

**State of California  
Office of Administrative Law**

**In re:**  
**Department of Corrections and  
Rehabilitation**

**Regulatory Action:**

**Title 15, California Code of Regulations**

**Adopt sections:**

**Amend sections: 3076, 3076.1, 3076.2,  
3076.3, 3076.4, 3076.5**

**Repeal sections:**

**NOTICE OF APPROVAL OF REGULATORY  
ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2022-0701-04**

**OAL Matter Type: Regular Resubmittal (SR)**

---

This rulemaking by the Department of Corrections and Rehabilitation adopts, amends and repeals regulations concerning the recommendation to recall of inmate commitments and resentencing of inmates by the Secretary pursuant to Penal Code, section 1170.03.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 10/1/2022.

Date: August 11, 2022

  
Elizabeth A. Heidig  
Deputy Director

For: Kenneth J. Pogue  
Director

Original: Kathleen Allison, Secretary  
Copy: Josh Jugum

# RESUBMITTAL

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE  
NOTICE PUBLICATION/REGISTRATION

For use by Secretary of State only

STD. 400 (REV. 10/2019)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z-2021-0309-01</b>	REGULATORY ACTION NUMBER <b>2022-0701-04</b>	EMERGENCY NUMBER <b>SR</b>
------------------	---	---	-------------------------------

For use by Office of Administrative Law (OAL) only

**ENDORSED - FILED**  
In the office of the Secretary of State  
of the State of California

**AUG 11 2022**

**1:55 pm**

OFFICE OF ADMIN. LAW  
2022 JUL 1 PM4:20

NOTICE	REGULATIONS
--------	-------------

AGENCY WITH RULEMAKING AUTHORITY California Department of Corrections and Rehabilitation	AGENCY FILE NUMBER (If any) 18-0882
---	--

### 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)
<b>OAL USE ONLY</b>	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER <b>2021, 12-2</b>	PUBLICATION DATE <b>3/19/2021</b>	

### B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Recommendation to Recall Sentence and Resentence PC 1170.03	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) See attachment
---	--

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
TITLE(S) 15	3076, 3076.1, 3076.2, 3076.3, 3076.4, 3076.5

3. TYPE OF FILING			
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input 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"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input checked="" 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"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<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)  
**May 23, 2022 through June 8, 2022**

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100 )  
 Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))  Effective on filing with Secretary of State  \$100 Changes Without Regulatory Effect  Effective other (Specify) \_\_\_\_\_

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY  
 Department of Finance (Form STD. 399) (SAM §6660)  Fair Political Practices Commission  State Fire Marshal  
 Other (Specify) \_\_\_\_\_

7. CONTACT PERSON Josh Jugum	TELEPHONE NUMBER (916) 445-2266	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) joshua.jugum@cdcr.ca.gov
---------------------------------	------------------------------------	-----------------------	---

8. 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 	DATE <b>6-29-22</b>
TYPED NAME AND TITLE OF SIGNATORY JEFF MACOMBER, Undersecretary, Operations	

For use by Office of Administrative Law (OAL) only  
**ENDORSED APPROVED**  
**AUG 11 2022**  
 Office of Administrative Law

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

**1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)**

2019-1121-01EON

2020-0914-01EE

2021-0429-03EE

2021-1207-05C

TEXT OF ADOPTED REGULATIONS – NCR 21-04

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

Chapter 1. Rules and Regulations of Adult Operations and Programs.

*Article 6.6. Department Recommendation to Recall Sentence and Resentence Inmate*

**3076. Secretary's Authority. Recall of Commitment Recommendation Circumstances.**

(a) Subdivision (a)(1) of Section 1170.03 of the Penal Code authorizes the Secretary to recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate for any reason, subject to the Secretary's sound discretion.

(b) Subdivision (e)(1) of Section 1170 of the Penal Code authorizes the Secretary to recommend to a sentencing court that the sentence previously imposed on an inmate be recalled if the criteria found in subdivision (e)(2) of Section 1170 of the Penal Code are satisfied.

(c) The provisions of this article do not apply to condemned inmates and inmates sentenced to life without the possibility of parole.

~~(a) The Secretary, or designee, may recommend at any time to the sentencing court the recall of an inmate's commitment pursuant to Penal Code section 1170(d), if the inmate is not sentenced to death, for one or more of the following reasons:~~

~~(1) It is evident from the inmate's exceptional behavior that is so extraordinary beyond simply complying with all regulations and procedures during incarceration that they have changed as a person and would be a positive asset to the community.~~

~~(2) Information which was not made available to the court in pronouncing the inmate's sentence is brought to the attention of the Secretary, who deems the information would have influenced the sentence imposed by the court.~~

~~(3) The Secretary deems that circumstances have changed to the extent that the inmate's continued incarceration is not in the interest of justice.~~

~~(b) The Secretary, or designee, may recommend at any time to the sentencing court the recall of an inmate's commitment pursuant to PC section 1170(e), if the inmate is not sentenced to death or to a term of life without the possibility of parole, for one or more of the following reasons:~~

~~(1) The inmate is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the California Department of Corrections and Rehabilitation.~~

~~(2) The inmate is permanently medically incapacitated with a medical condition, that renders him or her permanently unable to perform activities of basic daily living, and results in the inmate requiring 24-hour total care, including, but not limited to coma, persistent vegetative state, brain death, ventilator dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing. Activities of basic daily living are breathing, eating, bathing, dressing, transferring, elimination, arm use, or physical ambulation.~~

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1170(d)03, 1170(e) and 5054, Penal Code.

**3076.1 Recommendation Pursuant to subdivision (a)(1) of Section 1170.03 of the Penal Code. Recall of Commitment Recommendation Consideration Factors for Penal Code Section 1170(d).**

(a) Under any of the following circumstances, the Secretary may recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate:

(1) When an inmate demonstrates exceptional conduct as defined in subsection (b)(1);

(2) When there is the substantial likelihood of a sentencing discrepancy as described in subsection (c)(1);

(3) When there is a change in sentencing law as described in subsection (d)(1); or

(4) When a referral is received from the head of a law enforcement agency, the head of a prosecutorial agency, or a judicial officer as described in Section 3076.2.

(b) Recommendation Based on Exceptional Conduct.

(1) An inmate may be considered for recommendation pursuant to subsection (a)(1) if their behavior while incarcerated demonstrates compliance with departmental rules pursuant to subsection 3076.1(b)(2)(C) and participation in rehabilitative programming.

(2) Notwithstanding subsection (b)(1), inmates who meet the following criteria shall be excluded from consideration under this subsection:

(A) An inmate who is required to register as a tier two or three offender pursuant to sections 290(d)(2)(A) and 290(d)(3) of the Penal Code.

(B) Inmates who have not yet served ten continuous years of custody in the Department;

(C) Inmates who have been found guilty of a serious or violent rules violation which qualifies as a Division A-1, A-2, B, C, or D offense as described in subsections 3323(b) through (f) within the last five years or whose serious or violent rules violation as described above is pending;

(D) Determinately sentenced inmates who are already scheduled for release within the next 18 months;

(E) Determinately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution, are eligible for parole consideration within the next 18 months or have already been afforded parole consideration; or

(F) Indeterminately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution or Sections 3041, 3051, or 3055 of the Penal Code, are scheduled for a parole hearing within the next 18 months or have already been afforded a parole hearing, regardless of the decision by the Board of Parole Hearings.

(G) An inmate who is convicted of a single offense and is serving the low (mitigated) term for which there is no lesser-included offense, sentence enhancement, or alternative sentencing scheme which might result in a shorter sentence if the court legally resentenced the inmate.

(3) Initial eligibility for consideration under subsection (a)(1) shall be determined by the Classification Services Unit.

(A) The Classification Services Unit shall review all referrals received from a Warden, the Director of the Division of Adult Institutions, or the Secretary.

(B) The Classification Services Unit shall not accept referrals from inmates or other parties on behalf of inmates.

(C) If an inmate is found ineligible for one of the reasons enumerated in subsection (b)(2), the Classification Services Unit shall document the reason or reasons for the inmate's ineligibility and a copy of the document shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(D) If an inmate is found to have no exclusionary case factors pursuant to subsection 3076.1(b)(2), the Classification Services Unit shall submit the inmate's name to the Secretary. The Secretary may elect to decline to make a referral to the sentencing court, or direct the Classification Services Unit to prepare a Cumulative Case Summary, which shall include all of the following information:

1. Inmate's name and CDCR number;
2. Current commitment offense, brief description of the crime, and sentence;
3. County of commitment;
4. Summary of sustained juvenile petitions and adult criminal convictions;
5. Active or potential holds, warrants, and detainees;
6. Institutional behavior, including serious rules violation reports, drug test results, gang or disruptive group information, placement score, current housing assignment, a summary of work and educational assignments, and participation in rehabilitative programs and self-help activities;
7. Inmate visitor history (number of approved visitors and number of visits made during incarceration);
8. Victim notification requirements;
9. Other legally mandated notification requirements; and
10. A copy of the Abstract of Judgment and minute order for the inmate's current commitment offense, including plea agreements.

(4) Inmates considered under this section but deemed ineligible by the Classification Services Unit as described in subsection (b)(3)(C), or not acted upon by the Secretary as described in subsection (e)(3), shall not be reconsidered by the Department for two years from the date the decision was documented by the Classification Services Unit or the Secretary, whichever is later in time.

(c) Referral Based on the Substantial Likelihood of a Sentencing Discrepancy.

(1) An inmate may be considered for referral pursuant to subsection (a)(2) if their sentence, as reflected in the Abstract of Judgment, contradicts applicable sentencing laws at the time of their sentencing hearing or subsequent court decisions suggesting the substantial likelihood of a sentencing discrepancy.

(2) Notwithstanding subsection (c)(1), determinately sentenced inmates who are scheduled for release within the next six months shall be excluded from consideration under this section.

(3) Initial eligibility for consideration under subsection (a)(2) shall be determined by the Correctional Case Records Unit. Eligibility shall be determined by evaluating the Abstract of Judgment of each inmate and determining if there is a discrepancy between the inmate's sentence and the sentencing laws that existed at the time of the sentencing hearing or between the inmate's sentence and subsequent court decisions. If an inmate is found eligible, the Correctional Case Records Unit shall refer the matter to the Secretary.

(d) Referral Based on a Change in Sentencing Law.

(1) An inmate may be considered for referral pursuant to subsection (a)(3) if the applicable sentencing laws at the time of their sentencing hearing are subsequently changed due to new statutory or case law authority with statewide application.

(2) Notwithstanding subsection (d)(1), inmates who meet the following criteria shall be excluded from consideration under this subsection:

(A) Inmates who have not yet served five continuous years of CDCR custody;

(B) Inmates who have been found guilty of a serious or violent rules violation which qualifies as a Division A-1, A-2, B, C, or D offense as described in subsections 3323(b) through (f) within the last one year or whose serious or violent rules violation as described above is pending;

(C) Determinately sentenced inmates who are already scheduled for release within the next 18 months;

(D) Determinately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution, are eligible for parole consideration within the next 18 months or have already been afforded parole consideration; or

(E) Indeterminately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution or Sections 3041, 3051, or 3055 of the Penal Code, are scheduled for a parole hearing within the next 18 months or who have already been afforded a parole hearing, regardless of the decision by the Board of Parole Hearings.

(3) Initial eligibility for consideration under subsection (a)(3) shall be determined by the Classification Services Unit or the Correctional Case Records Unit.

(A) If an inmate is found ineligible for one of the reasons enumerated in subsection (d)(2), the Classification Services Unit or the Correctional Case Records Unit shall document the reason or reasons for the inmate's ineligibility and a copy of the document shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(B) If an inmate is found to have no exclusionary case factors pursuant to subsection 3076.1(d)(2), the Classification Services Unit (CSU) or the Correctional Case Records Unit shall submit the inmate's name to the Secretary. The Secretary may elect to decline to make a referral to the sentencing court, or:

1. If the inmate was submitted to the Secretary by CSU, direct CSU to prepare a Cumulative Case Summary, as described in subsection 3076.1(b)(3)(D), or:

2. If the inmate was submitted to the Secretary by the Correctional Case Records Unit, a recommendation letter shall be forwarded to the sentencing court.

(4) Inmates considered under this section but deemed ineligible by the Classification Services Unit or the Correctional Case Records Unit as described in subsection (d)(3)(A), or not acted upon by the Secretary as described in (e)(3), shall not be reconsidered by the Department for two years from the date the decision was documented by the Classification Services Unit, the Correctional Case Records Unit, or the Secretary, whichever is later in time.

(e) Decision by the Secretary.

(1) The Secretary shall reach a decision on any matter under this section within 10 business days of receiving the referral.

(2) If the Secretary elects to recommend an inmate for recall and resentencing, a recommendation letter and, when required pursuant to subsection 3076.1(b)(3)(D), a Cumulative Case Summary shall be forwarded to the sentencing court and a copy shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(3) If the Secretary elects not to recommend an inmate for recall and resentencing, a "General Chrono" (CDC Form 128-B; Rev. 4/74), which is incorporated by reference, shall be generated informing the inmate that the Secretary took no action and a copy shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(4) Pursuant to the broad discretion vested in the Secretary by statute, namely subdivision (a)(1) of Section 1170.03 of the Penal Code, the Secretary's decision is final and not subject to internal administrative review.

~~For inmates meeting one or more of the recall eligibility requirements of section 3076(a), the Classification and Parole Representative, shall consider the following factors as may be applicable when recommending recall of commitment consideration for an inmate:~~

~~(a) The inmate's commitment offense.~~

~~(b) Whether the inmate has a history of affiliation with organized criminal activity, including, but not limited to, any known disruptive group, street gang, prison gang, terrorist group, or racketeering enterprise.~~

~~(c) The inmate is or is not designated as a Public Interest Case by the Classification Staff Representative, or their placement has or has not been ordered by the Departmental Review Board because of an unusual threat to the safety of persons or public interest in the inmate's case.~~

~~(d) Whether the inmate's prior criminal history includes violent acts against persons pursuant to Penal Code (PC) section 667.5(c) or PC section 1192.7(c), or registerable offenses pursuant to PC section 290.~~

~~(e) Whether there exists a documented victim or next of kin of the inmate's commitment offense in the community who would suffer fear from the release of the inmate back into the community.~~

~~(f) Whether the inmate's documented institutional behavior reflects a history of offenses involving force, violence, assault, arson or predatory sexual behavior.~~

~~(g) Whether the inmate has committed any other criminal acts, either prior to or during the current period of incarceration, that indicate he or she would be a danger to the public if released.~~

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 290, 1170.03(d), 3041, 3043, 3051, 3055 and 5054, Penal Code; Cal. Const., art. I, sec. 32.

### **3076.2 Referral Based on a Law Enforcement, Prosecutorial, or Judicial Referral. Recall of Commitment Processing for Penal Code Section 1170(d).**

(a) No more than 10 business days after receiving a request from the head of a law enforcement agency, head of a prosecutorial agency, or judicial officer asking that the Secretary consider referring an inmate to a sentencing court pursuant to subdivision (a)(1) of Section 1170.03 of the Penal Code, the Classification Services Unit shall forward a copy of the request to the District Attorney of the county that prosecuted the inmate resulting in their current incarceration in state prison for consideration pursuant to the District Attorney's independent authority to initiate such a referral.

(b) If the District Attorney elects not to refer the inmate for recall and resentencing or the District Attorney does not respond with a decision to the Classification Services Unit within 90 calendar days of the referral, then the Classification Services Unit shall, no more than 10 business days after learning of the District Attorney's decision not to refer, or 90 calendar days after making the referral to the District Attorney described in subsection (a), whichever comes first, prepare a Cumulative Case Summary as described in subsection (b)(3)(D) of section 3076.1 and forward the request and the summary to the Secretary for consideration pursuant to subsection 3076(a).

(c) If the District Attorney elects to refer the inmate to the sentencing court, then the matter shall be considered closed.

~~(a) Requests for consideration which are initiated by the facility at any time or by the sentencing court more than 120 days after the date of the inmate's commitment shall be referred to the Classification and Parole Representative (C&PR).~~

~~(b) Upon receipt of the request, the C&PR shall consider the factors listed in section 3076.1 and review the inmate's central file to determine if the inmate is sentenced to death.~~

~~(1) If the inmate is sentenced to death, the C&PR shall document the reason for the ineligibility on a CDC Form 128-B (Rev. 04/74), General Chrono. The original CDC Form 128-B shall be filed in the inmate's central file and a copy, excluding any confidential material as defined in section 3321, sent to the inmate. A formal, written response shall be provided to the sentencing court or~~

the Secretary, including the reason the inmate is not eligible for Penal Code (PC) section 1170(d) recall.

~~(2) If the inmate is not sentenced to death, the C&PR shall submit the request to the inmate's caseworker. The inmate's caseworker shall have five working days to prepare an evaluation report, noting the inmate's case factors as listed in section 3076.1, and include the following information and attachments:~~

~~(A) The inmate's cumulative case summary including, but not limited to the following information:~~

~~1. Inmate's name and CDC number.~~

~~2. Current commitment offense, brief description of the crime, and sentence.~~

~~3. County of commitment.~~

~~4. Prior juvenile and adult criminal history.~~

~~5. Active or potential holds, warrants, detainers.~~

~~6. Institutional adjustment, including rules violation reports, counseling chronos, pending disciplinary actions, gang/disruptive group information, placement score, current housing assignment, work and education assignments, and participation in self-help activities.~~

~~7. Mental health and developmental disability status.~~

~~(B) A list of any victim notification or other special notification requirements.~~

~~(C) The inmate's post-release plan.~~

~~(D) Abstract of Judgment for the inmate's current commitment offense.~~

~~(E) Probation Officer's Report for the inmate's current commitment offense.~~

~~(F) Institutional Staff Recommendation Summary.~~

~~(G) Legal Status Summary.~~

~~(H) CDC Form 112 (Rev. 09/83), Chronological History.~~

~~(I) The inmate's most recent Board of Parole Hearings Parole Consideration Report with the Lifer Parole Hearing Decision Face Sheet containing the Board of Parole Hearings' disposition (applies only to inmates who are sentenced to an indeterminate term).~~

~~(c) The C&PR shall review and forward the evaluation report to the warden or chief deputy warden within three working days.~~

~~(d) The warden or chief deputy warden shall review and sign the evaluation report and ensure it is forwarded to California Department of Corrections and Rehabilitation headquarters within three working days.~~

~~(e) The evaluation report for a PC section 1170(d) recall shall be referred to the Secretary, or designee, for review and consideration.~~

~~(1) If a positive recommendation for recall is made, and the inmate is sentenced to a determinate term, the Secretary, or designee's, recommendation shall be referred directly to the sentencing court.~~

~~(2) If the inmate is sentenced to an indeterminate term, the Secretary or designee's recommendation, whether positive or negative, shall be referred to the Board of Parole Hearings for review and consideration.~~

~~(f) When the court requests a post-sentence report within 120 days of the inmate's sentencing, the inmate's caseworker shall evaluate all available information, and assess the inmate's potential for completing probation or other alternate sentencing, and the threat posed to the community if the inmate fails to realize that potential. The inmate's caseworker shall complete an evaluation report, as described in subsection 3076.2(b)(2), and forward the report to the C&PR within five working days.~~

~~(g) The C&PR shall have three working days to review the evaluation report and forward it to the warden or chief deputy warden.~~

~~(h) The warden or chief deputy warden shall review and sign the evaluation report and submit it directly to the sentencing court within three working days.~~

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1170(ad), 3043 and 5054, Penal Code.

**Section 3076.3** is re-titled. The existing text remains unchanged.

**3076.3. Recommendation Pursuant to subdivision (e) of Section 1170 of the Penal Code – Consideration Factors. Recall of Commitment Recommendation Consideration Factors for Penal Code Section 1170(e).**

**Subsections 3076.3 initial paragraph through 3076.3(j) remain unchanged.**

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1170(e), 3043 and 5054, Penal Code; and *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578.

**Section 3076.4** is re-titled. The existing text remains unchanged.

**3076.4. Recommendation Pursuant to subdivision (e) of Section 1170 of the Penal Code – Processes. Recall of Commitment Processing for Penal Code Section 1170(e).**

**Subsections 3076.4 initial paragraph through 3076.4(j) are unchanged.**

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1170(e), 3043 and 5054, Penal Code; and *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578.

**Section 3076.5 is re-titled. The existing text is deleted in full and replaced with the following text.**

**3076.5 Victim Notification for Recall of Commitment Recommendations.**

(a) Recommendation pursuant to subdivision (a)(1) of Section 1170.03 of the Penal Code.

(1) No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified of a referral by the Department to the sentencing court pursuant to subdivision (a)(1) of Section 1170.03 of the Penal Code, based on exceptional conduct as described in subsection 3076.1(a)(1) or a law enforcement, prosecutorial, or judicial referral as described in subsection 3076.2, that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(2) No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified that the sentencing court has scheduled a hearing on a referral pursuant to subdivision (a)(1) of Section 1170.03 of the Penal Code, based on the substantial likelihood of a sentencing discrepancy as described in subsection 3076.1(a)(2) or a change in sentencing law as described in subsection 3076.1(a)(3), that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(b) Recommendation pursuant to subdivision (e) of Section 1170 of the Penal Code. No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified of a referral by the Department to the sentencing court pursuant to subdivision (e) of Section 1170 of the Penal Code, that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(c) All notifications made pursuant to this section shall include the name and the address of the court that will consider the recall of the inmate's commitment.

~~When informed by department headquarters or the Board of Parole Hearings that an inmate's commitment has been recommended for recall to the sentencing court, the Classification and Parole Representative shall notify any victim of a crime committed by the inmate, or the victim's next of kin, provided that the victim or the victim's next of kin has formally requested notice about the status of the inmate in prison, including, but not limited to, notification of release, escape, a scheduled execution, an inmate's entry into a contract for the sale of the story of a crime, death, or of any hearing to review or consider the release or parole suitability or the setting of a parole date for the inmate, in writing; either by submitting a signed letter or a completed CDCR Form 1707 (Rev. 06/16), Request For Victim Services, which is incorporated by reference, to the Office of Victim and Survivor Rights and Services, and the requesting party has kept the department or the Board of Parole Hearings apprised of their current mailing address. The notification shall include the name and address of the court that will consider the recall of the inmate's commitment.~~

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 679.03, 1170.03(d), 1170(e), 2085.5, 3003, 3043, 3043.1, 3043.2, 3043.25, 3043.3, 3053.2, 3058.8, 3605, 5054 and 5065.5, Penal Code.

ADOPT

NAME and NUMBER

CDC 128-B (Rev. 4/74)

DATE

GENERAL CHRONO

NAME and NUMBER

CDC 128-B (Rev. 4/74)

DATE

GENERAL CHRONO

NAME and NUMBER

CDC 128-B (Rev. 4/74)

DATE

GENERAL CHRONO

**Office of Victim and Survivor Rights and Services (OVSRS)**  
**P.O. Box 942883, Sacramento, CA 94283-0001**  
Toll Free Number: 1-877-256-6877 Fax Number: (916) 445-3737  
Web: <http://www.cdcr.ca.gov/victims> Email: [victimservices@cdcr.ca.gov](mailto:victimservices@cdcr.ca.gov)



**DO NOT MAIL THE COMPLETED FORM TO A PRISON. ALL INFORMATION WILL REMAIN CONFIDENTIAL.**

- Check one:  New/Revised Request for Victim Services  Change of address/phone/e-mail only (complete sections A, D and E)  
 Collection of court ordered restitution only/**no notification services** (complete sections A, D and E)

**SECTION A. APPLICANT INFORMATION (Must be completed.)**

- Check one:  Victim of crime(s) committed by offender  Witness who testified against the offender  
 Family member of **victim**, indicate relationship: \_\_\_\_\_  
(See page 2 – Section A)

Name of Victim(s): \_\_\_\_\_

Person requesting information. \_\_\_\_\_  
(FIRST) (MIDDLE) (LAST)

Physical Address: \_\_\_\_\_  
(STREET) (CITY) (STATE) (ZIP CODE)

Mailing Address (If different): \_\_\_\_\_  
(STREET) (CITY) (STATE) (ZIP CODE)

Telephone: (\_\_\_\_) \_\_\_\_\_ (\_\_\_\_) \_\_\_\_\_ (E-MAIL) \_\_\_\_\_  
(PRIMARY) (SECONDARY)

**NOTE: It is your responsibility to keep the OVSRS informed of any changes to your contact information.**

**SECTION B. NOTIFICATION OF CHANGES TO OFFENDER'S CUSTODY STATUS (Complete if you want to request notification.)**

To be notified of changes to the custody status of an offender, check the box below to indicate your preferred method\* of receiving notices:

1.  Send me notification by electronic mail (e-mail)  
**OR**  
2.  Send me notification by mail  
**Please choose only one (1) mail delivery method:**  
 Regular Mail  Certified Mail (signature required to receive)

*Change in custody status includes release, death, escape, parole proceeding (Victims/Victims' family members only), contract, or scheduled execution.*

**NOTE: CDCR is unable to provide notification each time an offender is transferred between institutions.**

\* **NOTE: If the preferred method of notification you selected is not available, regular mail will be used to send the notice.**

**SECTION C. CONDITIONS OF PAROLE/COMMUNITY SUPERVISION (Complete if you want to request special conditions.)**

**Requests for special conditions of parole/community supervision are considered but not guaranteed.**

I request the following conditions when the offender is released on parole/community supervision:

1.  Offender not be allowed to contact me while he/she is on parole/community supervision.  
2.  Offender not be allowed to live in the same county that I live in.

**For direct victims/witnesses only:**

3.  Offender not be allowed to live within 35 miles of my home address (available only for specific types of crimes, see page 2)  
**NOTE: If you would like to provide additional information explaining your request, attach a separate sheet of paper.**

**SECTION D. OFFENDER IDENTIFICATION (Complete as much information as possible.)**

Offender's Full Name (Print): \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(FIRST) (MIDDLE) (LAST) MO DAY YEAR

CDCR Number (Offender ID): \_\_\_\_\_ Date Sentenced to Prison: \_\_\_\_\_  
MO DAY YEAR

Court Case Number: \_\_\_\_\_ County of Sentencing: \_\_\_\_\_

**SECTION E. APPLICANT SIGNATURE (Sign and date the completed form.)**

Signature of Applicant: \_\_\_\_\_ Date: \_\_\_\_\_

**REQUEST FOR VICTIM SERVICES  
CDCR 1707 (Rev. 06/16)****INSTRUCTIONS**

Read the following instructions carefully to fill out page 1 of the form so that it can be processed correctly. Sections A, D, and E must be completed. Complete all other sections, based on your needs. All information will remain confidential.

Check one of the three boxes at the top of the CDCR 1707 form to indicate if this is a **new/revised request for victim services**, a **change of address/phone/e-mail only**, or **Collection of court ordered restitution only/no notification services**. If you check **change of address/phone/e-mail only**, complete sections A, D, and E. If you check **Collection of court ordered restitution only/no notification services**, complete sections A, D, and E.

**SECTION A. APPLICANT INFORMATION**

This section must be completed. Check the box that most accurately describes your relationship to the crime: **victim**, **witness**, or **family member of victim** and your relationship to the victim. (Example - spouse, child, sibling, grandparent or grandchild)

Please indicate the name(s) of the victim(s) of the crime committed by the offender.

Clearly print your name, physical address, mailing address (*if different*), your primary phone number, secondary phone number, and e-mail address.

**NOTE:** *In order to be entitled to receive notice the requesting party shall keep the department or board informed of his or her current contact information. (Penal Code sections 3043(a)(1), 3058.8(b))*

**SECTION B. NOTIFICATION OF CHANGES TO OFFENDER'S CUSTODY STATUS**

Complete this section if you choose to request notification services. Check the most appropriate box(es).

You have one of two choices to receive notice of an offender's **release, escape, death, parole proceeding** (*Victims/Victims' family members only*), **contract, or scheduled execution**.

Check **Box 1** to register to receive notification by electronic mail (e-mail).

Check **Box 2** to register to receive notification by mail. Indicate whether you prefer to receive your notice by regular mail or certified mail. If the preferred method of notification you selected is not available regular mail will be used to send the notice.

**NOTE:** *It is your responsibility to request notification of an offender's criminal appeal. Please call the State of California, Office of the Attorney General, Victim Services Unit 1-877-433-9069.*

**SUBMIT COMPLETED FORM BY MAIL, FAX OR E-MAIL (SCANNED COPY) TO:**

California Department of Corrections and Rehabilitation  
Office of Victim and Survivor Rights and Services  
P.O. Box 942883, Sacramento, CA 94283-0001  
Fax: (916) 445-3737 / E-mail: [victimservices@cdcr.ca.gov](mailto:victimservices@cdcr.ca.gov)

**PRIVACY STATEMENT:**

**AGENCY STATEMENT:** The California Department of Corrections and Rehabilitation (CDCR), CDCR 1707, Request for Victim Services.

**OFFICE RESPONSIBLE FOR FORM:** Office of Victim and Survivor Rights and Services, P.O. Box 942883, Sacramento, CA 94283-0001. The telephone number is 1-877-256-6877. **AUTHORITY:** California Constitution Article I, section 28, Penal Code sections 667.5, 679.03, 2085.5, 3003, 3043, 3058.8, 3605, 5065.5.

**PROVIDING INFORMATION:** The information requested is necessary to process your request for victim services and is voluntary. Failure to provide any of the information requested may prevent the OVSRS from processing your request. **All information will remain confidential per Penal Code section 679.03(c):** Your information may be shared with the investigating agency, the district attorney's office that prosecuted the case, and/or the State of California, Office of the Attorney General, Victim Services Unit.

**Penal Code section 5065.5:** When notified that an offender has entered into a contract for the sale of the story of a crime for which the offender was convicted CDCR will notify registered victims and victim's immediate family members.

**SECTION C. CONDITIONS OF PAROLE/COMMUNITY SUPERVISION**

Complete this section if you choose to request special conditions of parole/community supervision. You may check all the conditions that you wish to request or are eligible to receive however such conditions are not guaranteed.

Checking **Box 1** will request that the offender have **no contact** with you while he/she is on parole/community supervision.

Checking **Box 2** will request that the offender **not be allowed to live in the same county** that you live in.

Checking **Box 3** will request that the offender **not be allowed to live within 35 miles of your home address**. *Per Penal Code Section 3003, available only for the following crimes: murder or voluntary manslaughter, mayhem, rape, sodomy by force, oral copulation, lewd acts on a child under 14, any felony punishable by death or imprisonment in the state prison for life, stalking, felony with a great bodily injury enhancement, and continuous sexual abuse of a child.*

**NOTE:** *The third box applies to direct victims and witnesses only. (Penal Code section 3003)*

**SECTION D. OFFENDER IDENTIFICATION**

Provide as much information as you can in this section to ensure that we have the correct offender involved in your case. If you need help completing this section, you may contact the district attorney's office in the county where the trial was held.

**SECTION E. APPLICANT SIGNATURE**

Sign and date the completed form.



## **FINAL STATEMENT OF REASONS:**

The following documents are incorporated by reference:

The Initial Statement of Reasons.

The first readoption of the emergency regulations. (OAL File no. 2020-0914-01)

The second readoption of the emergency regulations. (OAL File no. 2021-0429-03)

The Certificate of Compliance filing of this rulemaking action (OAL File no. 2021-1207-05C)

## **UPDATES TO THE INITIAL STATEMENT OF REASONS**

On November 21, 2019, the department submitted to the Office of Administrative Law (OAL) proposed emergency regulations concerning Recommendation to Recall Sentence and Resentence Inmates pursuant to Penal Code section 1170(d)(1). The emergency regulations were approved effective January 1, 2020.

An emergency readoption of the regulations was submitted to OAL on September 14, 2020, and approved effective October 10, 2020. This readoption extended the period of emergency authority to May 11, 2021, pursuant to Executive Orders N-40-20 and N-71-20, which were in effect at the time.

A second emergency readoption of the regulations was submitted to OAL on April 29, 2021, and approved on May 6, 2021. This second readoption extended the period of emergency authority to December 8, 2021, pursuant to Executive Orders N-40-20 and N-71-20, which were in effect at the time.

Notice of Change to Regulations 21-04 was published and distributed on March 19, 2021. Public comments were accepted through May 7, 2021. The department received over 200 comments during this period. A teleconference public hearing was held on May 7, 2021, at which 36 people commented. Due to technical issues that prevented some of the callers on the teleconference line from being able to make comments, the hearing was continued on May 28, 2021. The department received an additional 34 comments at this second hearing.

After submitting final regulations to OAL in December of 2021, the department determined additional amendments to the proposed text and supporting documents were necessary. The department withdrew the regulations from OAL in January of 2022 and developed amended regulations.

*A Notice of Change to Text as Originally Proposed* (Renotice) was distributed on May 23, 2022, to the persons and organizations who provided comments during the initial public comment period. The Renotice was posted on the department's website on the same date. The department accepted public comments from this date through June 8, 2022. The department received 194 comments during this public comment period.

## **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 reduce the department's ability to refer inmates for resentencing pursuant to penal code section 1170(d)(1).

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 department'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.

**SUMMARIES AND RESPONSES TO COMMENTS RECEIVED DURING THE PUBLIC HEARING ON MAY 7, 2021:**

A teleconference public hearing was held on May 7, 2021, at which 36 people made public comments. Due to technical issues that prevented some of the callers on the teleconference line from being able to make comments, the hearing was continued on May 28, 2021. The department received an additional 34 comments at this second hearing.

**Speaker 1:** There shouldn't be an exclusion for inmates serving life without parole when it comes to the 1170(d) process.

**Response:** PC section 1170(a)(3) states "Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d)." CDCR has determined that this provision of law means that the provisions of Penal Code section 1170(d)(1) do not apply to inmates sentenced to death or LWOP, with the exception of subsection 1170(d)(2), which applies only to juvenile offenders under specific circumstances.

**Speaker 2:**

**Comment 1:** Both the criteria and the application of the criteria used in case evaluation is more restrictive than the broad language of the Penal Code.

**Response:** The department has adopted specific exclusionary criteria as described in the proposed regulation text. The reasons for these specific exclusions are contained in the Initial Statement of Reasons (ISOR) as well as in this document in response to other public comments.

The department contends that exclusionary criteria are necessary for several reasons. Both the department and the court system have limited resources in terms of staff and time to devote to the referral and resentencing process. Establishing criteria for referral allows the department to focus those limited resources on inmates who have demonstrated their readiness to reenter society and who have the best chance of being resentenced.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals made with no vetting or criteria applied (e.g., referrals of inmates with multiple, recent, serious disciplinary infractions, or referrals of inmates who have served only a very short portion of their original sentence) may endanger the success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements.

Certain exclusionary criteria are adopted to ensure the department's limited resources are used to refer for resentencing those inmates who have time to go through the referral and resentencing process before reaching their release date or parole hearing date.

**Comment 2:** Requirements of prolonged participations in rehabilitative programming exclude people who do not have access to such programs.

**Response:** All institutions provide some access to educational and rehabilitative programming. The regulations do not require participation in any specific program and do not favor any one type of rehabilitative or educational programming over another.

**Comment 3:** There should be no life without parole exceptions for resentencing under Penal Code 1170 (d).

**Response:** See response to Speaker 1.

**Speaker 3:** There should be no exclusion for sex offenders. The age of consent for sex varies throughout the United States and because of this an individual could possibly commit a crime and be a sex offender. Excluding sex offenders takes away their last hope to be able to integrate into society.

**Response:** As of January 1, 2021, inmates who are required to register as Tier 1 offenders are not excluded from exceptional conduct referrals. Tier 2 and 3 registrants remain excluded for reasons stated in the ISOR: a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while a Tier 2 and Tier 3 offense requires registration for a minimum of 20 years and life respectively. These registrants who have committed offenses that require Tier 2 or 3 registration are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance." (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

**NOTE: Speaker 4 did not make a comment regarding the proposed regulations.**

**Speaker 5:** There should be no exclusion for sex offender registrants from resentencing.

**Response:** See response to Speaker 3.

**Speaker 6:** There should be no exclusion for sex offender registrants from resentencing because it's discriminatory.

**Response:** See response to Speaker 3.

**Speaker 7:**

**Comment 1:** CDCR staff at California Medical Facility are not familiar with 1170(d). Staff are not aware of the process and therefore there are no outlets for inmates to go to for recommendations regarding 1170(d).

**Response:** This comment is regarding the personal experience of a specific inmate. The comment is either insufficiently related to the specific action proposed or to the procedures followed by the department in proposing or adopting these regulations, or generalized or personalized to the extent that no meaningful

response can be formulated by the department in refutation or accommodation of the comment, therefore the comment is irrelevant pursuant to Government Code, Section 11346.9(a)(3).

**Comment 2:** There is no need for blanket exclusions. Both the criteria and the application of the criteria used in case evaluation are more restrictive than the broad language of the Penal Code.

**Response:** See response to Speaker 2, Comment 1.

**Comment 3:** Requirements of prolonged participation in rehabilitative programming exclude people who do not have access to such programs.

**Response:** See response to Speaker 2, Comment 2.

**Comment 4:** Exceptional conduct resentencing referrals should be open to all.

**Response:** See response to speaker 2, Comment 1.

**Comment 5:** CDCR should accept referrals from volunteer community organizations and family members.

**Response:** As stated in the ISOR, the department does not accept self-referrals from inmates or inmate family members, friends, or attorneys. This provision was adopted because these persons do not have access to all of the inmate's case factors which are necessary to make a determination whether or not the inmate meets the exceptional conduct criteria. Also stated in the ISOR: Subsection 3076.1(b)(3)(A) is adopted to establish and clarify that the department's Classification Services Unit shall only review inmates that are referred to them by Wardens, the Director of the Division of Adult Institutions, or the Secretary of the department. This will ensure that referrals are made by individuals in the best position to have complete information about an inmate's behavioral and rehabilitative conduct while incarcerated and that the inmate meets the exceptional conduct criteria.

**Speaker 8:** Commenter objects to the change to regulations and considers it an overreach of CDCR policy. Commenter supports the legal objections presented by the Alliance for Constitutional Sex Offender Laws. Commenter states he has completed his own studies and research to find mechanisms that can partially satisfy the requirements for public safety. Some examples of these mechanisms are therapy that is not necessarily court mandated, 12-step programs, and family support networks. Commenter states that the use of these methods can reduce the need for the current legal approach.

**Response:** See response to Speaker 3.

**NOTE: Speaker 9 did not make a comment regarding the proposed regulations.**

**Speaker 10:** Commenter is director of the Alliance for Constitutional Sex Offense Laws. Commenter states that since 1976 the status of someone as a registered citizen or registrant was a factor considered regarding resentencing but has never been categorically excluded. In 2018, Assembly bills 1812 and 2942 were passed and signed that had the primary purpose to expand the opportunities for resentencing and had no categorical exclusions. Commenter states that with proposition 57 there was a categorical exclusion that effected registrants from early parole considerations which had many lawsuits and later made its way to the California Supreme Court. The Supreme Court made a unanimous decision that said that CDCR's regulations violated the state's Constitution and must be repealed. The result of the legal actions taken in regards to Proposition 57 were emergency regulations that have been issued to repeal the mistake CDCR made. With new regulations regarding 1170(d), CDCR is using the same rationale to exclude individuals convicted of a sex offense and the public safety exclusion is based on a myth of rate of re-offense. Commenter states that CDCR reports that less than one percent of registrants while on parole re-offend. The public safety rationale that's expressed in these regulations does not authorize CDCR to rewrite legislation. Commenter states the regulations should be amended to eliminate all categorical exclusions

so that regulations pertaining to 1170(d) do not result in the same outcome as Proposition 57 and the *Gadlin* case.

**Response:** See response to Speaker 3. Regarding the comments about Proposition 57, assuming the commenter is referring to the nonviolent parole review process, this process is the result of a Constitutional mandate that requires CDCR to review and refer any inmates convicted of a nonviolent felony offense. However, referral for resentencing pursuant to PC section 1170(d)(1) is entirely discretionary. The nonviolent parole process is required to be applied to all inmates, while the PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code. While all inmates must be evaluated for eligibility for the nonviolent parole process, no inmate is entitled to an evaluation or eventual resentencing referral under PC 1170(d)(1). Drawing parallels between these very different circumstances is not warranted.

**Speaker 11:**

**Comment 1:** Commenter opposes sex offender registrants being blocked from the opportunity to apply for resentencing. Registrants should not be excluded from resentencing without considering their individual circumstance because it is arbitrary, unjust hysteria.

**Response:** See response to Speaker 3.

**Comment 2:** Commenter requests a second hearing due to technical issues.

**Response:** Due to the technical issues that occurred during the teleconference hearing on May 7, 2021, the hearing was continued on May 28, 2021. The department posted notice of this continuance on its website on May 18, 2021, and sent notice to all persons on the department's NCR mailing list the same day.

**Speaker 12:** Commenter strongly opposes the proposed regulations. Commenter supports speaker 10's comments. Everyone should be guaranteed equal protection under the law according to the US Constitution. There should be no arbitrary exclusions for people based on certain circumstances.

**Response:** See response to speaker 2, comment 1; and speakers 3 and 10.

**Speaker 13:** Exceptional conducting resentencing should be open to all. Commenter opposes the regulations regarding 1170(d) because it excludes inmates serving LWOP sentences even though LWOP inmates are eligible for resentencing within the law.

**Response:** See responses to Speaker 2, Comment 1, and Speaker 1.

**Speaker 14:** Strongly opposes the regulations pertaining to exclusion of sex offender registrants from resentencing. Commenter believes that this exclusion will further stigmatize individuals with registration requirements.

**Response:** See response to Speaker 3.

**Speaker 15:**

**Comment 1:** Commenter states her husband was put forward for resentencing by staff at his institution but has not heard from department headquarters.

**Response:** See response to Speaker 7, Comment 1.

**Comment 2:** Commenter opposes regulations pertaining to exclusions for 1170(d)(1). 1170(d)(1) should be for all inmates, regardless of sentencing, who have demonstrated during their incarceration they have transformed and are ready for society.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 16:** Strongly opposes any exclusions especially those pertaining to LWOP or death penalty sentence. 1170(d) itself does not exclude any sentence, and CDCR should follow suit of law.

**Response:** See response to Speaker 1.

**Speaker 17:** Commenter agrees with speaker 10 and is strongly against excluding resentencing for individuals who committed PC 290 (sex offense) crimes. Many inmates that are charged with certain types of 290 crimes are wrongfully charged, because of being inappropriately charged with human trafficking and prostitution. Inmates, particularly minorities, who are unable to afford an attorney are forced to take deals due to ineffective counsel. Penal Code 1170 does not specify exclusion for inmates who committed 290 crimes so it should not be an exclusion.

**Response:** See response to Speaker 3.

**Speaker 18:** Supports speaker 10 in her objection and believes the whole process should be rehabilitation. Sex offenders have a very low recidivism rate and new regulations are trying to dehumanize people classified as sex offenders. Sex offenders should have equal opportunities under the law.

**Response:** See response to Speaker 3.

**Speaker 19:**

**Comment 1:** Commenter strongly opposes the exclusions in the regulations because of the broad scope the legislators intended by amending 1170(d)(1). There is no need for blanket exclusions. Both the criteria and the application of the criteria used in case evaluation are more restrictive than the broad language of the Penal Code. Exceptional conduct resentencing referrals should be open to all.

**Response:** See response to Speaker 2, Comment 1.

**Comment 2:** CDCR should accept referrals from attorney volunteers, community organizations, and family members.

**Response:** See response to Speaker 7, Comment 5.

**Speaker 20:** These regulations should not be approved because the CDCR is subverting the intent of 1170(d). Penal Code 1170(d) doesn't exclude any groups from resentencing. The purpose of the revisions to Penal Code 1170(d) was to reduce unjust mass incarceration in California. LWOP inmates should be eligible for good conduct resentencing referrals.

**Response:** See response to Speaker 1 and Speaker 2, Comment 1.

**Speaker 21:** The regulations are unjust due to blanket exclusions across wide categories of people. CDCR must remove all blanket regulations because the intent of 1170(d) was to incentivize and recognize good behavior, as well as to recognize the decades of extreme sentencing policy.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 22:** The regulations are a bad idea due to blanket exclusions. Excluding sex offenders from resentencing is unjust.

**Response:** See response to Speaker 2, Comment 1, and Speaker 3.

**Speaker 23:** Commenter opposes new regulations that would exclude any group of people from resentencing. Proceeding with these regulations will result in legal actions and reflect poorly on CDCR. Excluding groups from 1170(d) is form of discrimination.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 24:**

**Comment 1:** The exclusionary criteria are unfair and go against Penal Code 1170 (d) (1). CDCR should accept self-referrals, referrals from attorneys, volunteers, community organizers, and family members for a potential resentencing.

**Response:** See responses to Speaker 2, Comment 1; and Speaker 7, Comment 5.

**Comment 2:** The public hearing phone system is not giving people a chance to speak out because of technical issues.

**Response:** See responses to Speaker 11, Comment 2.

**Speaker 25:** Commenter is a member of the Alliance for Constitutional Sex Offense Laws and opposes the regulations.

**Response:** The department acknowledges the commenter's opposition to the proposed regulations, however, the department will continue with this rulemaking action for the reasons provided in the Notice of Proposed Regulations and the Initial Statement of Reasons.

**Speaker 26:** Statutes regarding 1170(d) do not include exclusions therefore there should be no exclusions from resentencing.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 27:**

**Comment 1:** Commenter is concerned about the exclusions and barriers to resentencing within the new regulations. Remove categorical exclusions because this criteria has no relation to the penal code or a person's transformation. Categorical exclusions remove incentives that could lead to profound risks to people in the prison and do not serve public safety or principles of rehabilitation.

**Response:** See response to Speaker 2, Comment 1.

**Comment 2:** Exceptional conduct and resentencing should be open to all because not all inmates can meet requirements of prolonged participations in rehabilitative programs.

**Response:** See response to Speaker 2, Comment 2.

**Comment 3:** Self-referrals should be eligible for resentencing.

**Response:** See response to Speaker 7, Comment 5.

**Speaker 28:** Commenter objects to exclusions for resentencing because it goes against the legislative intent of 1170(d) and Proposition 57.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 29:** Commenter “strongly opposes the resentencing.”

**Response:** The department is not certain what the commenter intended by this statement. Assuming the commenter is opposed to the proposed regulations, see response to Speaker 25.

**Speaker 30:**

**Comment 1:** Commenter opposes exclusions for resentencing regarding inmates serving LWOP.

**Response:** See response to Speaker 1.

**Comment 2:** Commenter states CDCR should accept referrals from non-staff.

**Response:** See response to Speaker 7, Comment 5.

**Speaker 31:**

**Comment 1:** The purpose of Penal Code 1170 is to decrease incarceration in California; including broad exclusions defeats the purpose of the legislation.

**Response:** See response to Speaker 2, Comment 1.

**Comment 2:** Remove the exclusions of people who have already received parole consideration from resentencing referrals because these are some of the best candidates for resentencing.

**Response:** Decisions by the Board of Parole Hearings are based on an analysis of the inmate’s risk to public safety. The department has determined that once an inmate has been afforded an opportunity to appear before the Board for parole consideration, regardless of the outcome, the Board is best suited for determining the inmate’s risk to public safety, in accordance with BPH’s statutory responsibilities.

**Speaker 32:** Commenter opposes this rulemaking action. “Equal protection under the law means just that, equal protection under the law.”

**Response:** See response to Speaker 25.

**Speaker 33:** Commenter opposes blanket exclusions and is in favor of broadening the criteria to be eligible for resentencing as the Penal Code intended. Resentencing referrals should be open to all based on their achievements, not group characteristics.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 34:** Strongly opposes new regulations that exclude sex offender registrants from resentencing because it takes away their incentives for rehabilitation.

**Response:** See response to Speaker 3.

**Speaker 35:**

**Comment 1:** Commenter requests another public hearing due to technical issues.

**Response:** See response to Speaker 11, Comment 2.

**Comment 2:** The proposed regulations are contrary to the language and the spirit of the enabling statutes and not necessary to effectuate the purpose. The purpose of the legislation was for CDCR to accommodate the projected population decline by reducing capacity of state-owned and operated prisons and maximizing long-term state facility savings. Exclusions undermine the purpose of legislation.

**Response:** See response to Speaker 2, Comment 1.

**Comment 3:** Commenter recommends revising the regulations to include people of advanced age by creating an advanced age cohort, as well diminished physical condition to be considered for resentencing. CDCR should prioritize reviewing individuals with advanced age, diminished physical conditions and significant health problems. The Penal Code currently places all separated persons in interest of justice, and it's for a judge to consider in the interest of justice based on certain factors enumerated in the statute, including age and diminished physical condition. Regulations also failed to prioritize those with low recidivism risks, including elderly and infirmed.

**Response:** Inmates of advanced age or diminished physical capacity may be eligible for resentencing under Penal Code section 1170(e). Additionally, such inmates may be eligible for parole consideration under the Board of Parole Hearing's Elderly Parole Program.

**Comment 4:** Commenter states the regulations should be revised to remove Section 3076.1(b)(2)(D) and not use rules violations as a bar for resentencing consideration. People with rules violations should be included for resentencing referral because rules violations are arbitrary and capricious. Staff could be biased when writing rules violations. Staff have written up vague and arbitrary rules violations.

**Response:** As stated in the ISOR, only serious (as opposed to administrative) rules violations within a specified timeframe are disqualifying. Serious rules violations often involve criminal activity, violence, or other serious anti-social behavior. Any serious disciplinary infraction involving a Division A-1, A-2, B, C, or D offense pursuant to Section 3323 while incarcerated is not indicative of the effort needed to be considered for exceptional conduct referral.

**Comment 5:** People should not be excluded based on time served, release date, or parole schedule because these exclusions are in conflict with enabling statutes.

**Response:** Regarding time served: The proposed regulations establish ten years of continuous custody in the department as the minimum time period before eligibility for an exceptional conduct referral. As stated in the ISOR, the department determined that ten years in the custody of the department is a sufficient length of time to ensure that inmates have demonstrated a pattern of positive rehabilitative programming for a sustained period of time. Because the department cannot verify all behavior and rehabilitative efforts that took place prior to the inmate's arrival in department custody, only time served in the department's custody will count toward eligibility.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals of inmates who do not have a significant record of rehabilitation and discipline-free time served may endanger the success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements and has a substantial record of rehabilitation and positive programming.

Also as stated in the ISOR, subsection 3076.1(d)(2)(A) is adopted to establish that inmates must serve five years of their sentence in CDCR custody before becoming eligible for referral pursuant to subsection 3076.1(d). This provision recognizes that any referral to the sentencing court based on a retroactive

change in sentencing law necessitates the exercise of discretion by the judge, typically based on the judge's evaluation of the inmate's behavior while in CDCR custody. Therefore, the department determined that five years of custodial history in the department was a reasonable length of time to present to the judge for consideration.

Regarding release date and parole schedule: Certain exclusionary criteria are adopted to ensure the department's limited resources are used to refer for resentencing those inmates who have time to go through the referral and resentencing process before reaching their release date or parole hearing date.

**Comment 6:** There should be no exclusions for sex offenders for resentencing. The reason for excluding sex offenders is not valid because the data used to determine recidivism is incorrect. Data presented today show that sex offenders fall in one of the lowest categories to commit offenses. Double punishment is not warranted by a public safety argument, and the argument CDCR put in the record for justification for the regulations should not be included.

**Response:** See response to Speaker 3.

**Comment 7:** CDCR'S financial data and economic background fail to note the substantial cost savings in sentence reductions. CDCR calculated a net savings of \$6,166,000 across five years which was calculated incorrectly and missing an additional 14 million in savings. The calculation also did not account for additional overhead savings. When overhead cost is included in the calculation the cost savings comes out to be \$220 million in 3.5 years.

**Response:** The department contends that the commenter's cost/savings numbers are erroneous. The department estimated the economic and fiscal impact of the proposed regulations on the Form STD. 399 and attachment. As stated in the attachment, "The Institution savings and Parole cost numbers are subject to change as updated PC 1170(d) Average Daily Population impact projections are made by the CDCR Office of Research, bi-annually in the spring and fall." The department has provided an updated economic and fiscal impact statement, signed by the Department of Finance, as part of the final filing of these regulations with the Office of Administrative Law.

**Speaker 36:**

**Comment 1:** The Penal Code is clear that this resentencing relief should be broadly available. Regulations that create exclusions are arbitrary and capricious criteria, which add feelings of confusion, mistrust and unfairness for those who are incarcerated. Blanket exclusions are unnecessary because this is the same unjust criteria used from Proposition 57 which has been repeatedly challenged.

**Response:** See response to Speaker 2, Comment 1.

**Comment 2:** CDCR should accept self-referrals, as well as referrals from attorneys, volunteers, community organizations and family members. People can help flag eligibility for CDCR and decrease the burden on CDCR staff to be the only people to provide the path forward. CDCR should make clear who can submit referrals and what information is needed to be included.

**Response:** See response to Speaker 7, Comment 5.

**Comment 3:** Prioritizing people for resentencing who are at facilities with increased access to different programs, is inequitable and forces incarcerated individuals to bear the burden of infrastructure inequalities within CDCR. Individuals who have proven rehabilitation have the ability to resentence and get back to their families, especially during the COVID-19 pandemic.

**Response:** See response to Speaker 2, Comment 2.

**SUMMARIES AND RESPONSES TO COMMENTS RECEIVED DURING THE PUBLIC HEARING ON MAY 28, 2021:**

**NOTE:** Speaker 1 did not make a comment at the hearing.

**Speaker 2:**

**Comment 1:** It is unfair and unjust to exclude LWOP inmates.

**Response:** PC section 1170(a)(3) states “Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d).” CDCR has determined that this provision of law means that the provisions of Penal Code section 1170(d)(1) do not apply to inmates sentenced to death or LWOP, with the exception of subsection 1170(d)(2), which applies only to juvenile offenders under specific circumstances.

**Comment 2:** There should be no blanket exclusions which categorically and unjustly deny people resentencing because Penal Code 1170 was intended to incentivize all inmates. The criteria for exclusions have no relation to rehabilitation or current risk to public safety and preparedness for release. This same criteria was used for Prop 57 which has been challenged in litigation and struck down by the appellate court and the California Supreme Court.

**Response:** The department has adopted specific exclusionary criteria as described in the proposed regulation text. The reasons for these specific exclusions are contained in the Initial Statement of Reasons (ISOR) as well as in this document in response to other public comments.

The department contends that exclusionary criteria are necessary for several reasons. Both the department and the court system have limited resources in terms of staff and time to devote to the referral and resentencing process. Establishing criteria for referral allows the department to focus those limited resources on inmates who have demonstrated their readiness to reenter society and who have the best chance of being resentenced.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals made with no vetting or criteria applied (e.g., referrals of inmates with multiple, recent, serious disciplinary infractions, or referrals of inmates who have served only a very short portion of their original sentence) may endanger the success of the program. The credibility of the department’s referrals is enhanced by ensuring every inmate referred has met specific requirements.

Certain exclusionary criteria are adopted to ensure the department’s limited resources are used to refer for resentencing those inmates who have time to go through the referral and resentencing process before reaching their release date or parole hearing date.

**Speaker 3:** CDCR failed to notify the public of this second public hearing and the meeting being scheduled for a Friday before a long holiday weekend will result in not having full public participation. In addition, the technical issues from the last public hearing make it seem like the agency is trying to avoid public comments.

**Response:** Due to the technical issues that occurred during the teleconference hearing on May 7, 2021, the hearing was continued on May 28, 2021. The department posted notice of this continuance on its website on May 18, 2021, and sent notice to all persons on the department’s NCR mailing list the same day.

**Speaker 4:** Commenter states he “opposes to deny anyone convicted of a sex offense to resentencing opportunities.” Denying inmates convicted of a sex offense places a stigma on them, which makes it strenuous and more difficult to get through their experience in prison.

**Response:** As of January 1, 2021, inmates who are required to register as Tier 1 offenders are not excluded from exceptional conduct referrals. Tier 2 and 3 registrants remain excluded for reasons stated in the ISOR: a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while a Tier 2 and Tier 3 offense requires registration for a minimum of 20 years and life respectively. These registrants who have committed offenses that require Tier 2 or 3 registration are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, “Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest.” (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that “Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance.” (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

**Speaker 5:** Commenter opposes regulations that exclude sex offenders from resentencing because they are being all tied in a second-rank system. Certain sex offenders were titled sex offenders for a crime like urinating on a street with no facilities around. Because of situations like this, resentencing should be available to all.

**Response:** See response to Speaker 4.

**Speaker 6:** Strongly opposes denying anyone convicted of a sex offense from resentencing opportunities. There should be equality for resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 7:** Commenter supports 1170 because of personal experience with a family member in prison who has now been referred for resentencing and is going through the process.

**Response:** The department acknowledges the commenter’s support.

**Speaker 8:** Commenter is against the proposed regulation section 3076.2(b)(2)(A) because this discriminates against sex offenders who have rehabilitated and showed good conduct. This section contradicts CDCR findings for sex offender recidivism which is 0.6 percent which is much lower than offenses such as manslaughter.

**Response:** See response to Speaker 4.

**Speaker 9:** Commenter opposes exclusions for 290 registrants because it is unjust.

**Response:** See response to Speaker 4.

**Speaker 10:** Commenter strongly opposes provisions that unfairly and unconstitutionally exclude most registrants from resentencing opportunities. It is not equitable to categorically ignore the rehabilitative achievements of individuals based on the fact that their offense is designated a sex offense. CDCR’s exclusion is in direct conflict with the underlying purpose and discourages rehabilitation amongst this population.

**Response:** See response to Speaker 4.

**Speaker 11:** Commenter states excluding registrants from resentencing is unfair if they have completed the required rehabilitation programs.

**Response:** See response to Speaker 4.

**Speaker 12:** There is no logical, rational, reason to exclude sex offenders from resentencing. Excluding sex offenders is discriminatory.

**Response:** See response to Speaker 4.

**Speaker 13:**

**Comment 1:** Commenter opposes blanket exclusions, because resentencing is broadly available within the Penal Code. Creating exclusions for LWOP, death penalty, or 290 registrants, is illegal and against the purpose of legislative intent. These exclusions were developed from emotion not logic.

**Response:** See response to Speaker 2, Comment 2.

**Comment 2:** Strike exclusions that involve inmates who have already received parole consideration. The scope of the resentencing process is very different than a parole suitability hearing. Inmates who have prepared for parole hearings are some of the best candidates for resentencing.

**Response:** Decisions by the Board of Parole Hearings are based on an analysis of the inmate's risk to public safety. The department has determined that once an inmate has been afforded an opportunity to appear before the Board for parole consideration, regardless of outcome, the Board is best suited for determining the inmate's risk to public safety, in accordance with BPH's statutory responsibilities.

**Comment 3:** CDCR should accept self-referrals as well as referrals from attorneys, volunteers, community organizations, and family members to flag potential eligibility for resentencing referrals to CDCR. Commenter suggests creating forms for inmates to have access to for resentencing referrals and creating guidelines for these new referral forms.

**Response:** As stated in the ISOR, the department does not accept self-referrals from inmates or inmate family members, friends, or attorneys. This provision was adopted because these persons do not have access to all of the inmate's case factors which are necessary to make a determination whether or not the inmate meets the exceptional conduct criteria. Also stated in the ISOR: Subsection 3076.1(b)(3)(A) is adopted to establish and clarify that the department's Classification Services Unit shall only review inmates that are referred to them by Wardens, the Director of the Division of Adult Institutions, or the Secretary of the department. This will ensure that referrals are made by individuals in the best position to have complete information about an inmate's behavioral and rehabilitative conduct while incarcerated and that the inmate meets the exceptional conduct criteria.

**Speaker 14:** Commenter strongly opposes new regulations because it would mainly affect minorities. Minorities are sentenced harshly and would never have a chance for resentencing.

**Response:** The proposed regulations make no distinctions based upon personal characteristics.

**Speaker 15:** Opposes denying anyone convicted of a sex offense from resentencing opportunities. These offenders should be treated the same as all other offenders.

**Response:** See response to Speaker 4.

**Speaker 16:** Commenter opposes exclusions for LWOP and death sentence. The California law states anyone incarcerated in a state prison, or county jail, is eligible for resentencing making these regulations unjust. If LWOP and inmates with the death sentence are working on changing their life they should not be excluded. Commenter states an LWOP conviction is an easy win for prosecutors. Inmates serving an LWOP term should not be excluded.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 17:** Commenter opposes denying anyone convicted of a sex offense from resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 18:** Commenter strongly opposes denying anyone convicted of a sex offense from resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 19:** Commenter strongly opposes exclusions that are proposed by these regulations, because the legislature did not include restrictions or exclusions. These exclusions are discriminatory and unconstitutional and will invite future lawsuits costing taxpayer dollars.

**Response:** See response to Speaker 2, Comment 2.

**Speaker 20:** Penal Code 1170(a)(3) states anyone currently incarcerated in state prison or county jail is eligible for a base sentencing referral, with no exceptions. CDCR's criteria and regulations that include exclusions in regards to 1170 are discriminatory and illegal.

**Response:** See response to Speaker 2, Comment 2.

**Note:** Speaker 21 did not make a comment at this hearing.

**Speaker 22:** Commenter states 95% of inmates will return home from prison but only sex offenders are on a list that will affect many aspects of their life. Excluding LWOP and sex offenders could be taking opportunities away from the ones with the lowest recidivism rate and the group that can benefit from resentencing the most.

**Response:** Regarding LWOP, see response to Speaker 2, Comment 1. Regarding sex offenders, see response to Speaker 4.

**Speaker 23:** Commenter opposes denying anyone convicted of a sex offense from resentencing.

**Response:** See response to Speaker 4.

**Speaker 24:** Commenter opposes regulations.

**Response:** The department acknowledges the commenter's opposition to the proposed regulations, however, the department will continue with this rulemaking action for the reasons provided in the Notice of Proposed Regulations and the Initial Statement of Reasons.

**Speaker 25:** Inmates that rehabilitated should be allowed to resentence and should not be labeled under 290.

**Response:** See response to Speaker 4.

**Speaker 26:** Commenter supports the Alliance for Constitutional Sex Offense Law in their opposition denying any sex offenders from resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 27:** Commenter opposes excluding sex offenders from resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 28:** Commenter states he “opposes the bill.”

**Response:** This comment doesn’t specify what bill the commenter opposes. Assuming commenter is opposed to the proposed regulations, see response to Speaker 24.

**Speaker 29:** CDCR is wrong for excluding LWOP from receiving referrals; everyone who has rehabilitated should have a chance to sentence.

**Response:** See response to Speaker 2, Comment 1.

**Speaker 30:** Do not exclude sex offenders from resentencing opportunities.

**Response:** See response to Speaker 4.

**Speaker 31:** No inmates should be excluded from resentencing opportunities particularly sex offenders because this is political.

**Response:** See responses to Speaker 2, Comment 2; and Speaker 4.

**Speaker 32:** There should be no exclusions including people having to register as sex offenders.

**Response:** See responses to Speaker 2, Comment 2; and Speaker 4.

**Speaker 33:** Commenter opposes exclusions within the regulation.

**Response:** See response to Speaker 2, Comment 2.

**Speaker 34:** Sex offenders should not be excluded from resentencing opportunities.

**Response:** See response to Speaker 4.

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

**EXPLANATORY NOTE:** The department received over 200 written comments during the public comment period. Many of these comments were identical, or substantively identical, template comments. The department will aggregate repetitive comments, as allowed by Government Code section 11346.9(a)(3), for purposes of clarity and brevity. The template comments that were submitted by a large number of commenters are summarized and responded to below.

Comments that consisted only of these template comments are grouped together. As an example, if Commenter 30 submitted Template Comments 3, 10, and 15; and Commenter 46 submitted Template Comments 1,5, and 22, these comments will be aggregated and responded to as a group.

**Template Comment 1:** There is no need for blanket exclusions that categorically and unjustly deny people their day in court for resentencing relief that is broadly available in the California Penal Code.

**Template Response 1:** The department has adopted specific exclusionary criteria as described in the proposed regulation text. The reasons for these specific exclusions are contained in the Initial Statement of Reasons (ISOR) as well as in this document in response to other public comments.

The department contends that exclusionary criteria are necessary for several reasons. Both the department and the court system have limited resources in terms of staff and time to devote to the referral and resentencing process. Establishing criteria for referral allows the department to focus those limited resources on inmates who have demonstrated their readiness to reenter society and who have the best chance of being resentenced.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals made with no vetting or criteria applied (e.g., referrals of inmates with multiple, recent, serious disciplinary infractions, or referrals of inmates who have served only a very short portion of their original sentence) may endanger the success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements.

Certain exclusionary criteria are adopted to ensure the department's limited resources are used to refer for resentencing those inmates who have time to go through the referral and resentencing process before reaching their release date or parole hearing date.

**Template Comment 2:** Californians amended PC 1170(d)(1) to incentivize change and good behavior, but CDCR is excluding people unjustly who are not excluded by the Penal Code. CDCR is broadly excluding people based on criteria that have no relation to a person's rehabilitation, current risk to public safety, or preparedness for release.

**Template Response 2:** See Response to Template Comment 1. The exclusionary criteria have been established specifically to take into account the inmate's rehabilitation, current risk to public safety, and preparedness for release.

**Template Comment 3:** CDCR is using the same unjust criteria from Proposition 57 nonviolent parole review that have been repeatedly challenged in litigation and struck down by appellate courts and the California Supreme Court.

**Template Response 3:** The nonviolent parole review process and the Penal Code (PC) section 1170(d)(1) referral process are separate and unrelated processes. This comment is a broad statement and doesn't specify which criteria the commenter believes has been struck down via litigation. Assuming the comment refers to the exclusion of sex offenders, the nonviolent parole process applies to all inmates by statute, while the PC 1170(d)(1) process is a discretionary process based on the Secretary's authority pursuant to the penal code. Additionally, as of January 1, 2021, only Tier 2 and Tier 3 registrants are excluded from the referral process. Tier 2 and 3 registrants remain excluded for reasons stated in the ISOR: a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while Tier 2 and Tier 3 offenses require registration for a minimum of 20 years and life respectively. These registrants who have committed offenses that require Tier 2 or 3 registration are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount

importance.” (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

**Template Comment 4:** Both the criteria and the application of the criteria used in case evaluation are more restrictive than the broad language of the Penal Code. For instance, people with LWOP (life without parole) and Death Penalty sentences are eligible for resentencing in the law, but excluded in CDCR's regulations.

**Template Response 4:** PC section 1170(a)(3) states “Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d).” CDCR has determined that this provision of law means that the provisions of PC section 1170(d)(1) do not apply to inmates sentenced to death or LWOP, with the exception of subsection 1170(d)(2), which applies only to juvenile offenders under specific circumstances.

**Template Comment 5:** There are already safety measures in place to make sure people referred for resentencing are rehabilitated and ready to come home.

**Template Response 5:** This comment doesn't specify what “safety measures” are currently in place, and the department is unable to determine what safety measures the commenter may be referring to. Therefore, no accommodation to this comment is possible.

**Template Comment 6:** Because of the broad discretion given to both CDCR and resentencing judges, there are many ways to guard against the release of someone who may be a risk to public safety.

**Template Response 6:** See response to Template Comment 5. The comment doesn't specify the “many ways to guard against the release of someone who may be a risk to public safety” and the department is unable to determine what the commenter is referring to. The exclusionary provisions adopted by the department as part of this rulemaking action are intended to mitigate the risks to public safety.

**Template Comment 7:** There is no need for blanket exclusions targeting people on account of their group characteristics instead of their individual achievements and rehabilitation.

**Template Response 7:** See response to Template Comment 1.

**Template Comment 8:** Judicial review of someone's preparedness for release will generally be more thorough and demanding than the considerations of a parole board hearing or case evaluation.

**Template Response 8:** This is a statement of opinion without supporting evidence. The department has no authority or oversight over the judicial review process, which may vary from case to case. The department has adopted exclusionary criteria for the reasons stated in response to Template Comment 1.

**Template Comment 9:** Using Rules Violations Reports and Parole Board decisions as dispositive evidence of preparedness for release shields both CDCR and BPH staff from necessary oversight and confuses the legal standards that should be used to determine preparedness for release. Resentencing decisions made by judges are entirely different and separate processes than the internal administrative function served by parole boards.

**Template Response 9:** As stated in the ISOR, only serious (as opposed to administrative) rules violations within a specified timeframe are disqualifying. Serious rules violations often involve criminal activity, violence, or other serious anti-social behavior. Any serious disciplinary infraction involving a Division A-1, A-2, B, C, or D offense pursuant to Section 3323 while incarcerated is not indicative of the effort needed to be considered for exceptional conduct referral.

Decisions by the Board of Parole Hearings (BPH) are based on an analysis of the inmate's risk to public safety. The department has determined that once an inmate has been afforded an opportunity to appear before the Board for parole consideration, regardless of outcome, the Board is best suited for determining the inmate's risk of public safety, in accordance with BPH's statutory responsibilities.

**Template Comment 10:** Exceptional Conduct resentencing referrals should be open to all - not just people with select crimes who have access to programs and have clean records for 5 years.

**Template Response 10:** Inmates are not excluded based on the crime committed but rather on the inmate's sentence (i.e., condemned, LWOP, Tier 2 or Tier 3 registrant). All institutions provide access to educational or rehabilitative programming. The regulations do not require participation in any specific program and do not favor any one type of rehabilitative or educational programming over another. Regarding the comment about "clean records for 5 years," see response to Template Comment 9.

**Template Comment 11:** The requirement of "prolonged participation in rehabilitative programming" excludes people who do not have access to programs, because of: limited offerings and/or long wait lists at their facility or yard, confinement in solitary or disciplinary classification, medical status, educational background, language barriers, or other reasons.

**Template Response 11:** All institutions provide access to a variety of educational and rehabilitative programming. The regulations do not require participation in any specific program and do not favor any one type of rehabilitative or educational programming over another. Inmates in the Security Housing Unit or Administrative Segregation based upon a finding of guilt for a serious or violent rules violation are excluded pursuant to subsection 3076.1(b)(2)(C) from referral for exceptional conduct. Placement in ASU temporarily for non-disciplinary reasons is typically for a short period of time and would not prevent the inmate from participating in future rehabilitative programming.

**Template Comment 12:** The requirement that people have no "serious or violent rules violation" within 5 years excludes 1000s of people who have rehabilitated and pose no risk to public safety.

**Template Response 12:** See response to Template Comment 9.

**Template Comment 13:** The requirement that people already served ten years excludes 1000s of people who have fully rehabilitated and deserve their day in court.

**Template Response 13:** As stated in the ISOR, this provision was adopted to establish ten years of continuous custody in the department as the minimum time period before eligibility for an exceptional conduct referral. The department determined that ten years in the custody of the department is a sufficient length of time to ensure that inmates have demonstrated a pattern of positive rehabilitative programming for a sustained period of time. Because the department cannot verify all behavior and rehabilitative efforts that took place prior to the inmate's arrival in department custody, only time served in the department's custody will count toward eligibility.

Additionally, as stated in response to Template Comment 1, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals of inmates who do not have a significant record of rehabilitation and discipline-free time served may endanger the success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements and has a substantial record of rehabilitation and positive programming.

**Template Comment 14:** The exclusion of all people who must register as a sex offender upon release goes directly against evidence and research that shows a low risk of recidivism and a huge diversity of

experiences and crimes within this so-called group. All 290 registrants should be eligible so as to reflect the Penal Code, which did not exclude anyone from referral for exceptional conduct.

**Template Response 14:** As of January 1, 2021, inmates who are required to register as Tier 1 offenders pursuant to the Penal Code are not excluded from exceptional conduct referrals. Tier 2 and 3 registrants remain excluded for reasons stated in the ISOR: a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while a Tier 2 and Tier 3 offense requires registration for a minimum of 20 years and life respectively. These registrants who have committed offenses that require Tier 2 or 3 registration are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, “Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest.” (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that “Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance.” (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

**Template Comment 15:** Umbrella exclusions remove powerful incentives for people to rehabilitate and change, create despair and hopelessness, and treat people not as individual human beings but as unredeemable outcasts whose paths to personal change are irrelevant.

**Template Response 15:** See response to Template Comment 1.

**Template Comment 16:** Change in Sentencing Law resentencing referrals should be open to all - not just people who have already served 5 years and who have a clean record for the last year.

**Template Response 16:** As stated in the ISOR: Subsection 3076.1(d)(2)(A) is adopted to establish that inmates must serve five years of their sentence in CDCR custody before becoming eligible for referral pursuant to subsection 3076.1(d). This provision recognizes that any referral to the sentencing court based on a retroactive change in sentencing law necessitates the exercise of discretion by the judge, typically based on the judge’s evaluation of the inmate’s behavior while in CDCR custody. Therefore, the department determined that five years of custodial history in the department was a reasonable length of time to present to the judge for consideration.

Subsection 3076.1(d)(2)(B) is adopted to establish criteria that ensures only those inmates who have demonstrated compliance with departmental regulations are eligible. Inmates who commit certain serious disciplinary rules violations have demonstrated an inability to maintain a pro-social standard of conduct. The department has determined that these inmates are more of a risk to public safety if given the opportunity to have their sentences recalled.

**Template Comment 17:** CDCR’s criteria overemphasize disciplinary record in-custody which may have little bearing on a person’s preparedness for release or current risk to public safety.

**Template Response 17:** See responses to Template Comment 9 and Template Comment 16.

**Template Comment 18:** Many people are serving a small base term loaded up with 1- and 5-year enhancements making up the majority of a person’s time. These enhancements have been amended by recent laws. 5 years is too long to wait to get back into court.

**Template Response 18:** As stated in the ISOR, this provision was adopted to establish that inmates must serve five years of their sentence in CDCR custody before becoming eligible for referral pursuant to subsection 3076.1(d). This provision recognizes that any referral to the sentencing court based on a retroactive change in sentencing law necessitates the exercise of discretion by the judge, typically based on the judge’s evaluation of the inmate’s behavior while in CDCR custody. Therefore, the department

determined that five years of custodial history in the department was a reasonable length of time to present to the judge for consideration.

**Template Comment 19:** A change in sentencing law reflects the people of California's decision to decrease unfair punishment. Minor in-custody infractions shouldn't keep a person incarcerated past the date of a fair sentence.

**Template Response 19:** See response to Template Comment 9 and Template Comment 16. Rules violations that are not considered serious will not exclude an inmate from consideration. As stated in the ISOR, only serious (as opposed to administrative) rules violations within a specified timeframe are disqualifying. Serious rules violations often involve criminal activity, violence, or other serious anti-social behavior. Any serious disciplinary infraction involving a Division A-1, A-2, B, C, or D offense pursuant to Section 3323 while incarcerated is not indicative of the effort needed to be considered for exceptional conduct referral.

**Template Comment 20:** CDCR should accept self-referrals as well as referrals from attorneys, volunteers, community organizations, and family members so that people can flag their potential eligibility for a resentencing referral to CDCR.

**Template Response 20:** As stated in the ISOR, the department does not accept self-referrals from inmates or inmate family members, friends, or attorneys. This provision was adopted because these persons do not have access to all of the inmate's case factors which are necessary to make a determination whether or not the inmate meets the exceptional conduct criteria. Also stated in the ISOR: Subsection 3076.1(b)(3)(A) is adopted to establish and clarify that the department's Classification Services Unit shall only review inmates that are referred to them by Wardens, the Director of the Division of Adult Institutions, or the Secretary of the department. This will ensure that referrals are made by individuals in the best position to have complete information about an inmate's behavioral and rehabilitative conduct while incarcerated and that the inmate meets the exceptional conduct criteria.

**Template Comment 21:** Staff are working through thousands of cases with the limits of technology in producing qualitative data to increase administrative efficiency.

**Template Response 21:** The department is unable to determine the meaning of this comment or what accommodation the commenter may be requesting, if any. Every inmate considered for referral requires an in-depth review of their case factors and record while in department custody.

**Template Comment 22:** CDCR should establish and provide access for all incarcerated people to a triplicate form to use to request review and referral for PC section 1170(d)(1) recall and resentencing.

**Template Response 22:** As stated in response to Template Comment 20, the department does not allow self-referrals.

**Template Comment 23:** CDCR should make clear who can submit referrals and what information to include to submit an individual's case to the Secretary for consideration.

**Template Response 23:** See response to Template Comment 20.

**Template Comment 24:** CDCR should accept referrals from non-staff, including lawyers, community organizations, legislators, family members, and volunteers.

**Template Response 24:** See response to Template Comment 20.

**Template Comment 25:** 1170(d)(1) was passed to offer critically needed and broad post-conviction relief. Imposing these arbitrary and capricious exclusions is completely at odds with the spirit of the law, which

seeks to remedy decades of heavy-handed sentencing that has earned California the ghoulish statistic of the second largest incarcerated population in the United States. These categorical exclusions are unnecessary because consideration for resentencing is itself a mechanism for evaluating a person's preparedness for safe release. We all watched COVID-19 rip through overcrowded prisons this past year, resulting in the deaths of hundreds of incarcerated individuals. Our mandate must be to safely release as many people as possible from prison, which is exactly what 1170(d)(1), broadly applied as intended, would enable.

**Template Response 25:** See response to Template Comment 1.

**Template Comment 26:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Template Response 26:** This comment is a request on behalf of an inmate to be referred for resentencing pursuant to PC section 1170(d)(1). The department does not accept self-referrals for the reasons described in response to Template Comment 20.

**Template Comment 27:** The COVID-19 pandemic makes resentencing more urgent. We have seen this virus devastate prisons.

**Template Response 27:** There have been other processes implemented that have resulted in the release of a large number of inmates due to the pandemic. The 1170(d)(1) resentencing program is not the appropriate vehicle to address these issues, in part due to the long timeframes involved once an inmate is referred to the court.

**Commenters 1 through 135 submitted template comments as described above.**

**Commenter 136:**

**Comment 1:** Commenter states that the penal code does not exclude sex offenders, and the previous regulations that implemented the penal code did not exclude sex offender registrants. Commenter states that AB 1812 and AB 2942, passed in 2018, encouraged relevant agencies to recommend inmates for resentencing and expand inmates' opportunities for resentencing. The department is not authorized to categorically exclude persons from resentencing because of a current or prior conviction for a registerable offense.

**Response:** The department has adopted specific exclusionary criteria as described in the proposed regulation text. The reasons for these specific exclusions are contained in the Initial Statement of Reasons (ISOR) as well as in this document in response to other public comments.

The department contends that exclusionary criteria are necessary for several reasons. Both the department and the court system have limited resources in terms of staff and time to devote to the referral and resentencing process. Establishing criteria for referral allows the department to focus those limited resources on inmates who have demonstrated their readiness to reenter society and who have the best chance of being resented.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals made with no vetting or criteria applied may endanger the overall success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements.

As of January 1, 2021, only Tier 2 and Tier 3 registrants are excluded from the referral process. Tier 2 and 3 registrants remain excluded for reasons stated in the ISOR: a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while a Tier 2 and Tier 3 offense requires

registration for a minimum of 20 years and life respectively. These registrants who have committed offenses that require Tier 2 or 3 registration are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance." (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.)

**Comment 2:** Commenter references the California Supreme Court's ruling in the *Gadlin* case, in which the court determined that excluding all registrants from early parole consideration was inconsistent with relevant statutes. Commenter states that the same applies to Penal Code section 1170(d)(1), as this statute does not make categorical exclusions. The department's rationale for the exclusion of registrants under the proposed regulations is identical to the rationale at issue in the *Gadlin* case. Nothing in the text of the penal code authorizes the department to adopt exclusionary criteria for registrants or any other category of inmate "for public safety." Commenter states that when the Legislature intends to restrict eligibility it expressly does so.

**Response:** The nonviolent parole review process is the result of a Constitutional mandate that requires CDCR to review and refer any inmates convicted of a nonviolent felony offense. However, referral for resentencing pursuant to PC section 1170(d)(1) is entirely discretionary. The nonviolent parole process is required to be applied to all inmates, while the PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code. While all inmates must be evaluated for eligibility for the nonviolent parole process, no inmate is entitled to an evaluation or eventual resentencing referral under PC 1170(d)(1). Drawing parallels between these very different circumstances is not warranted.

**Comment 3:** Commenter states "Courts have struck down the department's attempts to contradict legislation based upon appeals to 'public safety' that are divorced from the text and purpose of that legislation." Resentencing requires a judge's review, which will resolve any public safety concerns.

**Response:** The department has adopted specific exclusionary criteria as described in the proposed regulation text. The reasons for these specific exclusions are contained in the Initial Statement of Reasons (ISOR) as well as in this document in response to other public comments.

The department contends that exclusionary criteria are necessary for several reasons. Both the department and the court system have limited resources in terms of staff and time to devote to the referral and resentencing process. Establishing criteria for referral allows the department to focus those limited resources on inmates who have demonstrated their readiness to reenter society and who have the best chance of being resentedenced.

Additionally, the department believes that the referral and resentencing program must maintain credibility with those judges ultimately responsible for the actual resentencing of inmates. Referrals made with no vetting or criteria applied may endanger the success of the program. The credibility of the department's referrals is enhanced by ensuring every inmate referred has met specific requirements.

A key component of the department's mission is public safety; therefore any discretionary decision made by the department will take public safety into account.

**Comment 4:** Commenter states the subject matter of Penal Code section 290.03(a)(1) and the CASE Act/Proposition 35 is inapposite to Section 1170(d)(1). That is because Penal Code section 290.03(a)(1) sets forth legislative findings in connection with the California Sex Offender Registration Act and the state's lifetime registration requirement, which has since been modified by the tiered registry law, SB 384. Such

legislative findings in unrelated legislation, however, do not authorize CDCR to selectively deprive Registrants of the benefit of sentencing reforms that the Legislature has provided. The 2012 voter initiative known as the CASE Act, or Proposition 35, is even farther afield, since its provisions were almost exclusively concerned with defining elements and procedures related to the crime of "human trafficking." In fact, the only provision of the CASE Act directed toward Registrants was a requirement that they divulge their internet identifiers to law enforcement, a requirement that was subsequently enjoined on the grounds of unconstitutionality as applied retroactively.

**Response:** Penal Code section 290.03(a)(1) states explicitly "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." The department disagrees that this is "inapposite" to the provisions of the proposed regulations in question.

**Comment 5:** Commenter states that the fact the proposed regulations limit the exclusion of registrants to Tier 2 and Tier 3 registrants does not authorize the department to rewrite the penal code. Commenter states that the department's language in the ISOR which explains the necessity of the exclusions "merely expresses the department's view of the tiered registry law, and is not a basis for the department's authority under" the penal code.

**Response:** See response to comment 1.

**Comment 6:** Commenter states the exclusion of registrants is inconsistent with the purpose and language of the proposed regulations themselves, as described in the ISOR. It is not equitable to categorically ignore the rehabilitative achievements of individuals because their offense is designated a sex offense. The proposed regulations discourage rehabilitation among sex offenders.

**Response:** See response to comment 1. The department disagrees with the statement that the proposed regulations discourage rehabilitation among sex offenders. There are many reasons why an inmate would benefit from participation in rehabilitative programming beyond a referral pursuant to PC 1170(d)(1), including earning credits to reduce their time to serve.

**Commenter 137:**

**Comment 1:** Commenter states the exclusionary criteria based upon a previous or pending serious or violent rules violation is problematic and unjust. Commenter states that rules violations should be comprehensively and independently reviewed for accuracy, particularly if the inmate alleged that the allegations made against them were fabricated or falsified.

**Response:** Regarding the exclusion based upon a serious or violent rules violation, see response to Template Comment 9. Regarding the comment concerning allegations that a rules violation was fabricated or falsified, inmates may use the existing grievance and appeals process to contest their rules violations at the time it is issued.

**Commenter 138:**

**Comment 1:** Commenter states the proposed regulations outline which inmates the department will not refer for resentencing but does not address which inmates it will refer.

**Response:** Any inmate not excluded by the provisions of the proposed regulations is eligible for consideration for referral.

**Comment 2:** Commenter states that neither the penal code nor the proposed regulations outline how incarcerated people can ask for consideration. Inmate families and attorneys are sending letters to try to refer inmates but are being told that outside referrals aren't being accepted.

**Response:** See response to Template Comment 20.

**Comment 3:** Commenter states that the courts should create guidelines and procedures to be followed. Inmates are being considered for resentencing by the courts without knowing they are under consideration or being allowed to submit information to the court. Additionally, judges are not provided with guidance regarding whether “the entire sentence must be redone” or only certain enhancements should be focused on, or if they can demand the immediate release of an inmate.

**Response:** This comment is outside the scope of the proposed regulations and beyond the authority of the department. The department has no authority to place requirements upon the courts.

**Comment 4:** Commenter states that many inmates and their families and attorneys are receiving inaccurate information regarding the 1170(d) process.

**Response:** This comment is outside the scope of the proposed regulations. CDCR is not responsible for info that does not come from the department. The regulations are publically available on CDCR’s website and in law libraries. Additionally, all department regulations are distributed annually to all CDCR inmates.

**Comment 5:** Commenter states that inmates sentenced to LWOP should not be excluded from exceptional conduct referrals.

**Response:** See response to Template Comment 4.

**Comment 6:** Commenter states that correctional counselors have not been helpful in providing referrals, or information about how to be referred, to inmates, and are not helping inmates to enroll in programs that may help them demonstrate that they are trying to become rehabilitated.

**Response:** This comment is outside the scope of the proposed regulations. Regarding the comment concerning programs that may help inmates demonstrate efforts to become rehabilitated, the regulations do not require participation in any specific program and do not favor any one type of rehabilitative or educational programming over another.

**Comment 7:** Commenter objects to the exclusionary criteria based upon time served, and upon time served without a serious or violent rules violation, for exceptional conduct and change in sentencing law referrals.

**Response:** See responses to Template Comment 9 and Template Comment 16.

**Comment 8:** Commenter states that a detailed and specific referral process should be created and that family members, attorneys, and inmates themselves should be allowed to make referrals. Commenter states that money saved from releasing inmates could be used to set up dedicated courts and prosecutors focused on the resentencing process. Commenter suggests several provisions that could be implemented regarding these potential courts.

**Response:** See response to Template Comment 20. The comment about using money saved for court processes is outside the scope of the proposed regulations.

**Comment 9:** Commenter states that inmates need access to institution Wardens to request their assistance in the 1170(d) process. Inmates should have a form available to request to speak to the Warden. Correctional officers and counselors should be creating necessary documents that will be provided to the Wardens for referral, and should be knowledgeable of 1170)(d). Institution staff should face repercussions if they refuse to refer inmates, and should be guaranteed that they won’t face punishment or liability for inmates that are released.

**Response:** The department does not accept self-referrals (see response to Template Comment 20); therefore the processes proposed by the commenter are not necessary. The portion of the comment regarding institution staff is beyond the scope of the regulations.

**Comment 10:** Commenter states that inmates should not be required to be physically present at court appearances.

**Response:** This comment is outside the scope of the proposed regulations.

**Comment 11:** Commenter states that blanket exclusions should be removed for the exceptional conduct and change in sentencing law cohorts.

**Response:** See response to Template Comment 1.

**Commenter 139:**

**Comment 1:** Commenter states the proposed regulations require fulfillment of impossible requirements for the exceptional conduct cohort. Commenter states “there is no need for a programming requirement as long as we find evidence showing that the incarcerated person has one way or another attempted to rehabilitate.” Recidivism remains high and existing programs are not proven to impact recidivism, so there should be no requirement to participate in programming. Programs are often not evidence-based or cost effective, and are often not available to all inmates or at all prisons. Participation in programming should be regarded as a positive attribute rather than a requirement.

**Response:** The department contends that rehabilitative programming has been demonstrated to have a positive impact on reducing recidivism. As stated in the ISOR: “Exceptional conduct is demonstrated through sustained compliance with departmental rules and prolonged participation in rehabilitative programming. The department determined that exceptional conduct requires these two components because they best demonstrate the inmate’s ability to behave in a pro-social manner if released, and to demonstrate the necessary tools to succeed in the community. Tools for success can best be demonstrated when an inmate participates in extensive programs designed to help their transition back to the community. Achieving long term compliance with rules and participating in programming over a period of years demonstrates exceptional effort to improve one’s self on the inmate’s part.”

**Comment 2:** Commenter states that requiring participation in rehabilitative programs takes away from the rehabilitative value of these programs because inmates will participate solely in order to be eligible for resentencing rather than because they wish to rehabilitate themselves.

**Response:** There are many reasons why an inmate would benefit from participation in rehabilitative programming beyond a referral pursuant to PC 1170(d)(1), including earning credits to reduce their time to serve. The department contends that participation in such programming is valuable, irrespective of any material benefit to the inmate.

**Commenter 140:**

**Comment 1:** Commenter states that the requirement to participate in rehabilitative programming disadvantages inmates who are not able to participate due to their sexual orientation, gender, race, disability, etc.

**Response:** Inmates are not prohibited from participating in rehabilitative programming on the basis of their sexual orientation, gender, or race, or disability. Inmates who have diminished physical capacity may be eligible for resentencing under Penal Code section 1170(e). The regulations do not require participation in

any specific program and do not favor any one type of rehabilitative or educational programming over another.

**Comment 2:** Commenter makes several recommendations regarding actions that should be taken by the state Legislature.

**Response:** This comment is outside the scope of the proposed regulations. The department has no authority to require that the Legislature take any action.

**Commenter 141:**

**Comment 1:** Commenter states that the department's figures regarding the cost/savings of the proposed regulations, as described in the Form STD. 399 and attachments are inaccurate. Commenter uses figures from department tracking logs to contend that the department has severely underestimated the cost savings of the proposed regulations. For example, the department tracking log shows an annual housing cost for a single inmate of \$8,259 dollars, while the 2020-21 state budget shows this figure as \$91, 067. Commenter states that according to the May revision of the Governor's Budget, the resentencing of 477 inmates has already saved over \$18 million.

**Response:** The department contends that the commenter's figures are inaccurate. The department has filed an updated Form STD. 399 as part of this rulemaking action. The estimates of economic and fiscal impact described on this form have been reviewed and approved by the California Department of Finance.

**Commenter 142:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for referral for resentencing.

**Response:** See response to Template Comment 4.

**Comment 2:** Commenter states that "CDCR staff in the Classification Services Unit (CSU) and the Correctional Case Records Unit are charged with making initial findings of eligibility depending on the type of resentencing referral." Commenter further states "CSU staff are receptive to referrals from people and their support networks, but will not respond to these self-referrals formally."

**Response:** The commenter is correct about the offices within the department that make initial findings of eligibility, however, the department does not accept self-referrals, as established in the proposed regulations.

**Commenter 143:**

**Comment 1:** Commenter states that no inmate should be excluded from referral consideration based on conviction or sentence type, including inmates sentenced to LWOP or the death penalty, as well as sex offenders.

**Response:** See response to Template Comment 1.

**Comment 2:** Commenter states that referral decisions should not be "overly constrained" by the four cohorts created by the proposed regulations. "Referral decisions are best made on an individual basis, taking into account who the incarcerated individual is today and their readiness to return home."

**Response:** See response to Template Comment 1.

**Comment 3:** The requirement of “prolonged participation in rehabilitative programming” excludes people who do not have access to programs, because of: limited offerings and/or long waitlists at their facility or yard, confinement in solitary or disciplinary classification, medical status, educational background, language barriers, or other reasons.

**Response:** See response to Template Comment 11.

**Comment 4:** Commenter states the time served requirement fails to recognize that in many cases, individuals are serving a small base term inflated with sentence enhancements, many of which have been recently repealed under California law. Five years is an unnecessary and arbitrary amount of time to serve before being considered for referral.

**Response:** See response to Template Comment 16.

**Comment 5:** Commenter states that CDCR should expand the pool of individuals who can make recommendations to the Secretary for referral consideration. There are many attorneys, community organizers, volunteers, legislators, and others who have great insight into individuals who are excellent candidates for referral.

**Response:** See response to Template Comment 20.

**Commenters 144 through 151 submitted template comments as described above.**

**Commenter 152:**

**Comment 1:** Commenter provides his personal history as a CDCR inmate and states he’s seen several inmates apply for resentencing and not one has been resentenced. Commenter is skeptical that inmates will actually benefit from the provisions of the proposed regulations.

**Response:** This comment is outside the scope of the proposed regulations, however, the department notes that over 1,700 inmates had been referred to the courts for potential resentencing under the 1170(d)(1) provisions. Nearly 500 inmates have had their sentences reduced by the courts, and the average reduction has shortened sentences by more than four years.

**Commenter 153:**

**Comment 1:** Commenter states that the penal code does not exclude sex offenders, and the previous regulations that implemented the penal code did not exclude sex offender registrants. Commenter states that AB 1812 and AB 2942 were passed in 2018 to expand inmates’ opportunities for resentencing. “Nothing in Section 1170(d)(1) authorizes the department to adopt exclusionary criteria for Registrants, or any other category of inmate, ‘for public safety’.” Commenter cites data which indicates that registrants have a low rate of re-offense. The exclusions are “in direct conflict with the underlying purpose and discourage rehabilitation amongst this population.”

**Response:** See responses to Template Comments 1 and 14. Additionally, Penal Code 1170.03, which authorizes the Secretary to recommend inmates for resentencing, provides broad authority and does not place specific limits on the Secretary’s judgement.

**Comment 2:** Commenter states that the exclusionary criteria may be due to political pressure or to ensure jobs for law enforcement personnel, and cites statements from the department’s Economic Impact Assessment.

**Response:** The department's reasons for adopting the provision of the proposed regulations are contained in the Initial Statement of Reasons and the Notice of Proposed Regulations.

**Commenter 154:**

**Comment 1:** Commenter provides his personal history as a CDCR inmate. Commenter states inmates should not be excluded for consideration under exceptional conduct because of their commitment offense. Courts have ruled against using these “carve outs” or exclusions because it’s biased, unconstitutional, and unjust. Eligibility should be based on an inmate’s in-custody rehabilitation and participation in programs, not their commitment offense. Current recidivism statistics do not concur with the idea that sex offenders have a high rate of re-offense.

**Response:** See responses to Template Comments 1 and 14.

**Comment 2:** Commenter states that many sex offenders find it dangerous to participate in rehabilitative programming but do so anyway to gain insight into their behavior. There is also a lack of programs available to sex offenders.

**Response:** All institutions provide access to educational or rehabilitative programming. The regulations do not require participation in any specific program and do not favor any one type of rehabilitative or educational programming over another.

**Commenter 155:**

**Comment 1:** Commenter provides his personal history as a CDCR inmate. Commenter states inmates should not be excluded for consideration under exceptional conduct because of their commitment offense. Courts have ruled against using these “carve outs” or exclusions because it’s biased, unconstitutional, and unjust. Eligibility should be based on an inmate’s in-custody rehabilitation and participation in programs, not their commitment offense.

**Response:** See responses to Template Comments 1 and 14.

**Commenter 156:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 157:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 158:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 159:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 160:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 161:**

**Comment 1:** Commenter states that inmates sentenced to an indeterminate term should be eligible for exceptional conduct referral after serving the full term of their primary offense, and eligible for resentencing due to a change in sentencing law when these new provisions of law take effect.

**Response:** See response to Template Comment 1.

**Commenter 162:**

**Comment 1:** Commenter states the exclusionary criteria based upon a previous or pending serious or violent rules violation is problematic and unjust. Commenter states that rules violations should be comprehensively and independently reviewed for accuracy, particularly if the inmate alleged that the allegations made against them were fabricated or falsified.

**Response:** Regarding the exclusion based upon a serious or violent rules violation, see response to Template Comment 9. Regarding the comment concerning allegations that a rules violation was fabricated or falsified, inmates may use the existing grievance and appeals process to contest their rules violations at the time it is issued.

**Commenter 163:**

**Comment 1:** Commenter objects to the provisions of subsection 3076.1(b)(1), which excludes inmates from eligibility for exceptional conduct referral due to a serious rules violation. Most inmates who have been incarcerated for a long time have such a violation because “almost all discipline is classified as ‘serious’. It is almost impossible to do it all ‘discipline free’.”

**Response:** Subsection 3076.1(b)(2)(D) establishes that only serious or violent rules violations within the last five years will exclude inmates from eligibility. See response to Template comment 9.

**Commenter 164:**

**Comment 1:** Commenter provides her history as a CDCR inmate sentenced to LWOP who had her sentence commuted by the Governor. Commenter states that inmates sentenced to death or LWOP should be eligible for resentencing.

**Response:** See response to Template comment 4.

**Commenter 165:**

**Comment 1:** Commenter states that subsection 3076.1(b)(2)(A) discriminates against black and brown people, while leaving untouched worse offenders such as murderers or gang members.

**Response:** Subsection 3076.1(b)(2)(A), which concerns specified Penal Code 290 registrants, has nothing to do with race or ethnicity. See response to Template comment 14.

**Commenter 166:**

**Comment 1:** Commenter states that inmates who receive a serious rules violation report for possession of a narcotic should be eligible for resentencing if the inmate completes a Substance Use Disorder treatment program. Substance use disorder can produce psychological or physical dependency that can be very difficult to overcome.

**Response:** The department provides substance abuse disorder treatment in all its facilities. The department will retain the timeframes without a serious or violent rules violation for the reasons described in the Initial Statement of Reasons.

**Commenter 167:**

**Comment 1:** Commenter provides his history as a CDCR inmate.

**Response:** Commenter does not propose any changes to the proposed regulations, therefore no accommodation to this comment is possible.

**Commenter 168:**

**Comment 1:** Commenter states that inmates should be able to self-refer for resentencing consideration under Penal Code section 1170(d)(1).

**Response:** See response to Template comment 20.

**Comment 2:** Commenter provides his case history as a CDCR inmate. Commenter states that sex offenders should not be excluded from consideration for referral.

**Response:** See response to Template comment 14.

**Commenter 169:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for referral.

**Response:** See response to Template comment 4.

**Commenter 170:**

**Comment 1:** Commenter is a CDCR inmate who states he was attacked by Correctional Officers and received a serious rules violation due to this incident. Commenter states that this incident should not disqualify him for consideration for referral for resentencing.

**Response:** Inmates may use the existing grievance and appeals process to contest their rules violations at the time it is issued.

**Commenter 171:**

**Comment 1:** Commenter states that inmates sentenced to LWOP or death should be eligible for referral.

**Response:** See response to Template comment 4.

**Comment 2:** Commenter states that inmates sentenced to LWOP or death should be allowed to work and should be eligible for rehabilitative programs.

**Response:** This comment is outside the scope of the proposed regulations.

**Comment 3:** Commenter states that attorneys should be able to refer inmates to the Secretary pursuant to Penal Code section 1170(d)(1).

**Response:** See response to Template comment 20.

**Commenter 172:**

**Comment 1:** This comment comes from a CDCR inmate who provides his case history and would like to be considered for resentencing.

**Response:** See response to Template comment 26.

**Commenter 173:**

**Comment 1:** Commenter states that registrants should be eligible for resentencing.

**Response:** See response to Template comment 14.

**Commenter 174:**

**Comment 1:** Commenter states that registrants should be eligible for resentencing.

**Response:** See response to Template comment 14.

**Commenter 175:**

**Comment 1:** This comment comes from a CDCR inmate who would like to be considered for resentencing.

**Response:** See response to Template comment 26.

**Commenter 176:**

**Comment 1:** This comment comes from a CDCR inmate who would like to be considered for resentencing.

**Response:** See response to Template comment 26.

**Commenter 177:**

**Comment 1:** Commenter provides her personal history as a CDCR inmate and states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template comment 4.

**Commenter 178:**

**Comment 1:** Commenter provides his personal history as a CDCR inmate and states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template comment 4.

**Commenter 179:**

**Comment 1:** Commenter states that sex offenders should be eligible for resentencing.

**Response:** See response to Template comment 14.

**Commenter 180:**

**Comment 1:** Commenter states that the proposed regulations are in defiance of penal code 1170(d)(1) and the will of California voters. Commenter states “Stick to the guidelines outlined in PC 1170(d)(1)...Let Judges do their jobs.”

**Response:** See response to Template Comment 1.

**Commenter 181:**

**Comment 1:** Commenter asks how an inmate is initially referred. “How can we be sure it is objective and not arbitrary?”

**Response:** As described in the Initial Statement of Reasons, “Subsection 3076.1(b)(3)(A) is adopted to establish and clarify that CSU shall only review inmates that are referred to them by Wardens, the Director of the Division of Adult Institutions, or the Secretary of the department. This will ensure that referrals are made by individuals in the best position to have complete information about an inmate’s behavioral and rehabilitative conduct while incarcerated and that the inmate meets the exceptional conduct criteria.”

**Comment 2:** Commenter states “Please give special consideration to those who have offended under 18 and since demonstrated meaningful reform as exhibited in their records.

**Response:** There are other programs available for youthful offenders. The PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code. Nothing in the proposed regulations prevents the Secretary from giving consideration for any reason to an otherwise eligible offender.

**Commenter 182:**

**Comment 1:** Commenter would like to recommend her incarcerated son for resentencing.

**Response:** See response to Template Comment 20.

**Commenter 183:**

**Comment 1:** Commenter states that long sentences are harmful and do not result in rehabilitation.

**Response:** This comment is outside the scope of the proposed regulations.

**Commenter 184:**

**Comment 1:** Commenter states “I am writing in support of the bill that grants release to those unfairly being imprisoned.”

**Response:** The department acknowledges the commenter’s support of the proposed regulations.

**Commenter 185:**

**Comment 1:** Commenter states “This seems to me to be a humane course of action, within a system that over-incarcerates minority populations.”

**Response:** The department acknowledges the commenter’s support of the proposed regulations.

**Commenter 186:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 187:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and requests to be referred for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 188:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 189:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that inmates should be allowed to refer themselves for consideration for resentencing.

**Response:** See response to Template Comment 20.

**Commenter 190:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that inmates should be allowed to refer themselves for consideration for resentencing.

**Response:** See response to Template Comment 20.

**Comment 2:** The COVID-19 pandemic makes resentencing more urgent.

**Response:** See response to Template Comment 27.

**Commenter 191:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and requests to be referred for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 192:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and requests to be released from prison.

**Response:** It is not clear that this comment is related to the proposed regulations. Assuming the commenter is asking to refer himself for consideration for resentencing, see response to Template Comment 20.

**Commenter 193:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and asks how he can be referred by the prison Warden when most inmates have little to no contact with the Warden.

**Response:** The Warden has the authority to use any resources at their disposal to determine that a referral is warranted, including review of records such as the inmate's central file, discussions with staff, volunteers, etc.

**Commenter 194:**

**Comment 1:** Commenter states that he opposes all exclusionary criteria contained in the proposed regulations. CDCR is overusing the term "public safety" and is discriminating against PC 290 registrants. The department claims the regulations establish a major expansion of the process to recommend inmates for resentencing, but the exclusionary criteria will severely curtail any opportunity for many inmates to be referred for resentencing.

**Response:** See responses to Template Comments 1 and 14. Regarding the comment that the term public safety is overused, public safety is a critical part of the department's mission.

**Commenter 195:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for resentencing.

**Response:** See response to Template Comment 4.

**Comment 2:** Commenter states the department should accept self-referrals from inmates, as well as from attorneys, volunteers, community organizations, and family members.

**Response:** See response to Template Comment 20.

**Commenter 196:**

**Comment 1:** The commenter provides his case history as a CDCR inmate along with comments about the current living conditions within state prisons.

**Response:** The commenter makes no request for accommodation, therefore this comment is dismissed as irrelevant, pursuant to Government Code section 11346.9(a)(3). Living conditions within CDCR facilities are outside the scope of the regulations.

**Commenter 197:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that inmates sentenced to LWOP should be eligible for referral for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 198:**

**Comment 1:** Commenter states that inmates sentenced to LWOP should be eligible for referral for resentencing.

**Response:** See response to Template Comment 4.

**Commenter 199:**

**Comment 1:** Commenter provides his case history as a CDCR inmate and states that sex offenders should be eligible for referral for resentencing.

**Response:** See response to Template Comment 14.

**Commenter 200:**

**Comment 1:** The commenter provides his case history as a CDCR inmate along with comments about the current living conditions within state prisons. Commenter opposes “blanket exclusions” and states consideration for referral for resentencing should be done on an individual basis.

**Response:** See response to Template Comment 1.

**Commenter 201:**

**Comment 1:** Commenter states that non-profits, schools businesses, and other community-based organizations should be able to recommend inmates for resentencing.

**Response:** See response to Template Comment 20.

**Commenter 202:**

**Comment 1:** Commenter states that PC 290 registrants should be eligible for referral for resentencing. This exclusion contradicts the department’s own findings that sex offenders have a low rate of recidivism.

**Response:** See response to Template Comment 14.

**Commenter 203:**

**Comment 1:** Commenter states that PC 290 registrants should be eligible for referral for resentencing.

**Response:** See response to Template Comment 14.

**Commenter 204:**

**Comment 1:** Commenter states that “lifers” should be eligible for referral for resentencing.

**Response:** Only those inmates sentenced to death or life without parole (LWOP) are excluded from consideration. Regarding the exclusion of inmates sentenced to LWOP, see response to Template Comment 4.

**Commenter 205:**

**Comment 1:** Commenter states that the Legislature did not categorically exclude registrants or any other group of inmates from consideration for resentencing.

**Response:** See responses to Template Comment 1 and Template Comment 14.

**Commenter 206:**

**Comment 1:** Commenter states that PC 290 registrants should be eligible for referral for resentencing.

**Response:** See response to Template Comment 14.

**Commenter 207:**

**Comment 1:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 208:**

**Comment 1:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 209:**

**Comment 1:** Commenter states that the Legislature did not categorically exclude registrants or any other group of inmates from consideration for resentencing.

**Response:** See responses to Template Comment 1 and Template Comment 14.

**Commenter 210:**

**Comment 1:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 211:**

**Comment 1:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 212:**

**Comment 1:** Commenter states that PC 290 registrants should be eligible for referral for resentencing.

**Response:** See response to Template Comment 14.

**Commenter 213:**

**Comment 1:** Commenter states that her brother is serving a sentence that is longer than necessary due to several sentencing enhancements.

**Response:** This comment is regarding an individual inmate's case and is therefore outside the scope of the proposed regulations.

**Commenters 214, 215, and 216 submitted template comments as described above.**

**Commenter 217:**

**Comment 1:** This comment comes from a CDCR inmate (or an inmate's family member/friend/advocate) who would like to be considered for resentencing.

**Response:** See response to Template Comment 26.

**Commenter 218:**

**Comment 1:** Commenter states that PC 290 registrants should be eligible for referral for resentencing. Many inmates convicted of sex offenses have had a human trafficking charge added to their charges by prosecutors in order to strengthen their chances of a plea bargain or conviction.

**Response:** See response to Template Comment 14. Also, the PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code. Nothing in the proposed regulations prevents the Secretary from giving consideration for any reason to an otherwise eligible offender. Regarding the comment about charges added by prosecutors, this matter is beyond the scope of the department's authority.

**Commenter 219:**

**Comment 1:** The exclusion of all people who must register as a sex offender upon release goes directly against evidence and research that shows a low risk of recidivism and a huge diversity of experiences and crimes within this so-called group. All 290 registrants should be eligible so as to reflect the Penal Code, which did not exclude anyone from referral for exceptional conduct.

**Response:** See response to Template Comment 14.

**Commenter 220:**

**Comment 1:** Commenter states "Though CDCR was aware that stakeholders wished to discuss these policies and give input in advance of rulemaking, the entity secretly filed immediately effective "Emergency Operational Necessity" based regulations to bypass pre-rulemaking input, and have temporarily effective regulations in place before receiving any input, despite the year and a half it operated underground regulations and it had to promulgate regulations indicating that they were not in fact needed on an emergency basis."

**Response:** The commenter misunderstands the emergency regulation provisions of the Administrative Procedure Act, as well as CDCR's unique authority to adopt emergency regulations pursuant to Penal Code section 5058.3. These emergency provisions allow state agencies to adopt regulations when operationally necessary before accepting public comments on the regulations. Once the regulations take temporary emergency effect, the agency publishes and distributes notice of the regulations and accepts public comment. That process was used with the emergency adoption of these regulations. The period of temporary emergency authority was longer than usual due to two Governor's Executive Orders that extended these timeframes due to the fact that most state agencies had to redirect staff to mitigate the

COVID-19 public health emergency. CDCR followed all applicable statutes and other provisions of law regarding the adoption of these proposed regulations.

**Comment 2:** Commenter states that the legislature passed legislation creating PC § 1170(d)(1) to address California's prison overcrowding crisis and restore equity in sentencing. The Legislature passed Assembly Bill 1812 in order to decrease mass incarceration's costs and effects by releasing people from prison and saving money. AB 1812 created the text of PC section 1170(d)(1) to provide clearer guidance to trial courts as to the relevant post-conviction factors courts may consider when making a resentencing determination. AB 1812 also allocated funding to allow CDCR to use PC section 1170(d)(1) to request resentencing of people in its custody. AB 2494 was passed to allow District Attorneys to refer individuals for resentencing. These enabling statutes were passed in order to expand the number of avenues for release and with the expectation that CDCR and DA's would use the broad language of the penal code to refer as many individuals for resentencing as possible.

**Response:** Assuming this comment refers to the adoption of exclusionary criteria regarding PC 1170(d)(1) referrals, see response to Template Comment 1. Also, the PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code.

**Comment 3:** Commenter states the department's estimates of costs and savings, as described in the Form STD. 399, Economic and Fiscal Impact Statement, inexplicably underestimate savings. Any staffing costs are clearly outweighed by savings. Commenter states that the department's own figures show that cost savings should have exceeded \$20 million since 2018. Using the Legislative Analyst's Office figures, cost savings should have exceeded \$31 million since 2018. Using the 2021 State Budget figures, cost savings should have exceeded 220 million since 2018. Additionally, these numbers may be low, given that this legislation targets elderly and infirm people who are more costly to house due to medical needs.

**Response:** The department contends that the commenter's cost/savings numbers are erroneous. The department estimated the economic and fiscal impact of the proposed regulations on the Form STD. 399 and attachment. As stated in the attachment, "The Institution savings and Parole cost numbers are subject to change as updated PC 1170(d) Average Daily Population impact projections are made by the CDCR Office of Research, bi-annually in the spring and fall." The department has provided an updated economic and fiscal impact statement, signed by the Department of Finance, as part of the final filing of these regulations with the Office of Administrative Law.

**Comment 4:** Commenter states the draft regulations interfere with the imperative to release those with advanced age and diminished physical condition who are less dangerous to society and more costly to house. The average age in state prisons is 40 and there are currently around 27,000 inmates over 50. Providing the adequate care that aging and infirm persons are entitled to under *Plata*, *Coleman*, and *Armstrong* is expensive. Studies show this population poses the lowest risk of recidivism of any prison population, and the highest risk of contracting life-threatening illnesses, such as COVID-19. Commenter states that Compassionate Release, Elderly Parole, and Medical parole are too exclusionary to save lives in overcrowded prisons. The regulations should be amended to permit all inmates over 50 to be referred for resentencing.

**Response:** Inmates of advanced age or diminished physical capacity may be eligible for resentencing under Penal Code section 1170(e). Additionally, such inmates may be eligible for parole consideration under the Board of Parole Hearing's Elderly Parole Program. Additionally, advanced age or poor health are not exclusionary factors under the proposed regulations. The PC 1170(d)(1) process formalizes the discretionary authority vested in the Secretary to make a referral of an inmate to the courts for resentencing, based upon the penal code. Nothing in the proposed regulations prevents the Secretary from giving consideration for any reason to an otherwise eligible offender.

**Comment 5:** Commenter states that the exclusionary criteria based upon a serious or violent rules violation should be removed. “CDCR rules violations are a poor metric to measure whether someone meets the judicial standard of release.” The department’s definitions and enforcement of rules violations is arbitrary and capricious, and have proven to be biased against people of color. Rules violations are sometimes issued to inmates as retaliation for reporting staff misconduct or asking for medical accommodation. Some inmates are issued rules violations for refusing to participate in activities that may endanger them, such as not participating in work or housing with another inmate who may wish to inflict harm on them. Basing eligibility on an arbitrary disciplinary system that cannot reliably account for successful rehabilitation directly conflicts with the purpose behind the amendments to PC 1170(d)(1). Moreover, CDCR’s internal process of review prevents inmates from effectively challenging their rules violations.

**Response:** See response to Template Comment 9. Regarding the comment concerning allegations that a rules violation may not be justified, inmates may use the existing grievance and appeals process to contest their rules violations at the time it is issued. The department notes that there are currently emergency regulations in effect that adopt a more streamlined and responsive process for responding to inmate and parolee grievances and appeals. The department intends to adopt these processes permanently.

**Comment 6:** Commenter states that inmates should not be excluded from eligibility based on time served. This exclusion isn’t necessary to accomplish the purpose to PC 1170(d)(1). The requirement to serve ten years before eligibility based on exceptional conduct is arbitrary and unnecessarily rigid. Commenter cites recent court decisions that struck down “arbitrary” exclusions. This exclusion incorrectly assumes that inmates who have not yet served ten years are unable to rehabilitate themselves and establish a continuous course of exceptional conduct. More critically, this criteria excludes everyone who has been sentenced to less than ten years from consideration for referral. For the same reasons, excluding inmates who have not yet served five years from consideration based on a change in sentencing law is unjust and unnecessary. Judicial review already encompasses these considerations. Additionally, this criteria makes it impossible to remedy over-charging by District Attorneys.

**Response:** See responses to Template Comment 13 and Template Comment 16.

**Comment 7:** Commenter states that inmates should not be excluded from eligibility based on release date. CDCR claims that it can take 18 months to complete the court process for referral and resentencing but case studies show that referrals can result in release dates as swiftly as six to eight weeks from the initial referral date.

**Response:** This exclusionary criteria was adopted to ensure the department’s limited resources are used to refer for resentencing those inmates who have time to go through the referral and resentencing process before reaching their release date or parole hearing date.

**Comment 8:** Commenter states that determinately-sentenced inmates should not be excluded from eligibility based on their parole schedule. The Board of Parole Hearings (BPH) is not best suited to determine the disproportionality of a sentence. PC 1170(d)(1) assigns the responsibility for this determination to the judiciary. BPH is a part of CDCR and incentivized to keep people incarcerated. Commenter states that indeterminately-sentenced inmates should not be excluded from eligibility based on their parole schedule. This exclusion causes significant harm to indeterminately-sentenced people who have the least uniformity in sentencing and very little certainty in their release date. Courts have granted relief to inmates at a significantly higher rate than parole boards.

**Response:** Decisions by the Board of Parole Hearings are based on an analysis of the inmate’s risk to public safety. The department has determined that once an inmate has been afforded an opportunity to appear before the Board for parole consideration, regardless of outcome, the Board is best suited for determining the inmate’s risk to public safety, in accordance with BPH’s statutory responsibilities.

**Comment 9:** Commenter states that sex offenders should be eligible for consideration for referral. Commenter states the three-tier sex offender registry system was designed for the purpose of altering registration requirements, not to be co-opted as an exclusionary means for resentencing. People convicted of sex offenses have some of the lowest recidivism rates of all people convicted of crimes. This exclusion will have the effect of disincentivizing sex offenders from pursuing rehabilitation in prison.

**Response:** See response to Template Comment 14. The department disagrees with the statement that the proposed regulations discourage rehabilitation among sex offenders. There are many reasons why an inmate would benefit from participation in rehabilitative programming beyond a referral pursuant to PC 1170(d)(1), including earning credits to reduce their time to serve.

**Commenter 221 submitted template comments as described above.**

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

**Renotice Commenters R1 through R210 and R212 through R217 submitted comments that were substantively identical to the template comments as described above. Additionally, these comments were not related to the changes to the text contained in the Notice of Change to Text as Originally Proposed (renotice).**

#### **Commenter R211:**

**Comment 1:** Commenter provides his history as an inmate in CDCR custody and requests to be considered for recall of commitment pursuant to these regulations.

**Response:** See response to Template Comment 26.

**Comment 2:** Commenter states that department staff at the Correctional Counselor I level should be trained to refer all inmates who are eligible for consideration for recall of commitment under the penal code.

**Response:** See response to Template Comment 1.

**Comment 3:** Commenter states the five year exclusionary criteria under subsection 3076.1(b)(2)(C) should be changed to three years.

**Response:** See responses to Template Comments 9 and 12.

**Comment 4:** Commenter states that inmates should be able to petition the courts themselves if they believe they meet the criteria.

**Response:** Regarding petitioning the court, this comment is outside the scope of the proposed regulations. If the commenter means that inmates should be able to refer themselves for recall of commitment, see response to Template Comment 20.

#### **Commenter R218:**

**Comment 1:** Commenter states that inmates sentenced to life in prison or a determinate sentence that exceeds life expectancy should be eligible for referral.

**Response:** Regarding inmates sentenced to life without parole, see response to Template Comment 4. Inmate sentenced to a term that may exceed their life expectancy are not ineligible based on the length of their sentence.

**Comment 2:** Commenter asks the department to adopt emergency regulations to allow an inmate to request a recall of commitment and resentencing.

**Response:** If the commenter means that inmates should be able to refer themselves for recall of commitment, see response to Template Comment 20. The commenter may choose to submit a petition requesting the department adopt the requested provisions in a separate rulemaking action.

**Comment 3:** Commenter asks that the department adopt new provisions authorizing all department staff at the Correctional Counselor I (CCI) level to refer all inmates who are eligible for consideration for recall of commitment under the penal code directly to the Superior Court.

**Response:** The department has adopted exclusionary criteria for the reasons described in the response to Template Comment 1. Staff at the CCI level do not have access to all of the information necessary to determine eligibility pursuant to the proposed regulations. The commenter may choose to submit a petition requesting the department adopt the requested provisions in a separate rulemaking action.

**Comment 4:** Commenter states that instead of being physically transferred out to court, hearings should be conducted at prisons over video monitors.

**Response:** This proposal is outside the scope of the proposed regulations, as the regulations do not address the actual hearing process conducted by the courts. The commenter may choose to submit a petition requesting the department adopt the requested provisions in a separate rulemaking action.

**Comment 5:** Commenter requests that the Secretary of CDCR approved a standard letterhead to allow CCI staff to refer requests directly to the Superior Court.

**Response:** This is an extension of this commenter's comment 3 above. See response to that comment.

**Commenter R219:** Commenter requests that the proposed regulations be amended to address referrals to courts that did not result in recall of commitment or resentencing, and proposes several provisions in furtherance of this goal, including provisions that would mandate the department to:

1. Send each county's court and public defender a list and a copy of the corresponding letters for the cases where CDCR's 1170.03 log categorized the court's "Action Taken" as not resentenced.
2. Prioritize measures to increase court responses to pending and future "Exceptional Conduct" referrals.
3. Request the court comply with 1170.03(b)(1) by calendaring these cases and notifying the defendant and counsel within 30 days and take timely action to consider cases.
4. Copy public defender and private counsel on referral letters.

Commenter states the regulations should contain a provision "for re-requesting the courts to consider all non-recalled and non-resentenced cases in order to save millions of dollars, comply with the requirements of both AB 1540 and the 2020-21 state budget's mandate to close prisons, and save the lives of at-risk populations currently incarcerated."

**Response:** The proposed regulations implement the penal code as written. They codify rules to determine eligibility or ineligibility of inmates and create processes to make referrals from the Secretary to the courts. In accordance with the penal code, the regulatory provisions end with the process of referral and notification to inmates and, when specified, victims. No provision of law requires that the department go beyond this process and create additional provisions for when the courts do not take action on a referral. Should the department decide to create such processes in the future, the commenter is welcome to

resubmit their comments. Additionally, the commenter may choose to submit a petition requesting the department adopt the requested provisions in a separate rulemaking action.