

# Daily Journal

www.dailyjournal.com

MONDAY, MAY 1, 2017

## Prop 57 fails to address set of inmates

By Sharif E. Jacob and Andrea Nill Sanchez

This past November, California voters approved Proposition 57, a ballot initiative instituting a series of measures aimed at reducing the state's prison population. The California Department of Corrections and Rehabilitation (CDCR) issued new, emergency regulations implementing Prop. 57 on March 24, which the Office of Administrative Law approved on April 13.

While Prop. 57 and the CDCR's emergency regulations have received widespread attention for the overall effects they will have on the prison population, most reports have overlooked the consequences for a particular subset of prisoners — parole eligible life-term inmates. Unfortunately, as written, Prop. 57 does little or nothing to address overcrowding for this category of inmates.

### Prison Population Reduction Obligations and Proposition 57

On Aug. 4, 2009, a three-judge federal court observed that "California's prisons are bursting at the seams and are impossible to manage." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 888 (E.D. Cal. 2009). Finding that overcrowded prisons were leading to violations of inmates' constitutional rights, the *Coleman* court ordered the governor of California and various state officials to submit a plan for reducing its prison population by approximately 40,000 inmates within two years. The court cited "numerous means" to achieve this goal, including parole reform, sentencing reform and the expansion of good time credits. Eight years later, the state is still grappling with how to comply with the *Coleman* order. It is also now facing public demands to reduce the amount of taxpayer dollars spent on prison costs.

The passage of Prop. 57 this past November is a manifestation of both of these related, but independent, forces. The ballot initiative's stated purpose is to save "money by reducing wasteful spending on prisons" and prevent "federal courts from indiscriminately releasing prisoners." To achieve these goals, it requires the implementation of three reforms. First, it creates a special parole consideration process for inmates who qualify as nonviolent offenders. Second, it gives CDCR the authority to award sentence credits for rehabilitation, good behavior or educational achievements. Third, it grants judges the exclusive authority to decide whether a juvenile should be prosecuted as an adult.

The proposed regulations CDCR released in March are aimed at effectuating the requirements of Prop. 57. The regulations increase the award of existing good time credits and offer additional credits for completing educational, rehabilitative

and vocational programs in prison. See Proposed Cal. Code Regs. Title 15, Sections 3043-3043.6. The regulations also detail the new parole consideration process for non-violent offenders. *Id.* Sections 2449.1-2449.5. Since the Office of Administrative Law initially approved the emergency regulations, they are temporarily in effect until Sept. 20 while the CDCR undertakes the public comment process, according to Steven J. Escobar in the Office of Administrative Law.

### How Indeterminate Sentencing Policies Affect Prison Overcrowding

Unlike most inmates — who receive fixed (determinate) sentences — indeterminate sentenced inmates are sentenced to an unspecified amount of time that can range anywhere from seven years to life, with the possibility of parole. "Lifers," or "life-term" inmates, as they are commonly referred to, constitute approximately 20 percent of the California prison population. As of 2013, the lifer population totaled 26,775. Prison Census Data Tbl.10 (Dec. 31, 2013).

According to recidivism studies completed by the CDCR, lifers pose the lowest risk to public safety. Despite these facts, lifers have traditionally stood only an 18-20 percent chance of being granted parole. See Weisberg et al., "An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California," September 2011 at 4. In 2013, there were approximately 9,315 life-term prisoners who were past their minimum eligible parole date — even though virtually all of them were designated low risk. *In re Butler*.

This problem did not go unnoticed by the *Coleman* court. In identifying the various causes of California's increasing prison population, it identified "the actions of the parole board and the Governor in declining to release prisoners serving terms of 15 or 25 years to life who have served their minimum sentence or more with unblemished records and are determined by prison officials not to constitute a risk to society."

### Proposition 57 Impact on Life-Term Prison Population

Despite the undeniable impact that Prop. 57 and the associated regulations will have on the prison population as a whole, it is less clear that the reforms will have any consequences on the lifer population.

In order to grasp the effect of Prop. 57 on lifers, it is important to understand a few basic rules that apply to indeterminate sentenced inmates. Most indeterminate-sentenced inmates cannot be released before their minimum eligible parole date

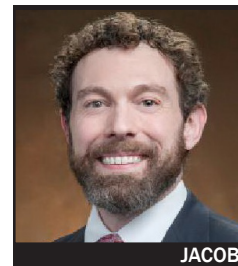
(MEPD). Cal. Code Regs. Title 15, Section 3000 (2016). Some lifers may qualify as either (or both) youth and elderly offenders, depending on whether they committed the offense they are serving time for before age 23 and/or are currently over 60 years old. Calif. Penal Code Section 3051(a)(1). Unlike other indeterminate sentenced inmates, youth and elderly offenders must be released once the Board of Parole Hearings finds them suitable for parole, regardless of their MEPD. *Id.* Section 3046(c).

The board's proposed regulations, however, will not advance the release date of any parole eligible life-term inmates. As to the earning of credits, the new regulations provide that they will advance a *determinately* sentenced inmate's release. But they only propose to advance an *indeterminately* sentenced inmate's initial parole hearing. See Proposed Calif. Code Regs. Title 15, Section 3043(a). An initial parole hearing in and of itself is no guarantee of release. Unless the board plans on implementing the new regulations in such a way that also advances the actual release date of a lifer found suitable for parole, the new credit-earning regulations will have no impact on the release date of indeterminate sentenced inmates.

More significantly, most life-term inmates will not benefit from the new regulations because they are not even eligible to receive the credits the new regulations provide for. The majority of lifers are serving time for first-or second-degree murder. See Weisberg at 4. And any inmate who committed either offense after June 3, 1998, is ineligible to receive any conduct credit reduction altogether. See Calif. Penal Code Sections 190(e), 2933.2(a).

Ultimately, it is certainly possible — if not likely — that Prop. 57 and the new regulations will reduce prison overcrowding overall. However, it should not go unnoticed by either side of the debate over the merits of the reforms that the proposed regulations as currently written do little (if anything at all) to reduce overcrowding caused by the lifer population.

**Sharif E. Jacob**, a partner in the San Francisco office of *Keker & Van Nest*, focuses on intellectual property litigation, complex business disputes and representing individuals. **Andrea Nill Sanchez** is an associate in the San Francisco office.



JACOB



SANCHEZ