected to exceed the juvenile's natural life expectancy. (*People v. Caballero* (2012) 55 Cal.4th 262.) Similarly, in 2013, the Ninth Circuit Court of Appeal used the same legal reasoning to extend the *Graham* decision to cases in which a non-homicide juvenile offender was sentenced to a *determinate term* of years that would be expected to exceed the juvenile's natural life expectancy. (*Moore v. Biter* (2013) 725 F.3d 1184.)

On January 1, 2014, the California Legislature enacted Senate Bill No. 260 (2013-2014 Reg. Sess.) (SB 260), which established parole consideration hearings for youth offenders. Specifically, this bill enacted Penal Code section 3051 and amended Penal Code sections 3046 and 4801 to establish alternative hearing deadlines and requirements for persons who were under the age of 18 when they committed their controlling offenses, as defined by statute, and who were not disqualified under section 3051 from youth offender status. Section 3051, subdivision (e), mandated the board to "revise existing regulations and adopt new regulations" regarding determinations of suitability for qualified youth offenders under that section.

On January 1, 2016, before the board could file its proposed regulations, the California Legislature enacted Senate Bill No. 261 (2015-2016 Reg. Sess.) (SB 261), which amended Penal

Code sections 3051 and 4801 to raise the qualifying age of youth offenders to persons who were under the age of 23 when they committed their controlling offenses, as defined by statute.

On January 27, 2016, the United States Supreme Court found that its prior decision in *Miller v. Alabama*, prohibiting mandatory life sentences without parole for juvenile offenders, was retroactive on state collateral review. (*Montgomery v. Louisiana* (2016) 136 S.Ct. 718.) Consequently, juveniles currently serving sentences of life without the possibility of parole have the right to request resentencing following individualized consideration of factors relating to their youth at any time. Alternatively, the court noted that “[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” (*Id.* at 736.)

On January 1, 2018, again before the board could file its proposed regulations, the California Legislature enacted two bills that impacted parole consideration hearings for youth offenders. First, Assembly Bill No. 1308 (2017-2018 Reg. Sess.) (AB 1308) amended Penal Code sections 3051 and 4801 to raise the qualifying age of youth offenders to persons 25 years of age or younger when they committed their controlling offenses, as defined by statute. Second, in accordance with the *Montgomery* decision, Senate Bill No. 394 (2017-2018 Reg. Sess.) (SB 394) amended Penal Code section 3051 to establish parole hearing deadlines for persons who were sentenced to life without the possibility of parole for their controlling offense, as defined by statute, so long as they committed that offense under the age of 18, and are not disqualified from youth offender status under any exemptions in subdivision (h) of section 3051.

This proposed regulation package is submitted to comply with the statutory mandate to regulate the board’s process for providing parole consideration hearings for qualified youth offenders. In this package, the board is providing clarity on youth offender qualification, the board’s process for scheduling and holding youth offender parole consideration hearings, and the youth offender factors that require different levels of consideration throughout the hearing process.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS:

Defining who qualifies as a youth offender benefits all stakeholders by resolving several ambiguities and clarifying how to determine whether an inmate will qualify for youth offender protections. Additionally, clarifying the methods through which inmates may seek administrative remedy or one-time board review for erroneous disqualifications or Youth Parole Eligible Date (YPED) calculations benefits inmates by clarifying how to resolve potential errors. These processes also benefit public safety by ensuring the greatest possible accuracy in qualifying inmates for youth offender status and calculating their parole eligibility dates.

Clarifying the process for calculating a YPED, as well as how initial and subsequent hearings will be scheduled, benefits inmates, victims, and other hearing participants because each stakeholder will have a better understanding of when to prepare for a youth offender’s initial or subsequent parole consideration hearing. Also, specifying how a board psychologist will consider the youth offender factors when preparing a risk assessment for a youth offender and document the consideration in the risk assessment benefits hearing participants by ensuring a more unified approach to presenting this information in a risk assessment. Interpreting the three youth factors also benefits each stakeholder by clarifying what information will be discussed and

given great weight at hearings for youth offenders, and considered by board psychologists in risk assessments for youth offenders. Moreover, collating each of the at-hearing rights and requirements into a single subdivision further benefits these stakeholders by providing a single location from which to identify all of the ways in which hearings for youth offenders differ from other parole consideration hearings, which allows each hearing participant to better prepare for their role in the hearings.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The board has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the board has concluded that these are the only regulations that concern the board's requirements in conducting parole hearings for youth offenders.

DISCLOSURES REGARDING THE PROPOSED ACTION

Local Mandates: The board has determined that the proposed action imposes no mandate upon local agencies or school districts.

Fiscal Impact Statement: The board has made the following initial determinations:

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: **None**

- Cost or savings to any state agency: **TOTAL COST \$4,813,975: This budget increase was already granted to the board for implementation of statutory youth offender requirements. The implementation of these regulations will be absorbed by the current increased budget and resources and will not result in additional discretionary costs or savings to the board.**

In the current and next two subsequent fiscal years, the board has not and will not request any additional funding for the sole purpose of implementing the youth offender laws or these proposed regulations. While the board may request additional funding during the current and two subsequent fiscal years due to an anticipated general increase in workload across all board functions, which may include youth offender parole hearings, the board does not anticipate any necessary increase in budget specifically to implement these regulations. Additionally, the anticipated budget increase requests would not be necessary solely to complete all anticipated youth offender parole hearings over these fiscal years.

In prior fiscal years, the board requested, and was granted, funding of \$1,297,741 (Fiscal Year 2014-2015), \$314,528 (Fiscal Year 2015-2016), and \$3,201,706 (Fiscal Year 2016-2017) for a total of 11.5 psychologist positions, 2 senior psychologist positions, 1.5 limited-term attorney III positions, 4 administrative law judges, 2 commissioners, 1 associate governmental program analyst, and 1 office technician, and including associate governmental program analyst overtime pay and additional contracted interpreter,

transcription, and attorney services, all for the specific purpose of implementing the statutory requirements for youth offender hearings following the enactment of Senate Bills 260 (2013-2014 Reg. Sess.) and 261 (2015-2016 Reg. Sess.).

- Other non-discretionary cost or savings imposed on local agencies: **None**
- Cost or savings in federal funding to the state: **None**

Significant Statewide Adverse Economic Impact on Business: The board has determined that there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impacts on Representative Private Persons or Businesses: The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination or Expansion: The board has determined that adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within California; or (3) affect the expansion of businesses currently doing business within California. While the enactment of Senate Bills 260 and 261, establishing the youth offender statutes, necessitated the board's establishment of new positions as noted above, these jobs were already established to implement the board's new duties under the statutory youth offender laws. The adoption of these regulations will not result in the creation or elimination of additional jobs beyond those already established in the previously granted budget change proposals.

Effect on Housing Costs: The board has made an initial determination that the proposed action will have no significant effect on housing costs because housing costs are not affected by the internal processes governing the board's requirements in conducting parole consideration hearings or parole reconsideration hearings for youth offenders.

Small Business Determination: The board has determined that the proposed regulations do not have a significant adverse economic impact on small business because small businesses are not affected by the internal processes governing the board's requirements in conducting parole consideration hearings or parole reconsideration hearings for youth offenders.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The board concludes that it is (1) unlikely that the proposed regulations will create or eliminate any jobs in California, (2) unlikely that the proposed regulations will create any new business or eliminate any existing businesses, and (3) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Anticipated Benefits to the health and welfare of California residents, worker safety, and the state's environment: As further explained in the Economic Impact Analysis, contained within the Initial Statement of Reasons, these proposed regulations will benefit all stakeholders by providing greater clarity on how to determine which inmates qualify as youth offenders and

when each hearing participant should prepare for the youth offender's initial hearing. We anticipate that having a better understanding for how to prepare for these hearings will ultimately help to reduce some of the risk and anxiety hearing participants experience when faced with these hearings. Additionally, the proposed regulations reduce the risk of error through the appeal and review processes and ensure greater uniformity in how the youth factors are considered and applied to inmate cases. This will ultimately benefit public safety and welfare by ensuring that the candidates most suitable for parole will be released.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Interested parties are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes during the public comment period.

AVAILABILITY OF PROPOSED TEXT

The board will make the rulemaking file available to the public throughout the rulemaking process at its offices located at 1515 K Street, Suite 600, Sacramento, California. As of the date this Notice is published in the Office of Administrative Law's Notice Register, the rulemaking file consists of this Notice, Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation and Initial Statement of Reasons. Copies of any of these documents may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the board may adopt the proposed regulations substantially as described in this Notice. If the board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulation text to the attention of the Contact Person identified in this Notice or by visiting the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html. If the board makes modifications, the board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, phone number, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

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