



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 2449.1, 2449.4, 2449.5, 2449.30, 2449.32, 3490, 3491, 3492, 3493, 3495, 3496, 3497	NCR Number: 21-07	Publication Date: August 6, 2021	Effective Date: April 29, 2021
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INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of California Code of Regulations (CCR), Title 15, Division 2, sections 2449.1, 2449.4, 2449.5, 2449.30, and 2449.32; and Division 3, sections 3490, 3491, 3492, 3493, 3495, 3496, and 3497, regarding nonviolent offender parole process eligibility pursuant to the *Gadlin* ruling.

PUBLIC COMMENT PERIOD

The public comment period will close on **September 21, 2021**. Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than **September 21, 2021**.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each Department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 05/19), Certification of Posting, shall be returned to RPMB by mail or email. See Department Operations Manual section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to Josh Jugum, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2266, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Mina Choi, Board of Parole Hearings, at (916) 838-4937.

Original Signed By:

KATHLEEN ALLISON
Secretary
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or Department), proposes to amend sections 2449.1, 2449.4, 2449.5, 2449.30, and 2449.32 of Division 2, and sections 3490, 3491, 3492, 3493, 3495, 3496, and 3497 of Division 3, of Title 15 of the California Code of Regulations regarding nonviolent offender parole process eligibility pursuant to the Gadlin ruling.

PUBLIC COMMENT PERIOD

The public comment period begins **August 6, 2021** and closes on **September 21, 2021**. Any person may submit written comments by mail addressed to the primary contact person listed below, or by email to rmb@cdr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

No public hearing is scheduled for these proposed regulations; however, pursuant to Government Code Section 11346.8, any interested person or their duly authorized representative may request a public hearing, no later than 15 days prior to the close of the written comment period.

CONTACT PERSONS

Primary Contact

Josh Jugum
Telephone: (916) 445-2266
Regulation and Policy
Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001

Back-Up

Y. Sun
Telephone: (916) 445-2269
Regulation and Policy
Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001

Program Contact

Mina Choi
(916) 838-4937
Board of Parole Hearings

AUTHORITY AND REFERENCE

California Constitution, Article I, section 32, subdivision (a)(1) provides that CDCR shall adopt regulations in furtherance of the nonviolent offender parole consideration program.

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as: Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

In November 2016, voters approved the passage of Proposition 57, also known as The Public Safety and Rehabilitation Act of 2016. Proposition 57 established a parole consideration process for determinately-sentenced and indeterminately-sentenced nonviolent offenders who have served the full term of their primary offense and who demonstrated they no longer pose a current, unreasonable risk to the public. In accordance with Proposition 57, the Department promulgated regulations governing the nonviolent offender parole review process (NVPP), which were then amended several times to comply with court decisions. Current regulations exclude from NVPP consideration those inmates convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act.

On December 28, 2020, the California Supreme Court issued its ruling in *In re Gadlin* (2020) 10 Cal.5th 915. The Court held that eligibility for NVPP consideration must be based on an inmate's current conviction and that an inmate may not be excluded from NVPP consideration based on a current conviction for a nonviolent registerable sex offense. The Court also ordered the Department to treat as void and repeal California Code of Regulations, Title 15, section 3491, subsection (b)(3), and section 3496, subsection (b), and to make any further conforming changes necessary to comply with the Court's decision.

Accordingly, the Department and the Board submitted an emergency rulemaking removing language that excluded inmates from NVPP consideration based on a conviction for a nonviolent registerable sex offense. The emergency rulemaking also provided timelines for the referral and parole consideration of those inmates now eligible for NVPP consideration under the *Gadlin* decision. This rulemaking will make permanent the changes implemented by the emergency regulations.

This action will:

- Eliminate regulatory provisions that exclude from NVPP consideration those inmates convicted of a nonviolent registerable sex offense. Specifically, this rulemaking action eliminates Title 15, section 3491, subsection (b)(3), and section 3496, subsection (b), as ordered by the *Gadlin* court.
- Establish timelines for the Department to review determinately-sentenced and indeterminately-sentenced inmates who were not referred to the board for NVPP consideration due to a nonviolent registerable sex offense conviction.
- Establish timelines for the board to schedule the initial parole consideration hearings for those indeterminately-sentenced inmates who are now eligible under *Gadlin*. No new timelines have been proposed for the board to review determinately-sentenced inmates now eligible under *Gadlin* because the board is able to absorb the additional reviews into its current workload without disrupting the review of other eligible nonviolent offenders. Therefore, the current regulatory provisions governing the board's timelines for reviewing determinately-sentenced nonviolent offenders will apply to those now eligible under *Gadlin*.
- Make additional changes that were not addressed by the *Gadlin* decision but are necessary to clarify ambiguities regarding inmates' NVPP eligibility and consideration.
- Eliminate the use of gender pronouns to promote diversity, equity, and inclusion.

DOCUMENTS INCORPORATED BY REFERENCE

None

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

The Department proposes these regulations with the goal of treating all nonviolent offenders in a fair and equitable manner, and providing them with the opportunity for parole consideration under the board's nonviolent offender parole review process. The inclusion of more inmates in nonviolent parole eligibility and consideration will also make prisons and communities safer by encouraging inmates to participate in rehabilitative programs and service opportunities that enhance skills and employability, thus improving inmate behavior and creating a safer prison environment for inmates and staff. In addition, the proposed regulations will bring the Department into compliance with the *In re Gadlin* court ruling.

EVALUATION OF INCONSISTENCY / INCOMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

Pursuant to Government Code 11346.5(a)(3)(D), the Department has determined the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that these are the only regulations affecting the nonviolent offender parole eligibility process affected by the *Gadlin* ruling.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency: *None*
- Cost to any local agency or school district that is required to be reimbursed: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has made an initial determination that the proposed regulations 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 the proposed regulations place no obligations or requirements on any business.

EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations will not affect small businesses. This action has no significant adverse economic impact on small business because they place no obligations or requirements on any business.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The Department has determined that the proposed regulation will have no effect on the creation of new, or the elimination of existing, jobs or businesses within California, or effect the expansion of businesses currently doing business in California. The Department has determined that the proposed regulations will have no effect on worker safety or the state's environment, as the regulations only affect parole eligibility for specific inmates.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, 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 provisions of law. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed during the written comment period or at a public hearing should one be scheduled.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The Department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, and Notice of Proposed Regulations will also be made available on the Department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the Department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this Notice. If the Department 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 Department adopts, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

California Code of Regulations, Title 15, Division 2. Board of Parole Hearings

Chapter 3. Parole Release

Article 15. Parole Consideration for Determinately-Sentenced Nonviolent Offenders

Section 2449.1. Definitions.

Subsections 2449.1 initial paragraph through 2449.1(e) are unchanged.

Subsection 2449.1(f) is amended.

(f) A “nonviolent parole eligible date” is the date on which a nonviolent offender who is eligible for parole consideration under Section 3491 has served the full term of ~~his or her~~ their primary offense, less any actual days served prior to sentencing as ordered by the court under Section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the department.

Subsection 2449.1(g) is unchanged.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a); *In re Canady* (2019) 57 Cal.App.5th 1022; *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

Section 2449.4. Review on the Merits.

Subsections 2449.4(a) through 2449.4(d) are unchanged.

Subsections 2449.4(e) and 2449.4(f) are amended.

(e) If the hearing officer finds the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity, the hearing officer shall deny release and issue ~~his or her~~ a decision.

(f) If the hearing officer finds the inmate does not pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity, the hearing officer shall approve release and issue ~~his or her~~ a decision unless the decision will result in the inmate being released two or more years prior to ~~his or her~~ their earliest possible release date. If the decision will result in the inmate being released two or more years prior to ~~his or her~~ their earliest possible release date, the decision shall be reviewed by an associate chief deputy commissioner or the Chief Hearing Officer before it is finalized and issued. If the associate chief deputy commissioner or the Chief Hearing Officer does not concur with the hearing officer’s decision, he or she shall issue a new decision approving or denying release.

Subsections 2449.4(g) through 2449.4(j) are unchanged.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a).

Section 2449.5. Factors to Consider During a Review on the Merits.

Subsection 2449.5(a) is unchanged.

Subsection 2449.5(b) is unchanged but is shown for reference.

(b) The following factors concerning the inmate's current conviction(s), if present, shall be considered as aggravating the inmate's risk.

Subsections 2449.5(b)(1), 2449.5(b)(2), and 2449.5(b)(4) are unchanged. Subsection 2449.5(b)(3) is amended.

(3) There ~~were multiple~~ was a convictions involving large-scale criminal activity.

Subsection 2449.5(c) is unchanged but is shown for reference. Subsections 2449.5(c)(1), 2449.5(c)(2) and 2449.5(c)(4) are unchanged. Subsection 2449.5(c)(3) is amended.

(c) The following factors concerning the inmate's current conviction(s), if present, shall be considered as mitigating the inmate's risk.

(3) ~~There was only one conviction.~~ There were no convictions involving large-scale criminal activity.

Subsection 2449.5(d) is unchanged but is shown for reference. Subsections 2449.5(d)(1) and 2449.5(d)(4) are unchanged. Subsections 2449.5(d)(2) and 2449.5(d)(3) are amended.

(d) The following factors concerning the inmate's prior criminal conviction(s), if any, shall be considered as aggravating the inmate's risk.

(2) The inmate's prior criminal conviction(s) coupled with ~~his or her~~ their current conviction(s) show a pattern of assaultive behavior or a pattern of ~~similar~~ criminal conduct that is increasing in severity.

(3) The inmate was incarcerated for a misdemeanor conviction involving physical injury to a victim or a felony conviction within five years prior to ~~his or her~~ the inmate's current conviction(s).

Subsection 2449.5(e) is unchanged but is shown for reference. Subsections 2449.5(e)(1) and 2449.5(e)(2) are unchanged. Subsections 2449.5(e)(3) and 2449.5(e)(4) are amended.

(e) The following factors concerning the inmate's prior criminal behavior, if present, shall be considered as mitigating the inmate's risk.

(3) The inmate's prior criminal conviction(s) coupled with ~~his or her~~ their current conviction(s) shows a pattern of assaultive behavior or a pattern of ~~similar~~ criminal conduct that is decreasing in severity.

(4) The inmate was free from incarceration for a misdemeanor conviction involving physical injury to a victim or a felony conviction for five years or more prior to ~~his or her~~ the inmate's current conviction(s).

Subsection 2449.5(f) is unchanged but is shown for reference. Subsections 2449.5(f)(1), 2449.5(f)(2), and 2449.5(f)(4) are amended.

(f) The following factors concerning the inmate's institutional behavior, work history, and rehabilitative programming as documented in the inmate's central file shall be considered as aggravating the inmate's risk.

(1) The inmate has been found guilty of institutional Rules Violation Reports resulting in physical injury or threat of physical injury since ~~his or her~~ their last admission to prison or has one or more recent ~~serious~~ institutional Rules Violation Reports, as classified by the department as serious, as specified in subdivision (a) of section 3315 of article 5 of subchapter 4 of chapter 1 of Division 3 of this title.

(2) There is reliable information in the confidential section of the inmate's central file indicating the inmate has engaged in criminal activity since ~~his or her~~ their last admission to prison.

Subsection 2449.5(f)(3) is unchanged.

(4) The inmate has limited or no participation in available rehabilitative or self-help programming to address the circumstances that contributed to ~~his or her~~ their criminal behavior, such as substance abuse, domestic violence, ~~or~~ gang involvement, or sexual offending.

Subsection 2449.5(g) is unchanged but is shown for reference. Subsections 2449.5(g)(1), 2449.5(g)(2), and 2449.5(g)(4) are amended.

(g) The following factors concerning the inmate's institutional behavior, work history, and rehabilitative programming as documented in the inmate's central file shall be considered as mitigating the inmate's risk.

(1) The inmate has not been found guilty of institutional Rules Violation Reports resulting in physical injury or threat of physical injury since ~~his or her~~ their last admission to prison and does not have recent serious institutional Rules Violation Reports, as classified by the department as serious, as specified in subdivision (a) of section 3315 of article 5 of subchapter 4 of chapter 1 of Division 3 of this title.

(2) There is no reliable information in the confidential section of the inmate's central file indicating the inmate has engaged in criminal activity since ~~his or her~~ their last admission to prison.

Subsection 2449.5(g)(3) is unchanged.

(4) The inmate has successfully participated in rehabilitative or self-help programming to address the circumstances that contributed to ~~his or her~~ their criminal behavior, such as substance abuse, domestic violence, ~~or~~ gang involvement, or sexual offending, if any, for a sustained period of time.

Subsection 2449.5(h) is unchanged.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a).

Article 16. Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders

Section 2449.30. Definitions.

Subsections 2449.30 initial paragraph through 2449.30(e) are unchanged.

Subsection 2449.30(f) is amended.

(f) A "nonviolent parole eligible date" is the date on which an indeterminately-sentenced nonviolent offender who is eligible for a parole consideration hearing under Section 3496 of Division 3 of this title has served the full term of ~~his or her~~ their primary offense, less any actual days served prior to sentencing as ordered by the court under Section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the Department.

Subsection 2449.30(g) is unchanged.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a); *In re Canady* (2019) 57 Cal.App.5th 1022; *In re Edwards* (2018) 26 Cal.App.4th 1181 (Sept. 7, 2018, B288086)

Cal.App.4th [237 Cal.Rptr.3d 673]; *In re Tate* (2006) 135 Cal.App.4th 756; and *In re Thompson* (1985) 172 Cal.App.3d 256.

Section 2449.32. Parole Consideration Hearings.

Subsection 2449.32(a) is unchanged. Subsections 2449.32(a)(1) and 2449.32(a)(2) are amended.

(1) If, as of the date of ~~his or her~~ their referral to the board under Section 3497 of Division 3 of this title, the inmate's nonviolent parole eligible date was at least 180 calendar days in the future, the inmate shall be scheduled for an initial parole consideration hearing within 60 calendar days following ~~his or her~~ their nonviolent parole eligible date.

(2) If, as of the date of ~~his or her~~ their referral to the board under Section 3497 of Division 3 of this title, the inmate's nonviolent parole eligible date was less than 180 calendar days in the future or it was in the past, the inmate shall be scheduled for an initial parole consideration hearing within one year from the date of ~~his or her~~ their referral to the board.

Subsection 2449.32(b) is unchanged.

Subsection 2449.32(c) is adopted.

(c) Notwithstanding other provisions of law, the board shall, by no later than December 31, 2022, schedule all parole consideration hearings for indeterminately-sentenced nonviolent offenders who became eligible for an initial parole consideration hearing as a result of the California Supreme Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915, and whose nonviolent parole eligible date is on or before December 31, 2022. Indeterminately-sentenced nonviolent offenders who became eligible for an initial parole consideration hearing as a result of the California Supreme Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915, and who, as of April 1, 2021, have been continuously incarcerated for 20 years or more and are within five years of their Minimum Eligible Parole Date, shall be scheduled for an initial parole consideration hearing on or before July 1, 2022.

Subsections 2449.32(c) through 2449.32(e) are renumbered to 2449.32(d) through 2449.32(f) and are substantively unchanged. Amendments have been made to capitalization and grammar.

(~~ed~~) Hearing panels shall conduct parole consideration hearings for indeterminately-sentenced nonviolent offenders in compliance with the requirements for initial and subsequent parole consideration hearings described in this Division, Penal Code sSections 3040, et seq., and applicable case law.

(~~de~~) If a hearing panel finds an indeterminately-sentenced nonviolent offender suitable for parole, and the parole grant is not vacated or rescinded, the inmate shall be released subject to all applicable review periods required by sSections 3041, 3041.1, and 3041.2 of the Penal Code, notwithstanding ~~his or her~~ their minimum eligible parole date or any additional terms imposed for in-prison offenses.

(~~ef~~) If a hearing panel finds an indeterminately-sentenced nonviolent offender unsuitable for parole, the panel shall impose a denial period in accordance with paragraph (3) of subdivision (b) of sSection 3041.5 of the Penal Code. The inmate's next hearing date may be advanced under paragraph (4) of subdivision (b) or paragraph (1) of subdivision (d) of sSection 3041.5 of the Penal Code.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b). Reference: Cal. Const., art. 1, sec. 32(a); and Sections 3041, 3041.1, 3041.2 and 3041.5, Penal Code; and *In re Gadlin* (2020) 10 Cal.5th 915.

California Code of Regulations, Title 15, Division 3. Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 5.5. Parole Consideration

Article 1. Parole Consideration for Determinately-Sentenced Nonviolent Offenders

Section 3490. Definitions.

Subsections 3490 initial paragraph and 3490(a) are unchanged but are shown for reference.

For the purposes of this article, the following definitions shall apply:

(a) An inmate is a “determinately-sentenced nonviolent offender” if the inmate was sentenced to a determinate term and none of the following are true:

Subsections 3490(a)(1) through 3490(a)(4) are unchanged.

Subsection 3490(a)(5) is amended.

(5) The inmate is currently convicted of and is sentenced to ~~serving~~ a term of incarceration for a “violent felony,” including a term for which a violent felony sentence was stayed under Penal Code section 654;” or

Subsections 3490(a)(6) through 3490(e) are unchanged.

Subsection 3490(f) is amended.

(f) A “nonviolent parole eligible date” is the date on which a nonviolent offender who is eligible for parole consideration under Section 3491 has served the full term of ~~his or her~~ their primary offense, less any actual days served prior to sentencing as ordered by the court under Section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the department.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); Section 1170.1(c), Penal Code; In re Canady (2019) 57 Cal.App.5th 1022; In re Pope (2010) 50 Cal.4th 777; In re Tate (2006) 135 Cal.App.4th 756; and In re Thompson (1985) 172 Cal.App.3d 256.

Section 3491. Eligibility Review.

Subsection 3491(a) is unchanged.

Subsection 3491(b) is unchanged but is shown for reference. Subsections 3491(b)(1) and 3491(b)(2) are amended.

(b) Notwithstanding subsection (a), an inmate is not eligible for parole consideration by the Board of Parole Hearings under Article 15 of Chapter 3 of Division 2 of this title if any of the following apply:

(1) The inmate is an indeterminately-sentenced nonviolent offender as defined in section 3495, in which case ~~he or she~~ they may be eligible for parole consideration under Article 2 of this subchapter; or

(2) Within one year of the date of the eligibility review, the inmate will be eligible for a parole consideration hearing under Section 3051 or 3055 of the Penal Code or the inmate has already been scheduled for an

initial parole consideration hearing under Section 3051 or 3055 of the Penal Code, ~~or~~

Subsection 3491(b)(3) is deleted.

~~(3) The inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in Sections 290 through 290.024 of the Penal Code.~~

Subsections 3491(c) through 3491(e)(2) are unchanged.

Subsections 3491(e)(2)(A), 3491(e)(2)(B), and 3491(e)(3) are amended.

(A) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed prior to ~~his or her~~ their arrival to prison, the terms for any in-prison crimes shall not be considered when identifying the inmate's primary offense.

(B) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed after ~~his or her~~ their arrival to prison, only the terms for all in-prison crimes currently being served or yet to be served shall be considered when identifying the inmate's primary offense.

(3) If the inmate is eligible for parole consideration by the Board of Parole Hearings under subsections (a) and (b), the department shall establish ~~his or her~~ the inmate's nonviolent parole eligible date, as defined in subsection 3490(f) of this article.

Subsections 3491(f) and 3491(g) are unchanged.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); *In re Gadlin* (2020) 10 Cal.5th 915.

Section 3492. Eligibility Review and Referral to the Board of Parole Hearings.

Subsections 3492(a) through 3492(e) are unchanged.

New subsection 3492(f) is adopted.

(f) Determinately-sentenced nonviolent offenders who became eligible for parole consideration as a result of the California Supreme Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915, and whose nonviolent parole eligible date is on or before July 1, 2021, shall be referred to the Board of Parole Hearings for parole consideration by July 1, 2021. This subsection shall not apply to determinately-sentenced nonviolent offenders whose earliest possible release date is on or before November 1, 2021.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); ~~and~~ Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a) and *In re Gadlin* (2020) 10 Cal.5th 915.

Article 2. Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders

Section 3495. Definitions.

Subsections 3495 initial paragraph and 3495(a) are unchanged but are shown for reference.

For the purposes of this article, the following definitions shall apply:

(a) An inmate is an "indeterminately-sentenced nonviolent offender" if the inmate was sentenced to an

indeterminate term and none of the following is true:

Subsections 3495(a)(1) and 3495(a)(2) are unchanged.

Subsection 3495(a)(3) is amended.

(3) The inmate is currently convicted of a “violent felony” and is sentenced to serving a term of life with the possibility of parole for a “violent felony;” including a term for which a violent felony sentence was stayed under Penal Code section 654;

Subsections 3495(a)(4) through 3495(e) are unchanged.

Subsection 3495(f) is amended.

(f) A “nonviolent parole eligible date” is the date on which an indeterminately-sentenced nonviolent offender who is eligible for a parole consideration hearing under Section 3496 has served the full term of ~~his or her~~ their primary offense, less any actual days served prior to sentencing as ordered by the court under Section 2900.5 of the Penal Code and any actual days served in custody between sentencing and the date the inmate is received by the Department.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); and Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); Section 1170.1(c), Penal Code; In re Canady (2019) 57 Cal.App.5th 1022; In re Edwards (2018) 26 Cal.App.4th 1181; In re Edwards (Sept. 7, 2018, B288086) Cal.App.4th [237 Cal.Rptr.3d 673]; In re Pope (2010) 50 Cal.4th 777; In re Tate (2006) 135 Cal.App.4th 756; and In re Thompson (1985) 172 Cal.App.3d 256.

Section 3496. Eligibility Review.

Subsection 3496(a) is unchanged.

Subsection 3496(b) is deleted.

~~(b) Notwithstanding subsection (a), an inmate is not eligible for a parole consideration hearing by the Board of Parole Hearings under Article 16 of Chapter 3 of Division 2 of this title if the inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in Sections 290 through 290.024 of the Penal Code.~~

Subsections 3496(c) through 3496(e) are renumbered to 3496(b) through 3496(d) and are otherwise unchanged.

~~(e)~~ The Department shall complete an eligibility review within 60 calendar days of an inmate’s admission to the Department.

~~(d)~~ The Department shall conduct a new eligibility review whenever an official record, such as an amended abstract of judgment or minute order, is received that affects the inmate’s eligibility under this article or when an inmate begins serving a term for one or more in-prison offenses of which at least one is an indeterminate term and none is for a “violent felony.”

~~(e)~~ The Department shall conduct an eligibility review by completing the following steps:

Subsections 3496(d)(1) through 3496(d)(3) are amended.

(1) The Department shall determine if the inmate is eligible for a parole consideration hearing by the

Board of Parole Hearings under subsections (a) ~~and (b)~~ of this section.

(2) If the inmate is eligible for a parole consideration hearing by the Board of Parole Hearings under subsections (a) ~~and (b)~~, the Department shall identify the inmate's primary offense, as defined in subsection 3495(d) of this article.

(A) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed prior to ~~his or her~~ their arrival to prison that are not a violent felony, the terms for any in-prison crimes that are not a violent felony shall be considered when identifying the inmate's primary offense.

(B) If at the time of the eligibility review the inmate is serving a term or terms for crimes committed after ~~his or her~~ their arrival to prison that are not a violent felony, only the terms for all in-prison crimes that are not a violent felony currently being served or yet to be served shall be considered when identifying the inmate's primary offense.

(3) If the inmate is eligible for a parole consideration hearing by the Board of Parole Hearings under subsections (a) ~~and (b)~~, the Department shall establish ~~his or her~~ the inmate's nonviolent parole eligible date, as defined in subsection 3495(f) of this article.

Subsections 3496(f) and 3496(g) are renumbered to 3496(e) and 3496(f) and are otherwise unchanged.

~~(fe)~~ Eligibility reviews under this section shall be served on the inmate and placed in the inmate's central file within 15 business days of being completed.

~~(gf)~~ Eligibility reviews under this section are subject to the Department's inmate appeal process in accordance with Article 8 of Chapter 1 of this Division.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); and *In re Gadlin* (2020) 10 Cal.5th 915.

Section 3497. Referral to the Board of Parole Hearings.

Subsections 3497(a) through 3497(d) are unchanged.

Subsection 3497(e) is adopted.

(e) Indeterminately-sentenced nonviolent offenders who became eligible for an initial parole consideration as a result of the California Supreme Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915, shall be referred to the Board of Parole Hearings for parole consideration by July 1, 2021, unless they have previously been scheduled for a parole consideration hearing under any other provision of law or will be eligible for a parole consideration hearing under any other provision of law within 12 months.

Note: Authority cited: Cal. Const., art. 1, sec. 32(b); Section 5058, Penal Code. Reference: Cal. Const., art. 1, sec. 32(a); and *In re Gadlin* (2020) 10 Cal.5th 915.

INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (the Department) and the Board of Parole Hearings (the Board) propose to amend the California Code of Regulations (CCR), Title 15, Division 2, sections 2449.1, 2449.4, 2449.5, 2449.30, and 2449.32; and Division 3, sections 3490, 3491, 3492, 3495, 3496, and 3497.

This rulemaking is necessary to implement the California Supreme Court's decision in *Gadlin*. Specifically, existing regulations excluding those inmates previously excluded from the nonviolent offender parole review process (NVPP) consideration based on a registerable sex offense must be repealed. Additionally, the rulemaking must also specify new timelines for the Department to review the eligibility of previously excluded inmates and for the board to consider parole for those found eligible under *Gadlin*.

In November 2016, voters approved the passage of Proposition 57, also known as The Public Safety and Rehabilitation Act of 2016. Proposition 57 established a parole consideration process for determinately-sentenced and indeterminately-sentenced nonviolent offenders who have served the full term of their primary offense and who demonstrate they no longer pose a current, unreasonable risk to the public. In accordance with Proposition 57, the California Department of Corrections and Rehabilitation (Department) promulgated regulations governing the nonviolent offender parole review process, which were subsequently amended to comply with court decisions. Current regulations exclude from NVPP consideration those inmates convicted of an offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act.

On December 28, 2020, the California Supreme Court issued its ruling in *In re Gadlin* (2020) 10 Cal.5th 915. The Court held that eligibility for NVPP consideration must be based on an inmate's current conviction and that an inmate may not be excluded from NVPP consideration based on a current conviction for a registerable sex offense that is not defined as violent in the Department's regulations. The Court also ordered the Department to treat as void and repeal California Code of Regulations, Title 15, section 3491, subsection (b)(3), and section 3496, subsection (b), and to make any further conforming changes necessary to comply with the Court's decision.

Accordingly, the Department and the Board submitted an emergency rulemaking removing language that excluded inmates from NVPP consideration based on a conviction for a nonviolent registerable sex offense. The emergency rulemaking also provided timelines for the referral and parole consideration of those inmates now eligible for NVPP consideration under the *Gadlin* decision. The Office of Administrative Law approved the emergency regulations, which are effective April 29, 2021, through October 7, 2021.

This rulemaking will make permanent the changes implemented by the emergency regulations. This rulemaking also makes additional changes to existing regulations to clarify ambiguities regarding NVPP eligibility and consideration. Lastly, this rulemaking eliminates the use of gender pronouns from the amended sections to promote diversity, equity, and inclusion.

Additionally, the proposed regulations will correct a non-substantive error in the current regulations. Due to a clerical error in a previous rulemaking action, CCR sections 3490 and 3491 are under Subchapter 5.5, Article 1, Parole Consideration for Determinately-Sentenced Nonviolent Offenders, while sections 3492 through 3497 are under Article 2, Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders. In fact, sections 3490 through 3493 concern determinately-sentenced nonviolent offenders, while sections 3495 through 3497 deal with

indeterminately-sentenced nonviolent offenders. The proposed regulation text fixes this error by moving the Article 2 heading back to its correct placement.

PROBLEM STATEMENT

Existing regulations exclude from NVPP consideration those inmates convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act. Consequently, any inmate with a prior offense or a current offense requiring sex offender registration is automatically excluded from parole consideration under NVPP, even if that offense is not defined as a violent offense under the regulations. In *Gadlin*, the California Supreme Court held that eligibility for NVPP consideration must be based on an inmate's current conviction and that an inmate may not be excluded from NVPP consideration based on a current conviction for a registerable sex offense that is not defined as violent in the Department's regulations. Therefore, existing regulations must be amended to allow this previously excluded population of inmates to be reviewed for NVPP consideration and to specify timelines for the Department and the board to conduct such reviews.

Existing regulations use gender pronouns, such as "he" or "she." To promote inclusivity, existing regulations must be amended to remove gender pronouns and replace them with gender-inclusive or gender neutral language.

Existing regulations (specifically subsections 2449.5(b)(3), (d)(2), (e)(3), and (g)(1)) identify the aggravating and mitigating factors a hearing officer must consider when determining an inmate's risk under NVPP. The goal of this NVPP review is to assess whether an inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity. Some of the language in the subsections specified above, however, appears to unintentionally limit the relevant information a hearing officer must consider in making this risk determination. Therefore, section 2449.5 must be amended to clarify any ambiguity and establish that hearing officers are able to consider all relevant information.

Existing regulations define "nonviolent offender" for purposes of NVPP consideration. Specifically, subsections 3490(a)(5) and 3495(a)(3) identify that a determinately-sentenced inmate or an indeterminately-sentenced inmate, respectively, is excluded from NVPP consideration if the inmate is currently serving a term of incarceration for a "violent felony," as defined in Penal Code, section 667.5, subdivision (c). It is also well established under Penal Code section 654's prohibition against multiple punishments for the same offense that, while a person can be convicted under multiple statutes for the same criminal act, they cannot serve multiple punishments for that act. Accordingly, courts will stay the execution of the shorter sentence for one offense, and will instead, as required by law, impose the longer sentence of the other offense. This scheme results in situations where an inmate commits and is convicted of both violent and nonviolent offenses under multiple statutes; however, the inmate ultimately only "serves" the longer sentence for the nonviolent offense under Penal Code section 654 because the execution of the shorter sentence for the violent offense has been stayed. Because these inmates have sustained convictions for committing violent offenses, they are violent offenders and are currently excluded from NVPP eligibility. However, existing regulations do not clearly state that these individuals are excluded from NVPP eligibility. Therefore, it is necessary to change existing regulations to clarify that such individuals are not eligible for NVPP consideration. This regulatory change simply captures the department's current practice of excluding these inmates from NVPP eligibility; it will not result in excluding additional inmates who would have otherwise been eligible.

ANTICIPATED BENEFITS OF THE REGULATIONS

The Department proposes these regulations with the goal of treating all nonviolent offenders in a fair and equitable manner, and providing them with the opportunity for parole consideration under the board's nonviolent offender parole review process. The inclusion of more inmates in nonviolent parole eligibility and consideration will also make prisons and communities safer by encouraging inmates to participate in rehabilitative programs and service opportunities that enhance skills and employability, thus improving inmate behavior and creating a safer prison environment for inmates and staff. In addition, the proposed regulations will bring the Department into compliance with the *In re Gadlin* decision.

ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code section 11346.3(b), the Department and the board has made the following assessments regarding the proposed regulations:

Creation or Elimination of Jobs within the State of California

The Department has determined that this rulemaking action will not have an impact on the creation of new, or elimination of existing, jobs within California. Job creation or elimination is not affected by the management of correctional facilities or the manner in which inmates are considered for parole.

Creation of New, Expansion or Elimination of Existing Businesses Currently Doing Business within the State of California

The Department has determined that this rulemaking action will not have an impact on the creation of new, or the expansion or elimination of existing, businesses within California because private businesses are not affected by the management of correctional facilities or the manner in which inmates are considered for parole. These proposed regulations are not expected to create new businesses in California, as any potential increase in workload will be absorbed by the Department and the board's current resources.

Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The Department anticipates that the proposed regulations will have no impact on the health and welfare of California residents, worker safety, and the state's environment. The proposed regulations affect parole eligibility for a specific class of inmates only.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternatives considered, or that have otherwise been identified and brought to the attention of the Department and the board would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915 and The Public Safety and Rehabilitation Act of 2016.

The Department and the board have made an initial determination that no reasonable alternatives to the regulations have been identified or brought to the attention of the department or the board that would lessen adverse impacts on small business, if any.

MATERIALS RELIED UPON

In proposing amendments to these regulations, the department has not identified or relied upon any technical, theoretical, or empirical study, report, or similar document.

SPECIFIC PURPOSE AND RATIONALE FOR EACH PROPOSED REGULATORY SECTION PER GOVERNMENT CODE 11346.2(b)(1)

Note: Gender pronouns (“he or she”) have been replaced with gender-neutral pronouns (“they”) throughout the proposed text. This is necessary to avoid using language that may discriminate against a person’s sex or gender identity and to reflect the Department’s policy of promoting inclusivity.

Section 2449.5. Factors to Consider During a Review on the Merits.

Subsections 2449.5(b)(3) and (c)(3) are amended to clarify the factors considered by the reviewing hearing officer. Subsection (b)(3) currently requires that, when assessing an inmate’s risk under NVPP, the hearing officer must consider as an aggravating factor whether the inmate has multiple convictions involving large-scale criminal activity. Large-scale criminal cases, particularly those that are financial in nature, often involve multiple criminal acts committed over a long period time. However, the criminal acts may be grouped together to support a conviction for a single criminal violation or, alternatively, the prosecuting agency and the defendant may enter into a plea agreement wherein the defendant pleads guilty to one count with an enhancement for multiple criminal actions. This results in the conviction of only one crime with an enhancement when, in actuality, the defendant committed multiple criminal acts, often with multiple victims. In assessing an inmate’s risk under NVPP, the relevant inquiry for this aggravating factor is whether the inmate has a robust criminal history—not whether the inmate was individually convicted on every count. Therefore, it is necessary to amend this section to clarify that a single conviction involving large-scale criminal activity is sufficient to be considered an aggravating factor by the reviewing hearing officer.

Subsection (c)(3), which is the mitigating counterpart to subsection (b)(3), also needs to be amended in light of the proposed change to subsection (b)(3). Since subsection (b)(3) now considers it aggravating if an inmate has one conviction involving large-scale criminal activity, subsection (c)(3) needs to be changed such that it is only a mitigating factor if the inmate has no convictions involving large-scale criminal activity.

Subsections 2449.5(d)(2) and (e)(3) identify the respective aggravating and mitigating factors the board must consider when reviewing a determinately-sentenced inmate’s parole suitability under NVPP. Subsection (d)(2) describes as aggravating any pattern of assaultive behavior or a pattern of “similar” criminal conduct that is increasing in severity. Correspondingly, subsection (e)(3) describes as mitigating any pattern of assaultive behavior or a pattern of “similar” criminal conduct that is decreasing in severity. Inmates often have multiple crimes in their history showing a pattern of increasing or decreasing severity in criminal behavior even though the crimes themselves are not necessarily “similar” to each other in that they are not the same type of crime. The focus, as intended by the regulations, is on whether the inmate’s criminal history demonstrated conduct that either increased or decreased in severity over time—not whether that

pattern of severity occurred within a set of similar type of crimes. Therefore, to properly reflect the intent of the regulations and to accurately assess an inmate's risk, it is necessary that subsections (d)(2) and (e)(3) are amended to remove the word "similar."

Subsection 2449.5(f)(1) is amended to clarify what constitutes a "serious" Rules Violation Report. It is unclear from the existing language which Rules Violation Reports are considered serious. Therefore, language is added to reference the Department's regulations on which Rules Violation Reports are considered to be serious. The board adopted the Department's definition of serious Rules Violation Reports because it identifies behavior considered to be the most disruptive and harmful in the prison setting, and inmates who participate in such activities are unlikely to be found suitable for parole.

Subsection 2449.5(f)(4) is amended to add "sexual offending" to the list of programming an inmate should participate in if it relates to their criminal behavior. Currently, an inmate's limited or lack of participation in programming addressing circumstances that contributed to their criminal behavior is considered to be aggravating the inmate's risk. Existing language outlines examples of such relevant programming to include those that address substance abuse, domestic violence, or gang involvement. The *Gadlin* decision now allows inmates convicted of nonviolent sex offenses to be considered for release under NVPP. Therefore, it is necessary to capture the programming relevant to this *Gadlin* population by specifying that those with a history of sexual misconduct should participate in programming targeting sexual offending, and a lack of or limited participation in such programming will be considered to aggravate the inmate's risk.

Subsection 2449.5(g)(1) is amended for two reasons. First, the subsection is amended to bring it into uniformity with existing regulations, specifically subsection (f)(1). When a hearing officer assesses an inmate under NVPP, they must consider the inmate's institutional behavior either as an aggravating factor under subsection (f)(1) or a mitigating factor under subsection (g)(1). Subsection (f)(1) states that institutional behavior is aggravating when an inmate has one or more recent serious institutional Rules Violation Reports (RVR). However, the corresponding subsection (g)(1) failed to note that institutional behavior is mitigating when the inmate does not have any recent serious institutional RVRs. Therefore, to balance these sections as originally intended, it is necessary to amend subsection (g)(1) to add in language clarifying that, if the inmate does not have any recent serious institutional RVRs, the hearing officer should find this a mitigating factor.

The second amendment clarifies what constitutes a "serious" Rules Violation Report, (see subsection 2449.5(f)(1) above). Inmates who do not engage in such serious misconduct are more likely to be found suitable for parole.

Subsection 2449.5(g)(4) is amended to add "sexual offending" to the list of programming an inmate should participate in if it relates to their criminal behavior. Currently, an inmate's successful participation in programming addressing circumstances that contributed to their criminal behavior is considered to be aggravating the inmate's risk. Existing language outlines examples of such relevant programming to include those that address substance abuse, domestic violence, or gang involvement. The *Gadlin* decision now allows inmates convicted of nonviolent sex offenses to be considered for release under NVPP. Therefore, it is necessary to capture the programming relevant to this *Gadlin* population by specifying that those with a history of sexual misconduct should participate in programming targeting sexual offending, and any successful participation in such programming will be considered to mitigate the inmate's risk.

Section 2449.30. Definitions.

Section 2449.30 The reference section is amended to incorporate the *In re Canady* decision and to update the citation for *In re Edwards*.

Section 2449.32. Parole Consideration Hearings.

Subsection 2449.32(c) is adopted to provide extended deadlines for the board to schedule the initial parole consideration hearings for those indeterminately-sentenced inmates who are now eligible under *Gadlin*. Normally, the board would schedule eligible inmates based on the timelines outlined in subsections (a) and (b). However, upon the effective date of the *Gadlin* decision, the board identified approximately 656 indeterminately-sentenced inmates either immediately due or who will be due for an initial hearing by December 31, 2021, based on their nonviolent parole eligible date (NPED).

In light of the substantial number of hearings scheduled in 2021 following the passage of, and amendments to, Penal Code sections 3051 and 3051.1, both of which established requirements for new hearings to be implemented by the end of 2021, as well as the increased number of hearings following the recent amendments to Penal Code section 3055, the board cannot feasibly absorb these new NVPP hearings following the changes in these regulations into its current workload. Therefore, to avoid cancelling or postponing hearings for other inmates who are also entitled to a parole consideration hearing under the law, the board needs additional time to schedule the hearings of those who are now eligible under *Gadlin*. Based on the number of hearings already due to those eligible under the law and the remaining slots available, the board has determined that it can schedule the 656 initial parole consideration hearings for those inmates now eligible under *Gadlin* by December 31, 2022.

The new provision also prioritizes scheduling those newly eligible inmates who have been incarcerated for a longer period of time and are within five years of their Minimum Eligible Parole Date. This criteria was selected based on existing regulations (subsection 2449.32(b)), which used the same criteria to prioritize inmates in the past. Additionally, prioritizing these inmates is necessary to promote equity since these inmates have already served significant lengths of time. It will also ensure the board focuses its limited resources first on those inmates who are more likely to be found suitable due to their advanced age and length of incarceration. The board determined that out of the 656 indeterminately-sentenced inmates due for an initial hearing by December 31, 2022, approximately 129 inmates fell into the prioritized category. These prioritized inmates will be scheduled for their initial hearing on or before July 1, 2022.

Subsections 2449.32(c) through (e) are renumbered to reflect the addition of the new subsection (c) above.

Section 3490. Definitions.

Subsection 3490(a)(5) is amended to clarify and codify current practice that a violent felony sentence stayed under Penal Code section 654 renders an inmate ineligible for referral to the board for NVPP consideration. Subsection (a)(5) specifies that a determinately-sentenced inmate is excluded from NVPP consideration if the inmate is currently serving a term of incarceration for a “violent felony,” as defined in Penal Code, section 667.5, subdivision (c). It is also well established under Penal Code section 654’s prohibition against multiple punishments for the same offense that, while a person can be convicted under multiple statutes for the same criminal act, they cannot serve multiple punishments for that act. Accordingly, courts will stay the execution of the shorter sentence for one offense and will instead, as required by law, impose the

longer sentence of the other offense. This scheme results in situations where an inmate commits a violent act and is convicted of both violent and nonviolent offenses under multiple statutes relating to that act; however, the inmate ultimately only “serves” the longer sentence for the nonviolent offense under Penal Code section 654 because the execution of the shorter sentence for the violent offense has been stayed. As such, the inmate is still a violent offender because the inmate is currently convicted of committing a violent crime, even though the court stayed the sentence for that crime.

Proposition 57 and the Department’s regulations intended that only nonviolent offenders be considered for parole under NVPP. However, existing regulations do not clearly state that those convicted of and sentenced to a term of incarceration for a violent offense where the sentence was stayed under Penal Code section 654 are excluded from NVPP eligibility. Therefore, it is necessary to change existing regulations to clarify that such individuals are excluded from NVPP eligibility. This regulatory change simply codifies the department’s current practice of excluding these inmates from NVPP eligibility; it will not result in excluding additional inmates who would have otherwise been eligible.

Section 3491. Eligibility Review.

Subsections 3491(b)(1) and (b)(2) are amended with grammatical edits to take into account the repealing of subsection (b)(3).

Subsection 3491(b)(3) is repealed to comply with the *In re Gadlin* decision. This subsection excludes from NVPP eligibility any determinately-sentenced inmate convicted of a past or present sexual offense requiring registration as a sex offender. The Court held that eligibility for NVPP consideration must be based on an inmate’s current conviction and that an inmate may not be excluded from NVPP consideration based on a current conviction for a registerable sex offense that is not defined as violent in the Department’s regulations. Therefore, this subsection is repealed as ordered by the Court.

Section 3492. Eligibility Review and Referral to the Board of Parole Hearings.

New subsection 3492(f) is adopted to provide deadlines for the Department to review determinately-sentenced inmates who were previously not referred to the board for NVPP consideration due to a registerable sex offense conviction. The Department ceased enforcing the current regulations excluding inmates with a nonviolent registerable sex offense conviction after the December 28, 2020 *Gadlin* decision. Therefore, the July 1, 2021 date provides a swift but reasonable deadline by which the Department must review those inmates previously screened out due to a nonviolent registerable sex offense conviction. Furthermore, the Department only needs to re-examine those inmates who were reviewed prior to the *Gadlin* decision and deemed ineligible for a referral to the board based on a nonviolent registerable sex offense conviction. Those reviewed after the *Gadlin* decision were not subject to this exclusion and, therefore, their reviews are valid. The Department also does not need to review again any inmates ineligible for parole consideration under provisions other than Title 15, section 3491, subsection (b)(3), as these inmates were ruled out based on criteria other than a nonviolent registerable sex offense conviction.

Determinately-sentenced nonviolent offenders whose earliest possible release date (EPRD) is on or before November 1, 2021, are excluded from consideration for practical reasons. Existing regulations already exclude determinately-sentenced nonviolent offenders whose NPED falls less than 180 days prior to their EPRD or if they will reach their EPRD in less than 210 calendar days.

(Pen. Code § 3492, subd. (a)). Subsection (f) simply reiterates existing law to clarify that this exclusion will continue to apply to those newly eligible under the *Gadlin* decision. Moreover, applying this same requirement to the newly eligible inmates under *Gadlin* is necessary to avoid a waste of state resources. Specifically, under the current NVPP process, upon an eligible inmate's referral to the board for NVPP parole consideration, there is a five-day notice period, followed by a 30-day window for written statements to be submitted by victims and the prosecuting agency. Upon the completion of this 30-day window, the board's administrative law judge has 30 days to review the inmate's case and issue a decision. Should the board approve the inmate for release, the Department's decision review period runs for an additional 60 days from the date of the decision before the inmate may be released. The sum of these time frames is approximately 125 days, which is unlikely to result in a release date prior to the inmate's EPRD. Furthermore, since the inmate will also be accruing credits during this timeframe, which would likely move up their EPRD to an even earlier date, this would further minimize any difference between the inmate's EPRD and release under NVPP. Thus, because inmates under this provision would likely be released under their EPRD before they would be processed for release following an NVPP grant of parole under this article, completing each step of the process to hold an NVPP paper review would have no impact on their release dates and would be a waste of state resources.

Section 3495. Definitions.

Subsection 3495(a)(3) is amended to clarify and capture current practice that a violent felony sentence stayed under Penal Code section 654 renders an inmate ineligible for referral to the board for NVPP consideration. Subsection (a)(3) specifies that an indeterminately-sentenced inmate is excluded from NVPP consideration if the inmate is currently serving a term of incarceration for a "violent felony," as defined in Penal Code, section 667.5, subdivision (c). It is also well established under Penal Code section 654's prohibition against multiple punishments for the same offense that, while a person can be convicted under multiple statutes for the same criminal act, they cannot serve multiple punishments for that act. Accordingly, courts will stay the execution of the shorter sentence for one offense and will instead, as required by law, impose the longer sentence of the other offense. This scheme results in situations where an inmate commits a violent act and is convicted of both violent and nonviolent offenses under multiple statutes relating to that act; however, the inmate ultimately only "serves" the longer sentence for the nonviolent offense under Penal Code section 654 because the execution of the shorter sentence for the violent offense has been stayed. As such, the inmate is still a violent offender because the inmate is currently convicted of committing a violent crime, even though the court stayed the sentence for that crime.

Proposition 57 and the Department's regulations intended that only nonviolent offenders be considered for parole under NVPP. However, existing regulations do not clearly state that those convicted of and sentenced to a term of incarceration for a violent offense where the sentence was stayed under Penal Code section 654 are excluded from NVPP eligibility. Therefore, it is necessary to change existing regulations to clarify that such individuals are excluded from NVPP eligibility. This regulatory change simply captures the department's current practice of excluding these inmates from NVPP eligibility; it will not result in excluding additional inmates who would have otherwise been eligible.

Section 3496. Eligibility Review.

Subsection 3496(b) is repealed to comply with the *In re Gadlin* decision. This subsection excludes from NVPP eligibility any indeterminately-sentenced inmate convicted of a past or

present sexual offense requiring registration as a sex offender. The Court held that eligibility for NVPP consideration must be based on an inmate's current conviction and that an inmate may not be excluded from NVPP consideration based on a current conviction for a registerable sex offense that is not defined as violent in the Department's regulations. Therefore, this subsection is repealed as ordered by the Court.

Subsections 3496(c) through (g) are renumbered to reflect the repealing of subsection (b)

Subsections 3496(d)(2) and (d)(3) are amended to remove the references to subsection (b), which has been repealed.

Section 3497. Referral to the Board of Parole Hearings.

New subsection 3497(e) is adopted to provide deadlines for the Department to review indeterminate-sentenced inmates who were previously not referred to the board for NVPP consideration due to a registerable sex offense conviction. The Department ceased enforcing the current regulations excluding inmates with a nonviolent registerable sex offense conviction after the December 28, 2020 *Gadlin* decision. Therefore, the July 1, 2021 date provides a swift but reasonable deadline by which the Department must review those inmates previously screened out due to a nonviolent registerable sex offense conviction. Furthermore, the Department only needs to re-examine those inmates who were reviewed prior to the *Gadlin* decision, and deemed ineligible for a referral to the board based on a nonviolent registerable sex offense conviction. Those reviewed after the *Gadlin* decision, were not subject to this exclusion, and therefore, their reviews are valid. The Department also does not need to review again any inmates ineligible for parole consideration under provisions other than California Code of Regulations, title 15, section 3496, subsection (b), as these inmates were ruled out based on criteria other than a nonviolent registerable sex offense conviction.

Indeterminate-sentenced nonviolent offenders who have already been scheduled or will be scheduled for a parole hearing within 12 months, are also excluded from consideration for practical reasons. The existing regulations already exclude indeterminate-sentenced nonviolent offenders from NVPP consideration if they have previously been scheduled for a hearing under any other provision of law or will be eligible for a hearing under any other provision of law within the next 12 months. (Pen. Code § 3497, subd. (a).) The board is simply reiterating existing law in subdivision (e) to clarify that this exclusion will continue to apply to those newly eligible under the *Gadlin* decision.

Moreover, applying this same requirement to the newly eligible inmates under *Gadlin* is necessary to avoid a waste of state resources. Specifically, indeterminate-sentenced nonviolent offenders, unlike determinately-sentenced nonviolent offenders, receive parole consideration hearings if found eligible for parole consideration under NVPP. If an inmate is already scheduled to receive a parole consideration hearing or will enter the hearing cycle within the next year, there is no added benefit to the inmate from being referred to the board because the inmate is already receiving or will receive shortly the benefit of NVPP parole consideration—a hearing before the board. Due to scheduling processes, pre-hearing due process requirements, and statutory notice requirements, the board requires approximately four to six months to place a hearing on calendar. Therefore, an inmate who is already scheduled to receive a hearing will not receive one any earlier upon being found eligible for parole consideration under NVPP. Additionally, an inmate who will be eligible for a parole consideration hearing within the next 12 months based on other legal authority (such as youth offender or elderly parole law) will be receiving a hearing presently regardless of NVPP eligibility. Even if such inmates were referred to the board under NVPP, they

are not likely to receive an earlier hearing date due to the pre-hearing notification and due process requirements. Worse, once the inmate's current hearing date is removed from the calendar, the new hearing date could ultimately be substantially later than the previously scheduled date due to the current high volume of hearings required for the board. Thus, because inmates under this provision would likely receive their hearing under other law before they would be scheduled for a hearing in accordance with the NPED under this article, completing each step of the process to reschedule would have no impact or possibly negative impact on their hearing dates and would be a waste of state resources.