November 6, 2020

Memorandum 2020-15

Parole Release and Penal Code Section 1170(d)(1) Resentencing: Overview

At its November 2020 meeting, the Committee on Revision of the Penal Code will address two issues related to people serving long sentences:

(1) Release by the Board of Parole Hearings (BPH).
(2) Resentencings requested by prosecutors and the California Department of Corrections and Rehabilitation (CDCR) under Penal Code Section 1170(d)(1).

This memorandum gives general background on both of these issues and collects possible recommendations for the Committee's consideration. A supplement to this memorandum, which will be released shortly, will present written submissions from panelists for the meeting.

The information presented here reflects discussions that the Committee Chair and the staff have had with stakeholders across California on every side of these issues. In examining parole release and Section 1170(d)(1) resentencings, the Committee's goal should be improving public safety while reducing unnecessary incarceration, improving equitable outcomes, and putting state and local resources to their best use. As the Committee has previously explored, there is copious empirical research that long sentences have diminishing returns when measured by crime rates and the costs of incarceration.[1]

PAROLE RELEASE

Ultimately, about half of CDCR's populations is eligible at some point for release by BPH — from "lifer" parole to parole review under Proposition 57.[2] Each of these situations is discussed further below, but they all share one thing common:

1. See, e.g., Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, Chapter 7: Incarceration and Crime (2013).

2. The data on this page comes from a June 2020 roster of people incarcerated in CDCR. The roster contains information for 124,280 people, which is used as CDCR's total population for the calculations here. The June 2020 roster indicates that 27,068 people are serving indeterminate life sentences, 6,810 are serving life sentences under the Three Strikes law, 13,469 are serving determinate sentences with a prior strike conviction (not including those convicted of offenses against person), and 12,314 are serving determinate sentences (not including those convicted of offenses against persons).

in each of them, the ultimate question is whether the person poses a current threat to public safety.[3] And for people serving indeterminate life sentences, current law directs the Board of Parole Hearings to "normally grant parole."[4] Specifically, the Board "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual."[5]

"Lifer" Parole Background and Grant Rate

Almost a third of all people in California's prisons — about 39,000 people as of June 2020 — are serving a life sentence:

	number of people	% of CDCR population
Life without parole	5,079	4%
Indeterminate lifers	27,068	22%
Three strikers	6,810	5%
Total	38,957	31%

The portion of CDCR's population serving an indeterminate life sentence or a life sentence under the Three Strikes law — more than 33,000 people, about 27% of the population — will not be released unless the Board of Parole Hearings grants them parole. (BPH generally has no authority to release people serving a life without parole sentence.)

The great majority of people serving these indeterminate life sentences (80%) are convicted of some of the most serious offenses, including murder,[6] but others were sentenced under the Three Strikes law (20%) and may be serving a life sentence for relatively minor misconduct.[7] The number of life sentences may contribute greatly to the increasing number of relatively old incarcerated people — as of June 2019, almost a quarter of the people in prison were 50 or older, including more than 5,000 older than 65.[8]

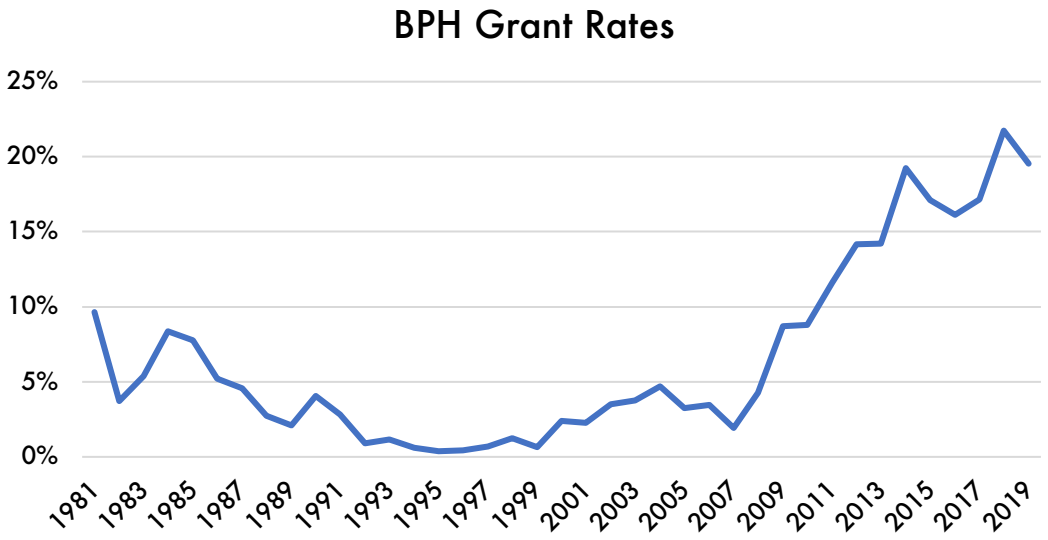
3. *In re* Lawrence, 44 Cal. 4th 1181, 1191 (2008) (indeterminate sentences); 15 CCR § 2449.4(c) (Proposition 57 parole review).
4. Penal Code § 3041(a)(2).
5. Penal Code § 3041(b)(1).
6. E.g., Penal Code §§ 190(a) (murder), 209(b) (kidnapping to "to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289").
7. See, e.g., Ewing v. California, 538 U.S. 11, 18 (2003) (life sentence for stealing three golf clubs).
8. CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 1.19.

How many people eligible for parole receive it each year? The most recent years of data show that the grant rate ranges from 17% to 22%.[9] A significant number of hearings are also delayed every year. A scheduled hearing may not occur if an incarcerated person believes that their chances at being granted parole may improve if they have more time to finishing programming or other accomplishments and asks that their hearing be delayed to a date in the near future.[10]

Information about the grant rate and the number of delayed hearing is here:

	2017	2018	2019	2020 (to 09/2020)
Scheduled hearings	5,335	5,226	6,061	5,052
Number of parole grants	915	1,136	1,184	798
Grant rate	17%	22%	20%	16%
Denial rate	42%	34%	37%	29%
% of hearings not held	41%	44%	43%	55%

The current grant rates are at historic highs, as this chart demonstrates:[11]



9. This statistical information from publicly-available BPH data. See CDCR, BPH, Parole Suitability Hearing and Decision Information <https://www.cdcr.ca.gov/bph/statistical-data/>.

10. The most common reason for a delay is a "postponement," which can be requested by an incarcerated person and moves the hearing to the next available calendar. An incarcerated person can also waive their hearing, which delays it for one to five years, and must ordinarily be requested 45 days before the scheduled hearing. An incarcerated person can also stipulate that they are unsuitable for parole release, which delays the hearing for a longer period of time, though a request can be made to have a hearing earlier. For further exploration of these subtle differences, see BPH Administrative Directive 2013-03A, Mar. 18, 2014 <https://www.cdcr.ca.gov/bph/2019/07/29/administrative-directive-no-2013-03a/>.

11. This information is taken from historical BPH data available at <https://www.cdcr.ca.gov/bph/2020/01/09/suitability-hearing-summary-cy-1978-through-cy-2018/>.

In 2019, a significant portion — 33% (394) — of parole grants were made at a person's first appearance before the parole board. BPH does not release data about the racial breakdown of people granted or denied parole,[12] but some empirical research shows that a person's race, use of a retained attorney, or whether they have been to the parole board before can be predictive of what happens in a parole hearing.[13] BPH hotly disputes these findings.[14]

BPH also considers parole for youth offenders, people who committed their offense under the age of 25.[15] In 2019, 697 parole grants were made to youth offenders — 59% of the parole grants made that year.[16]

In addition, some relatively old people with life sentences are eligible for "Elderly Parole." There are two versions of elderly parole: one created by federal court and in the Penal Code.[17] Under both versions, elderly parole is currently available for people who are 60 years or older and have served 25 years.[18] In 2021, statutory eligibility will expand to people who are 50 years or older and who have served 20 years.[19] Statutory elderly parole is not available for people sentenced under the Three Strikes law[20], but it is available for the court-mandated version of elderly parole. In 2019, 268 parole grants were made to people eligible for an elderly parole hearing — 25% of the parole grants made that year.[21]

12. See Urban Institute, *The Alarming Lack of Data on Latinos in the Criminal Justice System* <https://apps.urban.org/features/latino-criminal-justice-data/> (noting that California regularly releases race and ethnicity data only for arrests).
13. Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Parole Lifer Decisions*, 54 Harv. C.R.-C.L. L. Rev. 455, 485–92 (2019).
14. Nicholas Iovino, *California Parole Board Accused of Withholding Data From Researchers*, Courthouse News Service, May 20, 2020 ("a Board of Parole Hearings (BPH) administrator said she disagreed with University of Oregon researcher Kristen Bell's prior findings of racial bias in parole decisions for people sentenced to life as juveniles.").
15. Penal Code § 3051(a)(1). If the person is serving a determinate term, they are eligible for a youth offender hearing after serving fifteen years. Penal Code § 3051(b)(1). For an indeterminate sentence less than 25-to-life, a youth offender hearing is available after serving twenty years. Penal Code § 3051(b)(2). For longer indeterminate sentences, a hearing is available after serving twenty-five years. Penal Code § 3051(b)(3). People convicted under the Three Strikes law are excluded from this type of release. Penal Code § 3051(h)
16. Board of Parole Hearings, Report of Significant Events, 2019, p. 1 <https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2020/02/BPH-Significant-Events-2019.pdf?label=2019%20Report&from=https://www.cdcr.ca.gov/bph/statistical-data/> (hereafter, "BPH 2019 Report of Significant Events").
17. See Coleman v. Brown, 90-CV-00520-KJM-DB, Doc. 5060, Feb. 10, 2014, 3.
18. Penal Code § 3055(a).
19. AB 3234 (Ting) (2020), Section 2.
20. Penal Code § 3055(g).
21. BPH 2019 Report of Significant Events, *supra* note 13, at 1.

Proposition 57 Release

In addition to these categories of potential parole releases, Proposition 57 in 2016 allowed CDCR to create parole-release for people serving non-violent determinate sentences.[22] People in this category are eligible for release after serving their full principal term without accounting for any sentencing enhancements or credit for good conduct.[23] No hearing is held. Instead, a "paper review" is completed to determine if the person poses a "current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity."[24]

As of June 2020, about 21% of the CDCR population had convictions that will likely make them eligible for review under Proposition 57.[25] In 2019, BPH conducted 4,337 Proposition 57 parole reviews and approved release in about 20% of them — 860 people.[26]

Medical Parole and Compassionate Release

Since 2011, California law has allowed incarcerated people who are medically incapacitated to be eligible for release before reaching their normal release date.[27] In February 2014, the federal three-judge court overseeing the class action cases about prison overcrowding ordered California officials to expand this medical parole program as part of the effort to reduce crowding.[28] To comply with the court order, BPH created the "Expanded Medical Parole" program via a memorandum dated June 16, 2014 — attached here as Exhibit A.

The Expanded Medical Parole program applies to people in prison who "suffer[] from a significant and permanent condition, disease, or syndrome, resulting in [them] being physically or cognitively debilitated or incapacitated."[29]

22. See Cal. Const., art. I, § 32(1)(A). There is continuing litigation about who is eligible for Proposition 57 release. See, e.g., *In re* Gadlin, 31 Cal. App. 5th 784 (2019) (effect of prior sex offense convictions on eligiblity for Proposition 57 review), 440 P. 3d 144 (May 15, 2019) (California Supreme Court granting review).
23. 15 CCR § 3490(f) & (d).
24. 15 CCR § 2449.4(c).
25. This information come from the June 2020 CDCR roster and consists of 13,469 people serving determinate sentences with a prior strike conviction (not including those convicted of offenses against person), and 12,314 people serving determinate sentences (not including those convicted of offenses against persons).
26. BPH 2019 Report of Significant Events, *supra* note 13, at 3. Between 2015 and the implementation of Proposition 57 reviews in 2017, BPH also reviewed nonviolent "second strikers" for parole release once such a person had served half of their full sentence. See, e.g., Coleman v. Brown, 90-CV-00520-KJM-DB, Doc. 5060, Feb. 10, 2014, 3 & Doc. 5237, Nov. 14, 2014, 2. In its submission to the Committee, BPH reports that from January 2015 to June 2017, 4,336 people were released under this process.
27. Penal Code § 3550(a).
28. Coleman v. Brown, 90-CV-00520-KJM-DB, Doc. 5060, Feb. 10, 2014, 3.
29. Ex. A at 1.

Requests for medical parole can be made by incarcerated people or their family, as well as medical staff.[30] If parole is approved, BPH will specify the requirements for release to a licensed health care facility.[31] CDCR then has 120 days to find an appropriate medical placement for that person.[32] If the person's condition improves sufficiently, they can be returned to custody.[33]

From 2017 to 2019, BPH held 74 medical parole hearings, with the following results:[34]

	2017	2018	2019
Scheduled medical parole hearings	25	15	34
Number of medical parole grants	18	12	18
Grant rate: % of scheduled hearings	-—	—	53%
Grant rate: % of hearings held	72%	80%	69%
% of hearings not held	0%	0%	24%

In addition to medical parole, CDCR can also refer someone to court for what is often called "compassionate release." CDCR may do this when someone in prison is "terminally ill with an incurable condition caused by an illness or disease that would produce death within 12 months" or the person "is permanently medically incapacitated with a medical condition that renders them permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care."[35] A court then has discretion to release the person and should hold a hearing on the matter within 10 days of receiving notice from CDCR.[36]

Legal Standard for Release

When considering parole release for someone serving an indeterminate sentence, current law directs BPH to "normally grant parole" unless the parole candidate poses a current threat to public safety. BPH regulations provide further guidance for this determination, including whether the commitment offense was

30. *Id.*
31. *Id.* at 1–2.
32. *Id.* at 2.
33. *Id.*
34. All statistical information on this page is taken from publicly-available BPH data. See CDCR, BPH, Parole Suitability Hearing and Decision Information <https://www.cdcr.ca.gov/bph/statistical-data/>. For 2017 and 2018, there was no indication that any of the scheduled medical parole hearings were delayed.
35. Penal Code § 1170(e)(2)(A) & (B). Until this summer, the eligibility critera required a condition that would produce death within 6 months, not 12. See Senate Bill 118 (Committee on the Budget and Fiscal Review) (Section 14 amending Penal Code § 1170(e)(2)(A)).
36. Penal Code § 1170(e)(3).

especially heinous, and whether the person has showed signs of remorse (though an admission of guilt cannot be required).[37] Other considerations for BPH are the person's age and their behavior while in prison, including disciplinary write-ups and completion of programming.[38] For youth offender hearings, the Board "shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner."[39] Similarly, in elderly parole cases, "the board shall give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence."[40]

The California Supreme Court has limited BPH's ability to deny parole based entirely on "immutable circumstances," such as the heinous nature of the offense.[41] Instead, there must be some connection between the offense and current dangerousness. The standard to show this connection is low and there must only be "some evidence" of dangerousness.[42] One common way that BPH finds current dangerous is concluding that a person lacks "insight" into their offense and the circumstances that led up to it.[43] Proof of insight is complicated, but may include "acknowledg[ing] the material aspects of [the person's] conduct and offense, show[ing] an understanding of its causes, and demonstrat[ing] remorse."[44]

The related issue of a person's expression of remorse also presents special issues.[45] Every expert that the staff spoke to in preparing this memorandum noted that there was no known study linking remorse to recidivism, and other commenters have noted that expressions of remorse present complicated issues of how people with different racial, ethnic, and socio-economic backgrounds express themselves in the highly-charged atmosphere of a criminal proceeding such as a parole hearing.[46]

Despite BPH's focus on insight and remorse, one leading practitioner — who is scheduled as a Committee panelist — notes that she is "not aware of any studies

37. 15 CCR § 2281(c) (unsuitability) and (d) (suitability); Penal Code § 5011(b) (no admission of guilt).
38. 15 CCR § 2281(d)(7) & (9).
39. Penal Code § 4801(c).
40. Penal Code § 3055(c).
41. *Lawrence*, 44 Cal. 4th at 1221.
42. *Id.* at 1210.
43. *In re* Shaputis, 53 Cal. 4th 192, 217–221 (2011).
44. *In re* Ryner, 196 Cal. App. 4th 533, 549 (2011).
45. 15 CCR § 2281(d)(3).
46. See, e.g., Eve Hanen, *Remorse Bias*, 83 Missouri L. Rev. 301 (2018); Susan A. Bandes, *Remorse and Criminal Justice*, 8 Emotion Review 1, 3–4 (2016).

that show that insight and remorse are correlated to recidivism. … I think it just makes everyone in the room feel better."[47]

Parole Board and Governor Review Process

At a parole hearing, BPH uses a "structured decision-making" tool.[48] This type of tool, which was first developed in 2003 in Canada, "anchors the decision-making process with a statistical estimate of the incarcerated person's (static) risk of future criminal behavior."[49] But this tool does not tell a parole commissioner what decision to make — it only "structures the decision-making process to allow the decision maker to review and analyze evidence-based information in a consistent manner that is intended to lead to an informed and empirically supported decision."[50] One study has shown that recidivism rates decreased for people released on parole using a structured decision-making process — to 6.6% from 22.6% for any new offense and to 18.3% from 29.9% for technical violations.[51] And according to BPH, use of structured decision-making reduces the length of a parole hearing "by more than 30 minutes without significantly affecting the overall outcome of hearings."[52]

Another key tool used at a parole hearing is the Comprehensive Risk Assessment (CRA), which a BPH psychologist uses to measure a parole candidate's risk for committing future violence.[53] CRAs include "evaluation of the inmate's commitment offense, institutional programming, past and present mental state, and analysis of static and dynamic risk factors based on the inmate's behaviors and relationships, emotions and attitudes, and perceptions and attributions."[54]

47. Dashka Slater, *Can You Talk Your Way Out of A Life Sentence?*, Jan. 1, 2020, New York Times Magazine (quoting Heidi Rummel, the director of the Post-Conviction Justice Project at the University of Southern California Gould School of Law).

48. BPH 2019 Report of Significant Events, *supra* note 13, at 10–11.

49. Ralph C. Serin, Kaitlyn Wardrop, Laura Gamwell, Jennifer Shaffer, *Parole Decision-Making: Moving Towards Evidence-Based Practice, in* Moving Corrections and Sentencing Forward: Building on the Record 148 (Beth Huebner, Pam Lattimore & Faye S. Taxman, eds. forthcoming Nov. 2020).

50. *Id.*

51. *Id.* at 149 (citing Wardrop, Serin & Rentler, Evaluating the Structured Parole-Decision Making Framework in Three U.S. States, The American Journal of Forensic Psychology, 37(2) (2019)).

52. BPH 2019 Report of Significant Events, *supra* note 13, at 11.

53. 15 CCR § 2240. See also CDCR, BPH Home, Forensic Assessment Division <https://www.cdcr.ca.gov/bph/divisions/fad>.

54. *Id.*

Everyone appearing before BPH is provided counsel,[55] though the payment for an appearance, which must occur in-person at a prison, maxes out at $750.[56] These rates have been criticized as being too low for the volume and complexity of work that a typical parole appearance requires.[57]

If parole is denied, another hearing will be scheduled anywhere from three to fifteen years in the future.[58] If parole is granted, BPH'S Decision Review Unit must review the decision within 120 days.[59]

When parole is granted in murder convictions, the Governor then has an opportunity to review BPH's decision and may reverse BPH's decision.[60] For all other life-term offenses, the Governor may not reverse a grant of parole, but can send the case back for en banc review by BPH.[61] The Governor must apply the same factors that BPH does.[62] In his first year in office, Governor Newsom reversed grants of parole dozens of times.[63] California is one of only three states that allow the governor to reverse a parole decision for a person convicted of a life term (the other two are Maryland and Oklahoma).[64]

Unlike decisions made for people serving life sentences, the Governor has no review authority over Proposition 57 parole.

Court Review

Parole denials by both BPH and the Governor can be challenged in court, but it is difficult to get any relief. So long as there is "some evidence" supporting the conclusion of current dangerousness, state courts should not intervene, and

55. Penal Code § 3041.7; 15 CCR § 2256(c).
56. CDCR, BPH, Application Process For New Attorneys <https://www.cdcr.ca.gov/bph/attorney-overview/application> ("Panel attorneys will be paid a flat rate of $750 for each client assigned to them by the Board whose case they complete. A case is completed when a scheduled hearing results in a waiver, stipulation, postponement, continuance, grant of parole, or denial of parole.").
57. In re Poole, 2018 WL 3526684, *5–*9 (1st Dist. 2018) (describing criticism).
58. Penal Code § 3041.5(b)(3) & (4). In some circumstances, a hearing can also be advanced to an earlier date. Penal Code § 3041.5(b)(4).
59. Penal Code § 3041(b)(2).
60. Cal. Const. art. V, § 8(b); Penal Code § 3041.2.
61. Penal Code § 3041.1.
62. Cal. Const. art. V, § 8(b);
63. Anita Chabria and Taryn Luna, *Newsom seeks to halt parole for some murderers and serious offenders. What does that signal?*, Los Angeles Times, Mar. 26, 2019.
64. Matt Levin, *Behind California's Dramatic Increase in Lifers Freed from Prisons*, KQED, May 15, 2014 https://www.kqed.org/news/135494/behind-californias-dramatic-increase-in-murderers-freed-from-prisons ("Because of Prop. 89, California is one of only three states (Maryland and Oklahoma are the other two) where governors have the authority to review and reverse parole board recommendations for lifers.").

federal courts have little power to do so.[65] And victory in state court merely allows the person to have a new parole hearing — it does not entitle them to release.[66]

Recidivism

People serving life sentences who are released on parole have extremely low recidivism rates. The most recent data from CDCR covers people released from prison in 2014–15. It shows that released lifers have a 2.3% reconviction rate after three years (that is, there were 16 convictions).[67] The reconviction for all people released from CDCR in that time was 46.5%.[68] This "reconviction" rate includes convictions for both misdemeanors and felonies. For lifers, most of the new convictions (nine of the sixteen) were for misdemeanor offenses.[69]

Similarly, CDCR's most recent publicly-available information shows that reconviction rates decrease with length of stay — that is, the longer someone has been in prison, the lower the recidivism rate. For example, people who had been in prison for ten to fifteen years had a 22% reconviction rate three years after release, but people who had been in prison for fifteen years or more had a 12.5% reconviction rate three years after release.[70] Older people had a smaller reconviction rate than younger people,[71] and the reconviction rate for older people convicted of violent offenses was significantly less than for those convicted of non-violent offenses.[72]

California's extremely low lifer-recidivism rate is not an anomaly. In Maryland, hundreds of people who had received a life sentence were released beginning in 2012, when a new court decision — Unger v. State[73] — allowed for their

65. *In re* Lawrence, 44 Cal. 4th 1181, 1221 (2008); Swarthout v. Cooke, 562 U.S. 216, 222 (2011) (per curiam) ("The short of the matter is that the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business.").

66. *In re* Prather, 50 Cal.4th 238, 244 (2010) ("[A] decision granting habeas corpus relief in these circumstances generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider.").

67. CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, January 2020, Table 5.

68. *Id.*

69. *Id.*, Table 6. There were three felony convictions for crimes against person, two for felony drug/alcohol crimes, and two for "other" felony crimes. The nine misdemeanors: 3 misdemeanors against persons, 4 drug/alcohol misdemeanors, 1 property misdemeanor, and 1 "other" misdemeanor.

70. CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, January 2020, Figure 14.

71. *Id.*, Figure 18.

72. *Id.*, Figure 19.

73. 48 A.3d 242 (2012).

convictions to be vacated due to an egregiously bad jury instruction that courts stopped giving in the 1980s.[74] These "Unger releases" were done without any review by a parole board or other release authority, so they represent a "natural experiment" that allowed researchers to examine what happened when people convicted of the most serious offenses were released from prison without any formal finding that they were no longer dangerous.[75] The people receiving Unger releases all had tremendous reentry support, including a law school clinic dedicated to the task.[76] Since these releases began in 2012, 201 people have been released and the recidivism rate has been extremely low, with only seven people being incarcerated for violation of supervision conditions or convictions for new offenses (a 3% recidivism rate).[77]

RESENTENCING UNDER PENAL CODE SECTION 1170(d)(1)

In almost every scenario, once a trial court imposes a sentence, that sentence cannot later be changed.[78] But California has a special provision in the Penal Code that allows people to be resentenced if a prosecutor or the CDCR Secretary recommends it.[79] This provision is Penal Code Section 1170(d)(1), which is attached as Exhibit B. Section 1170(d)(1) creates a two-step process: first, a court

74. Michael Millemann Rebecca Bowman Rivas, and Elizabeth Smith, *Digging Them Out Alive*, 25 Clinical L. Rev. 365, 367–69 (2019) ("The court ordered new trials because, as grossly unfair and absurd as it may seem today, prior to 1981 State law required judges in criminal cases to instruct juries that they — the juries — had the ultimate responsibility to determine the law. Thus, judges told jurors that what they — the judges — said about the law was advisory only. This instructional error was not just an erroneous application of law; it nullified the rule of law itself.").

75. *Id*. at 370–71.

76. *Id*. at 414–20.

77. Justice Policy Institute, *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, November 2018, 17. Committee staff obtained the latest recidivism information in November 2020 from a Maryland public defender who is tracking it.

78. Dix v. Superior Court, 53 Cal. 3d 442, 455 (1991) (explaining the "common law rule that the court loses resentencing jurisdiction once execution of sentence has begun"). Some jurisdictions allow sentences to be modified long after their imposition. In Illinois, the "revestment doctrine" allows resentencing at any time with consent of all parties. See People v. Bailey, 2014 IL 115459 (2014). New Jersey has similar rules, and also allows a court to release someone at any time from custody to treatment. See N.J. Rules of Court, R. 3:21-10(b). Ohio allows many people convicted of felonies to apply for "judicial release" after serving a specified length of time. See Ohio Rev. Code § 2929.20. More examples can be found in a recent memorandum from the Washington D.C. Criminal Code Reform Commission. See D.C. Criminal Code Reform Commission, Advisory Group Memorandum #25, Sept. 23, 2019 <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory%20Group%20Memo%20%2325%20-%20Second%20Look%20and%20Related%20Provisions%20in%20Other%20Jurisdictions%20%289-23-19%29.pdf> .

79. Penal Code § 1170(d)(1). The Board of Parole Hearings and "the county correctional administrator in the case of county jail inmates" may also initiate § 1170(d)(1) requests but this does not appear to happen frequently.

must decide if a sentence should be "recalled" and, if a sentence is recalled, must then decide what the new sentence should be.[80]

Recent Changes

Some version of Section 1170(d)(1) has existed in the Penal Code for decades, but the law was expanded by two recent bills. The first, Assembly Bill 2942 (Ting, 2018), allowed prosecutors to file these resentencing petitions, which they could not do before. The other, Assembly Bill 1812 (Committee on Budget, 2018), provided additional guidance on how courts should consider these petitions. AB 1812 instructed courts that they could reduce a sentence if it was "in the interest of justice."[81] AB 1812 also specified that such reductions could occur even in a case that had been plea-bargained. It further directed courts to consider "post convictions factors" when undertaking a resentencing.[82]

Since the revival of Section 1170(d)(1), there are now two main tracks for people to get back into court to be resentenced: by a prosecutor asking for resentencing or by CDCR asking for it. Each prosecutor's office is left to its own devices for how to approach these cases and some have taken the beginning steps to do so in an organized way.[83]

CDCR's Process for Making Section 1170(d)(1) Referrals

For its part, CDCR has developed a set of regulations to determine who should be sent back to court: people who have "demonstrated exceptional conduct" and people whose sentence may be affected by changes in the law.[84] In this first group, CDCR will refer someone for resentencing "if their behavior while incarcerated

80. Penal Code § 1170(d)(1) ("the court may … at any time upon the recommendation of the secretary … or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.").

81. See Penal Code § 1170(d)(1) ("The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice.").

82. See Penal Code § 1170(d)(1) ("The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.").

83. See generally Eli Hager, *The DAs Who Want to Set the Guilty Free*, The Marshall Project, March 20, 2018.

84. 15 CCR § 3076.1(a)(1), (2) & (3). These are "emergency regulations" that become effective January 1, 2020. They have not yet been finalized.

demonstrates sustained compliance with departmental regulations, rules, and requirements, as well as prolonged participation in rehabilitative programming."[85]

The second group consists of persons who were sentenced under law that has changed.[86] It includes people who have sentencing enhancements that have either been repealed by the Legislature or enhancements imposed in a way that later court decisions found to be unlawful.[87] If CDCR decides to recommend someone for resentencing, the regulations specify that the person should be notified at the same time the referral is sent to court.[88]

As of October 31, 2020, CDCR had made 1,558 referrals pursuant to Section 1170(d)(1), with the following results:[89]

	Exceptional conduct	Change in law	Total
Referrals	142	1,416	1,558
Court responses	95	1,004	1,099
% court responses	67%	71%	71%
Resentencings	52	405	457
% resentenced	37%	29%	29%

In other words, a large percentage of referrals simply received no response from a court and there was no significant difference in the response rate for the "extraordinary conduct" referrals from CDCR compared to those made for changes in the law.

Court Process

One explanation for this response rate from the courts may be that there is no clear procedure for what courts are supposed to do when CDCR refers someone

85. 15 CCR § 3076.1(b)(1).

86. CDCR sometimes refers to this category as covering "retroactive" changes in the law. This label is confusing because CDCR will refer people for resentencing when there has been a change in the law that courts have decided is not retroactive.

87. CDCR Program Guide, Recall & Resentencing Recommendation Program, Penal Code section 1170(d)(1), version 1.2020, 7–16.

88. 15 CCR § 3076.1(e)(2).

89. This information was provided by the CDCR Office of Legal Affairs. These numbers do not include two referrals made at the request of law enforcement. See 15 CCR § 3076.1(a)(4) (providing process for law enforcement to request CDCR refer someone for resentencing). The 142 "extraordinary conduct" referrals come from 29 prisons, with six prisons (including both women's prisons — i.e., CCWF and CIW) having more than ten such referrals. Those six prisons are CCWF (29), VSP (20), SQ (16), CIW (16), CTF (16), FOL (13). Referrals from CDCR's two women's prisons make up 24% of all extraordinary conduct referrals even though women are typically only about 4.5% of CDCR's population. See CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 1.4.

for resentencing. CDCR's referrals are done via hard-copy letters sent to the court that sentenced a defendant. The letter from CDCR should also contain a "Cumulative Case Summary" that digests someone's "institutional behavior" and other information. But there is no provision in Section 1170(d)(1) that requires a court to hold a hearing, or follow any particular process, before summarily rejecting CDCR's request.[90]

A rule of court addressing Section 1170(d)(1) was recently circulated for public comment by the Judicial Council, but it has apparently been withdrawn with no further action.[91] The rule of court would have allowed a court to summarily deny a referral for resentencing.[92] But if the referral was based on "equitable considerations" and there was no summary denial, the proposed rule provided that counsel should be appointed and a status conference held to determine whether further proceedings were appropriate.[93] The proposed rule did not provide any suggested deadlines for court action at any step.

Even if a court does decide that resentencing is appropriate, there is ambiguity about the scope of resentencing and whether an entire sentence and judgment can be redone or whether only specific issues can be reconsidered.[94] An appellate court also recently held that counsel does not need to be assigned before a court can summarily deny a referral by CDCR for recall of sentence.[95]

And there is no requirement that a court explain why it refuses to resentence a person — and when a court doesn't give a reason, appellate courts "presume on a silent record the court properly exercised its discretion."[96] On appeal, reviewing judges have assumed that any decisions made by a trial court are to be reviewed

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90. See People v. McCallum, __ Cal. Rptr. 3d __, 2020 WL 5810212 (Sept. 30, 2020) ("We conclude the statutory language of section 1170, subdivision (d)(1), read in the context of section 1170 as a whole, shows the Legislature did not intend to require a trial court to hold a hearing before acting on a recommendation by the Secretary for recall and resentencing."). The litigation of this case is being led by Michael Romano, current Committee Chair.

91. Judicial Council of California, Invitation to Comment SPR20-14, Criminal Procedure: Resentencing Recommendations under Penal Code Section 1170(d)(1).

92. *Id.* at 7 (proposed rule 4.520(e) (summary denial appropriate if court "finds that the basis for the recommendation is facially incorrect, or … if the recommendation fails to state sufficient facts warranting resentencing").

93. *Id.* at 7 (proposed rule 4.520(d)(3)), 8 (proposed rule 4.520(g).

94. Compare People v. Lopez, __ Cal. Rptr. 3d __, 2020 WL 6336140 (Oct. 29, 2020) (while resentencing under Penal Code § 1170(d)(1), court could consider whether case should be transferred to juvenile court) with People v. Federico, 50 Cal. App. 5th 318, 325–328 (2020) (opposite conclusion). The California Supreme Court has agreed to review the latter case.

95. People v. Frazier, __ Cal. Rptr. 3d __ 2020 WL 6041867 (Oct. 13, 2020).

96. *Id.* at *5 ("[N]othing in section 1170, subdivision (d)(1), requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation.").

for abuse of discretion, even though most of these determinations will be made on a paper record with few, if any, credibility determinations.[97]

Other Jurisdictions

There are other models for how Section 1170(d)(1) could function. For example, the Model Penal Code (MPC) specifies principles for "second look sentencing" that allow someone to ask a judge for resentencing after serving 15 years of imprisonment.[98] Commentary in the MPC explains that this "provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[99]

The federal criminal system also allows anyone to request a sentence reduction with a motion for so-called "compassionate release."[100] To have a sentence reduction granted, a court must find that there are "extraordinary and compelling reasons" for reducing a sentence,[101] with the important limitation that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[102]

In 2018, the First Step Act created a process for defendants to file such requests in federal court.[103] Before then, only the federal Bureau of Prisons (BOP) could make these requests for people in their custody.[104] Because BOP largely failed to do so for decades, Congress allowed defendants to file the requests themselves. Since that expansion, more than a thousand of these requests have been granted.[105]

A proposed federal law from 2019 — the Second Look Act — would have gone further and allowed anyone who had served ten years in federal prison to apply for resentencing.[106] To be resentenced, someone would need to show that they were "not a danger to the safety of any person or the community, a "readiness for

97. See *McCallum*, 2020 WL 5810212 at *4 ("We review the trial court's decision whether to recall a defendant's sentence for an abuse of discretion.").
98. Model Penal Code: Sentencing § 305.6.
99. Model Penal Code: Sentencing § 305.6, Comment (a).
100. 18 U.S.C. § 3582(c)(1)(A).
101. 8 U.S.C. § 3582(c)(1)(A)(i).
102. 28 U.S.C. § 994(t).
103. United States v. Brooker, __ F.3d __, 2020 WL 5739712, *2–*4 (2d Cir. 2020).
104. *Id.* at *2.
105. *Id.* at *4 ("After the First Step Act became law in December 2018, BOP reports that over 1000 motions for compassionate release or sentence reduction have been granted.").
106. H.R. 3795 — Second Look Act of 2019. The text of this proposed law is available at https://www.congress.gov/bill/116th-congress/house-bill/3795/text?r=4&s=1

reentry," and that "the interests of justice warrant a sentence modification."[107] Courts would also be required to consider "the age of the defendant at the time of the sentence modification petition and relevant data regarding the decline in criminality as the age of defendants increase."[108]

The District of Columbia provides another possible model. It recently enacted a resentencing provision for anyone who was under eighteen at the time of their offense and has served at least fifteen years in prison.[109] They must be resentenced if the court concludes that "the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification."[110] In resentencing a person under this provision, the court has the special power to "issue a sentence less than the minimum term otherwise required by law."[111] The District of Columbia is also considering expanding resentencing to anyone under 25 years of age.[112] The scope of these resentencing provisions is necessarily small because it is limited to convictions from Washington D.C.[113]

AREAS FOR FURTHER EXPLORATION

Parole

Provide Greater Guidance to Parole Candidates About What Will Lead to Release on Parole

One common critique of the parole release process is that someone appearing before a parole board has little sense of what specific actions they must take to show suitability for release, particularly how to achieve the "insight" that many parole hearings turn on. CDCR and BPH could provide such specific guidance when someone enters prison and, if the person completes the expected programs, there could be a strong presumption in favor of release.

107. *Id.* (proposed Sec. 3627(a)(3)(A)(i), (ii) & (a)(3)(B)).
108. *Id.* (proposed Sec. 3627 (c)(1)(B)(ii)).
109. D.C. Code § 24-403.03(a), (a)(1).
110. D.C. Code § 24-403.03(a)(2).
111. D.C. Code § 24-403.03(e)(2)(A).
112. B23-0127 — Second Look Amendment Act of 2019 <https://lims.dccouncil.us/Legislation/B23-0127?FromSearchResults=true>.
113. United States Department of Justice, U.S. Attorney's Office, District of Columbia, New Bill Seeks to Make Over 500 Violent Criminals (Including Many Rapists and Murderers) Immediately Eligible for Early Release, Aug. 9, 2010 <https://www.justice.gov/usao-dc/pr/new-bill-seeks-make-over-500-violent-criminals-including-many-rapists-and-murderers> (noting that more than 70 people have applied for resentencing).

Revise the Standard for Release

California law currently says that parole release should "normally" be granted, unless the parole candidate poses a current threat to public safety. But even the most generous reading of the grant rate shows that parole is more likely to be denied than granted. The legal standard for parole release could be revised to better align the grant with the Legislature's intent that parole release should be the norm, not the exception. Such revisions could specify that release should only be denied if someone is at great risk of committing a violent offense or could specify that a lack of insight or failure to express remorse are not grounds for denying release. Similarly, the release standard could be revised to provide a strong presumption for release if someone has gone a certain period without any violations of prison rules.

Revise the Standard for Judicial Review

Courts reviewing parole release decisions must currently apply an extremely deferential standard of review and may not intervene in parole decision if there is "some evidence" supporting a parole denial. This standard of review could be revised to provide for more thorough judicial review of parole decisions, such as allowing courts to review these decisions with limited deference to BPH's findings.

Allow Parole Release to Non-Incarceratory Settings

Parole release is currently an all-or-nothing decision: the person is ether going to stay incarcerated or be released to the community with supervision. But additional types of releases could be created for people that the Board finds are close to being entitled to full release but may still need additional programming and support that could be delivered in a non-prison setting. For example, CDCR currently has a few hundred beds in what are essentially halfway houses for people with about a year left to serve on their sentence.[114] A similar model could be developed that is intended to house people for a longer period of time to help them prepare for their ultimate release from custody.[115]

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[114] CDCR, Male Community Reentry Program <https://www.cdcr.ca.gov/rehabilitation/mcrp/>.

[115] See, e.g., Government of Canada, Parole Board, Types of Conditional Releases <https://www.canada.ca/en/parole-board/services/parole/types-of-conditional-release.html> (describing "day parole" which allows someone to "to participate in community-based activities in preparation for full parole or statutory release.").

Codify the Court Order on Expanded Medical Parole Release

Medical parole currently exists in both statute and as a result of a federal court order issued more than six years ago. The federal court order is broader than the statutory authority, and it is likely confusing to many people that the written law of the state is not the actual legal standard for medical parole. The Penal Code could be updated to reflect the actual standard for medical parole.

Requests for Recall of Sentence and Resentencing under Penal Code Section 1170(d)

Specify the Court Process for the Existing Section 1170(d)(1) Process

The current Section 1170(d)(1) process has only minimal process for courts to follow. As a result, a large percentage of referrals by CDCR have gone unanswered by courts, including referrals that were made for "extraordinary conduct." Even when a court does rule on a referral, it is permissible for it to do so in summary fashion and without crucial information about the defendant's situation or plans for release. All of this may happen without the person in prison knowing anything about it.

The Committee could recommend that the important goals of Section 1170(d)(1) be reinforced with clear procedural protections, including the fundamental due process safeguards of notice and a right to hearing. The new process could include:

1. Placing the provisions of Section 1170(d)(1) in a separate statute for greater clarity and to reinforce that courts should give these requests full consideration.
2. Requiring CDCR to provide advance notice to people in their custody that a referral under Section 1170(d)(1) is going to be made for them and immediately forward the referral to the person while in CDCR custody.
3. Specifying that if no court action is taken on a Section 1170(d)(1) referral within 90 days, the sentence is automatically recalled and the matter is set for resentencing.
4. Specifying that a Section 1170(d)(1) referral can only be resolved after an initial status conference where counsel for the defendant is present. Summary disposition is disallowed.
5. Requiring a court to state reasons when denying a referral to recall or to resentence.
6. Requiring a court to send notice to the defendant of any actions taken in the case.

7. Specifying that any resentencing under Section 1170(d)(1) is a "full resentencing" as described in People v. Buycks, 5 Cal. 5th 857 (2018), and that all matters related to the conviction and sentence can be considered. (Appellate courts are currently split on this issue and it is set to be resolved by the California Supreme Court.)
8. Specifying that a denial of recall of sentence, denial of resentencing, or the new sentence imposed is appealable and reviewed de novo on appeal.

Create Presumptions in Favor of Resentencing

Under current law, a court considering a Section 1170(d)(1) matter has unguided discretion to resentence someone. That is true even if a prosecutor has brought the request for resentencing or if CDCR recommends resentencing.

The law could be revised to specify that if either of these entities (or a local sheriff or BPH) recommend resentencing, resentencing to a new, lower sentence should be presumptive. This presumption would not apply for the Section 1170(d)(1) referrals that CDCR makes because of changes in the law. In those cases, CDCR is expressing no view on whether resentencing is appropriate, so its referral should not be the basis for a presumption.

Create a Centralized Court for All Section 1170(d)(1) Referrals from CDCR

Under current practice, the court that originally sentenced a person receives and considers requests for resentencing under Section 1170(d)(1). Sometimes, however, the original sentencing judge is no longer available, particularly in older cases. Unless a court assigns experienced counsel, it is also on its own to interpret the material that accompanies a resentencing referral from CDCR.

An alternative would be to create a specialized court to handle these referrals statewide. Such a court would develop expertise in CDCR practices and documents. The availability of such a court would also help alleviate the unexpected judicial burden these referrals create. In addition, a specialized court that considers cases statewide (instead of only from one particular jurisdiction, as is currently the case) would have a complete view of sentencing practices across California. That would advance one of the stated goals of Penal Code Section 1170(d)(1): "to eliminate disparity of sentences and … promote uniformity of sentencing."

Allow Defendants to Make Their Own Requests for Resentencing After Fifteen Years

Penal Code Section 1170(d)(1) is not a true second-look sentencing provision. It functions more like a safety valve that lets truly exceptional cases escape incarceration.

Section 1170(d)(1) could be revised to allow defendants to make their own requests for resentencing after fifteen years of incarceration. This would make it a second-look process like the one envisioned by the Model Penal Code.

This proposal has obvious challenges. For example, it would be necessary to consider the flood of cases that courts would to have handle, the difficulties of assigning counsel to assist in these petitions, and the administrative burden on CDCR in providing relevant records.

Provide a Portion of the Savings from Lower Incarceration Costs to Prosecutors to Create Units to Investigate and Recommend Resentencing

Many people who are resentenced under Section 1170(d)(1) are released from custody earlier than expected, which could result in significant savings to the state. When a prosecutor has asked for resentencing under Section 1170(d)(1), a portion of this savings could be allocated to that prosecutor with the direction that the money be spent only on units that investigate and recommend similar resentencings. This incentive may encourage prosecutors — who otherwise see no tangible financial benefit from the additional work required for these cases — to investigate and make referrals where appropriate.

CONCLUSION

A significant portion of California's prison population is serving a life sentence or other extreme sentence. California's experience with releasing people serving these sentences suggests that there may be room to increase the number of people released from prison on parole and targeted resentencings under Penal Code Section 1170(d)(1), while still preserving public safety.

Respectfully submitted,

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Senior Staff Counsel

Exhibit A
BPH June 16, 2014 Memorandum on Expanded Medical Parole

Memorandum

Date : June 16, 2014

Subject: **EXPANDED MEDICAL PAROLE**

The purpose of this memorandum is to provide an overview of the new Expanded Medical Parole process. On February 10, 2014, the Three Judge Panel in the *Plata*/*Coleman* class action lawsuit ordered CDCR in consultation with the Receiver's office to "finalize and implement an expanded parole process for medically incapacitated inmates." The procedures for the new Expanded Medical Parole process will apply to medical parole hearings conducted on or after July 1, 2014. Significant features of the program are as follows:

Eligibility for Expanded Medical Parole

- The inmate suffers from a significant and permanent condition, disease, or syndrome, resulting in the inmate being physically or cognitively debilitated or incapacitated.
- The inmate qualifies for placement in a licensed health care facility, as determined by the Resource Utilization Guide IV (RUG IV) Assessment Tool.[1]
- The inmate will not pose an unreasonable risk to public safety if placed in a licensed health care facility.
- The inmate is not condemned or serving a sentence of life without the possibility of parole.

Pre-Hearing Procedures

- Medical personnel, the inmate, or the inmate's family or attorney may request that the inmate's CDCR primary care physician consider the inmate for expanded medical parole.
- The inmate's CDCR primary care physician will complete the Medical Parole Form (CDCR Form 7478) along with a RUG IV assessment.
- The forms will be reviewed by the chief medical executive at the facility where the inmate is housed. If approved by the chief medical executive, the forms will be submitted to the classification and parole representative at the institution where the inmate is housed for review. If approved by the classification and parole representative, the forms will be forwarded to the Division of Adult Institutions headquarters, which will prepare a packet for referral to the Board of Parole Hearings.

Hearing Procedures

- Hearings will be conducted by two or three person panels using the same structure as parole suitability hearings.
- A panel's approval of an inmate's placement in a licensed health care facility will be conditioned upon CDCR identifying a licensed health care facility that meets specified requirements identified by the panel. The panel will specify those facility requirements deemed necessary for the inmate's placement to not pose an unreasonable risk to public safety. Facility requirements will address issues such as applicable statutory residency

[1] The RUG IV is a tool used to evaluate eligibility for Medicare and Medicaid reimbursement for placement in a skilled nursing facility.

restrictions, facility security, limitations on visitation and contact with persons under the age of 18, and any other special care provisions rationally related to the inmate's prior misconduct.

- In addition to the above, the panel may condition the inmate's placement on the inmate's compliance with a variety of other requirements and restrictions, such as periodic medical evaluations, compliance with the skilled nursing facility's rules, alcohol and drug restrictions, electronic monitoring, and restrictions on communication with specified persons.
- All other existing Board of Parole Hearings' medical parole hearing procedures not impacted by the provisions outlined herein will be applied to expanded medical parole hearings, including appointment of counsel, and all applicable hearing notifications, including notice to law enforcement, prosecutors, and 90-day notice to registered victims and victims' next-of-kin.

Post-Hearing Procedures

- The board's proposed decision to approve placement of an inmate in a licensed health care facility will be valid for 120 days, during which time CDCR will work to identify a licensed health care facility that meets the requirements specified by the board and secure a bed for the inmate. If an available and appropriate facility is identified that meets the specified requirements, the inmate will be processed for transfer. If no such facility can be identified within 120 days, the board's proposed decision will be invalid and the inmate will remain in a CDCR institution.
- All existing statutory notification requirements governing release of inmates will apply to medical parole placements, including notification to law enforcement, prosecutors, victims, and victim's next-of-kin.

Return from Placement in a Licensed Health Care Facility

- CDCR will monitor the inmate's medical condition and behavior while he or she is placed in a licensed health care facility. Significant improvements in the inmate's medical condition will be reported to the board. The board will determine if the inmate no longer qualifies for medical parole. In addition, material violations of law, facility requirements, or inmate restrictions shall be reported to the board. The board will determine if additional facility requirements and restrictions are warranted.

Miscellaneous

- Inmates qualifying for medical parole as defined in Penal Code section 3550 et seq., or expanded medical parole, or both will be processed under expanded medical parole effective July 1, 2014.

Exhibit B
Text of Penal Code § 1170(d)(1)

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or a county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. Credit shall be given for time served.