ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC.
1215 K Street, 17th Floor
Sacramento, CA 95814
(818) 305-5984 || jmbellucci@aol.com

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Via U.S. Mail and E-mail

Secretary Kathleen Allison
Department of Corrections and Rehabilitation
Regulation and Policy Management Branch (RPMB)
P.O. Box 942883
Sacramento, CA 94283-0001
RPMB@cdcr.ca.gov

Re: Public Comments to NCR Number 21-04, Published 03/19/2021, and proposed amendments to 15 § CCR 3076, *et seq.* re: Recall and Resentence Recommendation Program Pursuant to Penal Code § 1170(d)(1)

Dear Secretary Allison:

The Alliance for Constitutional Sex Offense Laws, Inc. (ACSOL) respectfully submits these public comments regarding the above-referenced proposed final regulations implementing Penal Code section 1170(d)(1) ("Section 1170(d)(1)"). In particular, ACSOL urges the Department to eliminate the proposed amendment to Title 15, Section 3076.1(b)(2)(A)-(B) including but not limited to the categorical exclusion of persons convicted of a registrable sex offense ("Registrants") from the benefits of Section 1170(d)(1).

As the Department knows, Section 1170(d)(1) confers "a broader power to recall and resentence for any [] lawful reason" upon the Department's recommendation. (*Dix v. Superior Court* (1991) 53 Cal. 3d 442, 459, emphasis in original.) The text of Section 1170(d)(1) confirms the Legislature's intent that all inmates be eligible for a resentencing recommendation by the Department. Specifically, Section 1170(d) declares that

> [w]hen a defendant subject to this section [*i.e.*, the Determinate Sentencing Act] . . . has been sentenced to be imprisoned in the state prison . . . , the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, . . . , recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.

(Cal. Penal Code § 1170(d)(1).) Thus, an inmate is eligible for a resentencing recommendation by the Department when he or she is "a defendant subject to [the Determinate Sentence Act]

[and] sentenced to be imprisoned in the state prison." Section 1170(d) does not restrict eligibility in any respect, in general, or to any categories of inmates, in particular.

Section 1170(d)(1) was enacted in 1976, and the Department promulgated regulations outlining procedures for resentencing recommendations as early as 1992. Notably, the Department's initial regulations implementing Section 1170(d)(1) did not exclude Registrants from eligibility. Rather, the Department's regulations listed "whether the inmate's prior criminal history includes . . . registrable offenses pursuant to PC section 290" as among various "factors" that the Department "shall consider . . .as may be applicable when recommending recall of commitment consideration for an inmate." (See NCR No. 21-04, Text of Proposed Regulations, at p. 5;15 CCR § 3076.1(f) (1992).) The Department has operated under these regulations for many years.

In 2018, the Legislature passed, and the Governor signed into law, AB 1812 and AB 2942. This law has two stated objectives: (1) to expand inmates' opportunities for resentencing; and (2) to encourage relevant agencies, including the Department, to recommend inmates for resentencing. It is notable that neither AB 1812 nor AB 2942 restricted the eligibility of any category of inmate for resentencing. However, in response to legislation designed to increase opportunities for resentencing, the Department has inexplicably and without reason proposed regulations that deprive resentencing opportunities for nearly all Registrants. (See NCR No. 21-04, Text of Proposed Regulations at 15 CCR 3076.1(b)(2)(A), at p. 2.) For the reasons explained below, The Department is not authorized to categorically exclude persons the benefit of broadly applicable sentencing reforms merely because they are currently incarcerated for a registrable offense, or because they have sustained a past conviction for a registrable offense.

The Department will recall its similar and unsuccessful effort to "deny[] even the mere possibility" of benefit from a sentencing reform, that is, early parole consideration under Proposition 57, to the entire "category" of "individuals with convictions for registerable sex offenses." (*In re Gadlin* (2020) 10 Cal. 5th 915, 943.) In the case of Proposition 57, the Department's regulations deprived all Registrants of the opportunity for early parole consideration despite a constitutional mandate that early parole consideration be provided to "any person convicted of a nonviolent felony offense." (*Ibid.*, quoting Cal. Const. art. I, sec. 32(a)(1).) The California Supreme Court unanimously ruled that the Department's regulations excluding all Registrants from early parole consideration "are inconsistent with the language of article I, section 32(a)(1) and cannot stand." (*Ibid.*) Likewise, in the case of Section 1170(d)(1), the Department's categorical exclusion of Registrants from eligibility for a resentencing recommendation cannot stand because it is inconsistent with the broad mandate that eligibility include all defendants "subject to this section [*i.e.*, the Determinate Sentencing Act] . . .[who] has been sentenced to be imprisoned in the state prison."

Notably, the Department's purported and unsupported rationales for categorically excluding Registrants from its implementation of Section 1170(d)(1) are identical to those unsuccessfully offered in connection with the Department's Proposition 57 regulations. Specifically, the Initial Statement of Reasons accompanying the proposed regulations issue states:

> Subsection 3076.1(b)(2)(A) is adopted to establish certain felony convictions as exclusionary criteria. Under existing law, inmates convicted of a sexual offense that currently requires or will require that they register pursuant to PC Section 290 are excluded from consideration because these crimes reflect the determination of the people of the State of California (through initiatives and the legislature) that, "Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (PC Section 290.03.) Also, when the people of the State of California approved Proposition 35 on November 6, 2012, they declared that "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance." (See Proposition – Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35 (Proposition 35) (WEST), section 2, paragraph 1.) The Department has determined that the Recall and Resentencing Recommendation Program should apply a similar exclusionary criteria for public safety, until January 1, 2021, when PC Section 290 will be amended by legislative act (SB 384).

(Initial Stmt. of Reasons, NCR 21-04, at p. 4.) None of these rationales justifies the categorical exclusion of Registrants.

First, nothing in the text of Section 1170(d)(1) authorizes the Department to "adopt . . . exclusionary criteria" for Registrants or any other category of inmate "for public safety." When the Legislature intends to restrict eligibility for a sentencing reform, it expressly does so. (*Cf. People v. McCallum* (2020) 55 Cal. App. 5th 202, 213, construing Section 1170(d).) Therefore, the absence of such a restriction in Section 1170(d) confirms that no restriction for Registrants or any other category of inmate was intended.

Second, courts have struck down the Department's attempts to contradict legislation based upon appeals to "public safety" that are divorced from the text and purpose of that legislation. (E.g., *In re Lucas* (2012) 53 Cal. 4th 839, 849-50 [general "public safety" purpose underlying the sexually violent predator commitment statutes did not permit Department to adopt an expansive definition of the phrase "good cause" that conflicted with the terms and function of other statutes in the SVP framework].) Specifically, Section 1170(a)(1) does not authorize the Department to rewrite the statute based upon its view of "public safety," because resentencing requires a

judge's review, which will resolve any public safety concerns. (*Cf. Alliance for Const. Sex Offense Laws v. Cal. Dep't of Corr. and Rehab.* (2020) 45 Cal. App. 5th 225, 235-36 ["[W]e are dubious of the Department's premise that allowing nonviolent sex offenders to be considered for early parole endangers public safety. The Amendment does not require that all inmates convicted of a nonviolent felony be subject to immediate release from custody. Rather, those inmates are permitted only early consideration by the Board of Parole Hearings, which is charged with determining whether an inmate is suitable for parole." (emphasis in original)].)

Third, the subject matter of Penal Code section 290.03(a)(1) and the CASE Act/Proposition 35 is inapposite to Section 1170(d)(1). That is because Penal Code section 290.03(a)(1) sets forth legislative findings in connection with the California Sex Offender Registration Act and the state's lifetime registration requirement, which has since been modified by the tiered registry law, SB 384. Such legislative findings in unrelated legislation, however, do not authorize CDCR to selectively deprive Registrants of the benefit of sentencing reforms that the Legislature has provided.[1] The 2012 voter initiative known as the CASE Act, or Proposition 35, is even farther afield, since its provisions were almost exclusively concerned with defining elements and procedures related to the crime of "human trafficking."[2] In fact, the only provision of the CASE Act directed toward Registrants was a requirement that they divulge their internet identifiers to law enforcement, a requirement that was subsequently enjoined on the grounds of unconstitutionality as applied retroactively. (*Doe v. Harris* (9th Cir. 2014) 772 F.3d 563.)

Fourth, the fact that the proposed regulations limit the exclusion of Registrants to Tier 2 and Tier 3 Registrants also does not authorize the Department to rewrite Section 1170(d)(1). That is because the Initial Statement of Reasons states "Subsection 3076.1(b)(2)(B) establishes that beginning January 1, 2021, inmates required to register as Tier 2 or Tier 3 pursuant to PC Section 290 are excluded from consideration because those tiers represent the most serious types of sex offenses under the penal code. More specifically, a Tier 1 offense is not a serious or violent felony and only requires registration for a minimum of 10 years, while a Tier 2 and Tier 3 offense requires registration for a minimum of 20 years and life respectively." (Initial Stmt. of Reasons, NCR 21-04, at p. 4.) This conclusory statement merely expresses the Department's

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[1] Moreover, CDCR's own data demonstrate that these decade-old, boilerplate legislative findings regarding the re-offense rates for Registrants are inaccurate. For example, CDCR's most recent Outcome and Evaluation Report states that the re-offense rate for Registrants on parole is less than 1%, a figure that has diminished over time. CALIF. DEPT. OF CORRECTIONS AND REHABILITATION, 2014 OUTCOME EVALUATION REPORT 30-31 (July 2015), http://www.cdcr.ca.gov/Adult_Research _Branch/Research_Documents/2014_Outcome_ Evaluation_Report_7-6-2015.pdf.

[2] http://www.caseact.org/wp-content/uploads/2012/11/CASEAct_InitiativeText.pdf.

view of the tiered registry law, and is not a basis for the Department's alleged authority under Section 1170(d)(1).

Finally, the Department's exclusion of Registrants is inconsistent with the purpose and language of the proposed regulations themselves which, according to the Department, is "to fully apply the law and develop an equitable process for inmates to be considered for recall and resentencing." (Initial Stmt. of Reasons, NCR 21-04, at p. 4.) The Department professes that it

> seeks to make our prisons and communities safer by encouraging and motivating inmates to participate in rehabilitative programs and service opportunities that create skills, employability, and hope. This in turn will lead to improved inmate behavior and a safer prison environment for inmates and staff alike. Public safety is enhanced when inmates choose to pursue and accomplish tangible academic, vocational and personal/behavioral achievements to position themselves for earlier consideration before the Board or for successful transition to society.

(Initial Stmt. of Reasons, NCR 21-04, at p. 2.) This statement rings hollow because it is not "equitable" to categorically ignore the rehabilitative achievements of individuals based upon the fact that their offense is designated a "sex offense." Indeed, the proposed regulations achieve the opposite of the Department's stated intentions by discouraging rehabilitation among this population.

Accordingly, ACSOL urges the Department to eliminate the exclusion of Registrants in Section 3076.1(b)(2)(A)-(B) of the proposed regulations. If the Department declines to do so, ACSOL will pursue all available remedies.

Respectfully submitted,

Janice M. Bellucci

Attorney Janice M. Bellucci
Executive Director