

**State of California
Office of Administrative Law**

In re:
Department of Corrections and
Rehabilitation

Regulatory Action:

Title 15, California Code of Regulations

Amend sections: 2449.1, 2449.4, 2449.5,
2449.30, 2449.32, 3490,
3491, 3492, 3495, 3496,
3497

**NOTICE OF APPROVAL OF CERTIFICATE OF
COMPLIANCE**

**Government Code Sections 11349.1 and
11349.6(d)**

OAL Matter Number: 2022-0113-01

**OAL Matter Type: Certificate of Compliance
(C)**

This action makes permanent the emergency changes made in OAL File No. 2021-0409-02EON that amended the nonviolent offender parole review process (NVPP) eligibility regulations to be consistent with the California Supreme Court ruling *In re Gadlin* (2020) 10 Cal.5th 915. Additionally, this action makes changes to clarify NVPP eligibility and consideration and to eliminate the use of gender pronouns.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code.

Date: February 28, 2022



**Anna Thomas
Attorney**

For: Kenneth J. Pogue
Director

Original: Kathleen Allison, Secretary
Copy: Josh Jugum

NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 10/2019)

CERT

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-	2022-0113-01C	

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

FEB 28 2022

1:48 pm

For use by Office of Administrative Law (OAL) only	
NOTICE	REGULATIONS

OFFICE OF ADMIN. LAW
2022 JAN 13 PM 2:07

AGENCY WITH RULEMAKING AUTHORITY California Department of Corrections and Rehabilitation	AGENCY FILE NUMBER (If any) 21-05
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A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Nonviolent Parole Process Eligibility re Gadlin	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2021-0409-02EON
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND
	REPEAL
2449.1, 2449.4, 2449.5, 2449.30, 2449.32, 3490, 3491, 3492, 3495, 3496, 3497	
TITLE(S) 15	

3. TYPE OF FILING		
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input checked="" type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> File & Print
		<input type="checkbox"/> Print Only
		<input type="checkbox"/> Other (Specify) _____

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY		
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON Josh Jugum	TELEPHONE NUMBER 916 445-2266	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) joshua.jugum@cdcr.ca.gov
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I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Kathleen Allison</i>	DATE 1/6/2022
TYPED NAME AND TITLE OF SIGNATORY KATHLEEN ALLISON, Secretary	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

FEB 28 2022

Office of Administrative Law

TEXT OF ADOPTED 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.

(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 sections 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 sections 3041, 3041.1, and 3041.2 of the Penal Code, notwithstanding 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 section 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 section 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 sSection 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 sSection 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 unchanged.

(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.

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); and *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.

FINAL STATEMENT OF REASONS

The Initial Statement of Reasons (ISOR) is incorporated by reference.

DETERMINATIONS, ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

The department has determined that no alternative considered would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the action proposed. No such alternatives were proposed or brought to the department's attention during the adoption of this rulemaking action. The department determined that taking no action would violate the *Gadlin* court ruling.

The department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the CDCR's initial determination.

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

The department has determined that no reasonable alternatives to the regulation have been identified or brought to the attention of the department that would lessen any adverse impact on affected private persons or small businesses than the action planned.

The department, in proposing the adoption of these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document. The department has relied upon the results of the Economic Impact Assessment, which can be found in the Notice of Proposed Regulations and is available for review as part of the rulemaking file.

CORRECTION TO THE INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons contained the following statement in the fifth paragraph on page one:

The Office of Administrative Law approved the emergency regulations, which are effective April 29, 2021, through October 7, 2021.

The second date is incorrect. The correct date for the expiration of the emergency was February 5, 2022, unless a Certificate of Compliance was transmitted to OAL by February 4, 2022. CDCR transmitted a Certificate of Compliance to OAL on January 13, 2022.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD:

Commenter #1:

Comment 1: Commenter states "I hereby request the department to consider timeline. If an individual committed an offense that was considered violent but not fatal and so much time has passed, for instance has been in custody for the last 20 years and has demonstrated considerable sense of reform and programing, they should be given a chance to appear before the board for reconsideration. Especially if that person has reached elderly age or has been significantly ill, the society should extend a hand of mercy."

Response: This rulemaking is limited in scope and seeks to incorporate the California Supreme Court's decision in *In re Gadlin* (2020) 10 Cal.5th 915, which held that eligibility for consideration under the Nonviolent Offender Parole Review Process (NVPP) 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. This rulemaking also makes some changes to clarify existing ambiguities regarding an inmate's eligibility for NVPP consideration, but it does not seek to expand the criteria for eligibility. Thus, this comment is outside the scope of these regulations because it would expand the criteria for eligibility. Moreover, Proposition 57 was intended to include early parole consideration for those currently convicted of only nonviolent felony offenses. (Cal. Const., art. I, § 32.) Therefore, those convicted of violent offenses are currently excluded under the California Constitution from NVPP consideration.

Inmates who are ineligible for NVPP consideration may still be eligible for parole consideration based on the elderly parole program under Penal Code section 3055, subdivision (a) or in accordance with the February 10, 2014, order by the Three-Judge Court in *Coleman v. Newsom* (E.D.Cal. Feb. 10, 2014, No. 2:90-cv-00520-LKK DAD (PC), 2014 WL 2889598, 2014 U.S. Dist. Lexis 17913) and *Plata v. Newsom* (N.D. Cal., No. 3:01-cv-01351-TEH).

Commenter #2:

Comment 1: Commenter states that he supports changes to subsection 2449.5(f)(4) that add sexual offending to rehabilitative treatment programs, but states that there are no such programs within the department for inmates with sexual offending problems. Commenter states that if participating in such programs will help an inmate's chances of being paroled, such programs should be made available.

Response: As noted in the response to Commenter 1, this rulemaking is limited in scope and seeks to incorporate the California Supreme Court's decision in *In re Gadlin* (2020) and clarify existing ambiguities regarding an inmate's eligibility for NVPP consideration, but it does not seek to direct the department regarding which programs to offer. Thus, this comment is outside the scope of these regulations because it seeks to direct the department to make specific programs available to inmates.

Moreover, subsection 2449.5(f)(4) specifically states that the board will consider an inmate's participation in "available rehabilitative or self-help programming to address . . . sexual offending." (Emphasis added.) Therefore, an inmate's lack of participation due to unavailability of programming at the inmate's institution will not be held against them. However, the board encourages inmates to avail themselves of other feasible opportunities to participate in rehabilitative programming.

Comment 2: Commenter states that inmates who are determinately-sentenced can have their cases reviewed once a year, while "indeterminately sentenced prisoners if they are denied parole are denied for 3, 5, 10 or 15 years." Commenter states both classes of inmates should be "treated equally."

Response: Article I, section 32 of the California Constitution broadly states that any person convicted of a nonviolent felony offense shall be eligible for "parole consideration" after completing the full term for their primary offense. The constitution does not mandate or require specific procedures for this parole consideration process. (*In re Kavanaugh* (2021) 61 Cal.App.5th 320, 346.) Rather, the California Constitution simply requires that "parole consideration" be given after the offender completes the full term of their primary offense. The department and the board have wide latitude to define the procedures and parameters of "parole consideration." (*Id.* at 350.) Pursuant to this broad authority, the department promulgated regulations providing different avenues of parole consideration for determinately and indeterminately-sentenced inmates.

Specifically, determinately-sentenced inmates eligible under Proposition 57 receive parole consideration through an expanded version of the previous (now subsumed) nonviolent second strike offender parole process involving an annual paper review. Indeterminately-sentenced inmates, on the other hand, are

statutorily required to receive parole hearings under Penal Code sections 3041 and 3041.5 and are, therefore, subject to the statutorily-required denial lengths of 3, 5, 7, 10, or 15 years under subsection 3041.5(b)(3). Thus, despite the difference in frequency of parole review, the department's current parole consideration processes for determinately and indeterminately-sentenced inmates are in compliance with the constitutional provision in Article 1, section 32, because it provides specified methods of parole consideration for all nonviolent inmates upon the inmate's completion of the full term for their primary offense.

PUBLIC HEARING:

The department did not receive any requests to hold a public hearing regarding this rulemaking action.