

## **CALIFORNIA PROPOSITIONS - 2016 ELECTION UPDATE**

### **Propositions 57 & 64**

In the November 2016 election, California voters enacted two new laws that will potentially benefit thousands of prisoners and prior marijuana offenders: Prop 57 and Prop 64.

Prop 57 makes many non-violent prisoners eligible for much earlier parole consideration than was possible under the prior law. Although Prop 57 does not require the release of those non-violent offenders covered by the new law, by generating earlier parole consideration, it jump-starts the complicated parole process, and thereby speeds up the need to consider whether the time is right to retain an experienced parole lawyer for assistance and possible representation at the parole hearing.

Prop 64, enacted at the same time as another proposition legalizing marijuana for personal use, substantially reduces sentences for most marijuana offenses. Moreover, Prop 64 is retroactive in the sense that it applies to reduce the sentences applicable to prior marijuana offenses which, had they been committed today, would have generated either a lesser penalty or no penalty at all under the new law.

Both Prop 57 and Prop 64 require the enactment of regulations which will govern the way these laws operate in individual cases, but those regulations have not yet been enacted, and it may be some time before they are published and applied. In the meantime, prisoners will be well advised to understand the basics of these new laws and how they are intended to operate. The purpose of this summary is to assist prisoners in obtaining that basic understanding.

### **PROPOSITION 57**

#### **“Early Parole Consideration and Conduct Credits”**

Proposition 57 has three main provisions, two relating to adults and one to juveniles. The adult provisions make changes to parole eligibility and credit awards, the factors which determine when a prisoner will first be considered for release on parole. Regulations which will govern exactly how the new law applies in various situations have yet to appear and will come out only after the law takes effect in November of 2016. Therefore, the focus here is necessarily on the principal changes under Prop. 57 that are relatively clear from the face of the Legislation.

I suggest that you use the “Formula” I’ve set out and explained in this piece to determine whether a particular prisoner is eligible for earlier parole under Prop. 57. If the Formula indicates that you may become eligible for parole within the foreseeable future, you should consider hiring a lawyer to analyze your realistic chances for parole

and, if appropriate, represent you in seeking parole release as soon as you become eligible.

### **Parole Eligibility Under Prop. 57**

#### **Statutory Language**

“Any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

“For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.”

#### **Summary**

A state prisoner who has not committed a disqualifying crime will be eligible for parole after expiration of the longest term that could be imposed for the most serious offense, exclusive of any increase based on enhancements, consecutive sentences, or alternative sentences.

#### **“Non-Violent Crimes”**

Prop. 57 only grants parole consideration convictions for “non-violent felony offenses.” Prop. 57 does not define “non-violent felony”, However, California law currently provides two statutory lists: one for “violent felonies” and one for “serious felonies”. Therefore, one should assume that the only *disqualifying* crimes are the ones on the “violent” list, which includes:

- murder
- attempted murder
- voluntary manslaughter
- mayhem
- forcible sex offenses
- rape, spousal rape, or rape in concert
- robbery
- arson of inhabited structure or causing physical injury
- exploding destructive device
- assault with intent to commit mayhem or forcible sexual offenses
- continuous sexual abuse of a child
- kidnapping

- carjacking
- extortion in support of gang offenses
- threats to victims or witnesses
- first degree burglary where victim is present
- any felony punishable by death or life imprisonment
- any felony in which a gun is “used”
- use of weapon of mass destruction

Based on the definition used above, it should be noted that the following crimes, some of which could be considered to be “violent” and appear on California’s list of “serious felonies”, are *not disqualifying*:

- assault with a deadly weapon
- battery with serious bodily injury
- solicitation to commit murder
- domestic violence
- inflicting bodily injury on a child
- first degree burglary where victim not present
- rape/sodomy/oral copulation of unconscious person
- human trafficking involving a minor
- hate crimes
- arson of forest land causing physical injury
- assault with deadly weapon on police officer
- active participation in a criminal street gang
- exploding destructive device with intent to cause injury

**“Full term for the primary offense.”**

The “*primary offense*” is the one with the longest sentence attached to it.

The “*full term*” means the longest sentence for that crime *without* the addition of (a) enhancements; (b) consecutive sentences; or (c) alternative sentences.

Examples of *enhancements*, which *cannot* be added in to the “full term”, are the following:

- weapons use (+1)
- prior prison term (+1 to +5)
- gang allegation (+2 to +10)
- excessive loss (+1 to +4)
- drug quantity (+3 to +25)
- elderly or vulnerable victim (+1 to +5)
- hate crime (+2 to +4)

*Consecutive sentences* are imposed on the basis of the following circumstances, which *cannot* be used to increase the full term for Prop. 57:

- Charges for additional charged crimes.
- Crimes committed on separate occasions.
- Crimes committed against additional victims.

*Alternative sentences* are ones where a fact, if proved, doesn't add more time, but instead changes the sentence for the underlying crime, usually to a life sentence. Some examples of alternative sentences, which *cannot* be used to increase the full term, are:

- Three Strikes (25 to life)
- Two Strikes (double the base term)
- Gang enhancement (7-life to 15-life)
- Habitual sexual offenders (25 to life).

### **The Prop. 57 "Formula"**

(1) *Determine that your crime is "non-violent".*

Do this by making sure it is not on the list of "violent" offenses, which are disqualifying.

(2) *Calculate the new parole eligibility date.*

Use the maximum term for that crime, exclusive of any add-ons for enhancements, consecutive sentences, or alternate sentences (e.g., 3 strikes).

### **EXAMPLES**

#### **#1.**

A defendant who was convicted of (a) 3 counts of burglary with (b) one prior strike and (c) one prison prior.

*Before Prop. 57:*

- (a) Burglary terms are 2-4-6, so top term is 6.  
That's doubled under 2<sup>nd</sup> strike: 12 yrs.
- (b) 2 other burglaries merit consecutive sentences.

Each adds 16 months, doubled = 64 mos.	5 yrs 4 mos
(c) Prison prior adds 5 years.	5 years
Total Sentence =	22 Yrs 4 Mos
[1] "Old" Parole Eligibility (20% credits) =	17.86 years.

Under Prop. 57:

Under Prop. 57, only the longest term for the principal offense is counted. Therefore, parole eligibility is based only on the primary offense:

(a) Primary offense: Burglary 2-4-6. Maximum applies.	6 yrs.
(b) No add-on for consecutive sentences.	--
(c) No add-on for prior prison term.	--
[1] Parole Eligibility under Prop. 57 =	6 Years.

**#2.**

A defendant was convicted of assault with a knife, a gang allegation, a prison prior, and a strike prior.

Before Prop. 57:

(a) Basic terms for knife assault are 2-3-4..	
Maximum is doubled under 2 <sup>nd</sup> strike:	8 yrs.
(b) Gang enhancement.	+5
(c) Prison prior.	+5
Total Sentence =	18 years.
[2] "Old" Parole Eligibility (15% credits) =	15 yrs 4 mos.

Under Prop. 57:

Under Prop. 57, only the longest term for the principal offense is counted. Therefore, parole eligibility is based only on the primary offense:

(a) Primary offense: Assault 2-3-4. Maximum applies.	4 yrs.
(b) No add-on for gang enhancement.	--
(c) No add-on for prison prior.	--

[2] Parole Eligibility under Prop. 57 = 4 Years.

**#3.**

A defendant was convicted of rape by intoxicating substance and has 2 prior strikes.

Before Prop. 57:

(a)	Basic term for the rape is 3-6-8.	
(b)	But 3-strikes sentence is 25-life.	25-life
	Total Sentence =	25 - Life
	[3] "Old" Parole Eligibility (0% credits) =	25 years

Under Prop. 57:

Under Prop. 57, the 3-strikes sentence is not factored in.

(a)	Primary offense: Rape 3-6-8. Maximum applies.	8 yrs.
(b)	No add-on for prior strikes.	--

[3] Parole Eligibility under Prop. 57 = 8 Years.

**Credit Earning Under Prop 57**

**Statutory Language**

"The Department of Corrections shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements."

**Key Elements**

- Although parole eligibility under Prop. 57 is limited to non-violent felonies, there is no such limitation for earning credits, which can be awarded for all felonies.
- "Approved rehabilitative achievements" is not defined. For guidance, see Chapter 10, "Parole Release", in the *California Habeas Handbook*.
- Currently, ordinary felonies earn 50% credit; second strikers with a current serious offense get 20% credit; and violent felonies get 15% credit. Prop. 57 gives

the CDC the authority to award credits *in addition* to those already authorized by law, and places *no limits* on the amount of credits awarded.

### **Obtaining a Parole Evaluation Through My Office**

Once again, if you have applied the Prop 57 Formula and believe that you will become eligible for parole within the foreseeable future, you should consider retaining a lawyer to provide you with a comprehensive and practical Parole Evaluation that will let you know what your realistic chances are for parole, and what specific steps you will have to take inside and outside of the prison to successfully obtain parole release. Thereafter, if the Parole Evaluation is promising and cost-effective, you can retain counsel throughout the entire parole process.

If you'd like to obtain such a Parole Evaluation through my office, my colleague Susan Jordan, a parole specialist, will conduct the evaluation and will provide you with a comprehensive and practical analysis of your chances for parole release. Currently and until further notice, the fee for a "Prop. 57 Parole Evaluation" is \$5,000. To arrange for payment and to obtain a list of the required file materials we will have to review to conduct the evaluation, please contact Susan or myself by phone or e-mail as follows:

**Susan Jordan, Esq.**

Phone: (916) 242-0060

E-mail: [susanljordanlaw@comcast.net](mailto:susanljordanlaw@comcast.net)

**Kent Russell, Esq.**

Phone: (415) 563-8640

E-mail: [kentrussell@sbcglobal.net](mailto:kentrussell@sbcglobal.net)

## **PROPOSITION 64**

### **“Adult Use of Marijuana Act”**

#### **Summary**

Proposition 64 legalizes marijuana for recreational use and allows anyone convicted of various marijuana offenses to either (a) reduce their conviction to a misdemeanor, (b) reduce it to an infraction, or (c) fully expunge and remove the conviction from their record.

Prop 64 operates by adding section 11361.8 to the California Health and Safety Code. The new section applies to possession, cultivation, transportation, distribution, sale, and possession of marijuana for sale. It takes effect immediately, although purchase at dispensaries will not be possible until they become licensed.

Individuals who are arrested for marijuana offenses in the wake of Prop 64 will now face much lesser penalties, and in many instances conduct which could previously have led to a felony conviction is now completely legal. Moreover, individuals with prior marijuana convictions can petition the court for a reduction of their sentence if the prior carries a lesser penalty or is made legal under Prop 64. For example, if Prop 64 makes a former felony a misdemeanor, a person with a prior felony conviction can petition to have it reduced to a misdemeanor. Similarly, if Prop 64 legalizes what used to be crime under former law, the offender can petition to have the conviction expunged and stricken from the record.

#### **Eligibility**

The easiest way to see how Prop 64 will apply to various marijuana activity is to compare the sentencing structure under the old law to that which will apply under Prop 64.

The table starting on the next page summarizes the major sentence reductions mandated by Prop 64. The column on the left describes the activity; the middle column shows the sentence under prior law; and the right-hand column shows the reduced penalty under Prop 64.

**Table: Marijuana Offenses Before and After Prop 64**

<b>MARIJUANA ACTIVITY</b>	<b>CURRENT PENALTY</b>	<b>PROP 64 PENALTY</b>
<b>Possess</b> < 1 ounce.	\$100 ticket.	Legal
<b>Possess</b> < 8 grams concentrate.	1 year/\$500 or both.	Legal
<b>Transport</b> < 1 ounce or 8 grams.	Misdemeanor, \$100 fine.	Legal
<b>Give away</b> < 1 ounce or 8 grams.	Misdemeanor, \$100 fine.	Legal
<b>Home-grow</b> 1 plant.	16 mos.-2-3 years.	Legal
<b>Home-grow</b> < 8 plants.	16 mos.-2-3 years.	Legal
<b>Harvest</b> < 1 ounce not for sale.	16 mos.-2-3 years.	Legal
<b>Smoking</b> in no-smoking area.	\$100 ticket.	\$250 ticket.
<b>Public smoking</b> or <b>underage</b> use.	\$100 ticket.	\$100 ticket.
Age 18-20: <b>Grow</b> < 6 plants.	16 months-2-3 yrs.	\$100 ticket.
Age 18-20: <b>Possess</b> < 4 grams concentrate.	1 year, \$500 or both.	\$100 ticket.
Age less than 18 ( <b>Minor</b> ): all offenses.	Same as Adults.	Counseling, community service, drug ed.
Adult 18 or over: <b>Grow</b> > 6 plants.	16 mos.-2-3 yrs.	6 months, \$500 fine or both.
<b>Possess</b> > 1 ounce of pot.	6 mos/\$500 or both.	Same (6 mos./\$500 or both).
<b>Possess</b> > 4-8 grams concentrate.	1 year/\$500 or both.	6 months/\$500 or both.
<b>Transport or give away</b> > 1 ounce.	2-3-4 years	6 months/\$500 or both.
<b>Sale</b> of pot <b>without a licence</b> .	2-3-4 years	6 months/\$500 or both.
<b>Possess with intent</b> to sell.	16 mos.-2-3 years.	6 months/\$500 or both.
3 <sup>rd</sup> or aggravated: <b>Possess</b> > 6 plants.	16 mos.-2-3 years.	Wobbler (Felony or Misdemeanor)
3 <sup>rd</sup> or aggravated: <b>Possess w/intent</b> to sell.	16 mos.-2-3 years.	Wobbler.
3 <sup>rd</sup> or aggravated: <b>Sales</b> .	2-3-4 years.	Wobbler.
<b>Sales involving minors</b> .	3 to 7 years.	Same (3 to 7 years).

## Obtaining Relief Under Prop 64

Although most prior marijuana offenses can either be reduced or expunged from the record, the process is not automatic. A prior offender must petition the court for relief, must establish that the prior is one covered by Prop 64, and must demonstrate to the court that the individual is not a danger to society. If the petitioner is successful in doing so, the court will reduce the sentence and/or “expunge” (erase) the conviction. If a conviction is expunged, it cannot be used as a roadblock to employment opportunities or to deny civil rights such as voting or gun ownership.

The Petition for relief under Prop 64 can be filed with or without using the services of a lawyer. Of course, if one can afford attorneys’ fees that will probably amount to a couple of thousand dollars or so, it’s much more reliable and less stressful to retain an experienced lawyer for relief under Prop 64, and there are several now who are offering their services on the Internet in the wake of the measure’s passage.

On the other hand, the process is relatively straightforward; an individual with at least a high school education and the patience and determination to take on the task should be able to eventually succeed; and the worst that can happen is if you try and fail is to then face the fact that you’re going to need a to pay for a lawyer to help you.

Essentially the process involves the following steps:

- Obtain and fill out the appropriate form for relief under Prop 57.
- Contact the county clerk for the county in which sentencing occurred, and determine the necessary procedure for getting the case on calendar.
- File the form in the Superior Court along with a proposed order granting the requested relief.
- Appear in court before the judge and show the court that you are eligible for relief and are not a danger to society.
- Have the court sign the necessary order(s).
- Keep the signed orders in a safe place to use later, if necessary.

### Notes

As with most of the recent California laws that are designed to clear out the prisons of non-violent offenders, the propositions themselves are rather general, and we will have to await the issuance of guidelines and regulations by the Legislature to flesh

out the details. Hence, and because the *California Habeas Handbook 2.0* is being published before these guidelines and regulations have been issued, be prepared to check the Internet for updates before you take any action, especially if you are going to be proceeding without a lawyer.

As for now, note the following issues:

- Although the California Judicial Council is said to be working up a specific form for relief under Prop 64 (i.e, Health & Saf. Code § 11361.8), as this book is being published the only printed form that can be used is the older “Petition for Dismissal” which applies Penal Code sections 17(b), 17(d)(2), 1203.4, 1203.4a, 1203.41, and 1203.49. Although the existing form can be adapted for relief under Prop 64, shoe-horning will be necessary to get a decent fit.
- A person who has already received an expungement under § 1203.4 may still want to seek relief under Prop 64. That is because an expungement under the old law, which is designed for employment purposes, does not completely remove the case from your record – a special form of relief that will allow you to treat the conviction as if had never occurred.
- If you have a felony offense and are eligible for relief under Prop 64, your rights to own and use a gun could be restored.

*Kent Russell is the author of the California Habeas Handbook 2.0, which thoroughly explains state and federal habeas corpus under AEDPA, the federal law which governs habeas corpus practice throughout the United States. Edition 2.0, revised from top to bottom in 2016, includes a brand new, comprehensive chapter on Parole Release, written by Susan Jordan, Esq., a parole specialist. Another new chapter, co-written by Kent and Susan, covers all the recent California propositions which expand the possibility for post-conviction release in California beyond traditional habeas corpus. The California Habeas Handbook 2.0 is available for purchase on this Website.*