



CALIFORNIA
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**CDA A Analysis of
The Public Safety & Rehabilitation Act of 2016
(Governor's Initiative)**

February 4, 2016

Revised February 10, 2016



I. Overview

The Governor has proposed an initiative, The Public Safety and Rehabilitation Act of 2016 (“the Act”). Its apparent intent is to alleviate prison overcrowding and avoid the possibility of a federal court order releasing prisoners. However, the language in the initiative is drafted in a manner that would incorporate into the California Constitution drastic changes to our sentencing laws, including eligibility for parole that disregards enhancements such as use of a deadly weapon, commission of a crime to benefit a criminal street gang, or prior prison terms; disregards consecutive sentences for the commission of multiple offenses; and provides prison officials with broad authority to award increased conduct credits, including to murderers and rapists. The Act significantly undermines more than four decades of criminal justice policies approved by the Legislature and California voters that were designed to enhance public safety and protect the rights of crime victims. The proposal conflicts with other constitutional and legislative provisions, including the use of enhancements mandated by The Victims’ Bill of Rights (Proposition 8), the truth-in-sentencing provisions of Marsy’s Law, the treatment of serious juvenile offenders provided in Proposition 21, the human trafficking law, and the Three Strikes law. This analysis has been provided to the Governor for his review.

Some of the impacts are indisputably contained in the proposal’s provisions. Other impacts may be unintended, but are likely to be raised by criminal defendants, and may be accepted by the courts. These two categories are summarized below.

A. Indisputable consequences of the proposal are:

1. Inmates sentenced to non-violent felony offenses will be eligible for parole consideration after completion of only the term of their primary offense. This will include crimes designated by the Legislature and the voters as “serious” offenses.

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2. All enhancements will be excluded from the full term of the primary offense, including enhancements for use of a deadly weapon, excessive taking of property, commission of a crime while on bail, gang enhancements, prior prison terms, prior serious or violent felonies, etc. Defendants whose sentences were increased for these enhancements will be eligible for parole at the same time as defendants who do not have any enhancements.
3. Consecutive sentences will be excluded from the full term of the primary offense. Felons who commit multiple crimes against multiple victims will be eligible for early release at the same time as inmates who commit only one crime against one victim.
4. “Alternative sentences” involving increased punishment like the Three Strikes law will be excluded from the full term of the primary offense for many offenders. Thus, repeat serious and violent offenders will be eligible for early release at the same time as inmates who have no criminal histories.
5. The Penal Code currently provides that most prisoners serve only 50 percent of their sentences. The Act will give the California Department of Corrections and Rehabilitation (CDCR) unilateral and unlimited authority to award credits to all inmates, regardless of their charges or sentences, for good behavior and approved rehabilitative or educational achievements.
6. The Act eliminates the ability of prosecutors to directly file in adult court serious and violent crimes committed by the most dangerous juvenile offenders, including gang members just shy of their eighteenth birthday. The Act also eliminates the presumption that minors charged with enumerated serious crimes should be tried in adult court.

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B. Possible additional consequences

1. Based on the wording of the proposed constitutional provision, a plausible argument can be made that every inmate with at least one non-violent felony conviction is eligible for early release, regardless of whether the inmate has additional convictions that are violent.
2. The courts may hold that, based upon equal protection principles, county jail inmates sentenced under Penal Code section 1170(h), and also defendants eligible for Postrelease Community Supervision, are entitled to the benefit of the new provisions.
3. Most inmates serve only half their sentences. It is likely that the provisions regarding credits and adoption of regulations would permit CDCR to provide additional credits in excess of the limitations contained in the Penal Code.

II. The Process Lacked Input and Transparency

Merced County District Attorney Larry D. Morse II and Ventura County District Attorney Gregory D. Totten, Co-Chairs of CDAA's Legislation Committee, met with the Governor's public safety staff in December, where the Governor's plan to introduce an initiative was first raised. Despite requesting an opportunity to review the proposed initiative to avoid any drafting errors or unintended consequences, a draft was never made available. District Attorneys and the California District Attorneys Association regularly provide input on proposals to amend the criminal law, and provide both policy arguments and technical expertise regarding their wording. Regrettably, they were not provided a copy until after the initiative was publicly released. Because the Governor's proposal was an amendment to an existing initiative regarding the juvenile transfer process, the deadline to make additional changes has passed.

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III. The Title, Purpose, and Intent Are Misleading

The title of the initiative, The Public Safety and Rehabilitation Act of 2016, is designed to garner public support, but is misleading and does not reflect its actual provisions. Releasing repeat offenders and other prisoners earlier than allowed by current law endangers, rather than protects, public safety.

Since AB109/realignment and Propositions 36 and 47, most non-serious/non-violent criminals are no longer in state prison. In fact, as of Sept 2015, only 6.7 percent or 8,635 inmates in state prison did not have a serious/violent current offense or prior conviction. The controlling offense for 78 percent of inmates is a crime against the person, not a property or drug crime. The latest figures from June 2013 show that 62.2 percent of the CDCR population have a current violent offense, so the target of the initiative would be the 37.8 percent of the rest.

A stated purpose of the initiative is to “improve rehabilitation,” and the proposal allows credits for “approved rehabilitative or educational achievements.” But the proposal provides no funds or any other provisions to develop or expand rehabilitative programs. Nor are the drastic reductions in sentences mandated by the initiative necessary to “avoid the release of prisoners by federal court order.” While the federal courts have placed a cap on the population of California prisons, they have not attempted to specify which prisoners must be released.

IV. The Act Clearly Conflicts with Other Initiatives and Statutes

The exclusion of enhancements, consecutive sentences, and alternative sentences by the Act is contrary to longstanding existing law and principles in California law. Most significantly, the Act violates the fundamental principle that punishment should fit the crime. Penal Code section 1170(a)(1) provides that the purpose of imprisonment is punishment and that this purpose is best served by “terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.” In other words, similarly-situated offenders should receive similar sentences. **The Act, however, treats every**

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prison inmate the same by making inmates eligible for early release after serving the sentence for just one crime, and requires that enhancements, additional crimes, and prior convictions be disregarded.

A. Proposition 8

The Act conflicts with Proposition 8, The Victims' Bill of Rights, enacted by the voters in June 1982. Proposition 8 amended the Constitution to provide, "Any prior felony conviction of any person in any criminal proceeding... shall subsequently be used without limitation for purposes of ... enhancement of sentence in any criminal proceeding." (Cal. Const., art. I, § 28(f), renumbered by Prop. 9 in 2008 as art. I, § 28(f)(4).) The proposed initiative excludes prior convictions in making prisoners eligible for parole consideration.

B. Marsy's Law, Proposition 9

The Act conflicts with Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law, enacted on November 4, 2008. In the Findings and Declarations, the "People of the State of California find and declare" that crime victims have "the right to expect the government to properly fund the criminal justice system, so that the rights of crime victims stated in these Findings and Declarations and justice itself are not eroded by inadequate resources...." (Section 2, paragraph 1.) Further, "Victims of crime have a collective shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California." (Section 2, paragraph 5.)

Marsy's Law amended the California Constitution, to provide:

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.** The legislative branch shall ensure sufficient

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funding to adequately house inmates for **the full terms of their sentences**, except for **statutorily authorized credits** which reduce those sentences.

(Cal. Const., art. I, § 28(f)(5), emphasis added.)¹

The current initiative does exactly what the voters prohibited in Marsy's Law. It enacts early release policies intended to alleviate prison overcrowding. And it does so, in part, through administrative regulations for credits beyond the "statutorily authorized credits." It makes many sentencing decisions by judges essentially meaningless – careful judicial decisions as to whether to impose concurrent or consecutive sentences, whether to impose or stay enhancements, and whether to impose or strike prior convictions will all be "excluded" at the prison.

C. Proposition 21

The Act abolishes much of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, passed by 62.1 percent of the voters at the March 2000 election. The Findings and Declarations of Proposition 21 recognize not only the effectiveness of the Three Strikes law, but the necessity of imposing adult sanctions in serious juvenile cases. "The people find and declare" in Proposition 21 that "juvenile crime has become a larger and more ominous threat." (Section 2 (a).) "Vigorous enforcement and the adoption of more meaningful criminal sanctions, including the voter-approved 'Three Strikes' law, Proposition 184, has resulted in a substantial and consistent four year decline in overall crime." (Section 2 (c).) "The juvenile system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders." (Section 2 (i).) The current initiative conflicts with these findings by eliminating, not only direct filing for some juvenile cases enacted by Proposition 21, but by eliminating the presumption of unfitness in Welfare and Institutions Code section 707(c), which has been in effect since 1980. (Stats. 1979, ch. 1117, §2.)

¹ At the time Marsy's Law was enacted, the *Plata* and *Coleman* cases were already pending before the Three Judge Panel, with the court addressing overcrowding in the California prison system.

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D. Proposition 184

The Act allows CDCR staff to eliminate the effect of the Three Strikes law, enacted in 1994 by both the Legislature and the voters (Assembly Bill 971; Proposition 184), and amended by the voters in Proposition 36 on November 6, 2012. (Penal Code, §§ 667, 1170.12.) This law is based on the principle of public protection by increased prison terms for the small number of repeat offenders who are responsible for a disproportionate number of serious and violent crimes. The sentence is doubled for those defendants with a prior conviction for a serious or violent felony (“Two Strikes”). Defendants convicted of a new serious or violent felony, with prior convictions for two or more serious or violent felonies, are sentenced to a minimum of 25 years to life (“Three Strikes”). Because the Act will likely treat Two Strikes and Three Strikes as “alternative sentences,” and allow parole consideration after service of the new crime without respect to the prior convictions, it will conflict with Propositions 184 and 36.²

E. 10-20-Life Law

In addition, the Act could nullify the effect of Penal Code section 12022.53, the 10-20-Life law that was overwhelmingly passed in 1997 to combat gun violence.³ As noted in Section 1 of the bill, “The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.” The 10-20-Life law mandates enhancements in certain serious offenses of 10 years for the use of a gun, 20 years for the intentional discharge of a gun, and life for the discharge of a gun that results in death or great bodily injury. Because the Act excludes consideration of enhancements in determining parole consideration, if a

² On February 10, 2014, the federal Three Judge Panel in the *Plata/Coleman* class action lawsuit ordered CDCR to create and implement “a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings (board) once they have served 50 percent of their sentence” and increases conduct credit for second-strikers to 1/3 from the statutory 20 percent. The initiative goes beyond these provisions by (1) eliminating enhancements and consecutive sentences for other counts in determining when inmates are entitled to parole consideration, and (2) elevating the parole consideration to a constitutional provision that cannot be changed without returning the issue to the voters.

³ Penal Code section 12022.53 was enacted in 1997 in Assembly Bill 4, with a vote of 72-4 in the Assembly, 31-1 in the Senate, and signed by the Governor. It was reenacted in 2010 without substantive change.

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firearm allegation is not used to make an offense a violent offense, the 10-20-Life enhancement will be disregarded.

F. Proposition 35, Human Trafficking

Proposition 35, the Californians Against Sexual Exploitation Act, was approved by 81.3 percent of the voters on November 6, 2012. It increases penalties for human trafficking, including enhancements of 5, 7 or 10 years for infliction of great bodily injury; and an enhancement of 5 years if the defendant has a prior conviction. (Penal Code, § 236.4(b) & (c).) If the offense involves use of force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury against a minor, the penalty is 15 years to life. (Penal Code, § 236.1(c)(2).)

Proposition 35 finds that human trafficking is “a crime against human dignity and a grievous violation of basic human and civil rights.” (Prop. 35, § 2, ¶ 2.) It found, “We need stronger laws to combat the threats posed human traffickers....” (Prop. 35, § 2, ¶ 5.) A “Purpose and Intent” of Proposition 35 is “[t]o combat the crime of human trafficking and ensure just and effective punishment of people who promote or engage in the crime of human trafficking.” (Prop. 35, § 3, ¶ 1.)

The Governor’s initiative is contrary to the voters’ determination that we “need stronger laws” for human trafficking and that the sentences imposed for human trafficking are “just and effective.” The authority of CDCR to award conduct credits would allow reduction of the time actually served for human trafficking offenses. Under the initiative, consecutive sentences for multiple victims would be disregarded for parole consideration. Enhancements for great bodily injury or prior offenses could be “excluded” in making human traffickers eligible for parole consideration. The initiative is unclear whether the life term for human trafficking would be considered an “alternative sentence” that would also be “excluded.”

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V. The Act Allows Parole after Completion of the Sentence for One Count, and Disregards Enhancements, Sentences on Other Counts, and Alternative Sentences

The initiative proposes to amend the California Constitution to provide:

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.

(A) 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.

(Initiative, section 3, proposing Cal. Const., art. I, § 32, subd. (a)(1).)

As explained below, for persons convicted of non-violent offenses, this provision would base parole eligibility on the sentence imposed for a single count, and would ignore any additional punishment imposed for commission of multiple offenses, use of a deadly weapon, acting to benefit a criminal street gang, having a prior prison record, and numerous other enhancements. It would also allow accelerated release for repeat offenders convicted under the Three Strikes Law for serious offenses like assault with a deadly weapon on a peace officer, residential burglary, a state prison inmate holding a hostage, and rape of an unconscious person. In addition, as explained below, based upon the imprecise wording of the proposal, there is a substantial risk that it could result in the release of murderers and other violent felons.

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A. Non-violent offenses

1. Offenses included

The term “non-violent felony offense” is not defined in the initiative, or elsewhere in California law. However, Penal Code section 667.5, subdivision (c), which has been the law in California since 1977, defines “violent felony” with a list of some 23 offenses. That list currently includes crimes such as murder and attempted murder, mayhem, forcible rape (but not all rapes), forcible sexual assault crimes (but not all of them), felonies involving great bodily injury being inflicted on a victim, felonies involving firearm use, robbery, some arsons, kidnapping, carjacking, some felonies involving explosives, and any felony punishable by death or in the state prison for life. Presumably, any felony not included in the definition of “violent felony” would be a “non-violent felony” for purposes of the initiative.⁴

Voters may imagine that “non-violent felonies” are limited to low-level crimes like drug possession or auto burglary. But California also has a “serious felony” list, created by Proposition 8, enacted by the voters at the June 8, 1982, election. This serious felony list is much longer than the violent felony list and is contained in Penal Code section 1192.7(c). The violent felony list is a subset of the serious felony list meaning that violent felonies are also serious felonies. There are numerous serious felonies that are referred to as “not violent” under California law, but which are, in fact, violent in nature. Following is a partial list of these felonies:

⁴ Throughout the Penal Code, the terms “violent felony” and “serious felony” are associated with the statutes that contain those lists of felonies, Penal Code sections 667.5(c) and 1192.7(c)). This association is in the criminal street gang statute (Penal Code, § 186.22), statutes limiting prison conduct credits (Penal Code, § 2933.1), and the Three Strikes law (Penal Code, §§ 667 and 1170.12), to name a few. Numerous appellate court cases have interpreted issues involving what constitutes a violent or serious felony in terms of the lists in Penal Code sections 667.5(c) and 1192.7(c). Drafters who write an initiative and the voters who enact it are deemed to be aware of existing laws. (*In re Harris* (1989) 49 Cal.3d 131, 136.) There is a presumption that terms in a statute or ballot measure are being used in the precise and technical sense as interpreted by the courts. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216; *People v. Weidert* (1985) 39 Cal.3d 836, 845-846.) Therefore, courts will likely conclude that the phrase “non-violent felony” as used in the Act means all crimes that are not listed in the violent felony list (Penal Code, § 667.5(c)).

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- Penal Code section 136.1 Threats to a crime victim or witness
- Penal Code section 186.22(a) Active participation in a criminal street gang
- Penal Code section 186.22(b) Various felonies committed for gang purposes
- Penal Code sections 191.5 & 192(c) Vehicular manslaughter
- Penal Code section 192(b) Involuntary manslaughter
- Penal Code section 243(d) Battery with personal infliction of serious bodily injury
- Penal Code section 244 Throwing acid or flammable substances
- Penal Code section 245(a)(1) Assault with a deadly weapon
- Penal Code section 245(c) Assault with a deadly weapon on a peace officer or firefighter
- Penal Code section 246 Discharging firearm at an occupied dwelling, building, vehicle, or aircraft
- Penal Code section 261(a)(1) Rape where victim legally incapable of giving consent
- Penal Code sections 261(a)(3) & 262(a)(2) Rape by intoxicating substance
- Penal Code sections 261(a)(4) & 262(a)(3) Rape where victim unconscious of the act
- Penal Code section 261(a)(7) & Penal Code section 262(a)(5) Rape by threat of public official
- Penal Code section 422 Criminal threats
- Penal Code section 451(c) Arson of a structure or forest land
- Penal Code section 451(d) Arson of property
- Penal Code section 455 Attempted arson
- Penal Code section 459-460(a) Residential burglary
- Penal Code section 487(c)(2) Grand theft firearm
- Penal Code section 4501 Assault with a deadly weapon by state prison inmate
- Penal Code section 4503 Holding a hostage by state prison inmate
- Penal Code section 12022(b) Any felony involving the personal use of a deadly weapon

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- Penal Code section 18740 Exploding a destructive device or explosive with intent to injure

2. Exclusion of enhancements

The initiative requires that a defendant be considered for parole after the full term for the primary offense, excluding any enhancement. An enhancement is “an additional term of imprisonment added to the base term.” (See Cal. Rules of Court, rule 4.405(3).) Some examples are: committing a felony to benefit a criminal street gang (Penal Code, § 186.22), infliction of great bodily injury on a victim of human trafficking (Penal Code, § 236.4(b)), the use of a deadly weapon (e.g., a knife) during the commission of a crime (Penal Code, § 12022(b)), the taking of a large sum of money or property during the commission of a crime (Penal Code, § 12022.6), injuring or killing two or more victims during the commission of a drunk driving or vehicular manslaughter crime (Veh. Code, § 23558); fleeing the scene of a vehicular manslaughter (Veh. Code, § 20001(c)); having previously served a term in state prison (Penal Code, § 667.5(b)); or having a serious felony prior conviction (Penal Code, § 667(a)). The penalty for an enhancement is added on to the crime a defendant commits.

One example is a gang member who commits an assault with a knife (2, 3, or 4 years in prison), which is a serious, but not violent felony, and commits the crime for gang purposes such that he is subject to a 5-year gang enhancement pursuant to Penal Code section 186.22(b)(1)(B). A typical state prison sentence for this gang crime would be the middle term of 3 years for the assault plus the 5-year gang enhancement for a total term of 8 years. Under the Act, the gang enhancement is ignored, and the defendant would be eligible for release on parole after serving just three years (actually, just 1½ years with conduct credits).

Defendants who commit their crimes in certain ways or who have serious criminal histories should and do receive longer sentences than defendants who do not have enhancements such as weapon use or do not have criminal histories such as prior serious or violent felony convictions. **By ignoring enhancements in calculating an**

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inmate's release date, the Act treats higher-level and lower-level offenders the same.

Another ambiguity caused by the inexact drafting of the initiative relates to crimes that are considered "violent" *because* they have enhancements for infliction of great bodily injury or use of a firearm. (Penal Code, § 667.5(c)(8).) For example, human trafficking becomes a violent felony when it involves force, fear, etc against a minor. (Penal Code §§ 236.1(c)(2), 667.5(c)(7).) It is unclear whether CDCR would "exclude" the enhancements, thus rendering the crimes "non-violent" and eligible for early parole.

3. Exclusion of consecutive sentences

Consecutive sentences are also ignored in calculating when a felon may be released early from state prison. California law provides for imposition of one-third of the mid-term for most consecutive sentences. (Penal Code, § 1170.1(a).) Full-term consecutive sentences can be imposed for certain sex offenses and other aggravated crimes. (Penal Code, §§ 667.6, 1170.1(b), 1170.15, 1170.16.)

The initiative eliminates the effect of all consecutive sentences, at least for non-violent offenses. For example, a residential burglar who commits ten residential burglaries has to serve the term for only one burglary before being eligible for parole, and is thus treated the same under the Act as a felon who commits only one burglary.

At sentencing, the court may select a particular term and run other sentences consecutively or concurrently to reach an appropriate sentence. For example, the court could impose the middle term of 3 years for assault with a deadly weapon (Penal Code, § 245(a)(1)), and impose consecutive terms of 2 years for two other counts, for a total of 5 years. Or in the same case, the court may decide to impose the high term of 4 years for the principal term, and run the other counts concurrently, for the total of 4 years. Either approach would be acceptable to reach what the court believes is an appropriate sentence of 4 years. (See Cal. Rules of Court, rule 4.425(b)(1).) But the Act would have a consequence that the judge, prosecutor, and defendant never anticipated, allowing the defendant in the first scenario to be

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considered for parole after 3 years, while the defendant in the second scenario would not be eligible until 4 years.

B. Violent felonies

At first glance, the initiative seems to be limited to “non-violent felony offense[s].” But the wording makes it unclear whether those convicted of violent offenses would also be entitled to reduced sentences if they are also convicted of non-violent offenses. The proposal requires parole consideration for “[a]ny person convicted of a non-violent felony offense and sentenced to state prison.” Defendants’ attorneys will argue that the parole eligibility applies to *every* inmate with at least one non-violent felony conviction even though that inmate may also have violent felony convictions, or may even also be serving a life term for murder. The reason for this is that the drafters have not included any limitation or disqualifiers on who may be released early from state prison. The only qualification needed to get released from prison early is to have at least one non-violent felony conviction.

In other areas of California law, drafters have taken care to add appropriate disqualifiers. The series of “Realignment” bills that became law in October 2011 and provided for more felons to serve their sentences in county jail rather than in state prison contained specific disqualifiers. The language of Realignment’s Penal Code section 1170(h)(3) provides that a felon does not qualify for a county jail sentence if he or she has a current or prior serious felony conviction pursuant to Penal Code section 1192.7(c), or has a current or prior violent felony conviction pursuant to Penal Code section 667.5(c), or is required to register as a sex offender pursuant to Penal Code section 290. If the intent of the Act is to limit early release to criminals convicted only of non-violent offenses, then it should be written to specifically say this.

Defense attorneys will assert that the Act applies to defendants with violent felonies who also have non-violent felonies, and the courts will need to decide the issue. This claim will be made even if regulations are enacted to exclude those with violent felonies because the right to early parole consideration would be contained in the Constitution. The logical conclusion would be that a defendant who has committed

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both a violent and a non-violent offense should not be entitled to more lenient treatment than a defendant who has committed the same violent offense without also committing a non-violent offense. But existing case law does not make that a foregone conclusion.

In *People v. Ramos* (1996) 50 Cal.App.4th 810, the court interpreted Penal Code section 2933.1, which provides that “any person who is convicted of a [violent] felony offense. . . shall accrue no more than 15 percent of worktime credit. . . .” The defendant in *Ramos* was convicted of eight violent felonies (robbery) and a non-violent drug felony. Ramos argued that he should earn 50 percent credit for the 8-month consecutive sentence for the drug felony because it was not a violent felony. The court found that the 15 percent credit limitation applies to any offender with at least one violent felony conviction and thus to an entire sentence that contains at least one violent felony. (See *In re Reeves* (2005) 35 Cal.4th 765, 772-773.)

A contrary result is suggested by *People v. Johnson* (2015) 61 Cal.4th 674. The court in that case construed a provision of Proposition 36, that a third-strike inmate is eligible for resentencing if the third strike is for a felony that is not defined as serious and/or violent. The defendant had received two Three Strikes life terms: one based on a serious felony, and one based on a felony that was neither serious nor violent. The court adopted a “count-by-count” approach and concluded that the serious felony conviction precluded resentencing for one case but not for the other. Similarly, a court could interpret the Act to find that the presence of some non-violent felony counts does not entitle the defendant to parole consideration for violent felony counts.

Based on the current wording of the Act, a court may rule that as long as an inmate has a conviction for at least one non-violent felony offense, that inmate is eligible for early release from state prison no matter what other convictions that inmate is serving time for. Examples include a murderer also serving time for threats to a witness to that murder; a serial rapist also serving time for stealing the car of one of his victims; a child molester also serving time for being a felon in possession of a firearm; or a kidnapper who is also serving time for the crime of stalking. And there are dozens of additional examples that could be listed here.

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If the courts conclude that the Act applies to any inmate convicted of a non-violent felony, any state prison inmate who does not currently qualify for early release under the Act (because he/she is convicted of only violent felonies) will have an incentive to commit a felony in prison in order to become qualified for early release. Any prison-bound defendant currently in county jail will have an incentive to commit a crime in county jail in order to qualify for early release upon arrival in state prison. For example, an inmate serving a lengthy sentence for a violent offense such as attempted murder with great bodily injury and firearm use, would have an incentive to commit an assault with a deadly weapon by a state prisoner in violation of Penal Code section 4501(a) or an assault by means of force likely to produce great bodily injury by a state prison inmate in violation of Penal Code section 4501(b) just to become eligible for parole based on the new non-violent offense. Each of these offenses is a serious but not violent offense. The same would be true with an inmate serving a state prison term for murder who commits the non-violent felony crime of hostage taking in state prison pursuant to Penal Code section 4503. Inmate-on-guard assaults and inmate-on-inmate assaults in state prison will increase, because this will be the fastest and easiest way to qualify for early release, making California's state prisons and county jails more dangerous places.

C. Two Strike and Three Strike sentences

The Act also ignores "alternative sentences" in calculating parole release dates. The term is not defined in the Act or anywhere else in California law. However, California's Three Strikes law, which provides for a doubled term for felons with at least one serious or violent prior felony conviction and provides for a life term for felons with a current serious or violent offense along with two or more specified serious or violent priors, is considered an "alternative sentencing scheme" by the courts. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527; *People v. Cressy* (1996) 47 Cal.App.4th 981, 991; *People v. Sipe* (1995) 36 Cal.App.4th 468, 485-486.) This would mean that state prison inmates who are repeat and serious/violent offenders would be treated the same as felons who are not.

An example would be a serial residential burglar with a serious prior conviction, making the defendant a Two Strikes defendant with a 5-year Penal Code section

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667(a) Proposition 8 prior. In a four-count case, this defendant could be sentenced to a 4-year middle term (residential burglary is punishable by 2, 4 or 6 years in prison) doubled to 8 years, and 16-months consecutive doubled to 32 months consecutive for each of the three other counts, plus 5 years for the Penal Code section 667(a) serious felony prior conviction for a total term of 21 years. Under the Act, all burglaries beyond the first one are ignored, and this defendant is eligible for release after serving only a four-year term. The serial burglar would be treated the same as a felon with only one conviction for residential burglary and no criminal history.

Furthermore, when a court imposes an indeterminate sentence under the Three Strikes law, no “full term for the primary offense” is calculated. (Penal Code, § 667(e)(2)(A).) It is unclear how the initiative’s mandate that alternative sentences be excluded when determining the full term for the primary offense will be implemented. The language of the initiative simply does not make sense.

D. Other Alternative Sentencing Schemes

Other statutory schemes that are likely to be deemed “alternative sentences” are Penal Code section 667.61 (“One-strike”) and Penal Code section 667.71 (Habitual Sex Offender). These provide for life terms for sex offenders who commit their crimes in specified ways (weapon use, kidnapping, bodily harm, burglary, tying and binding, etc.) and/or have specified sexual assault prior convictions. However, because all of the underlying offenses are “violent,” it is unclear whether the parole consideration provision of the Act would apply to these sentences.

VI. The Act Creates Numerous Uncertainties Concerning Parole Procedure and Practice

A. Parole consideration – determinate sentences

California’s parole system applies to two types of prisoners: those serving determinate sentences and those serving indeterminate sentences. Most felonies are punishable by a “determinate sentence” in which the judge selects from a triad of possible sentences

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(e.g., 2, 3 or 5 years). That sentence is reduced by conduct credits of 15, 20 or 50 percent. After completion of the determinate sentence, reduced by conduct credits, the defendant is automatically released on parole, to be under the supervision of a state parole agent. The parole period for most offenses is three years, but is reduced to six months or a year if the parolee has no serious violations. (Penal Code, §§ 3000(b)(2)(B), 3001.)

Under the Act, it is unclear whether, after eliminating the enhancements and consecutive sentences, the defendant would be automatically released on parole (as is currently done for determinate sentences), or would have to argue suitability before a parole board. The language in the initiative – “parole consideration” – suggests some sort of discretionary determination. Expanding parole boards to handle these additional cases would be a significant expense for the state. The initiative does not indicate whether, instead, a clerk at the prison will “consider” whether to release the inmate. If so, the discretion appropriately vested in judges and parole boards could be delegated to low-level bureaucrats.⁵

B. Postrelease Community Supervision

Since October 2011, when the Realignment laws became effective, inmates whose current prison commitments include serious or violent felonies are released from state prison onto parole to be supervised by the state (Penal Code, § 3000.08), and inmates serving terms for only non-serious and non-violent felonies are released from state prison onto Postrelease Community Supervision (PRCS) to be supervised at the county level by probation departments (Penal Code, § 3451). Parole (Penal Code, §§ 3000 - 3073.1) and PRCS (Penal Code §§ 3450 – 3465) are two distinct and separate forms of supervision.

⁵ Whatever process is utilized must allow the victim “[t]o be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.” (Cal. Const., art. I, § 28(b)(15), enacted by Marsy’s Law.) The victim also has the right “[t]o have the safety of the victim, the victim’s family, and the general public considered before any parole or other post-judgment release decision is made.” (*Id.*, § 28(b)(16).)

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But the Act provides that “[a]ny 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.” (Emphasis added.) The Act says nothing about Postrelease Community Supervision. The absence of any reference to PRCS in the Act is very curious. An argument could be made that the use of the word “parole” and “non-violent” in the same sentence of the Act, and the absence of any reference to PRCS, demonstrate that the intent of the drafters is to have the Act apply only to serious felons, since they are the only non-violent felons who are released onto parole. Everyone else is released onto PRCS. Another possibility is that inmates convicted of non-violent felonies can be released early under the Act, but must be released on parole rather than on the statutory-provided PRCS. It is more likely that this is a drafting error and/or a fundamental misunderstanding of how release from state prison works. State prison inmates who are to be released onto PRCS for felonies that are neither serious nor violent will challenge the Act on the constitutional grounds of equal protection, and are likely to be successful in arguing that if serious felons are eligible for early release onto parole, then non-serious/non-violent felons should also be eligible for early release onto PRCS.

If it is the intent of the drafters to have state prison early release provisions apply only to the lower level offenders in state prison, then the language of the Act should explicitly prohibit its application to any inmate who is to be released onto parole. The Act should instead reference only release onto PRCS.

C. Parole consideration – indeterminate sentences

The second type of parole is for those sentenced to life terms (“indeterminate sentences”). These include those convicted of murder and sentenced to life with the possibility of parole (Penal Code, § 190), as well as several other crimes such as aggravated kidnapping and Three Strikes. (See list in CEB, Cal. Crim. Law & Proc., § 37.4.) After serving a designated minimum sentence, and periodically thereafter, these prisoners appear before a parole board. (Penal Code, § 3040 et seq.) In such cases, the parole board considers the defendant’s suitability for parole and determines whether or not the person should be released on parole. All of these offenses are

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“violent,” so, as discussed above, it is unclear whether the parole consideration provision of the Act could apply if there was also a non-violent offense.

D. Parole consideration – life without parole

Under California law, a defendant convicted of murder with designated “special circumstances” must be sentenced to either death, or life without parole (LWOP). (Penal Code, § 190 (a).) If the defendant was also sentenced for some non-serious crimes along with the murder, it is unclear if CDCR could make such an inmate eligible for parole by striking the special circumstances, or by concluding that the constitutional provision enacted by the initiative (“shall be eligible for parole consideration”) overrides the statutory “life without parole” provision.

E. Parole consideration – county jail sentences

Under Realignment, persons sentenced to so-called “non-non-non” felonies (non-violent, non-serious, non-sex) are sentenced to county jail rather than state prison. (Penal Code, § 1170 (h).) In general, these offenses are less serious than those that result in a state prison sentence. But because the sentencing triads are unchanged, some prisoners are serving sentences of a number of years in county jail. It is likely that defendants will argue that under equal protection principles, they should receive the early release provisions of the Act. While we cannot predict how the courts will rule, this is not a frivolous argument and could be adopted by the courts.

VII. The Act Gives CDCR Virtually Unlimited Authority to Increase Credits

California statutes award conduct credits to state prison inmates. Currently, in most cases, state prison inmates are required to serve only half (50 percent) of their sentences pursuant to Penal Code section 2933. For example, if a defendant is sentenced to 3 years in prison for assault with a deadly weapon and 5 years for a gang enhancement because he/she committed the assault for gang purposes, for a total of 8 years, the defendant will serve only 4 years, if the defendant behaves well in prison. Many inmates are entitled to additional reductions for “approved rehabilitative

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programming” of up to 6 weeks for each “performance milestone.” (Penal Code, § 2933.05.) If a defendant is serving a violent felony sentence (for example, multiple counts of robbery with firearm use), the defendant may earn conduct credit of up to 15 percent, meaning that the defendant must serve 85 percent of the sentence. Fifteen percent conduct credit for violent felonies is provided for in Penal Code section 2933.1 and is consistent with what inmates in federal prisons receive. The California Legislature decided in 1994 that violent felons should serve more than 50 percent of their sentences, so this law has been on the books for over 20 years. The people of California decided in 1998 that murderers should have to serve their full sentences without conduct credits, and enacted Penal Code section 2933.2 at the June 1998 election.

Conduct credits serve an important role in the criminal justice system by providing an incentive for state prison inmates to behave in prison. Conduct credits help make prisons safer for prison guards and other inmates, and they provide an incentive for inmates to work and pursue education inside state prison. Inmates serving life terms, such as murderers and major sex offenders, who must serve their full terms before being eligible for parole, also have an incentive to behave because they want to be paroled at the earliest possible date the law says they can be paroled. Misbehaving in prison pushes that date back. An inmate wishing to be released will follow the rules and participate in prison programs. But there is no evidence that it is necessary to increase the amount of credits in order to secure such cooperation. Instead, increasing credits appears to be a means of freeing bed space, which is specifically prohibited by Marsy’s Law.

The Act would add section 32 (a)(2) to article I of the California Constitution to provide, “The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.” Since CDCR already administers the statutory credits provisions, it appears that the purpose of the new language is to give CDCR the constitutional authority to award credits in addition to those allowed by statute.

The Act would also add section 32 (b) to article I of the California Constitution to provide, “The Department of Corrections and Rehabilitation shall adopt regulations in

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furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.”

CDCR, like other state agencies, already has authority to adopt regulations, following the procedures of the Administrative Procedure Act (Gov. Code, § 11340 et seq.). An important limitation on regulations is that they may not conflict with constitutional or statutory law. (Gov. Code, §§ 11342.1, 11342.2; *California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control* (1988) 201 Cal.App.3d 100, 106–107; *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4th 35, 42; *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 873.) What is not clear is whether, by putting the right of CDCR to make regulations regarding credits in the Constitution, this empowers CDCR to award credits in excess of the limits imposed by statute.

The credit regulations will not be discussed or debated by the Legislature, and they will not be voted on by the people of California. Credits will be decided by a group of CDCR appointees and staff. While the public will have the opportunity to comment on the proposed regulations under the Administrative Procedure Act, CDCR is under no obligation to heed the public comment received.

Furthermore, the authority of CDCR to release state prison inmates early by awarding them more conduct credits than current law permits, applies to all state prison inmates, not just those with a non-violent offense. It would apply to murderers, rapists, child molesters, gangsters, and all other serious and violent felons. The Act does not include any limitation on the type of inmate it applies to. Therefore, even if the early parole provision of the Act is interpreted by the courts to be more limited than suggested in this analysis, the conduct credit provision applies to all inmates. It permits the awarding of increased credits so that any inmate can serve less time than he or she must serve under current law. California could see inmates serving as little as one-third or one-fourth of their sentences, maybe less. The pressure on CDCR from the state would be to increase credits significantly in order to relieve prison overcrowding and budgetary issues, although that is specifically prohibited by Marsy’s Law.

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The Act effectively repeals current conduct credit statutes enacted by the State Legislature and voted on by Californians, and gives all authority over conduct credits to a state institution that is not accountable to the people. The only limitation on CDCR's power to set conduct credits is that CDCR must certify that the regulations "protect and enhance public safety." This phrase provides no real limitation on CDCR's power to shorten the sentences of prison inmates.

In 1977, California changed from indeterminate sentencing to determinate sentencing. Before this change, every defendant sentenced to state prison was sentenced to prison for the "term prescribed by law." Unless otherwise provided, the default sentence for a felony was 6 months to 5 years. (Former Penal Code, §§ 18, 18a, 18b; Stats. 1953, ch. 720.) As a result of California's indeterminate sentences having such low minimums, many inmates, even those serving time for violent and serious felonies, served very little time in state prison. It was not unheard of for a violent rapist to serve only a couple of years in state prison before release.

In an effort to increase uniformity and truth in sentencing, California created a determinate term sentencing system whereby most crimes carried a specific number of years in prison, with conduct credits limited to one-third at that time, meaning that inmates had to serve two-thirds of their sentence. After several amendments, one-third credits were increased to 50 percent credits. The Act would overturn California's current system of awarding conduct credits and would guarantee that thousands of inmates would be released before finishing their statutory sentences. If the public and crime victims are unhappy with the conduct credit scheme CDCR creates, the only way to fix it would be to amend the Constitution at a future election, which would require a ballot measure and the gathering of over 500,000 valid signatures from Californians eligible to vote, or, to perhaps file a lawsuit against CDCR and spend years in court litigating that the credit scheme created by CDCR does not protect and enhance public safety.

VIII. The Act Restricts the Ability to Prosecute in Adult Court Juveniles Charged with Serious Offenses

Section 4 of the Act eliminates direct filing of juvenile cases in adult court by prosecutors, and eliminates all presumptions that serious/violent juvenile offenders are unfit to be prosecuted in juvenile court.

The Act amends Welfare & Institutions Code section 602 to eliminate the requirement in subdivision (b) that specified juvenile cases be filed in adult court. Welfare and Institutions Code section 602(b) mandates the direct filing in adult court of specified crimes committed by juveniles age 14 or older, without requiring a hearing before a juvenile court judge to determine whether the minor is fit or unfit to be dealt with in the juvenile court system. It applies to specified sex crimes personally committed by the minor, and murder personally committed by the minor. The Act also amends Welfare and Institutions Code section 707 to eliminate all provisions (Welf. & Inst. Code, § 707, subd. (d)) that give prosecutors the discretion to file a juvenile case involving a serious or violent crime in adult court without requiring a hearing before a juvenile court judge.

By eliminating these provisions, the Act permits only judges, and not prosecutors, to decide whether a minor should be prosecuted as an adult, even in cases where a minor commits a violent crime such as attempted murder or forcible rape and has previously been found by the juvenile court to have committed other serious or violent crimes. These direct filing provisions, both mandatory and discretionary, were a part of the Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21) that California voters enacted in March 2000. Since Proposition 21 passed, the vast majority of juvenile cases have been handled in juvenile court, not adult court. California's district attorneys have used direct filing authority only in the worst cases, where, because of the magnitude of the offenses committed by a minor, the minor's criminal history, and public safety concerns, the cases could not be properly handled within the juvenile system. In most cases, even the most dangerous offenders who are dealt with by the juvenile court may only be kept in a juvenile facility for treatment until they reach the age of 23, after which they must be released back into the community.

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An additional consequence of the elimination of the ability of prosecutors to directly file juvenile cases in adult court will arise when serious crimes are committed by multiple offenders, some of whom are adults and others minors, particularly in gang cases. Without the ability to file one case in adult court naming all of the perpetrators, prosecutors will be forced to file multiple cases and to conduct separate trials in both adult and juvenile courts. Each juvenile offender would be entitled to a separate transfer hearing under the Act. This process would be costly and time-consuming and would further traumatize crime victims who would have to testify multiple times in different courts.

The Act amends Welfare and Institutions Code section 707 to eliminate all presumptions that a minor with a felony criminal history or a minor who commits a particular serious or violent felony is not fit to be prosecuted in juvenile court. (Welf. & Inst. Code, § 707(a)(2), (a)(3), and 707(c) are deleted.) The following presumption in Welfare and Institutions Code section 707(a)(2) is eliminated: A juvenile age 16 or older with two prior felonies committed when he/she was age 14 or older is presumed unfit to be prosecuted as a juvenile and is instead prosecuted as an adult. The following presumption in Welfare and Institutions Code section 707(c) is also eliminated: A juvenile age 14 or older who commits a serious or violent felony is presumed unfit to be prosecuted as a juvenile and is instead prosecuted as an adult.

The Act eliminates the term “fitness hearing” and uses the term “transfer hearing” instead. In a fitness/transfer hearing, a juvenile court judge hears evidence and decides, based upon five criteria set forth in section 707, whether a minor should be prosecuted in juvenile court or in adult court. The Act contains two paths for transferring a juvenile case to adult court: a) the commission of any felony crime by a minor age 16 or older; or b) the commission of a 707(b) offense by a minor age 14 or 15.

Welfare and Institutions Code section 707(b) lists 30 serious and violent felonies including murder, attempted murder, arson, robbery, sexual assault, kidnapping, violent gang crimes, carjacking, and torture. The five criteria used by judges for many years at fitness/transfer hearings to decide if a minor’s case should be sent to adult court were amended as of January 1, 2016, to make the criteria more favorable

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to juvenile offenders in an effort to reduce the number of juveniles prosecuted as adults. With the elimination of all direct filing, the elimination of all presumptions of unfitness for serious and violent juvenile offenders, and the five transfer criteria being worded in terms very favorable to juvenile offenders, the number of minors transferred to adult court will most likely plummet. This result would have significant public safety consequences for California.

Oddly, the Act eliminates the requirement in current law that a probation officer investigate the behavioral patterns and social history of a minor whose case the juvenile court is considering for transfer to adult court. Current law requires a probation officer to investigate and submit a report to the court about the behavior and social history of a minor. The Act requires only that a probation officer submit a report. The juvenile court should have more, not less, information, when conducting hearings regarding minors who commit serious or violent crimes. Eliminating the investigation aspect of the process could very well result in the juvenile court not receiving full and complete information about a minor.

The Act will create an enormous issue as to whether the changes in juvenile law are retroactive, such that a juvenile currently serving a term for a directly-filed offense or a juvenile who was presumed unfit for juvenile court, will seek to have his/her conviction set aside and seek a transfer hearing to determine whether he/she will be prosecuted in juvenile or adult court. Repeal of a criminal statute or the Legislature's reduction of a sentence is retroactive to cases not yet final on appeal. (*In re Estrada* (1965) 63 Cal.2d 740.) Changing the procedure by which a minor may be tried in adult court will result in thousands of inmates inundating the court system to seek more lenient sentences.

IX. The Flaws in the Initiative Cannot Be Fixed Without Another Ballot Measure

This Act makes early release and increased credit provisions part of the California Constitution. (See section 3 of the Act, which creates new section 32 of article I of the California Constitution.) Any amendment to the Constitution must be voted on by

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the people of California at an election. (See section 4 of article XVIII of the California Constitution). This is an important reason why the language of the Act should be scrutinized closely now, before the November election. The problems with the Act's early release and increased credit provisions cannot be easily fixed by the Legislature. The Act becomes law as written, it will take another ballot measure and vote of Californians at a future election to fix it.

Various means may be employed to reduce prison overcrowding, based upon the situation at any given time. A constitutional amendment that essentially wipes out decades of carefully crafted sentencing provisions is the wrong way to address the prison population issue. Long after the population issue is resolved, the Act will remain in the Constitution, requiring consideration for early release unless and until the voters enact another initiative.

The drafting of language in statutes and in the California Constitution needs to be precise because the words have technical meanings that interrelate with other provisions of law. Crime victims and taxpayers suffer when poorly drafted legislation or ballot measures become law, because years of time and millions of dollars are wasted while the meaning and application of the law are argued in the courts.

X. The Act Will Jeopardize Rather than Protect Public Safety

The Act's Title ("The Public Safety and Rehabilitation Act of 2016") and stated intent (to "protect and enhance public safety") is not at all consistent with what the Act actually does or with the consequences and ramifications of the Act.

Only 6.7 percent of the inmate population has neither serious nor violent offenses. Because the phrase "non-violent felony" has an established meaning in California law, thousands of felons who have committed serious but not "violent" felonies are eligible for early release. A partial list would include:

- rape of an unconscious or intoxicated victim
- assault with a deadly weapon on a peace officer or firefighter

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- a felony committed by a criminal street gang member to benefit his or her gang
- residential burglary
- assault with a deadly weapon
- threats to a crime victim or witness
- vehicular manslaughter
- battery where serious injury is inflicted on the victim
- any felony involving the personal use of a deadly weapon.

It is difficult to see how early release of these criminals would make the community in which they are released safer. Presumably, the argument would be that if they were not released, a federal court (or a receiver appointed by a federal court) might order even more dangerous persons released to prevent overcrowding. This speculation does not warrant changing California law by amending the Constitution to require parole consideration for a long list of serious offenses, accelerating their release for all time by excluding consideration of enhancements and consecutive terms.

Conclusion

The intent of the initiative appears to be to accelerate the release of state prison inmates serving terms for non-violent offenses. But it does so with a sledge hammer rather than a scalpel, amending the Constitution to drastically reduce sentences by requiring parole consideration for those serving consecutive sentences for multiple crimes, repeat offenders, and those whose crimes are aggravated by factors resulting in enhancements. Moreover, the initiative is drafted in a manner that may well make it applicable to serious felonies, violent felonies and possibly even murders. The credits provisions violate the intent of the Legislature and the voters in requiring inmates to actually serve the sentences they receive.

Unfortunately, the time to amend the initiative has expired. We recommend that the initiative be withdrawn and be replaced at a future date with a more precisely worded proposal.

