

BPH RN 21-04: INITIAL STATEMENT OF REASONS

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

Enactment of:

ARTICLE 17. PAROLE CONSIDERATION HEARINGS FOR ELDERLY INMATES

Enactment of Sections 2449.40 – 2449.43, governing parole consideration hearings for elderly inmates.

INTRODUCTION:

Through ongoing litigation in *Coleman v. Newsom*, and *Plata v. Newsom*, prisoners with serious medical and mental health conditions filed suit asserting their constitutional rights were violated due to prison overcrowding, resulting in their receiving inadequate medical and mental health care. The court found that the deficiencies in prison medical and mental health care violated prisoners' Eighth Amendment Rights. Plaintiffs' in both cases requested a three-judge court be convened pursuant to the Prison Litigation Reform Act (PLRA). The two district judges in each case independently granted those requests, and the Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court to preside over the consolidated class action.

On August 4, 2009, the three-judge court issued an order that required the State to submit a plan to reach a prison population cap of 137.5% design capacity in two years. According to the three-judge court's order, the population reduction was necessary because, at the time, the State's prisons housed twice as many prisoners as they were designed for, making the prisons unsafe for prisoners and staff. The three-judge court found that prisoners were unable to obtain life-saving medical and psychiatric care in these overcrowded prisons.

As an additional measure to reduce overcrowding, on February 10, 2014, the three-judge court directed the Board of Parole Hearings (board) to "finalize and implement a new parole process whereby inmates who are 60 years of age and have served a minimum of [25] years of their sentence" would be referred to the board for parole consideration. This process excluded from eligibility inmates who were either sentenced to life without the possibility of parole or condemned.

On June 16, 2014, the board issued a memorandum providing guidance on how the board would implement the court-ordered Elderly Parole Program. The court-ordered Elderly Parole Program was fully implemented on October 1, 2014.

On January 1, 2018, the California Legislature enacted Assembly Bill 1448 (2017-2018 Reg. Session) (AB 1448), which codified into law the Elderly Parole Program by adding section 3055 to

the Penal Code. The statutory version of the Elderly Parole Program differed from the Court-Ordered Elderly Parole Program in several respects. First, in addition to excluding condemned inmates or inmates sentenced to life without the possibility of parole, the statutory Elderly Parole Program also excluded inmates sentenced on any current offense under the strike laws in Penal Code sections 1170.12 or 667, subdivisions (b) through (i). Second, the statutory Elderly Parole Program also excluded any inmate convicted of first-degree murder of a peace officer engaged in performance of their duties, where the individual knows or reasonable should have known the victim was a police officer, or the victim was a peace officer or former peace officer intentionally killed in retaliation for performance of their official duties.

In signing AB 1448, Governor Brown commented that the Elderly Parole Program “has been a successful program that saves [California] a significant amount of money that would be otherwise spent for geriatric prisoners who no longer pose a risk to public safety,” and that he believed “the pool of eligible inmates can and should be broadened.” On January 1, 2021, the California Legislature enacted Assembly Bill 3234 (2019-2020 Reg. Session) (AB 3234), which amended Penal Code section 3055 to encompass the broader version of the statutory Elderly Parole Program to include inmates who are 50 years old and have served 20 years of continuous incarceration. The additional exclusions still apply.

PROBLEM STATEMENT:

The statutory language in Penal Code section 3055, as enacted by AB 1448 and amended by AB 3234, broadened the pool of inmates who qualify for Elderly Parole by lowering the minimum age and decreasing the length of incarceration required for parole consideration. The statute also excluded some inmates from qualification who are not excluded under the court-ordered Elderly Parole Program. This creates a two-track system where some inmates will be eligible for statutory Elderly Parole Program, but others (third and second strike inmates and those convicted of intentionally murdering a peace officer) will be eligible for the court-ordered Elderly Parole Program. Thus, the board is clarifying for inmates and the public, how to determine when an inmate qualifies for Elderly Parole under Penal Code section 3055.

Second, Penal Code section 3055 does not specify how the board or CDCR (the department) should interpret “continuous incarceration.” Thus, the board needs to provide clarification for the public, inmates, and victims to determine when “continuous incarceration” begins and what constitutes a break in custody for purposes of qualifying an inmate for Elderly Parole. Further, the board and the department need to clarify the interpretation of “incarceration” for the public and inmates to demonstrate which detention facilities qualify.

Third, Penal Code section 3055 does not specify whether the board or the department is responsible for determining whether an inmate qualifies as an elderly inmate or which agency calculates the inmate’s elderly parole eligible date (EPED). Thus, the board needs to specify in the proposed regulations which agency conducts these determinations.

Fourth, the statutory language of Penal Code section 3055 does not specify when the board should conduct parole consideration hearings for inmates who qualify for Elderly Parole. Penal Code section 3055 does not explain how and when these hearings will be scheduled, particularly if the elderly inmate has another parole eligible date that entitles them to an earlier hearing. Thus, the

board needs to clarify the timing for scheduling initial hearings for elderly inmates so that inmates and the public can understand how the board schedules these hearings as well as the interplay between different hearing eligibility dates. Additionally, Penal Code section 3055, subdivision (f) notes that elderly inmates denied parole remain subject to the same denial lengths under Penal Code section 3041.5, subdivision (b)(3), and may not receive a subsequent parole consideration hearing as an elderly inmate if they are released in accordance with other statutory provisions prior to the date of the subsequent hearing. For inmates already in the parole hearing cycle, the timing of a subsequent hearing is also governed by Penal Code section 3041.5, subdivision (b)(3). Thus, the board needs to clarify these provisions in simpler terms for inmates and members of the public who are not familiar with these code sections.

Fifth, Penal Code section 3055 establishes additional at-hearing requirements for hearing panels conducting parole consideration hearings for elderly inmates, including the requirement to give special consideration to the elderly factors, enforce victims' rights, and if the inmate is denied parole, set a denial length in accordance with Penal Code section 3041.5, subdivision (b)(3). The board needs to collate these rights into a single location and clarify how these requirements apply during parole consideration hearings for elderly inmates.

Sixth, in mandating specific information for hearing panels to consider when assessing parole suitability for elderly inmates, Penal Code sections 3055 references three Elderly Parole factors (elderly factors): age, time served, and diminished physical condition. However, the statute does not provide guidance on the meaning of these terms. Thus, the board needs to interpret and clarify the meaning of these terms for hearing panels, the public, and inmates so they will know how the board will interpret and apply the elderly factors to elderly inmates at parole hearings.

PURPOSE:

The board proposes to enact California Code of Regulations, title 15, article 17, which will include sections 2449.40 through 2449.43, as follows:

Section 2449.40 is *added* to clarify the criteria to qualify as an elderly inmate for the purpose of this article, and the definition of "continuous incarceration."

- Subdivision (a) clarifies the three required criteria that an inmate serving a determinate term or an indeterminate term of life with the possibility of parole must meet to qualify for Elderly Parole under this article. Specifically, the inmate must be age 50 or older, have served at least 20 years of continuous incarceration on the current sentence, and must be serving a determinate or indeterminate sentence with the possibility of parole. Further, this subdivision clarifies the three exclusions that will render otherwise-qualifying inmates ineligible for Elderly Parole, namely sentencing under the strike laws or first-degree murder of a peace officer under one of two enumerated circumstances.
- Subdivision (b) clarifies the board and the department's interpretation of "continuous incarceration" in accordance with Penal Code section 3055, subdivision (a), and case law. Further, this subdivision clarifies the department determines when incarceration begins and what constitutes a break in custody for purposes of calculating an EPED.

Section 2449.41 is *added* to clarify the board's procedures for determining when initial and subsequent parole consideration hearings are scheduled for elderly inmates under this article. This section further clarifies denial lengths elderly inmates are subject to.

- Subdivision (a) clarifies the board must provide a consultation to an elderly inmate during the sixth year before the inmate's EPED so long as they are not entitled to an earlier consultation under another provision of law. Further, this subdivision clarifies the information the board must provide to the inmate at the consultation.
- Subdivision (b) clarifies that an inmate who qualifies for Elderly Parole will receive an Elderly Parole hearing within six months following the date of their EPED unless another provision of law entitles an inmate to an earlier hearing date.
- Subdivision (c) clarifies that, in accordance with Penal Code section 3055, subdivision (f), elderly inmates remain subject to the denial length periods established by Marsy's Law in Penal Code section 3041.5, subdivision (b), paragraph (3).
- Subdivision (d) clarifies that no subsequent Elderly Parole hearing is necessary if the inmate is released prior to the date of the subsequent hearing.
- Subdivision (e) clarifies that a determinately-sentenced elderly inmate will not receive a subsequent Elderly Parole hearing if they will be released pursuant to their Earliest Possible Release Date (EPRD) within one year of the subsequent hearing date.

Section 2449.42 is *added* to establish the board's requirements and processes for conducting Elderly Parole hearings.

- Subdivision (a) clarifies that Elderly Parole hearings are subject to the same general rules and requirements as other parole consideration hearings, with the exception of the variations contained in the other subdivisions of this section.
- Subdivision (b) establishes the requirement that the hearing panel shall give special consideration to the elderly factors in determining whether the elderly factors reduce the inmate's risk of future violence.
- Subdivision (c) clarifies that elderly inmates will be suitable for parole unless the panel determines the elderly inmate remains a current, unreasonable risk to public safety even after the panel has given special consideration to the elderly factors, as required by subdivision (b). This subdivision further clarifies requirements for the hearing panel to articulate during their decision to deny parole to an elderly inmate.
- Subdivision (d) clarifies that all victim rights at parole consideration hearings still apply.

Section 2449.43 is *added* to clarify the board's interpretation of the elderly factors identified in Penal Code sections 3055, subdivision (c).

- Subdivision (a) clarifies the board's interpretation of "age" and lists the criteria for consideration under this factor.
- Subdivision (b) clarifies the board's interpretation of "time served" and lists the criteria for consideration under this factor.
- Subdivision (c) clarifies the board's interpretation of "diminished physical condition" and lists the criteria for consideration under this factor.

NECESSITY:

Section 2449.40

Defining who qualifies as an elderly inmate in section 2449.40 of the proposed regulations is necessary because following the enactment of Penal Code section 3055, the board needs to provide clarity to institution staff, inmates, and the public about how to determine if an inmate qualifies for Elderly Parole. Specifically, the board needs to define who qualifies as an elderly inmate within section 2449.40, subdivision (a), and clarify the criteria the department will use to qualify or disqualify an inmate from Elderly Parole. The board also finds it necessary to define “continuous incarceration” in this section to clarify for stakeholders how the department will determine continuous incarceration. For consistency with established law, the board interprets continuous incarceration in accordance with the case law in (*People v. Culp* (2002) 100 Cal.App.4th 1278.), which indicates “continuous incarceration” means an uninterrupted period of detention in one or more facilities described in Penal Code section 3055, subdivision (b).

Moreover, the board deems it necessary to clarify that inmates sentenced to death; sentenced to life without the possibility of parole; sentenced as second-strikers or third-strikers pursuant to Penal Code sections 1170.12, subdivisions (b) through (i), or 667; or convicted of first-degree murder of a peace officer or former peace officer in the performance of their official duties do not qualify for Elderly Parole because it would violate the intent of the Legislature to qualify such inmates for Elderly Parole. Clarifying these exclusions is also necessary for institutional staff, the public, and inmates to know the criteria that disqualifies inmates from qualifying for statutory Elderly Parole.

Section 2449.41

Establishing the board’s process for how and when consultations and parole consideration hearings will be scheduled for elderly inmates in section 2449.41 of the proposed regulations is necessary to clarify the interplay between different hearing eligibility dates and release dates, as well as to clarify for inmates and the public when the board will schedule hearings following an EPED.

Specifically, section 2449.41, subdivision (a), requires the board to conduct a consultation six years prior to an elderly inmate’s EPED. This ensures the board’s processes are consistent with the legislative intent of Penal Code section 3041, subdivision (a), paragraph (1), which states that the purpose of a consultation is to assist inmates in preparing for their initial parole suitability hearing by providing relevant information about the parole hearing process and factors relevant to the person’s suitability for parole. Specifically, in section 3041, paragraph (a)(1), the Legislature established that consultations must be held during the sixth year prior to a life inmate’s minimum eligible parole date (MEPD), but did not give similar direction regarding a hearing triggered by an EPED. For consistency with this section, the board determined consultations for hearings triggered by EPEDs should similarly be scheduled during the sixth year prior to the EPED.

Additionally, requiring initial Elderly Parole consideration hearings to be scheduled within six months after an elderly inmate reaches their EPED ensures that hearings are held as quickly as possible following the date the inmate will have reached 50 years of age and have served 20 years of continuous incarceration, allowing for time to complete all necessary pre-hearing requirements. Additionally, since Penal Code section 3055, subdivision (j), sets the maximum date by which the board must conduct hearings for eligible elderly inmates, it is necessary to clarify that, if an inmate is entitled to an earlier hearing under a different parole eligibility date, the board will not schedule the hearing within six months of the EPED because the elderly inmate will already have been scheduled for a parole hearing. For subsequent hearings, explaining that elderly inmates remain

subject to the denial periods established in Penal Code section 3041.5 is necessary to clarify the denial lengths that will be imposed at elderly hearings so inmates, the public, and victims will understand when subsequent hearings will be scheduled. Moreover, clarifying that the board will not schedule subsequent Elderly Parole hearings if the inmate is released pursuant to other statutory provisions prior to the date of the subsequent hearing is necessary to adhere to the Legislative intent of Penal Code section 3055, subdivision (f), since suitability hearings are unnecessary for inmates who have already been released under another law.

Moreover, clarifying in section 2449.41, subdivision (e), that a determinately-sentenced inmate will not be scheduled for a hearing if their EPRD is within 1 year of their EPED is necessary to explain the interplay between an EPRD and an EPED, and to avoid using hearing resources when the inmate's release is imminent. Specifically, a determinately-sentenced elderly inmate's initial hearing is generally scheduled about six months after their EPED. However, even if an inmate receives a grant at their initial hearing, the decision is subject to review by the board's Legal Division and the Governor under Penal Code sections 3041, 3041.1, and 3041.2, which combined can take up to five months to complete. In addition, the board's Legal Division and the Governor may refer the decision to the full board for review, further delaying the inmate's release by a month or more. This means that a person granted parole at their initial Elderly Parole hearing can expect to be released roughly 11 to 12 months after their EPED assuming the decision is unchanged after review by the board's Legal Division and the Governor. Thus, the potential impact of section 2449.41, subdivision (e) on a determinately-sentenced elderly inmate's length of incarceration is negligible because the elderly inmate will be released on parole under another provision of law at approximately the same time as the release would be finalized from the board's grant. Thus, providing an Elderly Parole hearing to a determinately-sentenced elderly inmate whose EPRD is within 1 year of their EPED would unnecessarily redirect board hearing resources away from other parole hearings the board is required to conduct.

Section 2449.42

Collating each of the at-hearing rights and requirements into a single section is necessary to simplify for hearing panels, inmates, victims, and the public all of the variations that specifically apply to parole consideration hearings for elderly inmates. As an initial matter, requiring these hearings to generally be conducted in accordance with the board's regulations for suitability hearings is necessary to establish that, but for the remaining subdivisions under this section, these hearings are conducted in the same manner as suitability hearings for all other inmates in accordance with Penal Code section 3055, subdivision (e). Then, establishing in section 2449.42, subdivision (b), the special consideration requirement for the elderly factors with reference to the proposed regulation interpreting these factors is necessary to clarify that, in giving special consideration to these factors, panels must be guided by the board's specified interpretations. Additionally, clarifying in section 2449.42, subdivisions (c) and (d) the requirements for a hearing panel to deny parole, and the rights of victims at these hearings is necessary to ensure that hearing panels, inmates, victims, and the public can find all of the variations for Elderly Parole hearings in a single location.

Section 2449.43

Interpreting and making specific in section 2449.43 of the proposed regulations the three elderly inmate factors listed in Penal Code sections 3055, subdivision (c), paragraph (1), is necessary to provide hearing panels with guidance about the meaning of the elderly factors to aid hearing panels

in determining how the elderly factors reduce an inmate's risk of future violence. Interpreting and making specific the elderly factors also ensures inmates, staff, victims, and the public have similar understandings of what is contemplated by each factor, so they understand how these factors will be interpreted and applied at hearings for elderly inmates.

ANTICIPATED BENEFITS:

Defining who qualifies as an elderly inmate benefits all stakeholders by resolving several ambiguities and clarifying how to determine whether an inmate will qualify for elderly inmate protections. These processes also benefit public safety by ensuring the greatest possible accuracy in qualifying inmates for elderly inmate status and calculating their parole eligibility dates.

Clarifying 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 an elderly inmate's initial or subsequent parole consideration hearing. 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 elderly inmates differ from other parole consideration hearings, which allows each hearing participant to better prepare for their role in the hearings. Lastly, interpreting the three elderly factors also benefits stakeholders by clarifying what information will be discussed and given special consideration at hearings for elderly inmates.

DOCUMENTS RELIED UPON:

Additionally, in interpreting other provisions of these proposed regulations, the board relied on the following additional court decisions:

- *People v. Culp* (2002) 100 Cal.App.4th 1278
- *In re Lawrence* (2008) 44 Cal.4th 1181

The board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included in this section.

ECONOMIC IMPACT ANALYSIS:

Creation or Elimination of Jobs within the State of California

The proposed action is designed to bring the board's regulations into compliance with Penal Code sections 3055, as enacted by AB 1448 and amended by AB 3234. However, the board has determined that the proposed action will have no impact on the creation or elimination of jobs within the State of California because the impact of these regulations on the board's workload has been absorbed within the board's existing resources.

Specifically, the main substantive changes in this proposed action require the board to conduct hearings for elderly inmates who either (a) were already in the board's hearing cycle but are now entitled to have their hearings conducted as elderly inmate hearings or (b) were not previously entitled to receive hearings until the passage of AB 3234. Elderly inmates in the first category do

not impact the board's workload because these inmates already had hearings scheduled; future hearings will just be conducted as Elderly Parole hearings. For elderly inmates in the second category, the board was required to schedule additional hearings for these newly-eligible inmates.

For the current fiscal year, additional resources were not necessary to implement these regulations. However, in the prior fiscal year, the board requested, and was granted, additional funding beginning in the current fiscal year to effectively carry out all general board functions, which includes the board's new statutory obligation under AB 3234 to provide Elderly Parole hearings to qualified elderly inmates.

The additional resources were also intended to address an increase in projected workload associated with youth offender hearings under Penal Code section 3051, the rescheduling of hearings that had to be postponed due to COVID-19, and hearings for nonviolent offenders required to be scheduled under Proposition 57. Thus, this regulation package is not expected to create or eliminate jobs in California because staffing needs have been absorbed within existing allocated resources.

Creation of New or Elimination of Existing Businesses Within the State of California

This regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because private businesses are not affected by a shift in rights and hearing requirements for elderly inmates seeking parole. These proposed regulations will have no additional effect on the creation or elimination of businesses in California.

Expansion of Businesses within the State of California

This regulatory action will not have a significant, statewide adverse economic impact directly affecting the expansion of business in California because private businesses are not affected by a shift in rights and hearing requirements for elderly inmates seeking parole. These proposed regulations will have no additional effect on business expansion in California.

Anticipated Benefits of the Regulations

As explained above in greater detail, these proposed regulations will benefit all stakeholders by providing greater clarity on how to determine which inmates qualify as elderly inmates and when each hearing participant should prepare for the elderly inmate's hearings. The proposed regulations also benefit public safety by ensuring greater uniformity in how the elderly factors are considered and applied to inmate cases.

ADDITIONAL FINDINGS:

The board has made an initial determination this regulatory action will not have a significant adverse economic impact on business. Neither the rights and requirements for elderly inmate hearings nor the process through these hearings are held affects operation of businesses in California. No facts, evidence, documents, testimony, or other evidence to the contrary has been provided to or reviewed by the board.

The board has determined this action imposes no mandates on local agencies or school districts, or mandates which require reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included above in the “Documents Relied Upon” section.

The board has determined that no alternative considered would be (1) more effective in carrying out the purpose of this action, (2) as effective and less burdensome to affected private persons than the action proposed, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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