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California Department of Corrections and Rehabilitation
Regulation and Policy Management Branch (RPMB)
P.O. Box 942883
Sacramento, CA 94283-0001

Re: Public Comment on Proposition 57 Regulations

To Whom It May Concern:

These comments are respectfully submitted regarding the proposed regulations concerning parole consideration pursuant to Proposition 57. As discussed below, I am concerned that the definition of nonviolent offender is excessively broad, and suggest that additional factors be considered in making parole determinations. I also suggest procedural changes to ensure that prosecuting agencies and victims have a meaningful opportunity to participate in parole decisions.

DEFINITION OF NONVIOLENT OFFENDER

The proposed regulations provide that nonviolent offender parole will be considered for offenders who are not currently serving a term for a violent felony, even if they have just completed a term for a violent felony, and regardless of their prior record of convictions. (Cal. Code Regs., tit. 15, proposed sections 3490, 3492.) This broad definition goes beyond what the voters reasonably would have understood to be a "person convicted of a nonviolent felony offense." The ballot pamphlet argument by Governor Brown stated the proposition "[a]llows parole consideration for people with nonviolent convictions" while "keeping dangerous criminals behind bars." The voters did not intend that inmates with a history of violent felonies be considered "nonviolent."

The Ventura County District Attorney's Office has begun responding to the Proposition 57 parole notification letters we have received, and I have reviewed and signed each response. Many of the inmates have a significant violent background. I urge the Department to modify the proposed regulations to exempt those inmates whose current period of incarceration includes a violent felony, and those who have a prior conviction for a violent felony.

PAROLE CONSIDERATION FACTORS

Proposition 57 provides, "Any person convicted of a nonviolent felony offense and sentenced to state prison *shall be eligible for parole consideration* after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32 (a)(1), emphasis added.) "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." (Cal. Const., art. I, § 32 (a)(1)(A).)

Under these provisions, enhancements, consecutive sentences and alternative sentences cannot prevent or delay eligibility for parole consideration. But Proposition 57 does not, and should not, preclude use of these factors in determining whether to *grant* parole.

Factors to be considered

Under the proposed regulations, the *only* factor to determine whether an inmate eligible for nonviolent offender parole will actually receive parole is "whether the inmate poses an unreasonable risk of violence to the community." (Section 2449.4(c).) The hearing officer *shall* approve parole if the offender does not pose an unreasonable risk of violence. (Section 2449.4 (d)(2).) The proposed nonviolent offender parole program releases inmates based on a single count in what is often a multi-count sentence. But it is neither just nor reasonable to treat a defendant who has been sentenced for multiple crimes the same as an individual sentenced for one crime. I appreciate that Proposition 57 will allow inmates to be released early, but by ignoring enhancements and additional counts, the release dates will not be proportional to the total length of the sentences imposed by the court.

Court-imposed enhancements for factors such as use of a firearm or other deadly weapon, infliction of great bodily injury, excessive taking of money from the victim, commission of a crime to benefit a criminal street gang, prior convictions, and prior prison terms, to name a few, are clearly relevant to the severity of the crime and the future dangerousness of the offender. Public safety demands that such factors be considered in determining whether, and when, to release an inmate into the community.

These factors are also important in ensuring that the inmate receive appropriate punishment for his or her conduct, deterring the inmate from the commission of crimes in the future, and general deterrence of the public from the commission of crime. Marsy's Law requires that "persons who commit felonious acts" be "sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance." (Cal. Const., art. I, § 28 (a)(4).) If offenders receive identical shortened sentences for one offense or ten, whether they used a firearm or not, whether or not they acted to benefit a

gang, and regardless of their prior history, this does nothing to deter multiple offenses, use of a firearm, the spread of gang violence, and repeated criminal conduct.

Analogy to parole for indeterminate sentences

By way of analogy, multiple factors are appropriately included in the regulations for granting parole for inmates serving indeterminate sentences. (Cal. Code Regs., tit. 15, § 2280 et seq.) Information considered for indeterminate inmates includes "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." (Cal. Code Regs., tit. 15, § 2281 (b).) Factors to be considered include whether there were multiple victims, a previous history of violence, psychological factors, and institutional behavior. (Cal. Code Regs., tit. 15, § 2281 (c).) Circumstances in aggravation include such factors as the vulnerability of the victim, a history of criminal behavior, the crime's potential for serious injury to persons other than the victim, and whether the defendant was on probation, parole, or had escaped when the crime was committed. (Cal. Code Regs., tit. 15, § 2283.) Enhancements are imposed for multiple commitments, and for prior felony convictions. (Cal. Code Regs., tit. 15, § 2286.) These factors would be equally appropriate in consideration of parole under Proposition 57 and should be included.

Justice for victims

Consideration of these factors would also help restore justice to crime victims. Our state constitution, as provided in Marsy's Law, requires Truth in Sentencing: "Sentences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts' sentencing orders, and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities." (Cal. Const., art. I, § 28 (f)(5).) Victims have the right to rely upon the sentence they hear rendered by the court, often after a long a grueling trial where they have been subjected to fear and often embarrassment of testifying. The court weighs all the facts and circumstances of the crime and of the defendant's background to reach a just sentence. The Department should consider these same factors in making decisions regarding parole.

PROCEDURE

The People, no less than the defendant, are entitled to due process of law. (Cal. Const., art. I, § 29.) In finalizing the regulations under Proposition 57, four issues should be addressed:

Notice

The 30-day comment period for the prosecuting agency and victim as provided in section 2449.2(a)(2) is too short. The time starts to run when the notice is "issued"; the notices are sent via regular mail and our office generally does not receive them until several days have run. We must then obtain the file from storage, assign it to an attorney, review the facts of the case, check the accuracy of the information provided, and write and serve a response. In some cases, we must locate and communicate with the victims. A longer time period is needed for both the prosecuting agency and victims to provide meaningful input.

Participation of victims

Victims have a constitutional right to "reasonable notice" of all parole proceedings, "[t]o be heard" at any "post-conviction release decision," "[t]o be informed of all parole procedures, to participate in the parole process, [and] to provide information to the parole authority to be considered before the parole of the offender." (Cal. Const., art. I, § 28 (b)(7), (8) & (15).)

The proposed regulations would give notification of referral to "registered victims," defined as "any person who is registered as a victim with the Office of Victim and Survivor Rights and Services at the time of the referral to the board." (Section 2449.2 (a)(1) & (b).) I do not disagree with that provision. But I do disagree with the limitation that written statements of only those "victims registered at the time of referral" will be considered. (Section 2449.4 (b)(2).) Some victims may not have registered previously, due either to the age of the case, or because they believed the sentence imposed by the court would be actually carried out.

Increasing the comment period would allow the prosecuting agency to locate and contact the victims, and give them the opportunity to register if they have not already done so. The regulations should be amended to allow comment by any victim who is registered before the expiration of the comment period, not just those who are registered at the time of the referral.

Access to central file

Although the inmate's institutional behavior is to be considered (section 2449.4 (c)(3)), and the hearing officer is to consider the inmate's central file (section 2449.4(b)(1)), the proposed regulations do not provide the district attorney with access to the inmate's central file. This results in a one-sided proceeding in which the inmate, but not the prosecution, has information as to the inmate's institutional behavior. We request that the regulations provide the prosecution with access to the inmate's central file prior to the date comment is due.

Right to appeal

The inmate is given the right to appeal a denial of parole (section 2449.5), but neither the prosecuting agency nor the victim has corresponding right to appeal a grant of parole. The rights of victims and the safety of the community should be at least as important as the rights the offender. Fundamental fairness requires that all parties have the same procedural rights to challenge a ruling.

CONCLUSION

The Truth in Evidence provision of our state constitution requires that sentences "be carried out in compliance with the courts' sentencing orders, and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities." (Cal. Const., art. I, § 28 (f)(5).) The stated purpose of the new regulations is not to alleviate overcrowding, but to "protect and enhance public safety." (Cal. Const., art. I, § 32 (b).)

I urge you to consider the changes requested above to ensure that the public is protected.

Very truly yours,

GREGORY D. TOTTEN
District Attorney

GDT:jd

By U.S. Mail and e-mail: CDCR-Prop57-Comments@cdcr.ca.gov