



PAROLE CONSIDERATION FOR THIRD STRIKERS

Background

The California Department of Corrections and Rehabilitation (CDCR) recently adopted emergency regulations that detail, among other matters, which inmates will now be eligible for parole consideration by the Board of Parole Hearings (BPH). This includes inmates serving Three Strike indeterminate sentences. The BPH estimates that between 3,000 and 4,000 non-violent third strikers could be affected – meaning they would now be eligible to go through an initial public safety screening process, followed by a parole board hearing before any decision is made to release them. In short, the CDCR regulations confirm that Proposition 57 extends to all nonviolent state prisoners, including third strikers, and that they are now eligible for parole consideration upon completion of the full term for their primary offense.

Proposition 57 was approved by California voters in 2016. It added a provision to California's Constitution that states: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, section 32, subd. (a)(1).) The full term for the primary offense is defined as "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." Proposition 57 also directed CDCR to adopt regulations "in furtherance of [Section 32(a)]" and "certify that these regulations protect and enhance public safety." (Cal. Const., art. I, section 32, subd. (b).)

CDCR initially adopted regulations that stated that nonviolent inmates were generally eligible for early parole consideration, but excluded non-violent third strikers. CDCR contended in its statement of reasons accompanying the regulations that "life term inmates remain ineligible for parole consideration because the plain text of Proposition 57 makes clear that parole eligibility only applies to determinately sentenced inmates, and furthermore, public safety requires their exclusion." The exclusion of third strikers from Proposition 57 was challenged in court. On September 7, 2018, the Second District Court of Appeal concluded that there was "no question" that the voters who approved Proposition 57 intended for those serving Three Strikes indeterminate sentences to be eligible for early parole

consideration. It directed CDCR to void and repeal portions of the regulations inconsistent with its ruling, and also directed CDCR to make any further conforming changes necessary to “render the regulations adopted pursuant to California Constitution, article I, section 32(b) consistent with section 32(a) and this opinion.” CDCR chose not to appeal from this decision. It has promulgated emergency regulations in compliance with the decision. The regulations went into effect January 1, 2019, portions of which are described and highlighted below.

Eligibility Review

The BPH generally describes its nonviolent offender parole review process on its website as follows: “A nonviolent offender parole review is a process in which the California Department of Corrections and Rehabilitation refers certain nonviolent offenders to the board for review and possible release, once the inmate has served the full term of his or her primary offense and has passed a public safety screening. Inmates are reviewed for release based on their criminal history, a review of their institutional records, and after consideration of input received from the inmate, victims, victims’ families, and the district attorney’s office that prosecuted the inmate. A decision is rendered after an administrative review of relevant and reliable documents; no hearing is conducted.”

Article 2 of the emergency regulations provides that indeterminately-sentenced nonviolent offenders shall be eligible for a parole consideration hearing. Prior to any hearing, the inmate will go through an eligibility review to determine whether the inmate is eligible for a parole consideration hearing. Once an inmate is determined to be eligible for the process, CDCR will determine when the inmate will have served the full term of his or her primary offense. This date is called the inmate’s nonviolent parole eligible date (NPED). Importantly, Proposition 57 defines the full term of the primary offense as the longest term imposed by the court, minus imposition of an enhancement, consecutive sentence, or alternative sentence. For third strikers, this means that CDCR must look solely at the full term of the primary offense, and disregard the “alternative sentence” mandated under California’s Three Strikes law. Because the full term of the primary offense will in perhaps most cases be significantly less than the mandated state prison term of at least 25 years to life for third strikers, this now allows for parole consideration for as many as 4,000 nonviolent third strike inmates. These inmates were previously ineligible for parole consideration.

Inmates who are screened will be provided written notice from CDCR of their eligibility and their NPED. Eligibility determinations are subject to appeal by an inmate through CDCR’s inmate appeals process. The eligibility review procedures are detailed in section 3496 of the emergency regulations. If determined eligible, the inmates will go through a second public safety screening and referral process detailed in section 3497 of the regulations. This is to occur 180 days prior to the NPED. Screening under section 3497 looks largely to the inmate’s history of compliance with prison rules, with a focus on serious

rules violations such as assault or battery upon a peace officer, threats to kill or cause serious bodily injury, and other rules violations specifically detailed in the regulations.

Indeterminately-Sentenced Nonviolent Offender Defined

The regulations specify who will now be eligible for parole consideration. It does so largely by defining what is considered “violent” for purposes of qualifying as a nonviolent offender. Thus, section 3495, subdivision (a), of the emergency regulations defines an “indeterminately-sentenced nonviolent offender” as an inmate sentenced to an indeterminate term and for whom **none** of the following is true:

- (1) The inmate is condemned to death;
- (2) The inmate is currently incarcerated for a term of life without the possibility of parole;
- (3) The inmate is currently incarcerated for a term of life with the possibility of parole for a “violent felony;”
- (4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for a “violent felony;”
- (5) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a “violent felony;”
- (6) The inmate is currently sentenced to a “violent felony” for an in-prison offense; or
- (7) The inmate has completed an indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense.

A “violent felony” is a crime or enhancement as defined in Penal Code section 667.5, subdivision (c). (Section 3495, subd. (b).) Although not expressly characterized as a violent felony, the emergency regulations still provide that nonviolent inmates who were convicted of sexual offenses that currently or will require registration as a sex offender under the Sex Offender Registration Act are not eligible for parole consideration. (Section 3491, subd. (b)(3).)

Impact

Apart from impacting as many as 4,000 nonviolent third strikers, Michael Romano, Director of the Three Strikes and Justice Advocacy Projects at Stanford Law School has described the Second District Court of Appeal decision driving the emergency regulations as “a really big decision.” He noted that it was “the culmination of years of litigation against

the country's most aggressive third-strike sentencing policy." Romano believes it will help relieve California's overcrowded prisons and improve public safety. Those eligible include many who committed petty crimes as minors, like one of Romano's clients, who is serving a life sentence for shoplifting a bottle of shampoo. Romano noted: "I think it's continuing to retell the story about three strikers." (<https://law.stanford.edu/press/california-will-offer-parole-for-4000-three-strike-prisoners-facing-life-sentences/>)