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August 31, 2017

Mr. Timothy Lockwood
Associate Director, RPMB
Cal. Dept. of Corrections and Rehabilitation
P.O. Box 942883
Sacramento, CA 94283-0001

Re: Notice of Change to Regulations 17-05, Proposition 57

Dear Mr. Lockwood:

The Criminal Justice Legal Foundation, an organization formed to protect and advance the interests of victims of crimes submits this comment on the above notice.

CDCR Authority to Override the Constitution and Statutes

The notice quotes Proposition 57 as saying " 'notwithstanding anything in this article or any other proposition of law,' CDCR 'shall adopt regulations in furtherance of [the Act] . . . .' " That quote is incorrect. The notice goes on to draw the conclusion from this misquote that "the Secretary has been granted broad rulemaking authority under the California Constitution to adopt, amend, or repeal regulations in furtherance of the Act, *notwithstanding other provisions of law* . . . ." (Emphasis added.) Proposition 57 does not say that.

The first quote splices together two phrases from two different subdivisions of the new section 32 of article I of the Constitution. Subdivision (a) enacts new substantive provisions regarding parole and credit earning "notwithstanding anything in this article or any other provision of law." Those other provisions are thus implicitly repealed to the extent they are in irreconcilable conflict with the new substantive provisions of subdivision (a) of section 32. "There is a presumption against repeals by implication," and a new provision repeals the old one only when the two " 'cannot operate concurrently.' " (See *Briggs v. Brown* (Aug. 24, 2017, S238309) __ Cal.5th ___ [p. 28].)

In particular, both the constitutional and statutory provisions of Marsy's Law (Proposition 9 of 2008) remain in effect except to the extent that they cannot operate concurrently with subdivision (a) of section 32. That extent is a matter of constitutional interpretation, and interpretation of the California Constitution is a judicial power. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352.)

The authority vested in CDCR to promulgate regulations is in subdivision (b), a separate subdivision from the "notwithstanding" language. The authority is merely to adopt regulations to further the provisions of subdivision (a). Subdivision (b), on its face, does not empower CDCR to repeal statutes or constitutional provisions that are not already nullified by subdivision (a).

For this reason, CDCR's regulations must be consistent with Marsy's Law except in those instances, if any, where subdivision (a) of section 32 is so clearly and irreconcilably inconsistent with a provision of Marsy's Law that it is not possible for both to operate. Mere convenience or policy preferences are not sufficient.

"Nonviolent Offender"

Section 32 does not define its terms, and it does not refer to definitions in other provisions of law. CDCR may propose a definition initially, but the interpretation of constitutional provisions is ultimately for the judicial branch. Absent an express definition in the text, and there are none here, words should be understood in their common meaning.

In defining "nonviolent offender," the Initial Statement of Reasons on page 15 identifies in principle that this excludes people who have committed crimes that "involve physical violence." That is correct, but the implementation of that principle in the text of the regulation falls far short.

Section 667.5, subdivision (c) of the Penal Code sets forth a very restricted definition of "violent felony" for the limited purpose of that section, to impose a stiff sentence enhancement on certain particularly violent recidivist criminals. That definition was not drafted with the intent of stating a comprehensive definition of "violent" crime for all purposes. To take just one example, a battery that causes a substantial injury but not quite "great bodily injury" is a crime that is certainly "violent" as that word is

commonly understood, yet it is not on the list. The fact that the drafters of section 667.5 did not consider this crime to be of such magnitude as to warrant a long sentence enhancement does not mean it is not violent.

Part 1 of the Penal Code is divided into title by type of crime. Title 8 is "Of Crimes Against the Person." The chapters of that title define crimes of homicide, mayhem, kidnapping, taking hostages, robbery, attempts to kill, assaults with intent to commit felonies, false imprisonment and human trafficking, and assault and battery generally. An inmate convicted of any of these "crimes against the person" or attempt to commit them should be excluded from the definition of "nonviolent offender." Title 9 also includes many sex offenses that are "violent" within the common meaning of the word. The regulation's exclusion of those required to register under section 290 of the Penal Code may be a reasonable method of identifying them.

When an inmate has been convicted of both violent and nonviolent offenses with sentences running consecutively, the regulation provides, in effect, that he is a "violent offender" until the term for the violent offense is completed, at which point he magically becomes a "nonviolent offender." That is preposterous.

For example, suppose an inmate broke into a home with the intent to kill the person who lived there and then attempted to do so, but the victim survived. He is sentenced for attempted murder and burglary consecutively. Under the regulation, he would be designated a "violent offender" for the duration of the prison term for attempted murder, but the same person would be deemed a "nonviolent offender" on the day that term expired. There is no basis in logic, psychology, or common sense to believe that the would-be killer is a different person on that day, and the people who voted for Proposition 57 could scarcely have imagined that would-be killers would be classified as "nonviolent offenders."

A "nonviolent offender" should be defined as a person who has never been convicted of any crime in Title 8 of Part 1 of the Penal Code, any crime for which registration as a sex offender is required, any crime in which the offender intentionally caused injury to another person, or any attempt to commit any of these crimes.

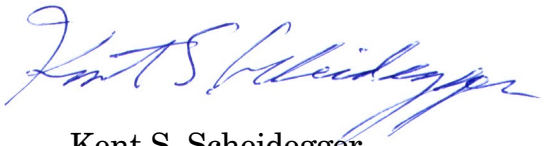
Notice to Victims and Right to Be Heard

The provisions regarding notice to victims, limitation of victims' right to be heard to written statements, and use of a document review rather than a live hearing are illegal. The provisions of Marsy's Law on victims' rights in this regard, particularly section 3043 of the Penal Code, are not in conflict with subsection (a) of section 32. Therefore, as noted in the first part of this comment, they are still the law, and CDCR does not have the authority to override them by regulation.

Subdivision (a)(1) of section 3043, as amended by Marsy's Law, requires 90 days notice, not 30. Further, subdivision (b) provides a right to personally attend the hearing. In some contexts, a statutory right to be "heard" can be satisfied by a document submission rather than personal attendance at a live hearing, but that is not true when the statute clearly contemplates a live hearing. Providing a right to appear is a clear indication that a live hearing is intended, and a right to submit a written statement is not sufficient. (See, *e.g.*, *County of Los Angeles v. Williamsburg Natl. Ins. Co.* (2015) 235 Cal.App.4th 944.)

The regulation must be amended to conform to all requirements of Marsy's Law regarding victims' rights to notice and opportunity to be heard.

Sincerely,



Kent S. Scheidegger