

CHANGES WITHOUT REGULATORY EFFECT

EXPLANATIONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 1. GENERAL CHAPTER 3. PAROLE RELEASE

SECTION 100: ELIMINATION OF TERM CALCULATION REGULATIONS

INTRODUCTION

The Board of Parole Hearings (Board) submits this filing in accordance with the California Code of Regulations, Title 1, section 100, for Changes without Regulatory Effect. The Board seeks to eliminate all regulatory text in the California Code of Regulations, Title 15, Division 2 governing prior procedures for the Board to conduct “term calculations” to set a release date for an inmate with an indeterminate or “life” sentence. As explained below in further detail, following significant changes in statutory law and a decision of the California Supreme Court, the Board no longer has legal authority to conduct term calculations under these regulations. Therefore, since the legal authority for these regulations no longer exists, the deletion of this text in the proposed regulations has no regulatory effect.

LEGAL BACKGROUND

The Penal Code previously required the Board to “establish criteria for the setting of parole release dates” for inmates within the Board’s jurisdiction housed in the California Department of Corrections and Rehabilitations (department). (Penal Code section 3041(a).) The purpose of setting the parole release dates was to establish a minimum amount of time the inmate would be required to serve upon being independently found suitable for parole that would “provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public.” (*See* former Pen. Code, § 3041, subd. (a) as amended by Stats. 2013, c. 312.). A term calculation consisted of four steps: (1) the panel selected a middle, mitigated (lower), or aggravated (upper) base term; (2) the panel adjusted the base term for additional crimes or enhancements, if any, and calculated the adjusted base term; (3) the panel awarded post-conviction credit; and (4) the panel subtracted the post-conviction credit from the adjusted base term and calculated the proposed life term, which the Board subsequently verified during its statutory decision review process.

In its regulations, the Board originally authorized a panel to complete each of these steps and calculate a life inmate’s life term only at a hearing when the panel had found the inmate suitable for parole, since Penal Code section 3041 still required a separate finding of suitability before an inmate was eligible for release, regardless of whether the inmate had completed the minimum calculated term. However, on May 28, 2013, an inmate-petitioner filed a petition for writ of habeas corpus challenging his denial of parole and raising a constitutional challenge against the Board’s

practice of deferring the steps of selecting a base term and calculating an adjusted base term until after a finding of suitability for parole. (*In re Roy Butler*, Alameda County Case No. 91694B). On its own motion the First Appellate District Court of California bifurcated the matter into one case addressing the petitioner's parole denial (Case No. A137273) and a second case addressing the challenge to the timing of selecting base terms and calculating adjusted base terms (Case No. A139411). On December 13, 2013, following a discovery period and a series of settlement conferences, the petitioner and Board stipulated to the entry of a court order in Case No. A139411.

The resulting December 16, 2013 court order required the Board to "begin implementation of new policies and procedures that will result in the setting of base terms and adjusted base terms for life term inmates at their initial parole consideration hearing, or at the next scheduled parole consideration hearing that results in a grant of parole, denial of parole, a tie vote, or a stipulated denial of parole." The Board was further ordered to "commence rulemaking proceedings designed to memorialize and embody said new policies and procedures." (*In re Roy Butler*, Stipulation and Order Regarding Settlement, First Appellate District Court of California Case No. A139411, December 16, 2013; hereinafter "*Butler* stipulated agreement.")

The Board initially complied with the *Butler* stipulated agreement. However, on January 1, 2016, the California Legislature amended Penal Code section 3041, subdivision (a) to relieve the Board from its duty to establish a release date. Specifically, following the 2016 revision, section 3041, subdivision (a)(4) stated, "Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date." (Sen. Bill No. 230 (2015-2016 Reg. Sess. §3041.) On January 1, 2018, the Legislature again amended section 3041, subdivision (a)(4) to state, "Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date or elderly parole eligible date." (Assem. Bill No. 1448 (2017-2018 Reg. Sess. §3041.) Under these amendments, the Board no longer retained legal authority to calculate parole release dates; instead, inmates must be released upon a finding of suitability once the inmate has passed at least one statutory parole eligibility date.

Following these legislative amendments, the Board ceased calculating terms; however, the *Butler* court initially ordered the Board to continue this practice, despite no remaining statutory authority to do so. (See *In re Butler* (2015) 236 Cal.App.4th 1222.) On April 2, 2018, the California Supreme Court ruled that the Board was not required to continue setting base terms for inmates. Specifically, the court held:

The settlement agreement approved by the parties in 2013 required the Board to calculate an inmate's base term at his or her initial parole hearing. At the time the parties ratified that agreement, a calculated base term directly impacted the release date for inmates serving indeterminate life sentences. Not so today. Instead, the release date for indeterminately-sentenced adult inmates—like *Butler*—is now guided by the date when an inmate has served the statutory minimum term and is

found suitable for parole based on statutory public safety-related criteria, subject to limited exception. These changes to California’s criminal justice system do not diminish the societal interest in avoiding arbitrary parole determinations. They do, however, dictate that base terms no longer directly control the release date for prisoners subject to indeterminate sentences. That these statutory changes are material to these parties’ agreement requires, legally and practically, modification of the injunctive order by the Court of Appeal. Moreover, sentencing in California involves primarily determinate sentences and parole determinations involving public safety considerations—so specific base term calculations are not a constitutionally necessary measure for guarding inmates serving indeterminate sentences against disproportionate punishment. (*In re Butler* (2018) 4 Cal.5th 728, 747.)

Therefore, following the California Supreme Court’s decision, the Board no longer retains legal authority to calculate “terms” or “release dates” for inmates, because the legislative amendments removed any legal effect of these terms. Instead, the inmate’s release date is determined by the date when an inmate has both served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Thus, the Board seeks to delete all regulatory language pertaining to selecting base terms, calculating adjusted base terms, awarding post-conviction credits, and calculating final release dates as these regulations no longer have legal effect.

ANAYLSIS REGARDING LACK OF REGULATORY IMPACT FOR THE CHANGES TO EACH SECTION

Section 2000 requires amendment because a portion of the definitions in this section states the Board determines and sets the parole date of an inmate. The Board no longer has authority to set a parole date because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a parole date for an inmate and this section requires amendment to delete the reference to the Board setting a parole date.

Section 2029 requires amendment to delete the reference to the Board setting a parole date for an inmate. The Board no longer has authority to set a parole date; therefore, the Board struck the reference in this section to the Board setting a parole date.

Section 2043 requires amendment to delete the reference to progress hearings. Progress hearings were previously held for inmates who were granted parole but had a future release date as a result of a “term” calculated by the Board. At this hearing, the panel’s only purpose was to determine whether a previously set parole date should be advanced in light of the inmate’s behavior following their grant of parole by awarding additional post-conviction credits. Because inmates are now eligible for release upon passing their earliest statutory minimum parole eligible date, the Board no longer has authority to award post-conviction credits or advance an inmate’s release date. Thus, progress hearings are now moot and the reference to progress hearings should be deleted.

Section 2239 requires amendment because a portion of this section states the Board may use information regarding Battered Woman Syndrome as a reason for mitigating the base term. The Board no longer has authority to set a base term; therefore, the Board struck the reference in this section to the Board mitigating a base term.

Section 2268 requires amendment because it refers to the Board setting a term of confinement. The Board no longer has authority to set a term of confinement because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, this section requires amendment to delete the two references to the Board setting a period of confinement and the inmate serving that period of confinement.

Section 2269 requires deletion because it regulates progress hearings. Progress hearings were previously held for inmates who were granted parole but had a future release date as a result of a “term” calculated by the Board. At this hearing, the panel’s only purpose was to determine whether a previously set parole date should be advanced in light of the inmate’s behavior following their grant of parole by awarding additional post-conviction credits. Because inmates are now eligible for release upon passing their earliest statutory minimum parole eligible date, the Board no longer has authority to award post-conviction credits or advance an inmate’s release date. Thus, progress hearings are now moot and this section must be deleted.

Section 2269.1 requires amendment because it references reviewing an inmate’s conduct pertinent to granting or withholding post-conviction credits, establishing a parole date, and scheduling progress hearings. The Board no longer retains authority to engage in any of these actions. Therefore, the Board is amending this section to delete all references to setting a parole date, granting or withholding post-conviction credits, and progress hearings.

Section 2270 requires amendment to strike references to sections 2282 through 2291 which regulate the Board setting an inmate’s term of confinement. These sections will be deleted from the Board’s regulations; therefore, any reference to these sections must be deleted.

Section 2272 requires amendment to delete the paragraph referencing progress hearings, which the Board no longer holds because it no longer has authority to award post-conviction credits. As explained above, progress hearings were previously held for inmates who were granted parole but had a future release date. At this hearing, the panel’s only purpose was to determine whether a previously set parole date should be advanced because of the inmate’s behavior following their grant of parole. The Board no longer has authority to advance an inmate’s release date; therefore, the Board has no reason to hold a progress hearing. Additionally, since paragraph (b) is deleted in full, leaving only one paragraph, the Board is deleting the paragraph (a) designation, since it no longer serves a purpose.

Section 2273 requires amendment to delete the reference to progress hearings, which the Board no longer holds because it no longer has authority to award post-conviction credits. As explained above, progress hearings were previously held for inmates who were granted parole but had a future release date. At this hearing, the panel’s only purpose was to determine whether a previously set parole date should be advanced because of the inmate’s behavior following their grant of parole.

The Board no longer has authority to advance an inmate's release date; therefore, the Board has no reason to hold a progress hearing.

Section 2280 requires amendment to delete the reference to the Board setting a parole date. The Board no longer has authority to set a parole date because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a parole date for an inmate and this section requires amendment to delete the reference to the Board setting a parole date. Additionally, the Board noted spaces missing between "under" and "§" as well as between "§" and "2281(c)" in the second sentence, which is remaining in the text of this statute. The Board added in the missing spaces.

Sections 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, and 2291 require deletion in full because these sections regulate the Board's previous process of setting a term of confinement, which includes selecting an inmate's base term from the matrices, adjusting the base term if appropriate, awarding post-conviction credits, and calculating the final period of incarceration, or "term." The Board no longer has authority to set a term of confinement because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, as the Board has no authority to engage in the process for setting a period of confinement for an inmate, these sections all require deletion.

Section 2292 requires amendment to delete references to the Board setting an inmate's parole date and awarding post-conviction credits. The Board no longer has authority to set a parole date because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Additionally, because the Board has no authority to set an inmate's parole date, it also has no authority to move an inmate's release date by awarding post-conviction credits. Because the Board has no authority to set a parole date for an inmate or award post-conviction credits, these sections must be amended to delete the references to the Board setting a parole date and awarding post-conviction credits.

Section 2304 requires amendment to delete references to the Board setting an inmate's parole date under Article 6. Parole Consideration for [Indeterminate Sentence Length] ISL Prisoners. Under this article, the Board is required to delete in full all sections regulating the prior process of calculating a term. Thus, this section must be amended to delete the reference to this process and the sections regulating the process.

Section 2305 requires deletion because it regulates progress hearings for ISL prisoners, which the Board no longer holds because it no longer has authority to award post-conviction credits. As explained above, progress hearings were previously held for inmates who were granted parole but had a future release date. At this hearing, the panel's only purpose was to determine whether a previously set parole date should be advanced because of the inmate's behavior following their grant of parole. The Board no longer has authority to advance an inmate's release date; therefore, the Board has no reason to hold a progress hearing.

Section 2306 requires amendment to delete reference to section 2317. As explained further below, section 2317 will be deleted because it regulates the Board's ability to set a parole release date. The Board is also deleting the hyphen separating the reference from 2316 and 2317.

Sections 2308 and 2309 requires amendment to delete the portions referencing progress hearings for the reasons noted above.

Section 2310 requires amendment to delete references to the Board setting a term of confinement because, as previously explained, the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, these sections must be amended to delete references to the Board setting a period of confinement.

Section 2315 requires amendment to delete references to the Board setting a parole date, determining the period of confinement, and the sections regulating those prior processes for ISL prisoners because, as previously explained, the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, these sections must be amended to delete these references.

Section 2317 requires deletion because it regulates the Board's prior process of setting a parole date for ISL prisoners. As explained above, the Board no longer has authority to set a parole date for inmates; thus, this section requires deletion.

Section 2319 requires deletion because it defines the total period of confinement, base crime, base period of confinement, and adjustments for ISL prisoners. These terms are part of the Board's prior process of setting a parole date. As explained above, the Board no longer retains authority to engage in this process. Therefore, the definitions in this section require deletion.

Sections 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2328, and 2329 require deletion in full because they regulate the Board setting a term of confinement for ISL prisoners, which includes calculating an inmate's base term, adjusted base term, and awarding post-conviction credits. The Board no longer has authority to set a term of confinement because, similar to normal life-sentenced inmates, the release date for ISL inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a period of confinement for an inmate and these sections require deletion because they regulate the Board setting an inmate's term following a grant of parole, including awarding post-conviction credits.

Section 2342 requires deletion because it governs the application of pre-prison credits by the Board when setting a term of confinement. The Board no longer has authority to set a term of confinement because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board no longer has authority to apply pre-prison credits to the period of confinement and this section must be deleted.

Section 2343 requires amendment to delete references to the Board setting an inmate's prior term under any previous regulations because the previous regulations are being deleted and the Board can no longer set an inmate's primary term.

Section 2369 requires amendment to delete references to awarding post-conviction credits. The Board has no authority to advance an inmate's parole date or award post-conviction credits. Therefore, the Board deleted all references to post-conviction credits.

Section 2371 requires deletion in full because it regulates prisoner rights during progress hearings, which the Board no longer holds because it no longer has authority to award post-conviction credits. As explained above, progress hearings were previously held for inmates who were granted parole but had a future release date. At this hearing, the panel's only purpose was to determine whether a previously set parole date should be advanced because of the inmate's behavior following their grant of parole. The Board no longer has authority to advance an inmate's release date; therefore, the Board has no reason to hold a progress hearing.

Section 2400 requires amendment to delete references to awarding post-conviction credits and establishing a period of confinement. The Board has no authority to advance an inmate's parole date or award post-conviction credits. Therefore, the Board deleted all references to post-conviction credits. The Board is also deleting references to the Board establishing periods of confinement for an inmate because the Board no longer has authority to set a parole date.

Section 2401 requires amendment because it refers to the Board setting a parole date for inmates who committed first- or second-degree murder on or after November 8, 1978. The Board no longer has authority to set a parole date because, similar to normal life-sentence inmates, the release date for inmates who committed these crimes is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, since the Board has no authority to set a parole date for inmates, this section requires amendment to delete the reference to the Board setting a parole date.

Sections 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, and 2411 require deletion because they regulate the Board setting a term of confinement for inmates who committed first- or second-degree murder on or after November 8, 1978, which includes calculating an inmate's base term, adjusted base term, and awarding post-conviction credits. The Board no longer has authority to set a term of confinement because the release date for indeterminate-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a period of confinement for these inmates and these sections require deletion because they regulate the Board setting an inmate's term following a grant of parole, including awarding post-conviction credits.

Section 2420 requires amendment to delete references to awarding post-conviction credits and establishing a period of confinement. The Board has no authority to advance an inmate's parole date or award post-conviction credits. Therefore, the Board deleted all references to post-conviction credits. The Board is also deleting references to the Board establishing periods of confinement for an inmate because the Board no longer has authority to set a parole date.

Section 2421 requires amendment because it refers to the Board setting a parole date for habitual offenders as defined in Penal Code section 667.7. The Board no longer has authority to set a parole date because, similar to normal life-sentenced inmates, the release date for these inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, since the Board has no authority to set a parole date for any inmates, this section requires amendment to delete the reference to the Board setting a parole date.

Sections 2423, 2424, 2425, 2426, 2427, 2428, 2429, and 2429.1 require deletion because they regulate the Board setting a term of confinement for habitual offenders as defined in Penal Code section 667.7, which includes calculating an inmate's base term, adjusted base term, and awarding post-conviction credits. The Board no longer has authority to set a term of confinement because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a period of confinement for these inmates and these sections require deletion because they regulate the Board setting an inmate's term following a grant of parole, including awarding post-conviction credits.

Section 2430 requires amendment to delete references to awarding post-conviction credits and establishing a period of confinement. The Board has no authority to advance an inmate's parole date or award post-conviction credits. Therefore, the Board deleted all references to post-conviction credits. The Board is also deleting references to the Board establishing periods of confinement for an inmate because the Board no longer has authority to set a parole date.

Section 2431 requires amendment because it refers to the Board setting a parole date for sex offenders sentenced under Penal Code section 667.51. The Board no longer has authority to set a parole date because, similar to normal life-sentenced inmates, the release date for these inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, since the Board has no authority to set a parole date for any inmates, this section requires amendment to delete the reference to the Board setting a parole date.

Sections 2433, 2434, 2435, 2436, 2437, 2438, 2439, and 2439.1 require deletion because they regulate the Board setting a term of confinement for sex offenders sentenced under Penal Code section 667.51, which includes calculating an inmate's base term, adjusted base term, and awarding post-conviction credits. The Board no longer has authority to set a term of confinement because the release date for indeterminately-sentenced adult inmates is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria. Therefore, the Board has no authority to set a period of confinement for these inmates and these sections require deletion because they regulate the Board setting an inmate's term following a grant of parole, including awarding post-conviction credits.