

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826

**ENDORSED - FILED**

in the office of the Secretary of State  
of the State of California

NOV 10 2015

1:59 PM



DEBRA M. CORNEZ  
Director

Date: November 10, 2015

To: David E. Walker

From: Chapter Two Compliance Unit

Subject: **2015 OAL DETERMINATION NO. 9 (S)**  
**(CTU2015-0911-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 2402(c), Circumstances Tending to Show Unsuitability for Parole.

On September 11, 2015, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether California Code of Regulations, title 15, section 2402(c), Circumstances Tending to Show Unsuitability for Parole, is an underground regulation. The challenged rule is attached hereto at Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250(a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. [Emphasis added.]

The Community Release Board adopted title 15, section 2402, including subdivision (c). It was filed with the Secretary of State on September 8, 1981, effective the thirtieth day thereafter, and was published in the California Code of Regulations (Register 1981, No. 37). Subdivision (c) has not been amended since its initial adoption in 1981.

<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In that California Code of Regulations, title 15, section 2402, subdivision (c) was duly adopted, filed with the Secretary of State and published in the California Code of Regulations pursuant to the APA, it does not meet the definition of an underground regulation.

Your challenge to subdivision (c) of section 2402 of title 15 as an underground regulation is based upon your assertion that it is inconsistent with Penal Code section 3041 (b), which states:

The panel or the board, sitting en banc, shall set a release date 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, and that a parole date, therefore, cannot be fixed at this meeting. After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing. No decision of the parole panel shall be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting.

Penal Code section 3041 is one of the statutory provisions the Community Release Board relied upon for authority and reference in adopting section 2402 of title 15, as is reflected in the history note of section 2402 (see Exhibit A attached).

Government Code section 11343.6 states:

The filing of a certified copy of a regulation or an order of repeal with the Secretary of State raises the rebuttable presumptions that:

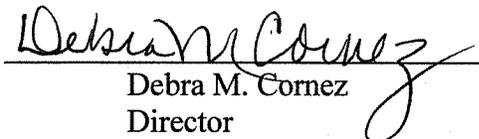
- (a) It was duly adopted.
- (b) It was duly filed and made available for public inspection at the day and hour endorsed on it.
- (c) All requirements of this chapter [the APA] and the regulations of the office relative to such regulation have been complied with.
- (d) The text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

Therefore, section 2402(c) of title 15 is presumed to have been duly adopted and consistent with Penal Code section 3041(b).

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>4</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
Debra M. Cornez  
Director

  
Elizabeth A. Heidig  
Senior Attorney

Copy: Jennifer Shaffer, Executive Officer, BPH  
Howard Moseley, Chief Counsel, BPH

<sup>4</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.**
  - (D) The challenged rule has expired by its own terms.
  - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.

# Exhibit A

## § 2402. Determination of Suitability.

Barclays Official California Code of Regulations

Title 15. Crime Prevention and Corrections

Division 2. Board of Parole Hearings

Chapter 3. Parole Release

Article 11. Parole Consideration Criteria and Guidelines for Murders Committed on or After November 8, 1978, and Specified Attempted Murders

15 CCR § 2402

### § 2402. Determination of Suitability.

(a) **General.** The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

(b) **Information Considered.** All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.

(c) **Circumstances Tending to Show Unsuitability.** The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) **Commitment Offense.** The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) **Multiple victims** were attacked, injured or killed in the same or separate incidents.

(B) **The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.**

(C) **The victim was abused, defiled or mutilated during or after the offense.**

(D) **The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.**

(E) **The motive for the crime is inexplicable or very trivial in relation to the offense.**

**(2) Previous Record of Violence.** The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

**(3) Unstable Social History.** The prisoner has a history of unstable or tumultuous relationships with others.

**(4) Sadistic Sexual Offenses.** The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

**(5) Psychological Factors.** The prisoner has a lengthy history of severe mental problems related to the offense.

**(6) Institutional Behavior.** The prisoner has engaged in serious misconduct in prison or jail.

(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include:

(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.

(4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.

(5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

(7) Age. The prisoner's present age reduces the probability of recidivism.

(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

Note: Authority cited: Sections 3041 and 5076.2, Penal Code. Reference: Sections 3041 and 4801, Penal Code.

## **HISTORY**

1. New subsection (d)(5), subsection renumbering, and amendment of Note filed 3-16-2001 as an emergency; operative 3-16-2001 (Register 2001, No. 11). A Certificate of Compliance must be transmitted to OAL by 7-16-2001 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 3-16-2001 order transmitted to OAL 7-16-2001 and filed 8-20-2001 (Register 2001, No. 34).

This database is current through 10/9/15 Register 2015, No. 41