

AN OVERVIEW OF PAROLE
AND THE BOARD OF PRISON TERMS
IN CALIFORNIA

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[§ 1] Introduction

This Article is designed to assist criminal law practitioners with the most common post-conviction problems relating to parole. For a more detailed coverage of this area of the law, see the California State Prisoners' Handbook. It may be purchased by contacting the Prisoners' Rights Union, 1909 6th Street, Sacramento, CA 95814, (916) 441-4214.

Indispensable to any library on this subject is Title 15, California Code of Regulations. It may be purchased by contacting Barclays Law Publishers, P.O. box 3066, San Francisco, CA 94080, telephone number (415) 244-6611. Periodically, the Board of Prison Terms (BPT), publishes administrative bulletins and issues minutes of meetings. They may be obtained from the Executive Officer, Board of Prison Terms (BPT), Sacramento, CA 95814, (916) 445-4071. The Department of Corrections (CDC) also publishes administrative bulletins. Counsel may request to be placed on the mailing list by writing Department of Corrections, R.A. Spindler, Regulation and Policy Management Branch, P.O. Box 942883, Sacramento, CA 94283, telephone number (916) 327-4270. CDC maintains an operations manual which is not published in accordance with the Administrative Procedure Act. (Govt. Code, § 611180; Amer. Friends Service Com. v. Proconier (1973) 33 Cal.App.3d 252.) It is available for public inspection at any prison or parole office.

The Board of Prison Terms has an in-house counsel who may be contacted at (916) 322-6729. The Department of Corrections has an in-house counsel relating to parole revocation matters who may be contacted at (916) 324-1924. The in-house counsel for the Department of Correction with respect to other matters is at (916) 445-0495.

[§ 2] Overview of Parole

As a result of the Determinate Sentence Law (DSL), most prisoners now serve determinate or fixed terms. Consequently, the role of the lawyer in post-conviction problems has greatly diminished. With respect to determinately sentenced prisoners, an attorney can assist a prisoner with respect to credit loss under (Pen. Code, § 2930), et seq. Counsel can also file administrative appeals on behalf of prisoners. See (15 Cal. Code Regs., § 3084) for any issue relating to the Department of Corrections (CDC and the Board of Prison

Terms (BPT). See 15 Cal. Code Regs., § 2050 et seq and 3084. Counsel can also assist with respect to recall of sentence under Penal Code section 1170(d) and disparate sentence review under Penal Code section 1170(f). Counsel can assist a prisoner with respect to prison classification. (See 15 Cal. Code Regs., § 3375.) The telephone number to discuss prison classification is (916) 322-2544.

This Article will, therefore, emphasize the concept of parole, in general, since it applies by all to all prisoners. Parole is the transitional legal status of all prisoners upon release from a California prison after serving their sentence. The parolee, though no longer confined in prison, must comply with extensive restrictions imposed on his or her freedom. Parole status includes both determinately sentenced prisoners and prisoners serving a sentence of life with the possibility of parole.

This Article will also discuss parole for life prisoners. This is a more complex problem. It deals with the concept of parole consideration, which is a hearing for the purpose of determining parole suitability and appropriate punishment if the prisoner is found suitable for release. Related to this subject is parole rescission; this a hearing to determine if a parole date which has set, but the prisoner has not yet been released parole, should be rescinded. Parole for life prisoners is under the jurisdiction of the Board of Prison Terms (BPT).

This will also discuss parole revocation which applies to any person who has been released from prison. As a result of recent changes in the law, parole revocation and parole revocation extension for determinately sentence prisoners is under the jurisdiction of CDC, the parole hearing division (PHD) and parole revocation for indeterminately sentenced prisoners remains under the jurisdiction of BPT. (Pen. Code, § 5077)

If counsel requests to be appointed by CDC or BPT to represent prisoners or parolees, he may write to the appropriate agency at the address listed at the beginning of this Article. Attorneys are paid \$23.75 per hour and are requested to spend no more time than six hours on a case due to recent budget cuts. However, counsel has an obligation to do all work necessary to prepare for a hearing in order to properly represent his client. Counsel should request that the agency approve those hours necessary to do proper representation.

[§ 3] What is Parole

Parole is a period of conditional, supervised freedom imposed on all prisoners on their release from prison. Parole provides a testing period for the reintegration of the prisoner into society. (In re Carabes (1983) 144 Cal.App.3d 927, 931-932) while benefitting society by reducing the cost of the correctional process.

(Morrissey v. Brewer (1972) 408 U.S. 471, 477). Although a parolee is no longer confined in prison, a parolee's status during parole requires and permits supervision and surveillance under restrictions that may not be imposed on the public (People v. Burgener (1986) 41 Cal.3d 505, 531).

All prison sentences are followed by a period of parole. However, the CDC may waive parole for good cause as to a determinately sentenced prisoner Penal Code section 3000(a) and b, and the BPT may waive parole for good cause as to an indeterminately sentenced prisoner. (Pen. Code, § 5077).

If an individual is not advised of the parole consequences under Penal Code section 3000, he may move to withdraw his plea. In re Carabes (1983) 144 Cal.App.3d 927, 931. Under certain circumstances, if an individual is not properly advised of the parole consequences, a court may order that the parole period be waived. Carter v. McCarthy (1986) 806 F.2d 1373, 1377.

[§ 4] Differences Between Parole and Probation

Jurisdiction of parolees and parole process is vested in an administrative agency and administrative law applies. (In re Muszalski (1975) 52 Cal.App.3d 500, 503-508 [the exhaustion of administrative remedies is required for review of parole decisions]). In contrast, probation involves judicial action and probation revocation requires a judicial determination of probable cause whereas parole revocation does not (People v. Coleman (1975) 13 Cal.3d 867, 895).

Precedents from probation cases may not apply to parole case (Prison Law Office v. Koenig (1986) 186 Cal.App.3d 560, 566-567; contra, see Lucido v. The Superior Court of Mendocino County (1990) 51 Cal.3d 335, 345 [holding that collateral estoppel did not bar prosecution after a favorable decision in a probation revocation hearing and suggesting that the rule also apply to parole revocation hearings]).

Parole searches require reasonable suspicion (Burgener, *supra* p. 534-536). Probation searches do not (People v. Bravo (1987) 43 Cal.3d 600, 608 [because unlike the parolee, the probationer has consented to the search as a condition of receiving probation].)

[§ 5] Length of Parole

Currently, determinately sentenced prisoners serve three years of parole that can be extended to four years for misconduct or indefinitely if the parolee absconds from parole supervision (Pen. Code, § 3000(b),

(d)). Life prisoners who are released on parole serve five years of parole except first and second degree murderers who serve life parole reviewable for termination after five years. (Pen. Code, §§ 3000(b), 3000.1(b)). Prisoners on parole for five years may have their parole extended an additional two years for misconduct or indefinitely if they abscond. (Pen. Code, §§ 3000(d), 3064).

[§ 6] Conditions

The liberty of a parolee is subject to parole conditions. (Pen. Code, §§ 3052, 3053). Before release on parole, a prisoner is notified by (CDC) of the conditions that apply to his or her release and to what county he or she will be released. Ordinarily, prisoners are paroled to the county in which the crime occurred (see Pen. Code, § 3003). Any condition imposed or decision where to parole a prisoner may be administratively appealed (see Pen. Code, § 3000(f); see also Pen. Code-, § 3003(b)). Certain conditions of parole (called general conditions), such as not to violate the criminal law and to report to the local parole office, are imposed on all parolees (see 15 CCR § 2512). Other conditions (called special conditions), such as conditions requiring narcotics testing or prohibiting the use of alcohol also may be imposed (see 15 CCR, § 2513). Consent to electronic monitoring devices may be required as a condition of parole, parole reinstatement or in lieu of return to prison notwithstanding any other law (Pen. Code, § 3004).

Where certain fundamental constitutional rights are involved, a parole condition restricting the exercise of those rights is only allowed by the courts to the extent actually necessitated by the legitimate demands of the parole process (Burgener, supra, p. 534 [parole condition allowing random search and seizure still requires "reasonable suspicion"]). A parole condition must be reasonable, meaning it will not be held invalid unless it: (1) has no relationship to the crime of which the offender was convicted; (2) relates to conduct that is not of itself criminal; and (3) requires or forbids conduct that is not reasonably related to future criminality (Burgener, supra p. 533).

[§ 7] Termination of Parole

Obviously, a parolee's parole period terminates after the parolee has served the entire term of parole (see "Length of Parole," supra) or if and when the Agency discharges the parolee from parole for good cause (see Pen. Code, § 3000(a)).

For nonviolent parolees (those whose crimes are not enumerated in Penal Code section 667.5(c)) parole automatically ends at the end of any continuous thirteen month period during their parole under certain circumstances (see Pen. Code, § 3001(a)):

(1) parole has not been revoked or suspended for absconding (see 15 CCR § 2535(b)(4) defining continuous);

(2) the CDC has not recommended their retention on parole; or

(3) CDC or BPT has not acted on that recommendation to retain them within that period. The Agency may not act to retain the parolee on parole unless the parolee is given notice that he or she has been retained on parole. In re Ruzicka (1991) 230 Cal.App.3d 595, 604.

All other parolees remain on parole until the end of their parole period unless CDC or BPT affirmatively act to terminate their parole (see Pen. Code, § 3000).

[§ 8] Administrative Appeal and Judicial Review

A prisoner or parolee may administratively appeal any decision or policy within the CDC. (15 Cal. Code Regs. § 3084 et seq.) The appeal must be submitted on a CDC 602 form which is available to the client. There is a three-level appeal process, with the final level the director's level. The time limits are set forth in 15 Cal. Code Regs. § 3084.6. A denial at the third level constitutes exhaustion of administrative remedies to file a writ of habeas corpus. (In re Muszalski (1975) 52 Cal.App.3d 500.)

An attorney can prepare the administrative appeal by completing the form for the client or by drafting a simple letter which can be attached to the 602 form. The client must submit the appeal to the institution. The attorney may mail the appeal to the third level, director's level. For further information see Chapter 1, California State Prisoners Handbook.

A prisoner or parolee may administratively appeal any decision by the BPT. An attorney may file the appeal directly to the BPT with an authorization signed by the client. (15 Cal. Code Regs. § 2050 et seq.) The appeal may be in the form of a letter. Normally, an appeal must be filed within ninety days of the decision or receipt of the transcript relating to the decision. (§ 2054.) Appeals relating to the denial of an attorney may be expedited. You may want to FAX this appeal. (§§ 2055, 2056.) The denial by the BPT of the appeal constitutes exhaustion of administrative remedies in order to file a writ of habeas corpus. (In re Muzalski, supra.)

Counsel should review the applicable Penal Code section and CDC of BPT rules to determine if there has been compliance by the administrative agency. If there has not been compliance, counsel can assist the client with the filing of an administrative appeal. If the administrative appeal is not granted, counsel can then file a writ of habeas corpus to seek discharge from parole. If there has been a determination of good cause by the appropriate administrative agency, a court will uphold that determination if there is "any evidence." Superintendent v. Hill (1985) 472 U.S. 445. These basic rules apply to any legal issue discussed in this chapter.

[§ 9] Chart: Deadlines

Parole Revocation Hearings

<u>Event</u>	<u>Time</u>	<u>Authority</u>
Violation report	17 days from parole hold	15 CCR § 2640(b)
Parolee advised of rights	24 days from parole hold	15 CCR § 2640 (d)
Parolee requests Attorney	Within 4 days of being advised of rights	15 CCR § 2640(c)
Parolee requests witness & Subpoenas	10 days before hearing	15 CCR § 2466(b)
Present documentary Against the parolee Counsel must Object and this rule will be strictly enforced to the benefit of the parolee.	10 days before hearing	15 CCR § 2030
Media requests to attend hearing 2032	3 working days before	15 CCR §§ 2031
Present documentary at any time, including during hearing		15 CCR § 2249

Hearing must be held within 45 days after placement of parole hold		15 CCR § 2640
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Appeal of decision	90 days after receipt of decision or tape-recording of hearing, if requested, whichever is later	15 CCR 2052(c)
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The state takes the position that the time limits specified do not create a right to have the specified action taken within that limit (15 CCR § 2000(a)(9)). However, in In re Jackson (1987) 43 Cal.3d 501 and In re Davis (1979) 25 Cal.3d 384. The courts have recognized that administrative regulations may meet minimum due process requirements.

Life Parole Hearings

<u>Event</u>	<u>Time</u>	<u>Authority</u>
Prisoner receives notice of week of hearing	1 month before hearing	15 CCR § 2246
Victim/next of kin receive notice of hearing date	30 days before hearing	15 CCR § 2029
Prosecutor receives notice of hearing date	30 days before hearing	15 CCR § 2030(b)
Prosecution notifies CDC of intention to attend	14 days before hearing	15 CCR § 2030(b)
Prisoner or attorney requests review of central file	10 days before week of hearing	15 CCR § 2247

Present documentary evidence against the prisoner. Counsel must object and this rule will be strictly enforced to the benefit of the prisoner	10 days before hearing	15 CCR § 2030 (c)
Present documentary evidence at any time including during hearing		15 CCR § 2249
Media request to attend hearing	3 working days before hearing	15 CCR §§ 2031 and 2032
Appeal of decision	90 days after receipt of decision or transcript whichever is later	15 CCR § 2052(c)

Rescission Hearings

<u>Event</u>	<u>Time</u>	<u>Authority</u>
Notice of hearing	4 days before hearing	15 CCR § 2465
Notice to District Attorney	30 days before hearing	15 CCR § 2466(b)
Prosecutor accepts invitation	14 days before hearing	15 CCR § 2466(b)
Prisoner of attorney may review file	10 days before hearing	15 CCR § 2466(b)
Present documentary evidence against the prisoner. Counsel must object and this rule will be strictly enforced to the benefit of the prisoner	10 days before hearing	15 CCR § 2466(b)
Prisoner request witnesses and sub-	10 days before hearing	15 CCR § 62466(b)

poenas

Present documentary or evidence at any trial, including during hearing		15 CCR § 2249
Media request to attend hearing	3 working days before hearing	15 CCR §§ 2031 and 2032
Appeal of decision	90 days after hearing or receipt of transcript, whichever is later	15 CCR § 2052(c)

[§ 10] Parole Revocation

Once a determinately sentenced prisoner is released from custody on parole or a life prisoner has been granted parole and released from custody, parole can be revoked for cause, including but not limited to violating any general or special condition of parole (People v. Monzo (1973) 44 Cal.App.3d 144, 146-147), absconding from parole, psychiatric deterioration, and failing to sign a parole agreement containing lawfully imposed conditions or parole (15 CCR §§ 2512, 2513, 2646; Pen. Code, § 3060.5; see also Pen. Code § 5077). Revocation of parole can result in the parolee receiving up to one year in prison (Pen. Code, § 3057) and extending the parole period to 48 months, or 84 months, when the parolee is subject to five years of parole. Penal Code section 3057(d) allows a parolee to earn one day credit for each day in prison on a parole revocation period subject to certain restrictions. Parolees on parole for life who have their parole revoked return to the status of life prisoners with annual suitability hearings (see Pen. Code, § 3000.1(d)).

[§ 11] Parole Hold

A parolee may be arrested by his or her parole agent if the agent has probable cause to believe the parolee violated a condition of parole. See Cal. Code of Regs. section 2616. Alternatively, the police may arrest the parolee at the request of the parole agent. People v. Giles (1965) 233

Cal.App.2d 643, 646-648. If a parolee is arrested for an alleged violation of a condition of parole, whether or not it constitutes a new violation of the law, a parole hold will normally be placed against him or her. See §§ 2600-2606. If a parolee hold is placed, there is no right to bail. In re Law (1973) 10 Cal.3d 21, 23-26.

Counsel may contact the parole agent to request that a parole hold be dropped. If this is unsuccessful, an administrative appeal may be filed to the CDC. If the alleged violation is a technical one, as apposed to a new violation of law, counsel is more likely to be successfully in challenging the placement of the parole hold.

[§ 12] The Parolee's New Case

If the basis for the alleged violation of parole also constitutes a new violation of law, counsel on the new case should be aware of the parole revocation process. For example, the parole hold must be lifted if the parolee is no longer on parole or if the maximum period of commitment for the parole violations, one year, has run. The parolee may request that his parole revocation hearing be held after the completion of the new criminal prosecution. This is called an optional waiver. See 15 CCR § 2641.

There may be an advantage to requesting that the parole revocation hearing go forward before the new criminal prosecution. Under those circumstances, witnesses may be subpoenaed and cross-examined at the revocation hearing. There is a tape recording of the revocation hearing, which counsel may obtain by having the client execute a written authorization to CDC or BPT to release the tape recording to counsel.

If the revocation hearing precedes the trial on the new offense, the client's prior testimony at the revocation hearing probably may not be used against him in the subsequent trial other than for impeachment purposes. See People v. Coleman (1975) 13 Cal.3d 867, 889. Coleman relates to a probation revocation hearing. There is no California case directly dealing with parole revocation hearing testimony.

Credit for time served with respect to the new criminal case must be analyzed carefully. Time served for a parole violation is not a sentence within the meaning of (Pen. Code, § 1170). See

generally, In re Joyner (1989) 48 Cal.3d 348; People v. Adrian (1987) 191 Cal.App.3d 868, 882; In re Attiles (1983) 33 Cal.3d 805; People v. Penner (1980) 111 Cal.App.3d 168.

Any parole revocation term is usually discharged if the release date for the new commitment is later than the revocation release date. See Cal. Code of Regs. § 2649 or 3901.21.17.

[§ 13] Revocation Screening Calendar

CDC and BPT have administratively created a parole revocation screening calendar. See Administrative bulletins 82/9, 85/6, 87/1, 87/3 and § 2742. Basically after a parolee has been in custody for approximately three weeks, a deputy commissioner meets with him at the jail or prison to make an offer or a plea bargain. If the offer is accepted, the parolee then waives his right to a parole revocation hearing. Normally, the offer would be shorter than that which the parolee might receive if he were violated at a revocation hearing unless the conduct involved in the charge is extremely serious.

[§ 14] Introduction to Parole Revocation Hearing Process

Morrissey v. Brewer (1972) 408 U.S. 471 is the landmark case that extended due process protections to parolees charged with violations of parole. Morrissey held that there must be a prerevocation hearing held at or near the place of the alleged parole violation, as promptly as convenient, while information is fresh and sources are available. If probable cause is found, a final revocation hearing must be held within a reasonable time, the court suggested 60 days, to determine whether or not parole is to be revoked. At both hearings, parolees are entitled to the following procedural protections:

1. Written notice of alleged violations;
2. Disclosure of evidence against the parolee;
3. Unless incarcerated in another jurisdiction, the right to be present In re Shapiro (1975) 14 Cal.3d 711;
4. To present documentary evidence and witnesses;

5. To confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause to not allow confrontation;
6. To receive a written statement of the evidence relied on and the reasons for revocation of parole.

**[§ 15] Administrative rights of the
parolee at the revocation hearing**

- (1) To receive notification of the charges and the supporting evidence including police, arrest, crime reports, and child abuse reports (Pen. Code, § 3063.5; 15 CCR § 2643(b));
- (2) To receive notice of the week of the hearing at least one month before the hearing (15 CCR § 2246) and to receive notice of the date of the hearing at least 4 days before the hearing (15 CCR § 2463(e));
- (3) To review nonconfidential documents in the central file and enter a written response to any material in the file ((15 CCR § 2247);
- (4) To be present, speak, and ask, answer questions (15 CCR § 2247);
- (5) To present documents (15 CCR § 2249);
- (6) To have an impartial hearing panel (15 CCR § 2250);
- (7) To have an interpreter, if necessary (15 CCR § 2251);
- (8) To receive, upon request, a tape of the hearing (15 CCR § 2254);
- (9) To receive a written statement of the decision (15k CCR 2255);
- (10) To request a continuance where there is insufficient time to prepare (15 CCR § 2253);
- (11) To request counsel (15 CCR § 2643(c));
- (12) To request that witnesses be present and subpoenaed (15 CCR § 2643(d))

[§ 16] Prevocation Hearing

Although Morrissey establishes the right to a prevocation hearing, California law has evolved into a unitary hearing practice. If there are pending criminal charges, the parolee is served with

a written notice that a felony preliminary hearing or a misdemeanor trial will serve as a substitute for the prerevocation hearing In re Law (1973) 10 Cal.3d 21, 27. Query, what is the impact on this procedure in light of Proposition 115 and its change in the lack of procedural protections afforded. A defendant at a felony preliminary hearing. Normally, a prerevocation hearing is now held only if a parolee is alleged to have committed a serious violation of parole within 30 days of his maximum discharge date (15 CCR § 2644(a); In re Beches (1975) 48 Cal.App.3d 288, 294-295). The failure to provide a prerevocation hearing has no consequence absent a showing of prejudice. In re Valrie (1974) 12 Cal.3d 139, 144-145; In re La Croix (1974) 12 Cal.3d 146.

[§ 17] Parole revocation extension

A parolee in custody on a parole violation may also have his or her revocation period extended if he or she engages in misconduct while in custody. This involves a hearing called a parole revocation extension hearing (see 15 CCR § 2742). The hearing rights and procedures are the same as those at a parole revocation hearing (15 CCR § 2742(i)); however, the period by which the revocation period may be extended depends on the conduct. For each act of misconduct punishable as a felony the revocation period may be extended for up to 180 days (Pen. Code, § 3057(c)). For each act of misconduct punishable as a misdemeanor the revocation period may be extended for up to 90 days (Pen. Code, § 3057(c)). For each act of misconduct punishable only as a serious disciplinary infraction (see 15 CCR §§ 3313, 3315) the revocation period may be extended for up to 30 days (Pen. Code, § 3057(c)). The extended period of return to custody may be reduced by credits if the parolee is eligible to earn them (see Pen. Code, § 3057(d)).

[§ 18] Prehearing Procedures

The parole agent is charged with the investigation of all parole violations. 15 CCR section 2617. It is his responsibility to prepare the parole violation report and any supplemental report. 15 CCR section 2619. If CDC or the BPT recommends that the parolee be scheduled for revocation proceedings, it is the responsibility of the District Hearing Agent (DHA) to make certain that the prehearing procedures are followed. The DHA shall serve a parolee with the violation report, notification of his rights, requests for witnesses evidence, and attorney determination. 15 CCR section

2638-40, 2642. The DHA will then make the attorney determination as required in § 19. The DHA will also determine which witnesses or what documents will be subpoenaed as required in § 21 and 22. Counsel should contact the DHA to demonstrate why counsel should be approved and why witnesses must be subpoenaed. Since the DHA has little contact with private counsel, it is important to follow up with personal contact to assure that the parolee's rights are properly protected.

[§ 19] Representation by Counsel

Parolees do not have an absolute right to be represented by counsel, either retained or appointed, at a revocation hearing. According to Gagnon v. Scarpelli (1973) 411 U.S. 778, due process provides a conditional right to counsel, which must be made on a case-by-case determination.

Gagnon at 790 provides:

"[P]resumptively, it may be said that counsel should be provided in cases, where, after being informed on his right to request counsel, the probationer or parolee makes such a request based on a timely claim: (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there is substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer or parolee appears to be capable of speaking effectively for himself." See also section 2691-2694.

In In re Love (1974) 11 Cal.3d 179, 190-196 the Supreme Court followed the Gagnon case-by-case determination of counsel at revocation hearing and rejected an absolute requirement of counsel. At 186, n6, the court defined where counsel should "presumptively" be appointed under Gagnon. "[P]etitioner has denied the commission of the alleged violations. He has attempted to cross-examine adverse witnesses and obtain relevant documents. He has attempted to present a defense, and has tried to obtain witnesses who would testify in his favor."

In Gee v. Brown (1975) 14 Cal.3d 142, 146 the Supreme Court recognized that there is a presumptive right to counsel where petitioner denied a controverted charge and was of low intelligence level.

Counsel should make every effort to be retained prior to the attorney determination made by the DHA, so he can prepare the responses to the form used to determine if counsel will be approved and advise the parolee. Counsel should request friendly and adverse witnesses, deny guilt as to charges, suggest mitigating circumstances and explain the inability of the parolee to represent himself, so the Gagnon test will be satisfied. If counsel is denied, this may be immediately appealed by telephone to Sacramento. See 15 CCR §§ 2055 and 2701. If you are not permitted to personally make the telephone appeal, counsel should prepare a written appeal and Fax it to Sacramento specifying the basis of the claim for counsel. The denial of counsel may again be raised by the parolee at the revocation hearing. If parole is subsequently revoked, the denial of counsel can then be the basis for a petition for writ of habeas corpus. Courts look favorably to a due process challenge based on a denial of counsel.

[§ 20] Disclosure of Evidence

A parolee has the right to disclosure of all evidence that is to be used against him. Morrissey, supra, Penal Code sections 3063.5, and 2643. The parolee shall receive copies of the parole violation report, supplemental reports, any arrest of crime reports and any evidence unless initially designated confidential by CDC. If anything is determined to be confidential, CDC must provide counsel with a form 1030, which designates what is confidential and why it has remained confidential. This may be administratively appealed. See section 3084. The rules relating to disclosure of confidential information are set forth in section 3321. In re Jackson (1987) 43 Cal.3d 501; Zimmerlee v. Keene (9th Cir. 1987) 831 F.2d 183, 186; Cato v. Rushen (9th Cir. 1987) 824 F.2d 703, 705. If there is confidential information, such as an informant who might be exposed to undue risk of harm, it will not be disclosed. However, the reliability of confidential information must be established by the hearing panel. See section 2235 (In re Prewitt (1973) 8 Cal.3d 470; In re Love, supra, at 185.

In order to properly prepare a revocation hearing, counsel should review the parolee's central file, the parole agent's field file, and the medical file, if necessary. Each parole agent maintains a file which contain his notes of all actions, such as interviews with witnesses.

Counsel must vigorously assert his right to discovery of all evidence, including the preparation of an administrative appeal to CDC prior to the hearing.

[§ 21] The Right to Present Evidence

The parolee has the right to present evidence in his own behalf by way of friendly witnesses or declaration. Morrissey, *supra*. In re Carroll (1978) 80 Cal.App.3d 22, 34-35. The state has the power to issue subpoenas for witnesses or for evidence. See (Govt. Code, § 11180) et seq; 15 CCR § 2677, and subpoenas should be requested for critical friendly witnesses.

If the parolee is denied the right to present evidence, an objection should be made. Since the hearings are informal, the evidence should be offered in whatever from available. Any violation of the right to present evidence may be raised by administrative appeal and in a petition for writ of habeas corpus.

[§ 22] The Right to Confront and Cross-Examine Adverse Witnesses

The parolee has the right to confront and cross-examine adverse witnesses. This may include the parole agent who wrote the violation report. See People v. Calais (1974) 37 Cal.App.3d 898; People v. Santanelles (1989) 216 Cal.App.3d 998; In re Wollendes (1974) 37 Cal.App.3d 967, 973. If there is good cause to deny confrontation, due process may not be violated. In re Carroll, *supra*, 35-36.

Even if the hearing officer states it does not rely upon certain information provided by an adverse witness, all such evidence must be made available to the parolee as it may exculpatory. See In re Love, *supra*, 184-185.

The decision to subpoena adverse witnesses is a tactical one. However, it must be remembered that the adverse evidence is already contained in a report which may be considered by the

hearing officer. Thus, subpoenas should normally be requested in order to protect the issue for appeal. In addition, if the adverse witness is subject to cross-examination, his testimony may be weakened, and the record may be used for impeachment in a subsequent criminal proceeding.

Any denial of confrontation must be objected to. It may then be administratively appealed or challenged in court.

[§ 23] Continuance

A continuance may be requested on any ground, including insufficient time to prepare for the hearing. This may be made to the DHA, Sacramento to CDC or BPT, and to the hearing officer. See 15 CCR § 2245, 2253.

[§ 24] Rules of Evidence

Basically, all relevant evidence is admissible, even if it would be hearsay, illegally obtained, or a voluntary confession obtained in violation of Miranda. See 15 CCR section 2665. In re Carroll, *supra*, at 30; In re Martinez (1971) Cal.3d 641, 649-652; In re Love, *supra*, at 190. Evidence suppressed in the criminal proceeding is admissible unless the method shocks the conscience. In re Douglass (1988) 206 Cal.App.3d 866.

Physical evidence is ordinarily not brought to the hearing unless there is no other means to present the evidence. Section 2667.

[§ 25] Standard of Proof

The standard of proof is preponderance of evidence. Even if a criminal case is dismissed or there is an acquittal, the hearing officer may still find good cause. See In re Dunham (1976) 16 Cal.3d 63, 66.

[§ 26] Record of the Hearing

The parolee must be afforded the written statement of the evidence relied on and the reasons for revoking parole. A tape recording of the hearing is made and will be provided upon request. 15 CCR section 2254. People v. Vickers (1973) 8 Cal.3d 451, 458.

[§ 27] The Right to a Timely Revocation Hearing

Morrissey, *supra*, at 488 suggested that hearing held within 60 days would not appear to be unreasonable. This issue was analyzed in the companion cases of In re LaCroix (1974) 12 Cal.3d 146 and In re Valrie (1974) 12 Cal.3d 139. The test established by LaCroix and Valrie is one of reasonableness based upon three consideration:

- 1) Pending criminal proceedings;
- 2) Restraints imposed on a parolee charged with a new crime;
- 3) Prejudice to the parolee.

LaCroix at 156-157 requires the parolee to object to the delay in a revocation hearing. Thus, the attorney should object to delay in writing or at the hearing. Valrie recognized that a parolee may be released if he is not afforded a timely revocation hearing. However, this does not mean that the CDC of BPT cannot again charge the parolee with parole violations based on the identical course of conduct. Valrie, *supra*, at 144-145.

CDC and BPT require the hearing to be held within 45 days. Thus, if the hearing is not held within this period of time, it may be appropriate to challenge the delay in court. However, the parolee may then be required to then prove prejudice. Prejudice may be established by any means, such as lack of availability of adverse or friendly witnesses or loss of memory.

[§ 28] Parolee Who Has Absconded to Another Jurisdiction

If a parolee absconds to another jurisdiction, he may be arrested in another state and facing criminal charges. The parolee is still entitled to a prompt revocation hearing which may be conducted in absentia. In re Shapiro (1975) 14 Cal.3d 711, 723. Under these circumstances, the parolee may wish to waive his right to revocation hearing, so that he may begin to immediately serve time on the parole violation. See 15 CCR § 2731.

[§ 29] Length of Parole Revocation Hearing

Violation Period, Work Time Credits

If the commitment offense occurred after January 1, 1979, the maximum parole revocation term is one year. (Pen. Code, § 3057). For certain prisoners, effective September 30, 1987, parole violators may receive work credits against the parole revocation term to reduce the violation period to six months. See Penal Code §§ 3057 and 2931, 2933; 15 CCR §§ 2743 and 2744. If a parolee who earns work term credits loses them as a result of rules violations, he is not entitled to restoration. Section 3057d. Counsel should carefully review the statute to determine if his client is afforded all credits under the law.

[§ 30] Parole Revocation Hearing Procedure

Parole revocation hearings are divided into two parts. The first part is the evidentiary hearing, where evidence concerning the charges is presented. The second part is the disposition hearing, where evidence relating to mitigation is presented. The hearing is conducted by one hearing officer. Normally, the hearing officer is not an attorney. He will be generally familiar with the concept of due process. However if counsel has specific case law to present, he should copy it and present it to the hearing officer.

At the commencement of the hearing, all legal objections should be made. The hearing officer will normally determine the order of witness, unless counsel makes a specific request. Thus, counsel should request witnesses be called in the order he desires. The hearing officer will ask the witness to testify in narrative, unless counsel makes a demand to commence the examination

by question and answer. Obviously, this later form is preferable, so counsel can control the testimony of the witness.

It is important to remember that all adverse evidence must be submitted 10 days in advance of the hearing. 15 CCR § 2030(c). Police officer witnesses will often attempt to present new adverse evidence not contained in a report. Counsel should make an immediate objection, and the rule will be strictly enforced to the benefit of the parolee.

Since the hearing is informal, counsel should interject any appropriate statement or comments. At the first part of the hearing, no evidence relating to the parolee's character is presented. If good cause is found, there is a disposition hearing. The panel may find no violation or dismiss the charge. 15 CCR § 2646. At the disposition hearing, normally evidence should be presented in written form. 15 CCR § 2668(b)(1). However, counsel may present witnesses from the community relating to reasons why the parolee should not be returned to prison. Evidence mitigating or justifying the charges may also be presented.

If the hearing is a psychiatric return, counsel should request that any psychiatrist or psychologist that has adverse information be subpoenaed. Counsel should also determine if there has, in fact, been a violation of a condition of parole. If there is no violation of a condition of parole, counsel must contend that CDC or BPT does not have the power to return the parolee to custody. See In re Rodriguez (1975) 14 Cal.3d 639, n. 16.

If a parolee is ordered returned to prison for up to one year, an administrative appeal may be filed. The attorney may file the appeal, but it must be accompanied by a written authorization, signed by the parolee. (15 CCR §§ 2050-2052).

[§ 31] Judicial Review

After administrative remedies have been exhausted, habeas corpus is the proper vehicle for challenging revocation proceedings. If the challenge is based on the lack of evidence, the courts will normally not review the question of good cause if there is some evidence to support the hearing officer determination. See Superintendent v. Hill (1985) 472 U.S. 445; In re Powell (1988) 45 Cal.App.3d

894. Prior to Hill, the standard of review was, if the board acted "without information, fraudulently, or on mere personal caprice," In re Spence (1974) 36 Cal.App.3d 636, 640.

However, if the challenge to the revocation proceedings is based upon a violation of due process, the court will normally order a new hearing.

Another remedy is to terminate the parole hold. Under those circumstances, the CDC of BPT may hold a new hearing. See In re Valrie (1974) 12 Cal.3d 139-144.

If the legal challenge relates to the denial of counsel, it may be appropriate to bring a writ prior to the revocation hearing in order to require the agency to permit the parolee to be represented by counsel. If a proper record has been made to support a claim for counsel under the Gagnon test, such a writ may be successful.

[§ 32] DETERMINING PAROLE FOR INDETERMINATELY SENTENCED PRISONERS ("LIFER HEARINGS")

Life Parole Consideration Hearing Overview

Determinately sentenced prisoners must be released on parole at the end of their term. There are certain crimes which still carry an indeterminate life sentence, such as first degree murder without a special circumstance, attempted first degree murder, conspiracy to commit first degree murder, second degree murder, kidnapping, and certain repeat offenses. Penal Code section 182, 190, 190.05, 209, 217.1, 664, 667.51, 667.7. Indeterminately sentenced prisoners are entitled to periodic parole hearings. Penal Code section 3040 et seq establishes the framework for life parole consideration hearings. These hearings are all under the jurisdiction of the BPT.

Prior to the initial parole consideration hearings, the BPT conducts documentation hearings to make recommendations regarding prison programs, with one deputy commissioner. (Pen. Code, § 3041a, 2269(c).) These hearings are held at three-year intervals, until the initial parole consideration hearing. The prisoner is not entitled to counsel at a documentation hearing. Counsel should review the documentation hearing decisions to determine if the prisoner has met the recommendations. If the prisoner has, these accomplishments may be incorporate into an argument to support parole suitability.

The initial parole consideration hearing is held one year before the Minimum Eligible Parole Date (MEPD). At the hearing, the board must set a release date unless it determines that certain requisite findings have not been made under Penal Code section 3041b. The statute may give rise to presumptive right to a parole release date and a state-created right to certain minimum procedural due process protections. See Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S 1; Montana Board of Pardons v. Allen (1987) 482 U.S. 369. Those legal issues have not yet been addressed by California Courts. In re Dayan (1991) 231 Cal.App.3d 184.

At the lifer hearing, the board determines if the prisoner is suitable for release. If he is found suitable, the BPT will set the length of confinement and a release date. BPT has developed lengthy regulations to implement Penal Code section 3041, see generally 15 CCR sections 2232-38, 2245-2273, 2280-2292, 2400-2411, 2420-2429.1, or 2430-2439.1. These regulations are attached as Appendix A.

If denied suitability, the next hearing may be scheduled in one year or two years, if the BPT finds that it is not reasonable to expect parole will be granted in the subsequent year and states reasons, or in three years or five years if the prisoner has been convicted of more than one offense involving the taking of a life, and the BPT makes the same findings as with two-year denial. See In re Jackson (1985) 30 Cal.3d 464 and Watson v. Estelle (9th Cir. 1989) 886 F.2d 1093 for an ex post facto evaluation of Penal Code section 341.5(b)(2) is amended.

If a parole date has been granted, the governor, within time frames specified by law, may request the board to review the decision or may modify the decision. See Penal Code 3041.1 and 3041.2, Article 5, section 8; In re Johnson (1992) 8 Cal.App.4th 618 and In re Attiles (1992) 6 Cal.App.3d 1467. The governor's power will be examined in more detail during the discussion of parole rescission hearings.

If a prisoner is found suitable for parole, a term will be set. There will be subsequent progress hearings at which the BPT may advance the previously set parole date based upon in-prison work or behavior. See section 2269, In re Stanley (1974) 54 Cal.App.3d 1030.

[§ 33] Minimum Eligible Parole Date

The life prisoner is entitled to his first lifer hearing one year before his MEPD. Penal Code section 3041.a. For those prisoners who committed life crimes prior to the Briggs initiative enacted on November 8, 1978, the MEPD is seven years. Penal Code § 3046. For those convicted of first degree murder for crimes committed on or after November 8, 1978, the penalty is 25 years to life, and for second degree murder, 15 to life. Generally, the minimum eligible parole date, MEPD, 15 years or 25 years can be reduced by one third for good behavior. (Pen. Code, § 190.) Thus, for first degree murder, the first lifer hearing would be held after 15 2/3 years, and for second degree murder, the first lifer hearing would be held after 9 years.

However, for prisoners incarcerated prior to April 1987, certain may be eligible to have the MEPD reduced by one half for worktime credits under Penal Code section 2933 for the period from 1983 to 1987. See In re Monigold (1988) 205 Cal.App.3d 1224; In re Oluwa (1989) 207 Cal.App.4th 439.

Lifers sentenced under Penal Code section 217.1, 667.51, and 667.7 may reduce the MEPD by one half as a result of work time credits based upon equal protection principles. (But see In re Singer (1993) 13 Cal.App.4th 1755.)

A life prisoner, who also receives a consecutive determinate sentence, serves the determinate term first under Penal Code section 669. However, if the prisoner receives a consecutive determinate term while serving a life term for a crime committed in prison, the determinate term does not interrupt the life term that is being served. The consecutive determinate term is served after the life term is completed. In re Thompson (1985) 172 Cal.App.3d 256. A prisoner is eligible to earn work time credits while serving a determinate sentence consecutive to a life sentence. (In re Monigold (1983) 139 Cal.3d 485.)

[§ 34] Right to Representation by Counsel; Goals

Life prisoners have the right to be represented by counsel at all lifer hearings, so an attorney will be provided at state expense if the prisoner cannot afford one. (Section 3041.7) In re

Jackson (1985) 30 Cal.3d 464. Generally, if a prisoner has more than \$1,500 in a bank account, he will not be deemed indigent. (Section 2256.)

Obviously, the primary goal is to convince the BPT that the prisoner is suitable for parole and present a cogent argument for the earliest possible release date. In the alternative, an argument should be made why parole should be denied for only one year. Finally, all appropriate objections must be made in order to preserve the case for judicial review.

The initial parole hearing is particularly important since the statement of facts with respect to the commitment offense is established. Thus, counsel must object to any aspects of the statement of facts that is not accurate. In that regard, counsel must carefully review all materials in order to make certain the statement of the case is accurate. The trial transcript would be the most accurate document, if it is available. Counsel can present a summary of the case in written form in advance of the hearing with reference to pages from the reporter's transcript. If there were not a trial, or if the trial transcript is not available, the appellate court opinion may be utilized or portions of the appellate briefs. The BPT normally relies on the probation officer's report, which may not be accurate since it is normally obtained from police reports or the district attorney's file. The BPT has an obligation to make its determination based on accurate information. See Monroe v. Thigpen (1991 11th Cir.) 932 F.2d 1437; In re Olson (1974) 37 Cal.App.3d 782. Counsel may want to present a written brief in support of suitability. Three copies should be provided to the institutional coordinator, so the panel will review it as part of the board packet.

[§ 35] Materials Received from the BPT

At each institution, there is a coordinator of lifer hearings. The lifer hearing addendum or board addenda will be prepared by the lifer hearing coordinator and mailed to the attorney in advance of the hearing. The packet will contain the cumulative case summary prepared by the CDC at the reception center, legal documents, notices sent and received from law enforcement and the court, psychiatric reports, board reports prepared by the counselor and other information relating to institutional behavior. See Penal Code section 3042 relating to notices.

Since the board addenda will not provide counsel with all necessary information, he has an obligation to review the prisoner's central file. He has a right to do this at least ten days before the hearing. (15 CCR § 2247; Pen. Code, § 3041.5; In re Olsen (1974) 37 Cal.App.3d 782.) You are entitled to obtain copies of any materials from the central file, except that which is confidential. See section 20, *infra*. In particular, you should copy documents which demonstrate good behavior and rules violation reports, (CDC 115s rule violation reports) and any other supporting information so that you can adequately prepare for the hearing and provide the necessary representation at the hearing.

[§ 36] Who may attend the hearing or submit materials

To represent the interest of the people, a representative of the District Attorney's office (not necessarily an attorney) from the county of commitment must be invited and may attend and participate in the hearing (Pen. Code, § 3041.7) If the prosecutor is to attend, the prisoner must be notified. (15 CCR § 2030(b)) With the Board's permission, media representatives may attend but may not participate in the hearing (15 CCR §§ 2031, 2032). The victim or the next of kin of a victim who has died, upon request, must receive notice of the hearing (Pen. Code, § 3043). The victim, next of kin, or two members of the victim's immediate family may appear personally or by counsel and express their views. The victim or next of kin also may bring other person for support who may not participate in the hearing (Pen. Code, § 3043.1). Other persons, including additional immediate members of the victim's family, may attend the hearing with prior permission from the Board (15 CCR § 2029; Pen. Code, § 3043). any person interested in the grant or denial of parole may submit a statement of that person's views supporting or opposing parole and that statement must be considered by the hearing panel. The statement may be written, audio-taped or video-taped (Pen. Code, §§ 3043.2, 3043.5(b)). Counsel should review these rules and object to any violation. Counsel should argue that since the victim or next of kin may present testimony, the prisoner should have the same right.

If counsel deems it important that a witness be presented, there is no statutory or administrative rule precluding the presentation of witnesses. However, it is the normal practice of the BPT to not permit the attendance of witnesses. Counsel may deem it important that he question a psychiatrist that prepared a report. Again, this is normally not permitted. However, since the

psychiatrist may quote verbatim the prisoner in his report and there is no verbatim record of the interview, counsel may request the right to examine the psychiatrist and request a subpoena under In re Carroll, supra.

The District Attorney must submit any documentary evidence not contained in the central file 10 days in advance of the hearing. Section 2030(c), this rule will be strictly enforced to the benefit of the prisoner, so counsel must make an appropriate objection. It is common that the District Attorney may argue evidence that is not contained in the central file, so counsel must be familiar with what is contained in the board packet and central file.

The prisoner or his attorney may submit any documentary evidence deemed appropriate at the hearing without advance notice. (See 15 CCR section 2249).

[§ 37] Hearing rights at life parole consideration hearing

Life prisoners prior to and at the parole suitability hearings required by Penal Code sections 3041 and 3041.5 have the following rights:

- (1) To receive notice of the week of the hearing at least one month before the hearing (15 CCR § 2246);
- (2) To review nonconfidential documents in the prisoner's central file and file a written response to any material in the file (15 CCR § 2247);
- (3) To be present, speak, and ask answer questions (15 CCR § 2247) and to not admit guilt concerning the commitment offense (Pen. Code, § 5011);
- (4) To be represented by an attorney (Pen. Code, § 3041.7);
- (5) To present documents (15 CCR § 2249);
- (6) To appear before an impartial hearing panel (15 CCR § 2250);
- (7) To an interpreter, if necessary (15 CCR § 2251);
- (8) To receive, upon request, a copy of the transcript of the hearing (Pen. Code, § 3041.5(a)(4));

- (9) To receive a written statement of the decision (15 CCR § 2255);
- (10) If confidential information affected a decision, to be notified of reports containing confidential information on which the panel relied (15 CCR § 2235); and,
- (11) To request a continuance on any grounds (15 CCR § 2253).

[§ 38] The Prisoner's Version of the Commitment Offense

At the hearing, the BPT will discuss the facts of the crime with the prisoner, however, he has a right not to be required to admit guilt, and parole may not be denied if he refuses to admit guilt. See Penal Code section 5011, 15 CCR section 2236. If the prisoner does not want to discuss the commitment offense, it would be advisable to submit a written statement regarding the most favorable person of the offense under 15 CCR section 2249. It must be remembered that it is critical that the prisoner remain consistent in the version of the commitment offense that he recounts, since the BPT will normally review transcripts of previous hearings and since false testimony may become an issue at a rescission hearing. If the prisoner elects not to discuss the commitment offense, this makes the role of the lawyer more difficult, since expression of remorse is relevant to the suitability determination. It must be remembered that the BPT accepts the court determination as to culpability for the commitment offense no matter what statement the prisoner makes.

[§ 39] The Lifer Parole Consideration Hearing

Procedure and the Role of Counsel

Presently, the BPT follows the following procedure at a lifer hearing by dividing the hearing into three parts. Initially, counsel may make any legal objections, including bias as to any panel member. The hearing panel is composed of three members. Two of whom must be board members, appointees of the governor. (Pen. Code, § 5075.1). The third panel member is normally a deputy commissioner, who has prior experience in corrections. Counsel should acquaint himself with the background and experience of the board members. Counsel should review previous hearing transcripts to determine if a board member has demonstrated bias.

Next, the hearing panel adopts a statement of facts for the life offense, the prior criminal history and social history of the prisoner. One panel member will conduct the examination of the prisoner in each of three sections.

The second section relates to institutional adjustment. Another panel member will address this area. The panel member will normally rely upon the board report prepared by the counselor, which discusses institutional behavior up to the date of the hearing. Again, the panel member may propose questions to the prisoner relating to institutional adjustment. During this portion of the hearing, all psychiatric reports will also be discussed. CDC 115's, rules violation reports will also be discussed.

The third portion of the hearing relates to parole plans. Another panel member will discuss this area, and he will rely upon the board report.

After the three areas have been discussed by the three different panel members, all panel members will question the prisoner on any subject pertinent to the hearing. Then the prosecutor will be permitted to ask clarifying questions through the board chairman. 15 CCR section 2029(d)(2). The board will then permit counsel for the prisoner to ask the prisoner any questions he deems appropriate.

The representative of the district attorney's office, if any, and the prisoner and the prisoner's counsel then summarize their positions regarding suitability and the term that should be given.

Prior to deliberation, the representative of the victim may make statement. (Pen. Code, § 3043, section 2029(d)(2).) Counsel should request an opportunity to respond to any statement and object to any new information. Finally, the panel adjourns to consider the matter and then returns to announce its decision on suitability. If the panel finds the prisoner suitable for parole they must then set a term.

Prior to the hearing, the attorney should review the prisoners central file.

The attorney should obtain copies of the documentation regarding in-prison accomplishments (completion of the programs and courses; obtaining of a general education, high school or college degree; and attendance at self help groups such as narcotics anonymous and alcoholics anonymous) to present to the hearing panel. Counsel should help the prisoner and his family

formulate and document parole plans including, if possible, job offers. With respect to viable parole plans, it must be remembered that, normally, the prisoner must parole to the county of commitment. (Pen. Code, § 300.O.) If the prisoner does not desire to parole to the county of commitment, counsel should make certain that there are reliable documented parole plans to both counties. This means that counsel should make certain that letters have been submitted to document the place of residence and a job offer. The best procedure would be for counsel to submit these letters in advance of the hearing.

Although the BPT normally does not permit counsel to ask questions until after the three phases of the hearing have been completed, counsel should remember that this is an informal hearing. Counsel should feel free to interpose follow up question to these posed by panel members in order to facilitate the discussion of any subject. Counsel should make any comments he deems appropriate at anytime. It must be remembered that counsel is aware of the information that he wants the prisoner to communicate to the hearing panel to convince the members that he is suitable for parole. In essence, counsel should attempt to retain control of the hearing to the extent possible.

[§ 40] Record of Hearing

Penal Code section 3041.5 requires that a verbatim transcript of the hearing be made. Presently, due to fiscal restraints, the BPT tape records all hearings and has them transcribed. The transcriptions are not normally accurate. If there is a conflict, counsel should obtain a copy of the audiotape. If the transcript does not contain the complete record of the hearing, counsel should request that the prisoner be afforded a new hearing, since he cannot make a legal challenge to the hearing without the verbatim transcript required by the law. See also section 2254. In re Sturn (1974) 11 Cal.3d 298.

[§ 41] Parole Suitability

The BPT has broad discretion to determine who is suitable for parole. The statute mandates that the board shall set a release date unless it determines that the gravity of the current convicted offense or the timing and gravity of the current or past offenses be such that consideration of the public safety requires a more lengthy period of incarceration. Penal code section 3041(b).

Although the statute does not discuss current psychological factors and recent institutional behavior, these factors weigh heavily at the hearing. The BPT regulations offer guidelines for parole suitability. (See 15 CCR section 2281, 2402, 2422, and 2432.) The courts have provided little guidance in this area. See generally In re Seabock (1983) 140 Cal.App.3d 29; In re Stanworth (1983) 33 Cal.3d 176; In re Duarte (1983) 143 Cal.App.3d 943. Counsel should make his presentation at the hearing based on the factors tending to demonstrate suitability as opposed to unsuitability contained in the regulations.

Section 3041 may give rise to a due process presumptive right to a parole release date and a state-created right to certain procedural protections. See Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1; Montana Board of Pardons v. Allen (1987) 482 U.S. 369. California law and administrative regulations may exceed procedural protections guaranteed by the federal constitution.

The Board cannot deny parole without information or base a decision on whim, caprice or rumor. (In re Powell (1988) 45 Cal.3d 894, 901.) Denial of parole may not be the result of a policy decision. (In re Minnis (1972) 7 Cal.3d 639, 649.) However, the denial of parole based on the offense alone may be within the discretion of the Board, if all relevant factors are also considered. (In re Seabock (1983) 140 Cal.App.3d 29, 35-36.)

Some constitutional proscriptions apply to the granting or denial of parole. The proscription against cruel and unusual punishment applies to term of incarceration. (In re Rodriguez (1975) 14 Cal.3d 639, 653-656 [ordering the release after twenty-two years of a mentally retarded prisoner convicted of fondling a six year old girl]). The ex post facto clause applies to parole release guidelines established by the Board. A change in the criteria for deciding the term of incarceration may violate the prohibition against ex post facto laws. (In re Stanworth (1982) 33 Cal.3d 176, 183-188 [holding that life prisoners who committed their offense before July 1, 1977 are entitled to hearings under the parole release guidelines in effect before the date]; see also former Title 15, California Administrative Code, sections 2350-2379 [effective 5/22/76]). The prisoner may not be entitled to an attorney at these hearings required by Stanworth (see In re DeMond (1985) 165 Cal.App.3d 932, 935).

To deny parole, the BPT must find that the public safety requires a more lengthy period of incarceration (see Pen. Code, § 3041(b)). However, it may only make that finding after due

consideration of all relevant factors including but not limited to the gravity and circumstances of the crimes involved (see discussion in In re Seabock, *supra*, p. 40; see also 15 CCR §§ 2281, 2402). Denial of parole is limited to "postponing suitability" and must be periodically reconsidered (Pen. Code, § 3041, 3041.5). The BPT now uses a preprinted form which incorporates its regulations to deny suitability. The panel fills in the blanks with facts from the hearing.

[§ 42] When a Life Prisoner May be Released on Parole

If a majority of the panel members find that the prisoner will not pose an unreasonable risk if released on parole, a parole date must be set. (See Pen. Code, § 3041.)

At the present time, the BPT sets very few parole dates. (See discussion *infra* § 50.)

A decision granting parole may be modified. Any member of a life parole consideration hearing panel that grants parole to a prisoner can request a review of the decision granting parole by the full Board (Pen. Code, § 3041(a)). Within 30 days following the date a proposed grant of parole by a hearing panel becomes effective, if based on a commitment offense of murder, the governor may review the decision (see Pen. Code, § 3041.2; 15 CCR § 2043). Up to 90 days prior to a scheduled parole release date, the governor has the power to request the Board to review a decision concerning the grant or denial of parole. This will result in an en banc hearing of the prisoner's case by the full Board. (Pen. Code, § 3041.1). If the decision has not become final, the board must immediately hold a new hearing. If the decision has become final, the BPT must schedule a parole rescission hearing.

The time frames under these sections allowing the governor to request the BPT to review a decision to grant parole have not been held to be mandatory, since the BPT has the inherent power to reconsider any decision granting parole. See In re Johnson (1992) 8 Cal.App.4th 618. Moreover, these sections granting new powers to the governor to require the BPT to review decisions granting parole have been held not to be ex post facto violations of law. (In re Arafiles (1992) 6 Cal.App.4th 467.)

The prisoner may not actually be released on parole sooner than 60 days from the hearing granting parole. (Pen. Code, § 3042.) Decisions granting parole become final upon release on the prisoner. (In re Bray (1979) 97 Cal.App.3d 506, 511.)

If there has been no request for review or rescission, the requirements for a life prisoner to obtain a release on parole are: (1) the prisoner is found suitable for parole at a life parole consideration hearing; (2) a term is fixed for the life crime; (3) the prisoner has served the term fixed less applicable credits and (4) 60 days has elapsed from the date of the hearing.

[§ 43] Term Determination

Once a prisoner is found suitable, the BPT must fix a term. That term is required to be set in a way that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public (see Pen. Code, § 3041(a)). The BPT has established term set matrices for the major life crimes [see 15 CCR § 2282(b) (pre 11/8/78 first degree murder), 2282(c) (kidnapping), 2403(b) (first degree murder [attempt first degree murder is 1/2 this matrix]), 2403(c) (second degree murder)]. The remaining elements of a "term set" (e.g., aggravating and mitigating factors, weapons, prior prison terms, other offenses) are contained in the applicable "term set" regulations: [either 15 CCR §§ 2280-2292 (crimes prior to 1/1/79 and first degree murders prior to 11/8/78) or 2400-2439.1 (murders subsequent to 11/8/78 and crimes subsequent to 12/31/78)].

Good behavior credits are usually four months per year. (§ 45 infra.)

As a shorthand calculation, counsel can usually determine the actual time that a prisoner will serve in custody by multiplying three quarters times the number of years the BPT will set for the total term. This assumes the prisoner earns good behavior credits for each year in prison. >From this period of incarceration, pre-conviction credits awarded under Penal Code section 2900.5 should be subtracted to the actual period of incarceration. See Appendix A for the BPT rules.

[§ 44] Base Term of Confinement

The BPT has established a matrix for each crime. The matrices establish tri-part terms based on how the crime was committed, the injuries inflicted, and the relationship between the victim and prisoner. Counsel should utilize the record from the case to argue that the prisoner be placed in the lowest range of the matrix. The BPT administers the matrix in a manner similar to which a judge determines a base term under the determinate sentence law; the BPT strictly follows the matrix.

[§ 45] Enhancement

Once the base term is set, an enhancement may be added for the use of a firearm or multiple commitments or prior convictions. (See 15 CCR section 2284-2286, 2405-2407, 2425-2427.) Counsel should review each regulation carefully, so he can argue how best to mitigate the punishment to be imposed. The manner in which the court imposed the sentence will affect the decision of the BPT. Obviously, a consecutive sentence is viewed as most serious, a concurrent sentence is less serious and a stayed sentence is least serious. Counsel should argue that no additional punishment may be added for a stayed sentence. Counsel should carefully study the regulations to determine how each applies to the case. If the BPT erroneously applies its rules, an administrative appeal should be filed.

If an enhancement or prior conviction is not constitutionally valid. This objection should be made. If there is a multiple punishment problem under Penal Code section 654, this objection should be made.

[§ 46] Post Conviction Credit

Normally, a prisoner can earn four months a year for good-time credit for each year spent in prison. A greater amount of postconviction credit can be granted. (See 15 CCR section 2290, 2410.) However, greater credit is normally only given for heroic activity, such as saving a life or finding a gun in prison. Normally, no credit will be given for prisoner who commit rules violations during a particular year. Counsel should be aware of the difference between serious and administrative rules violations. 15 CCR § 3314-3315.

[§ 47] Progress Hearing

When a life prisoner is found suitable and given a projected future release date that is less than 10 months after the hearing, normally no "progress hearing" will be scheduled to consider further time credits for performance, participation, or behavior (see 15 CCR §§ 2290(b), 2410(b), 2269(b)(1)). When the parole date is more than 10 months after the hearing, progress hearings will be scheduled at intervals specified in the regulations to consider granting credits (see 15 CCR § 2269). In

re Stanley (1976) 54 Cal.App.3d 1030 requires the BPT to award these credits. Counsel should request a progress hearing even if the release date is less than 10 months after the hearing.

[§ 48] Lifer Parole Rescission Hearings

Life prisoners who have been found suitable for parole, remain in prison to serve the remainder of the term, may have their previously set parole date postponed or rescinded upon a finding of good cause under California law, In re Fain (1983) 145 Cal.App.3d 540, 545 (Fain III).

At a parole rescission hearing, life prisoners have the same procedural rights as at parole suitability hearings. (See Pen. Code, § 3041.5 and 3041.7.) Due process requires that life prisoners be afforded the same procedural protections afforded parolees at parole revocation hearings. (In re Prewitt (1972) 8 Cal.3d 470; Gee v. Brown (1975) 14 Cal.3d 571.) Thus, California law affords life prisoners certain greater rights, such as an unconditional right to counsel. (Pen. Code, § 3041.7) For a discussion of the rights afforded parolees, see *infra* sections 15-27.

There must be cause for the rescission of parole date but cause may even exist if the board decides, in its discretion, that parole was "improvidently granted" under the circumstances that appeared at the time of the grant, or that may have appeared since (In re Powell, *supra*, p. 902). The most common bases for rescission are listed in 15 CCR § 2451.

In the past, rescission hearings were normally based upon conduct committed by a prisoner subsequent to the setting of a release date. Prisoner officials are required to report to the BPT conduct, which may result in a rescission hearing. (15 CCR section 2451.) There is a detailed list of punishable conduct. In such a case, the format for the hearing would be identical to a parole revocation hearing.

However, section 2451, subsection (c) provides that a rescission also may be based on any new information that indicates that parole should not occur. In such a case, the format for the hearing is evolving by trial and error and as a result of case law. At a rescission hearing, the Board's decision must have a factual basis and may not be based on "whim, caprice, or remorse" (In re Powell, *Ibid.*) the Board's decision must be supported by "some evidence" (In re Powell, *supra*, p. 904.)

Public outrage or a mere political desire that a parole date be rescinded does not constitute good cause. In re Fain (Fain I) (1976) 65 Cal.App.3d 376, 383-384, In re Fain (Fain II) (1983) 139 Cal.App.3d 295, 310. However, a new psychiatric report which suggests that the prisoner may pose an unreasonable risk if released to parole has been upheld as "some credible evidence" to support a good cause finding. (In re Powell, supra, at 902.)

Normally, courts are reluctant to intervene with the process until the BPT has held the parole rescission hearing. (In re Fain (Fain II) (1983) 139 Cal.App.3d 295.

[§ 49] Lifer Parole Prerescission Hearing

A prerescission hearing is required only if the prisoner is scheduled to be released within 20 days. (15 CCR § 2453a). See discussion *infra* § 14. Counsel must demand that the prisoner be afforded such a hearing and utilize it for discovery in order to prepare for the final hearing.

[§ 50] The Role of Counsel at Lifer Parole Rescission Hearings

Like a parole revocation hearing, a rescission hearing is conducted in two parts: a factual; and a dispositional phase. If no good cause is found, the hearing is terminated, and the previously set parole date is re-affirmed.

If good cause is found, there is a disposition phase much like the disposition phase in revocation hearing. The panel may vote not to change the parole date, postpone the parole date, or rescind the parole date.

As to the timeliness of the hearing, please review the discussion *infra* § 27 and 42. Basically, the courts have held that the BPT may reconsider a previously set parole date at anytime, subject to a showing of prejudice by the prisoner. Counsel must object to any delay as a result of a violation of a statute or due process.

Since 1990, due to the enactment of Article 5 section 8 of the California Constitution and Penal Code section 3041.1 and 3041.2, the Governor has ordered a systematic review of every BPT decision to grant a parole date or release a life prisoner. This has caused the BPT to conduct its

own internal review of all such cases. In most of these case, the Governor or the BPT has ordered that a rescission hearing be held.

In these cases, the basis for the rescission is normally not conduct by the prisoner subsequent to the setting of the release date. The board has relied upon section 2451(c) which provides that rescission may occur when "any new information indicates that parole should not occur," such as "information significant to the original grant of parole was fraudulently withheld from the board; or fundamental errors occurred resulting in the improvident granting of a parole date." (See In re Fain (Fain III) (1983) 145 Cal.App.3d 540, 545, 552; In re Powell (1988) 45 Cal.3d 894, 902.)

In cases where the issue is "fundamental errors occurred resulting in the improvident granting of a parole date, the BPT takes the position that notice is provided by a letter from the governor to the board which suggests why the parole date should be rescinded or its own internally-generated decision ordering a rescission hearing. The problem with this notice is that it does not provide where the fundamental error occurred or it does not detail the evidence relied on to justify rescission as required by Morrissey.

In order to defend these new rescission hearings, counsel must prepare meticulously and combine the efforts he would make at a parole revocation hearing and a parole consideration hearing. Depending on the charges, counsel must review the record of the criminal prosecution, the transcripts of all prior parole consideration hearings, including progress hearings, and the prisoner's central file. He must make certain that he has all correspondence generated by the district attorney or local law enforcement officers. If there has been a BPT investigation, he must obtain a copy of the report and the request for the investigation. Counsel must carefully review all decision by the BPT, en banc hearing and miscellaneous decisions, to determine the members involved in these decision to make certain that he receives an impartial hearing panel.

At the rescission hearing, counsel must be careful to make all appropriate, legal objects in order to preserve his record. He must request all necessary friendly or adverse witnesses and request that they be subpoenaed. Again, the principles discussed with respect to parole revocation apply. (See section 22, *infra*.)

If the hearing does not involve conduct committed by the prisoner subsequent to the setting of a parole release date, the BPT may refuse a request for witnesses. Clearly, this is a violation of due process under Morrissey and In re Carroll, supra.

In the hearing where the prisoner has committed no punishable conduct subsequent to the granting of the release date, an interesting, philosophical question is raised: Whether the parole board may change its decision when there is no new information, and the panel that set the release date made a decision that was supported by the evidence. (See In re Fain (Fain II), supra, at 303-311.)

In such cases involving fundamental errors resulting in the improvident setting of a parole release date, the BPT has held a rescission hearing and found no good cause. The board has then scheduled a second rescission hearing and rescinded the parole date. In the second rescission hearing, there was no new evidence that was not available to the previous panel, or should have been available to the previous panel. Courts have not considered any of these issues. This is an area ripe for active litigation. Counsel is urged to be creative and aggressive in the defense of these hearings.

[§ 51] Rights of Life Prisoners at Parole

Rescission Hearings

Life prisoners prior to and at their rescission hearings have the following rights (see also Pen. Code, § 3041.5);

(1) To receive notification of the charges and the supporting evidence unless designated confidential (15 CCR § 2465(a));

(2) To receive notice of the week of the hearing at least one month before the hearing (15 CCR § 2246) and to receive notice of the date of the hearing at least four days before the hearing (15 CCR § 2465(d));

(3) To review nonconfidential documents in the prisoner's central file and enter a written response to any material in the file (15 CCR § 2247);

(4) To be present, speak, and ask and answer questions (15 CCR § 2247);

(5) To be represented by an attorney (Pen. Code, § 3041.7 [if the prisoner is indigent (15 CCR § 2256(c)) the attorney will be provided at state expense]);

- (6) Notification that the prosecutor will attend (15 CCR § 2466(a));
- (7) To present documents (15 CCR § 2249);
- (8) To 10 days notice before the hearing of documents that prosecutor wishes to present (15 CCR § 2466(b));
- (9) To receive a copy of any such documents (15 CCR § 2466(b));
- (10) To an impartial hearing panel (15 CCR § 2250);
- (11) To an interpreter, if necessary (15 CCR § 2251);
- (12) To receive, upon request, a copy of the tape recording of the hearing (Pen. Code, § 3041.5(a)(4), 15 CCR § 2465(e));
- (13) To receive a written statement of the decision. (15 CCR § 2255).
- (14) To request a continuance (15 CCR § 2253);
- (15) To request the presence of both friendly and adverse witnesses (15 CCR § 2465(c)) and subpoenas for witnesses or documents (15 CCR § 2465(c));

[§ 52] Judicial Review

The board's decision must have a factual basis and may not be based on whim, caprice, rumor. The board's decision will be upheld as long as its findings are supported by some evidence. (In re Powell (1988) 45 Cal.3d 894, 902.) Again, if there are procedural due process violations during the course of the hearing, a court may order a new hearing. An administrative appeal must be filed, and then a petition for writ of habeas corpus may be filed.

[§ 53] Mentally Disordered Offender Hearing

Mentally disordered hearings (MDO) are governed by Penal Code sections 2960 and 2966. These provisions relate to the placement of prisoners in a state mental hospital upon release to parole or during the parole period. Counsel must study the applicable code sections carefully. In addition, the minimum procedural protections under Morrissey apply. (15 CCR § 2570 et seq.) The procedures for mentally disordered offender (MDO) hearings are similar to parole revocation

proceedings. The subject will not be further discussed. (People v. Gibson (1988) 204 Cal.App.3d 1425.)

Counsel should follow the advice discussed in the sections relating to parole revocation hearings and assert all available rights at the administrative hearing. If the administrative decision is to order placement in a mental hospital, the parolee is entitled to a judicial hearing with concomitant rights. (Pen. Code § 2972.)

An MDO hearing must be distinguished from a temporary transfer from prison to a mental hospital during the period of incarceration. (See Pen. Code § 2684.)