



BPH RN 21-01: REGULATIONS TO COMPLY WITH PENAL CODE SECTION 3041.5

Summary of Public Comments Received and Public Hearing¹

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF FEBRUARY 5, 2021, TO MARCH 22, 2021:

The board received written comments from a total of three members of the public (including two inmates) during the public comment period of February 5, 2021, through March 22, 2021. Each comment from the three commenters was individually identified with a unique identification (“ID”) number as follows: [the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that commenter]. (For example, the comment identified as **02-01** would indicate that comment was made in or by the **second** letter/speaker received and was the **first** comment from the author of that letter/speaker.) The board received a total of seven individual comments from the three written commenters. The comment ID numbers for comments received during the public comment period ranged from 01-01 through 03-01. Tables containing the identification number for each comment along with the commenter’s name, date of the comment, category of the comment, and the board’s determinations regarding the comment are included in the Written Comments Submitted tab for comments received during the 45-day public comment period, which also includes copies of each correspondence received during the public comment period.

Below, the board identifies the specific comment ID numbers for each public comment and then addresses each comment individually.

¹ The comments and responses here are excerpted from the Final Statement of Reasons filed with the Office of Administrative Law.

COMMENT ID: 01-01

COMMENT:

This commenter requested that the board mail the commenter a copy of the Proposed Regulatory Text, Initial Statement of Reasons, and the Form 399 Economic and Fiscal Impact Statement for the proposed regulations.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

While the board provided this commenter with the requested documents, the board declines to respond further to this request in the final statement of reasons. The board finds this comment relevant but not within the scope of the regulatory package because, while the comment is a request related to the regulatory package because it requests copies of documents contained within the regulatory package, the comment is not specifically directed at the proposed regulations or to the procedures followed by the board in proposing or adopting the regulations. (See Gov. Code, § 11346.9, subd. (a)(3).)

COMMENT ID: 02-01

COMMENT:

This commenter alleged that “[a]ny length of years for denial of parole to cases under Marsy’s law in which the victim’s family did not suffer a loss will constitute an unlawful imprisonment absent other legal ground.”

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant to and within the scope of the proposed regulatory package because it pertains to Marsy’s law denial lengths as outlined in proposed Section 2268, subdivision (b). On November 4, 2008, the People of the State of California approved Proposition 9, otherwise known as the Victims’ Bill of Rights Act of 2008: Marsy’s Law. This measure amended the California Constitution and Penal Code to provide additional rights to victims during criminal, juvenile, and parole matters. Of relevance, Marsy’s Law amended Penal Code section 3041.5, subdivision (b), by changing the period for scheduling an inmate’s next parole consideration hearing following a denial of parole, from up to two years for non-murderers and up to five years for murderers, to fifteen, ten, seven, five, or three years for all inmates.

Penal Code section 3041.5, subdivision (b)(3), establishes parameters for the board when setting an inmate’s denial length following a decision to deny parole. The Penal Code makes clear that, following a decision to deny parole, the board must schedule the inmate’s next parole consideration hearing in either 15, 10, 7, 5, or 3 years, utilizing a clear and convincing evidence standard. Thus, this term signifies the amount of time

before an inmate, who has been denied parole, will receive his or her next parole consideration hearing before the board. Contrary to the commenter's allegation, the statute does not distinguish between different classifications of victims when applying denial lengths in accordance with Penal Code section 3041.5, subdivision (b)(3). Rather, the denial lengths outlined in that section apply at all hearings conducted for the purpose of reviewing an inmate's parole suitability. Therefore, the commenter's allegation that the application of Marsy's law denial lengths to any case in which the victim's family did not suffer a loss constitutes an unlawful imprisonment is unsound and not supported by statutory law.

COMMENT ID: 02-02

COMMENT:

This commenter further alleged that "proposed section 2268 (b)-(3) is an illogical format for denying inmates from paroling against established law."

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant to and within the scope of the proposed regulatory package because it pertains to Marsy's law denial lengths as outlined in proposed Section 2268, subdivision (b). Proposed section 2268, subdivision (b)(3) provides, "If a panel finds by clear and convincing evidence that the inmate does not require a more lengthy period of incarceration than seven years, the panel must consider a denial length of seven, five, or three years." The denial length format outlined in this proposed section is consistent with the denial length format provided in Penal Code section 3041.5, subdivision (b)(3)(C). Following a denial of parole, and after finding by clear and convincing evidence that a denial of parole for 15 or 10 years is not required, both the Penal Code and the proposed regulatory text provide that the panel has discretion to set the inmate's next parole consideration hearing in seven, five, or three years. Since the proposed regulatory section is consistent with Penal Code section 3041.5, subdivision (b)(3)(3), the commenter's allegation is unfounded.

COMMENT ID: 02-03

COMMENT:

This commenter further alleged that "proposed BPH RN 21-01 section 2268 (b)-(3) and section 2270 (c)-(3) is proposed text/model for arbitrarily distribution of Marsy's law denial period unconstitutionally instead of it being the definition or informative as clarity the standard for how inmates may be determined for being found suitable for parole."

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant to and within the scope of the proposed regulatory package because it pertains to Marsy's law denial lengths as outlined in proposed Section 2268, subdivision (b) and proposed Section 2270, subdivision (c). Proposed sections 2268, subdivision (b)(3) and 2270, subdivision (c) provide, "If a panel finds by clear and convincing evidence that the inmate does not require a more lengthy period of incarceration than seven years, the panel must consider a denial length of seven, five, or three years." The denial length format outlined in these sections is consistent with the denial length format provided in Penal Code section 3041.5, subdivision (b)(3)(C). Following a denial of parole, and after finding by clear and convincing evidence that a denial of parole for 15 or 10 years is not required, both the Penal Code and the proposed regulatory text provide that the panel has discretion to set the inmate's next parole consideration hearing in seven, five, or three years. Since the proposed regulatory section is consistent with Penal Code section 3041.5, subdivision (b)(3)(3), the commenter's allegation is unsupported by statutory law.

COMMENT ID: 02-04

COMMENT:

This commenter further alleged that "BPH RN 21-01 section 2268 (b)-(3) and section 2270 (c)-(3) proposed language/text can not stand up against *Ayilene v. United States* (2013) 570 U.S. 99: Any fact that raises the maximum minimum of a sentence is an element of the offense that should be submitted to the jury and found beyond a reasonable doubt."

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant to and within the scope of the proposed regulatory package because it pertains to Marsy's law denial lengths as outlined in proposed Section 2268, subdivision (b) and proposed Section 2270, subdivision (c). In *Alleyne v. United States* (2013), 570 U.S. 99, the Supreme Court held, "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."

The commenter's allegation and reliance on *Alleyne* is misplaced and based on a misunderstanding of the law. In *Alleyne*, the Supreme Court found that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. The commenter's reliance on *Alleyne* is unfounded because *Alleyne* concerns the application of mandatory minimum sentencing guidelines relating to the process of sentencing a defendant following a conviction of a crime. The sentencing of a defendant is a function carried out by a Superior Court and occurs following an inmate's conviction of an offense. In contrast, Marsy's law denial lengths, as outlined in proposed Section 2268, subdivision

(b) and proposed Section 2270, subdivision (c), relate to the setting of a parole denial length following a finding of an inmate's unsuitability for parole. This is a function carried out by a hearing panel once the panel determines that an inmate is unsuitable for parole. In contrast to the commenter's assertions, a parole denial does not increase the inmate's sentence. Rather, it prevents the inmate from being released as a result of the parole hearing and prior to the natural end of their sentence. Following a denial of parole, the board is restricted by the parameters enumerated in Penal Code section 3041.5, subdivision (b)(3) when determining when to schedule an inmate's next parole consideration hearing. Once the board makes a determination that an inmate represents a current unreasonable risk of danger to society, it must deny parole as required by California Code of Regulations, title 15, sections 2280 and 2401. After denying parole, the board is required to set a denial length in accordance with Penal Code section 3041.5, subdivision (b)(3). Within the parameters of the statute, the board, utilizing a clear and convincing evidence standard, must schedule the inmate's next parole consideration hearing in either 15, 10, 7, 5, or 3 years.

The commenter appears to improperly relate the concepts of mandatory minimum sentencing and the setting of a parole denial length following a finding of an inmate's unsuitability for parole. Therefore, the commenter's allegation is unfounded.

COMMENT ID: 02-05

COMMENT:

This commenter finally alleged that "Proposition 57/ Cal Const. Art. 1, Sec 32(b) abolishes the Board of Parole Hearings authority over California inmates sentences by giving authority back to (CDCR) California Department of Corrections and Rehabilitation."

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds that this comment is outside of the scope of this proposed regulation. The purpose of the proposed regulation is to bring the board's regulations relating to the setting of parole denial lengths into compliance with Penal Code section 3041.5, subdivision (b). The proposed regulation does not address the authority over California inmate sentences. Therefore, this comment is declined in full.

Moreover, to the extent that that this comment is found to be within the scope of the proposed regulations, this commenter's allegation are incorrect. Proposition 57 and its amendments to the California Constitution, Article 1, Section 32, require the Board of Parole Hearings to establish a parole consideration process for nonviolent offenders and authorized the department to expand credit earning opportunities.

COMMENT ID: 03-01

COMMENT:

This commenter requested a public hearing.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to a request for a public hearing under the APA. (See Govt. Code § 11346.5, subd. (a)(17).) This request was received by the board on February 7, 2021, which was at least 15 days before the close of the public comment period.

The board approved this request and held a public hearing for this regulation package on Friday, May 21, 2021, which was after the public comment period had closed. Therefore, this comment was IMPLEMENTED.

SUMMARY OF THE MAY 21, 2021 PUBLIC HEARING:

The board opened this meeting at 9:00 A.M., introduced the topic, and opened the line for public comment. Approximately 30 persons appeared to be in attendance via video or phone. During the introduction, the board clarified that persons could make comments during the hearing, but were also welcome to submit comments by email to BPH.Regulations@cdcr.ca.gov and that we would accept any comments electronically received by on or before 11:59 P.M. of the date of the hearing.

Following the introduction, the board initially offered the opportunity for commenters to submit speaker cards to state they wished to comment; however, the board received no speaker cards. The board then requested any video participants who had not completed a speaker card, but who wished to comment, to select the "raise hand" feature to indicate they wished to comment; however, no video participants selected that feature or indicated in any other way they wished to speak. The board then requested any phone participants who had not completed a speaker card, but who wished to speak, to unmute their phone by pressing *6 and provide comments; however, no phone participants spoke. The board then made a second request for any participants who wished to provide comments during the hearing to either select the raise hand feature or unmute their phone to provide comments; however, no persons indicated they had any comments. The presiding hearing officer held the line open for ten minutes, then noted that ten minutes had passed and we had received no comments. The board then made a final request for any comments; however, no comments were received. The board then closed the hearing.