IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
FEB 03 2020
Jorge Navarrete Clerk
Deputy

In re

GREGORY GADLIN,

On Habeas Corpus.

Case No. S254599

Court of Appeal of California
Second District, Div. Five
Case No. B289852

Superior Court of California
County of Los Angeles
Case No. BA165439
Hon. William C. Ryan

APPLICATION AND BRIEF OF AMICUS CURIAE ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC. IN SUPPORT OF PETITIONER GREGORY GADLIN

Janice M. Bellucci
State Bar No. 108911
Law Office of Janice M. Bellucci
1215 K Street, 17th Floor
Sacramento, CA 95814
(805) 896-7854
jmbellucci@aol.com
Attorney for Amicus Curiae

RECEIVED
JAN 24 2020
CLERK SUPREME COURT

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE AND STATEMENT OF INTEREST

TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE:

Amicus Curiae Alliance for Constitutional Sex Offense Laws, Inc. ("ACSOL") respectfully submits this Application for leave to file the attached brief in support of Petitioner Gregory Gadlin.

ACSOL is a nationwide civil rights organization comprised of persons convicted of a sex offense ("Registrants"), their families, and others impacted by the registry. ACSOL advocates on behalf of these groups through education, litigation, and participation in the legislative and regulatory processes. As a group comprised of and representing incarcerated Registrants, ACSOL is particularly interested in the regulatory implementation of Proposition 57, and has submitted testimony and comments to the Department of Corrections and Rehabilitation ("CDCR") at all available opportunities.

In addition, ACSOL has filed two lawsuits challenging CDCR's emergency and final regulations implementing Proposition 57. Those cases, captioned *ACSOL, et al. v. CDCR, et al.* (Case No. C087294) and *ACSOL v. CDCR* (Case No. 34-2018-80002918), are currently pending before the Third District Court of Appeal, and Sacramento County Superior Court, respectively. Both cases challenge CDCR's denial of early parole consideration to two separate groups: (1) persons presently incarcerated for a nonviolent, non-sex offense, on the basis of a prior sex offense conviction; and (2) persons presently incarcerated for a sex offense. Of course, this matter involves CDCR's denial of early parole consideration to the first group, of which Petitioner Gadlin is a member, but does not involve CDCR's denial of early parole consideration to the second group, of which Petitioner Gadlin is not a member.

This amicus brief will assist the Court in two ways. First, this brief offers a more complete account of the history and context of Proposition 57 than is provided in either party's brief. The history and context of Proposition 57 are relevant to CDCR's characterization of that measure. Second, this brief addresses the merits of the concurring opinion authored by Justice Baker in the decision under review, which neither party in this matter has addressed. Specifically, this brief will discuss why the reasoning of the concurring opinion is not relevant to the issues before the Court, and why the reasoning of the concurring opinion should not be adopted by the Court when resolving the issues currently before it.

Date: January 22, 2020

Respectfully submitted,

/s/ Janice M. Bellucci
Janice M. Bellucci
Attorney for Amicus Curiae

TABLE OF CONTENTS

///

///

///

///

///

///

///

///

///

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

///

///

///

INTRODUCTION

CDCR's briefing in this matter presents a selective history of Proposition 57. That is, CDCR's brief ignores important events that bear upon the interpretation of Proposition 57, as well as CDCR's regulatory authority under it.

Significantly, Proposition 57 is not an isolated prison reform initiative. Instead, Proposition 57 is the most recent consequence of CDCR's long reluctance to address the "severely deficient" and unconstitutional standards produced by California's overcrowded prisons. (*See Brown v. Plata* (2011) 563 U.S. 493, 500-01, 509-10; *In re Edwards* (2018) 26 Cal. App. 5th 1181, 1191-92.) As described more fully in this brief, the origins of Proposition 57 are found in two federal lawsuits, commenced in 1990, which resulted in a series of orders directing CDCR to reduce both the density and the aggregate size of its prison population. CDCR's long resistance to those orders has been characterized by one federal Three Judge Court as "obduracy."[1]

CDCR's obduracy continues to endure today in its efforts to "curtail the right created by Proposition 57 of numerous inmates to parole consideration by the Board of Parole Hearings," including those convicted of a sex offense. (*In re McGhee* (2019) 34 Cal. App. 5th 902, 905.) In fact, as of the date of this filing, five separate Courts of Appeal have published

---

[1] See *Opinion and Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline*, dated Feb. 10, 2014, issued by the federal Three Judge Court in the consolidated actions captioned *Plata v. Brown*, U.S. District Court for the Eastern District of Cal., Case No. 3:01-cv-01351 JST (Dkt. No. 2767), at p. 4:15-17 (hereinafter "Memorandum Opinion"). This Memorandum Opinion by the Three Judge Court is the companion to the Order by the Three Judge Court that CDCR submitted as Exhibit A to its Motion for Judicial Notice in this Court on August 13, 2019.

opinions striking down CDCR's regulatory exclusions of certain groups from early parole consideration, including those convicted of a sex offense. (*In re Edwards* (2018) 26 Cal. App. 5th 1181; *In re Gadlin* (2019) 31 Cal. App. 5th 784, *rev. granted* May 15, 2019, S254599; *In re McGhee* (2019) 34 Cal. App. 5th 902; *In re Schuster* (2019) 42 Cal. App. 5th 943, *app. pending* S260024; *In re Mohammad* (2019) 42 Cal. App. 5th 719, 722 *app. pending* S259999.) Several unpublished appellate and trial court opinions have held likewise. Indeed, every court to consider this issue has ruled that CDCR cannot lawfully deny early parole consideration to persons serving terms for nonviolent felonies. (See *McGhee*, *supra*, 34 Cal. 5th at p. 905 ["We confront another attempt by the California Department of Corrections and Rehabilitation [] to curtail the right created by Proposition 57 . . . ." (emphasis added)].)

The common basis for these appellate rulings is a plain-text interpretation of Proposition 57, which guarantees that "any person convicted of a nonviolent felony offense" "shall" receive early parole consideration. (See, e.g., *Mohammad*, *supra*, 42 Cal. App. 5th at p. 722 ["In this proceeding challenging an aspect of regulations promulgated to implement The Public Safety and Rehabilitation Act of 2016 (Proposition 57), we give effect to the oft-repeated maxim that the best and most reliable indicator of the intended purpose of a law is its text."].) The history of Proposition 57 discussed below further affirms that the measure does not permit CDCR to deny early parole consideration to any person presently incarcerated for a "nonviolent felony offense" – including persons convicted of a nonviolent sex offense.

HISTORY OF PROPOSITION 57 AND JUDICIAL TREATMENT OF ITS EARLY PAROLE CONSIDERATION PROVISION

I. HISTORY OF PROPOSITION 57

A. *Coleman* and *Plata* Litigation

The origin of Proposition 57 is found in two federal civil rights lawsuits, known as the *Coleman* and *Plata* cases, which were initiated in 1990 and 2001, respectively. (*Brown v. Plata* (2011) 563 U.S. 493, 499; *In re Edwards* (2018) 26 Cal. App. 5th 1181, 1191-92.) Both lawsuits allege that the substandard medical and mental health services provided to inmates in California prisons violated the Eighth Amendment. (*Brown, supra*, 563 U.S. at p. 499.)

After years of litigation, the district courts in *Coleman* and *Plata* concluded that the substandard care at issue was a symptom of a larger cause: severe inmate overcrowding. (*Ibid.*) As the United States Supreme Court later determined, this overcrowding produced "serious constitutional violations in California's prison system" which "have persisted for years," and which "remain[ed] uncorrected" despite many years of litigation. (*Ibid.*) For these reasons, it "became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population." (*Ibid.*)

B. Establishment of the Three Judge Court

To facilitate the necessary reduction in the prison population, the individual judges in the *Coleman* and *Plata* cases requested and convened a "Three Judge Court" pursuant to the Prison Litigation Reform Act. (*Id.* at pp. 500-01, 509-10.) Three Judge Courts are empowered "to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment." (*Ibid.*) In August 2009, after weeks of trial and evidence,

the Three Judge Court issued a 184-page opinion that detailed the "severely deficient" medical care provided to California inmates due to overcrowding. (*Brown, supra*, 563 U.S. at pp. 509-10.) Based upon these findings, the Three Judge Court ordered CDCR to reduce its prison population to 137.5% of design capacity within two years (*i.e.*, by 2011). (*Ibid.*) The U.S. Supreme Court upheld the Three Judge Court's order in May 2011. (*Id.* at p. 510.).

C. CDCR Repeatedly Resists the Three Judge Court's Order

CDCR failed to meet the two-year deadline imposed by the Three Judge Court, and continued to violate the population reduction order for several more years. Specifically, in 2014, nearly five years after the original population reduction order was issued, the Three Judge Court found that CDCR "ha[s] consistently refused to take measures to reduce the California prison population." (Memorandum Opinion, *supra*, fn. 1, at p. 2:1-5.) The Three Judge Court also found that CDCR "continually failed to implement any of the measures approved by this Court and the Supreme Court that would have safely reduced the California prison population and alleviated the unconstitutional conditions of medical and mental health care in the prisons." (*Id.* at p. 2:11-14.) In response, the Three Judge Court resolved in 2014 to "act[] more forcefully with regard to [CDCR's] obduracy in the face of its continuing constitutional violations." (*Id.* at p. 4:15-19.)

D. The Three Judge Court Reiterates its Order to Reduce the Prison Population

On February 10, 2014, the Three Judge Court reiterated its order to reduce the California prison population to 137.5% of design capacity, and granted CDCR an additional two years to achieve that benchmark, provided that the agency's solutions were "long-lasting" and "durable."

(Memorandum Opinion, *supra*, fn. 1, at p. 2:15-28, 4:7-9.) In exchange for this reprieve, CDCR "agreed to develop comprehensive and sustainable prison population-reduction forms" through "various population reduction measures." (*Id.* at p. 003:15-18.)

II. THE ENACTMENT OF PROPOSITION 57

CDCR began implementing the new population reduction measures in or about January 2015. However, to ensure the long-term durability of the population reduction sought by that program and others, CDCR worked to identify additional population reduction mechanisms and reforms. These additional reforms became Proposition 57.

As detailed in Petitioner Gadlin's brief, Proposition 57 mandates that "any person" currently serving a sentence for a "nonviolent felony" "shall" be eligible for early parole consideration. The text of Proposition 57 does not limit or in any way restrict the terms "any person" or "nonviolent felony offense." Further, the plain text of Proposition 57 provides that eligibility for its benefits is to be determined solely by whether the conviction offense is "nonviolent." Eligibility for the benefits of Proposition 57 is not to be determined by any other criterion, such as whether the inmate is serving a determinate or indeterminate sentence, presents a risk of public safety, or has been convicted of a sex offense.

III. CDCR'S IMPLEMENTING REGULATIONS VITIATE PROPOSITION 57

On March 24, 2017, CDCR issued emergency regulations that flagrantly contradicted the plain text and intent of Proposition 57 by excluding several classes of inmates with nonviolent convictions from early parole consideration, including but not limited to Registrants. (Cal. Code Regs., tit.15, §§ 2449.1 (a), 3490 (a), 3492 (April 13, 2017).) Soon thereafter, on May 1, 2018, CDCR implemented its final regulations, which

also excluded the same classes of inmates. (Cal. Code Regs., tit.15, §§ 3491 (b), 3492 (May 1, 2018).)

Specifically, CDCR's emergency and final regulations purported to implement Proposition 57 by creating new provisions within Title 15 of the Code of Regulations entitled "Parole Consideration for Determinately-Sentenced Inmates." However, while Proposition 57 mandates early parole consideration for "any person convicted of a nonviolent felony offense," CDCR's regulations did not condition eligibility on whether the present conviction offense was "nonviolent." (Cal. Code Regs., tit.15, § 3491(a) (May 1, 2018).) Instead, CDCR conditioned eligibility upon its definition of a term not found in Proposition 57, that is, "nonviolent offender." (*Ibid.*) CDCR then defined the term "nonviolent offender" in a manner which categorically excluded many individuals who are presently incarcerated for a "nonviolent felony offense." For example, CDCR excluded:

- All inmates "[c]onvicted of a sexual offense that requires registration as a sex offender under Penal Code section 290," even if serving a sentence for a nonviolent, non-sex offense. (*Id.* § 3491 (b)(3) (May 1, 2018).)
- All inmates sentenced to indeterminate terms under the Three Strikes Law ("incarcerated for a term of life with the possibility of parole"), even if serving a sentence for a nonviolent offense. (*Id.* §§ 3490 (a)(1), 2449.1 (a)(1) (May 1, 2018).)
- Any other inmate serving a sentence for a nonviolent offense who, in CDCR's determination, indicates "an unreasonable risk of violence" according to certain "Public Safety Screening and Referral" developed by CDCR. (*Id.* §§ 3492 (May 1, 2018).)

For each of these categories, CDCR contended that "public safety requires their exclusion," despite the fact that Proposition 57 contains no such exclusions, and instead mandates early parole consideration for "any person convicted of a nonviolent felony offense." (*Edwards*, *supra*, 26 Cal. App. 5th at p. 1188.)

IV. FIVE SEPARATE APPELLATE PANELS HAVE STRUCK DOWN CDCR'S EXCLUSION OF REGISTRANTS AND OTHERS IN PUBLISHED OPINIONS

In published opinions, five separate appellate panels have struck down the above-referenced exclusions of Registrants, third strikers, and others in CDCR's emergency and/or final regulations.

A. *In re Edwards* (2d District, Division 5)

In the first decision, *In re Edwards* (2018) 26 Cal. App. 5th 1181, the Second Appellate District ruled that CDCR cannot exclude nonviolent, indeterminately sentenced third strikers from the early parole process. Specifically, the *Edwards* court ruled that the plain language of Proposition mandates that "all" inmates incarcerated for nonviolent felony offenses are eligible for early parole consideration, regardless of whether they are serving indeterminate or determinate sentences. (*Id.* at pp. 1186, 1190-91.) The *Edwards* court further ruled that CDCR lacked authority to exclude third strikers from the benefits of Proposition 57 because "public safety requires their exclusion," or for any other reason, because CDCR must implement the terms of that measure as written. (*Id.* at pp. 1188, 1190-91.)

B. *In re Gadlin* (2d District, Division 5)

The second decision, *In re Gadlin* (2019) 31 Cal. App. 5th 784, which is presently on review in this Court, involved an inmate who was

incarcerated for a non-sex offense, but who suffered a prior sex offense conviction for which he had already served a sentence. (31 Cal. App. 5th at pp. 786-87.) As in *Edwards*, the Second Appellate District in *Gadlin* ruled that CDCR cannot exclude those convicted of a nonviolent sex offense from early parole consideration, because the individuals are within the scope of the phrase "any person." In addition, the *Gadlin* court rejected the public safety argument asserted by CDCR, ruling that "policy considerations [] do not trump the plain text of section 32, subdivision (a)(1) [*i.e.*, Proposition 57]." (*Id.* at p. 789.)

C. ***In re McGhee* (1st District, Division 4)**

In the third decision, the First Appellate District rejected CDCR's public safety arguments in *In re McGhee* (2019) 34 Cal. App. 5th 902. In that case, the Court struck down CDCR's use of "screening criteria" to deny early parole consideration for those convicted of a nonviolent felony because, in CDCR's view, they "pose an unreasonable risk of violence." (*Id.* at p. 906.) The *McGhee* court labeled CDCR's exclusion as "another attempt by the California Department of Corrections and Rehabilitation [] to curtail the right created by Proposition 57 of numerous inmates to parole consideration[.]" (*Id.* at p. 905.) The *McGhee* court ruled that CDCR was required to grant early parole consideration to "all persons" convicted of a nonviolent felony, without the use of screening criteria, because the plain text of Proposition 57 demands it. (*Id.* at p. 911.) Significantly, the *McGhee* court also "unequivocally reject[ed] the assertion that compliance with Proposition 57 will undermine public safety," because Proposition 57 does not mandate early parole for any inmate, but merely provides early consideration for parole. (*Id.* at p. 913) According to the *McGhee* court, "[t]here is no reason to assume that the [parole] board will be insensitive to

the concern for public safety or will grant parole to those who present a public danger." (34 Cal. App. 5th at p. 913.)

D. *In re Schuster* (3rd District)

As in the present case, *In re Schuster* involved a person presently incarcerated for a non-sex offense (drug possession), who had previously been convicted of a sex offense (pimping). (*In re Schuster* (2019) 42 Cal. App. 5th 943, 947, *app. pending* S260024.) Notably, CDCR did not defend the merits of denying early parole consideration to Schuster. (*Id.* at p. 954.) Instead, CDCR argued only that the case was moot because Schuster had been released from prison. (*Ibid.*) The Third Appellate District in *Schuster* rejected CDCR's mootness defense and, on the merits, agreed with the Court of Appeal in *Gadlin* that "the focus of the Amendment for early parole consideration is on the inmate's current conviction, not on any prior convictions. The Amendment makes no mention of prior convictions or an inmate's status as a section 290 sex registrant." (*Id.* at p. 955.)

E. *In re Mohammad* (2d District, Division 5)

Finally, the Second Appellate District in *In re Mohammad* rejected CDCR's attempt to replace the plain text of Proposition 57's with a different standard based upon CDCR's interpretation of "voter intent" and "public safety." (*In re Mohammad* (2019) 42 Cal. App. 5th 719, 722, 727, *app. pending* S259999.) In so doing, the *Mohammad* court "g[a]ve effect to the oft-repeated maxim that the best and most reliable indicator of the intended purpose of a law is its text." (*Ibid.*)

In *Mohammad*, the petitioner was convicted of both a violent felony (second degree robbery) and a nonviolent felony (receiving stolen property). The trial court designated the nonviolent felony count as the petitioner's primary offense. (*Id.* at pp. 722-23.) After completing the term for the nonviolent count, Mohammad sought early parole consideration

because, under the plain text of Proposition 57, he was "[a] person convicted of a nonviolent felony offense and sentenced to state prison" who had "completing the full term for his or her primary offense."

CDCR denied early parole consideration to Mohammad because he had also been convicted of violent felonies and, CDCR asserted, Mohammad therefore did not meet the definition of "nonviolent offender" on which CDCR's regulations conditioned consideration for early parole. (42 Cal. App. 5th at pp. 726-27.) The *Mohammad* court ruled that the petitioner was entitled to early parole consideration because the plain text of Proposition 57 conditions early parole consideration on whether a "primary offense" is nonviolent, irrespective of other convictions. (*Id.* at p. 725.) Notably for the present case, the *Mohammad* court rejected CDCR's attempt to replace the plaint text of Proposition 57 with CDCR's presumed "voter intent" based upon the Proposition 57 ballot materials. The court said:

> [CDCR] urges us to consider voter intent as purportedly reflected in the Proposition 57 summary and arguments included in the official ballot pamphlet. We decline. There is nothing ambiguous about what section 32(a)(1) means in this case, and there is accordingly no cause to look beyond the text to ballot materials or other extrinsic evidence of the voters' intent.

(*Id.* at p. 727)

V. THE HISTORY AND CONTEXT OF PROPOSITION 57 SUPPORT AFFIRMING THE DECISION BELOW

Since the commencement of the *Coleman* and *Plata* litigation in 1990, CDCR's reluctance to conform its regulations to the governing law has required consistent and repeated judicial intervention and correction. In the case of Proposition 57's early parole consideration provision, all courts have rejected CDCR's attempt to replace the criterion of "nonviolence"

with other criteria, such as public safety, or inferences from the ballot materials. For a court to rule otherwise would effectively re-write Proposition 57, and undermine the voters' intent to make "all" persons convicted of a "nonviolent felony offense" eligible for early parole consideration.

As argued throughout Petitioner Gadlin's brief, the fact that Proposition 57 does not define the term "nonviolent felony offense" does not authorize CDCR to concoct "its own specialized and restrictive meaning of that term." (*Blue v. Bonta* (2002) 99 Cal. App. 4th 980, 989-90.) As with any agency, CDCR is constrained by both the "plain meaning" of the term "nonviolent," as well as the statutory framework in which Proposition 57 exists.

Moreover, and critically, CDCR's appeal to public safety overlooks the fact that the voters already "decided [that] parole consideration for those convicted of 'nonviolent' felony offense is consistent with public safety." (*Gadlin, supra*, 31 Cal. App. 5th at p. 789.) That is, Proposition 57 directs CDCR to implement specific "provisions" chosen by the voters. The Amendment states: "The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law." (Cal. Const. art. I, § 32(a) [emphasis added].) Among those explicit "provisions" is early parole consideration for "any person convicted of a nonviolent felony offense," along with various credit earning opportunities, and juvenile justice reforms. (*Ibid.*) CDCR is not empowered to "adopt regulations in furtherance of public safety," or some other generic instruction unconstrained by the measure's "provisions." Accordingly, the voters have already determined that early parole consideration for "all" nonviolent offenders is consistent with public safety. The Amendment states, in fact, that "The following provisions are hereby

enacted to enhance public safety . . . ." (Cal. Const. art. I, § 32(a) [emphasis added].) In other words, the early parole provision of Proposition 57 already contains and reflects the voters' decision about the reforms necessary to achieve the measure's public safety objectives.

In response, CDCR argues that the requirement to "certify that [its] regulations protect and enhance public safety" (Cal. Const. art. I, § 32(b)) permits the agency to override the plain text of Proposition 57 by denying early parole consideration to Registrants, just as CDCR has attempted to deny early parole consideration to third strikers and others. CDCR's interpretation of the certification requirement of Article I, Section 32(b) is erroneous because it renders all provisions of Proposition 57 subordinate to the certification requirement, and therefore fails to harmonize all of the measure's provisions in their context. That is, when viewed in the context of the entire Amendment, the certification requirement is limited to the provisions for which Proposition 57 extends discretion to CDCR, such as the development of programs to award sentence-reduction credits under Subdivision (a)(2). CDCR has, in fact, exercised that discretion by developing a complex credit earning program, and has certified that its regulations on that subject protect and enhance public safety. (See, e.g, Cal. Code Regs., tit.15, §§ 3042-3044.) In addition, as argued by Petitioner Gadlin, CDCR has exercised its discretion concerning the process by which eligible inmates are referred to the Board of Parole Hearings for early parole consideration. (See *id.* §§ 3491, subds. (c)-(g); 3493; 2449.2-2449.7.) However, on the separate subject of eligibility for early parole consideration, the voters have determined that the sole criterion of "nonviolence" should dictate eligibility, and that "all" persons with "nonviolent" convictions "shall" receive early parole consideration.

Finally, it should be noted that the "public safety" rationale upon which CDCR seeks to exclude those convicted of a past sex offense has no

limiting principle, and would produce absurd results. Essentially, CDCR argues that it may exclude any class of inmate it chooses if the agency subjectively determines that doing so is consistent with "public safety." If that interpretation of Proposition 57 were to be accepted by this Court, then nothing would or could stop CDCR from excluding any conceivable inmate, or class of inmate, from Proposition 57's benefits, no matter how irrational or inconsistent with the text that exclusion may be. In effect, CDCR's interpretation of the certification requirement of Subdivision (b) would bind the agency to nothing, and would instead permit the agency to nullify or re-write the "provisions" of Proposition 57 at will – as it is already attempting to do in its final regulations.

The limitless discretion claimed by CDCR is not authorized by the text of Proposition 57 or the Administrative Procedures Act. To the contrary, this Court has held that an interest in "public safety" cannot authorize a regulatory agency to effectively re-write an enabling law such as Proposition 57. For example, in *In re Lucas*, this Court ruled that the general "public safety" purpose underlying the sexually violent predator commitment statutes did not permit CDCR to adopt an expansive definition of the phrase "good cause" that conflicted with the terms and function of other statutes in the SVP framework. (*In re Lucas* (2012) 53 Cal. 4th 839, 850.) This was because "[a]dministrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris v. Williams* (1967) 67 Cal. 2d 733, 737.) For these same reasons, the decision of the Court of Appeal below should be affirmed.

///

///

///

///

THIS COURT NEED NOT AND SHOULD NOT ADOPT THE CONCURRING OPINION IN *IN RE GADLIN*

As noted above, the matter currently before this Court concerns only one of the two classes of Registrants that are negatively impacted by CDCR's regulatory implementation of Proposition 57: that is, persons who, like Petitioner Gadlin, are presently incarcerated for a non-sex offense. The entire panel of the Court of Appeal below (as well as the court in *In re Schuster*) agreed that this class of Registrant is entitled to early parole consideration under Proposition 57. (*In re Gadlin* (2019) 31 Cal. App. 5th 784, 790.)

However, despite noting that "the wise choice is" "almost always" "to refrain from saying more than necessary to dispose of an appeal," one of the Justices below authored a concurring opinion to express "[his] view" regarding a second class of Registrants: that is, persons presently incarcerated for a nonviolent sex offense. (*Id.* at p. 790 (concurring op. of Baker, J.) In regard to this second group, the concurring opinion states that "Proposition 57 authorizes the Secretary of the CDCR (Secretary) to adopt rules that exclude from early parole consideration those inmates who are currently in custody as a result of an offense that would require registration as a sex offender." (*Id.* at p. 791.)

For the following reasons, this brief respectfully argues that the question of early parole consideration for persons presently incarcerated for a sex offense is premature, and therefore that the reasoning of the concurring opinion should not be adopted by this Court.

///

///

///

///

///

I. THE QUESTION OF PROPOSITION 57'S APPLICATION TO PERSONS PRESENTLY INCARCERATED FOR A SEX OFFENSE WAS NOT BRIEFED

Significantly, neither the Court of Appeal's opinion below nor any party to this appeal has addressed or fully briefed the question of whether persons presently incarcerated for a sex offense are entitled to early parole consideration. That question presents different issues from those presented in this appeal, which is limited to the eligibility of persons presently incarcerated for a non-sex offense. Specifically, because Proposition 57 states that eligibility for early parole consideration is determined solely by a person's present conviction offense, the fact that a person within that group suffered a prior sex offense conviction is irrelevant. However, where a person's present conviction offense is a sex offense, his or her eligibility for early parole consideration turns on the separate issue of whether that sex offense is "nonviolent." The resolution of that issue should receive full briefing by the parties, as well as comprehensive review by the various lower courts now considering it.[2]

II. THE CONCURRING OPINION DOES NOT FULLY ANALYZE THE ISSUES PERTAINING TO PERSONS PRESENTLY INCARCERATED FOR A SEX OFFENSE

Notably, the concurring opinion concedes that it does not fully analyze the legal issues germane to persons presently incarcerated for a sex

---

[2] The question of whether persons presently incarcerated for a nonviolent sex offense are eligible for early parole consideration is currently before at least three of the lower courts in *ACSOL, et al. v. CDCR, et al.* (Cal. Ct. App. 3d. Dist. Case No. C087294); *In re Febbo* (Cal. Ct. App. 4th Dist., Div. 3 Case No. G057667), and *ACSOL v. CDCR, et al.* (Sacramento Co. Super. Ct. Case No. 34-2018-80002918).

offense, and therefore presents an incomplete analysis of CDCR's regulations as applied to them.

For example, the concurring opinion suggests that, because Proposition 57 leaves the term "nonviolent" undefined, "many" sex offenses which are not designated as nonviolent "at least arguably" involve "elements of violence." (*Gadlin, supra*, 31 Cal. App. 5th at pp. 793-95 & n.2.) The concurring opinion further suggests that voters "could have" though that the phrase "nonviolent offense" excludes some or all sex offenses. (*Ibid.*) However, it is critical to note that CDCR's regulations do not exclude persons convicted of a sex offense because sex offenses fail to meet the criterion of "nonviolence." Instead, CDCR's regulations substitute the criterion of nonviolent for the wholly separate criteria of perceived re-offense rates and "public safety," and were adjudicated in the lower courts upon that basis alone.

In addition, the concurring opinion concedes that its analysis of the term "nonviolent" in Proposition 57 is not complete, and in fact leaves "questions . . . for another day." (*Id.* at p. 796 fn. 4.) One such question is "whether an inmate incarcerated for indecent exposure could successfully challenge the sex offender regulatory exclusion as unconstitutional under proposition 57 as applied to him or her." (*Ibid.*) Presumably, the case of persons presently incarcerated for indecent exposure is "a question for another day" because no reasonable interpretation of the term "nonviolent" would exclude this non-contact offense, as CDCR's regulations presently do. Notably, the question of whether persons presently incarcerated for indecent exposure is currently pending before the Fourth Appellate District, Division 3, in the matter *In re Febbo* (Case No. G057667). Accordingly, because the concurring opinion's analysis is incomplete on this and similar questions about the application of Proposition 57 to persons presently

incarcerated for a sex offense, all such questions should be deferred to "another day."

III. THE ELIGIBILITY OF PERSONS PRESENTLY INCARCERATED FOR A SEX OFFENSE CANNOT BE DETERMINED BY REFERENCE TO THE PROPOSITION 57 BALLOT MATERIALS

Finally, the concurring opinion relies upon the Proposition 57 ballot materials in a manner that is inconsistent with the governing law and is inconsistent with the majority opinion below in which it concurs.

A. The Proposition 57 Ballot Materials Contain Conflicting Statements Regarding the Eligibility of Persons Presently Incarcerated for a Sex Offense

First, the ballot materials for Proposition 57 contain conflicting statements regarding the eligibility of persons presently incarcerated for a sex offense for early parole consideration, and the concurring opinion does not attempt to reconcile those conflicts in light of the governing case law. As the concurring opinion acknowledges, the opponents of Proposition 57 observed that some Registrants were eligible for early parole consideration under that measure, and listed the specific nonviolent sex offense convictions that would be eligible. (*Gadlin*, *supra*, 31 Cal. App. 5th at p. 795. See also Opening Brief on the Merits at pp. 15-16.) In rebuttal, the proponents failed to contradict this interpretation, and stated only that Proposition 57 "[d]oes [not] and will not change the federal court order that excludes sex offenders, as defined in Penal Code [section] 290, from parole." It is on the basis of this single oblique statement that the concurring opinion concludes that CDCR has the power to override the plain text of Proposition 57 with regard to persons convicted of a sex

offense. However, the concurring opinion reaches this conclusion without citing to or discussing the sizeable body of case law that addresses the relevance of ballot materials. Further, the concurring opinion reaches its conclusion without addressing the obvious question of how the opponents' contrary statements in the ballot materials should bear on the interpretation of Proposition 57. These matters deserve considerable attention and briefing.

For example, because Proposition 57's opponents conspicuously advised voters that persons with nonviolent sex offense convictions would benefit from Proposition 57, it is just as likely that voters passed the measure despite this, or perhaps because they wished to include such persons in Proposition 57's benefits. Notably, this Court has reached similar conclusions on the basis of opponents' ballot arguments in at least three cases. (See *Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 906-07 ["[T]he opponent's rebuttal to the argument in favor of Proposition 21 specifically made the voters aware that Proposition 21 would enhance the punishment of gang-related misdemeanors. . . . [and] "the voters passed the initiative despite these warnings."]; *Legislature v. Eu* (1991) 54 Cal. 3d 492, 505 [this Court "significantly" relied upon the "the opponents' ballot arguments" to interpret text of initiative which "forcefully and repeatedly stressed the measure's 'lifetime ban,' as 'the primary thrust of [their] ballot arguments[.]'"]; *People v. Superior Court (Cervantez)* (2014) 225 Cal. App. 4th 1007, 1017-18 [where ballot materials for Proposition 36 listed the specific offenses that were to be included and excluded from relief under that measure, this Court held that the list was conclusive evidence of how voters intended to treat each offense, and further held that the definition of each term in Proposition 36 must accord with the voters' intent as reflected in this list].) Yet, the concurring opinion at issue below does not address this important precedent.

B. The Reference in the Ballot Materials to a "Federal Court Order" is Unspecific and Unexplained

Second, an oblique reference to an unspecified federal court order in the ballot materials is unspecific, unexplained, and impossible to compare to the text actually enacted by voters. That is, the ballot materials do not identify the "federal court order" for the voters, and do not describe its contents, the particular inmates governed by it, or its alleged relationship to the language of Proposition 57. Although voters are presumed to know the difference between violent and nonviolent felonies as differentiated by statues, especially where (as here) the ballot materials specifically discuss those statutes, (*Cervantez, supra*, 225 Cal. App. 4th at p. 1015, *Robert L., supra*, 30 Cal. 4th at p. 906-07; *Eu, supra*, 54 Cal. 3d. at p 505), there is no authority for the proposition that voters are presumed to know the contents or relevance of an unspecified federal court order, especially an order that never mentions sex offenses, Proposition 57, or the definition of "nonviolent."

In fact, this Court has held that, when interpreting the text of ballot propositions, "the average voter, unschooled in the patois of criminal law, would not have understood" references in ballot materials that are accessible "primarily to attorneys, judges, and law enforcement personnel who are familiar with the criminal law." (*Robert L., supra*, 30 Cal. 4th at p. 902.) Because the "federal court order" referenced in the Proposition 57 ballot materials is similarly oblique and accessible "primarily to attorneys, judges, and law enforcement personnel who are familiar with the criminal law," the reference fails to override the plain language of Proposition 57, as well as the numerous statements in the ballot materials which confirm that those convicted of a nonviolent sex offense are eligible for early parole consideration.

C. The Concurring Opinion is Internally Inconsistent

Third, the concurring opinion's reliance upon the federal court order is internally inconsistent with the majority ruling in which it concurs. That is, the concurring opinion agrees with the majority that a prior sex offense conviction cannot disqualify person presently incarcerated for a nonviolent, non-sex offense conviction from early parole consideration, because eligibility is to be defined solely by an individual's present conviction. However, the reference to the federal court order in the ballot materials makes no distinction between an inmate's past or present sex offense conviction. Thus, if the reference to that order is insufficient to override the plain text of Proposition 57 by disqualifying those with a prior sex offense conviction from early parole, as the *Gadlin* court held, there is no reason why the reference to the federal court order would override the measure's application to those presently incarcerated for a nonviolent sex offense.

D. A Rebuttal Argument in the Ballot Materials Cannot Overrule the Plain Text of Proposition 57

Fourth, and most importantly, as this Court has ruled, "a possible inference based on the ballot argument is an insufficient basis on which to ignore the unrestricted and unambiguous language of the measure itself." (*Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 802-803 [emphasis added]. See also *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321 [The text of a proposition is "the first and best indicator of intent."]; *Carman v. Alvord* (1982) 31 Cal. 3d 318, 330-31 [statement in ballot materials by Legislative Analyst was "not conclusive in determining the probable meaning of initiative language" because it was "contradicted by the Attorney General's official title and summary"].)

Likewise, in the case of Proposition 57, the text of "the measure itself" confirms that early parole consideration is available for "any person

convicted of a nonviolent felony offense," including persons convicted of a nonviolent sex offense. A "possible inference" based upon an uncited and undescribed "federal court order" cannot replace and surmount the actual language approved by voters, because nothing in the text of Proposition 57 informs voters that CDCR, rather than the criterion of "nonviolence," will determine which inmates qualify for early parole consideration.

CONCLUSION

When "[a]dministrative regulations alter or amend the [enabling] statute or enlarge or impair its scope . . . [,] courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams* (1967) 67 Cal. 2d 733, 748). For these and the other reasons set forth by Petitioner Gadlin, ACSOL respectfully requests that the decision below be affirmed.

Date: January 22, 2020

Respectfully submitted,

/s/ Janice M. Bellucci
Janice M. Bellucci
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE
(Cal. Rule of Court 8.204, subd. (c))

The undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. The brief consists of 5,816 words as counted by the Microsoft Word word processing program, up to the signature block that follows the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 24, 2020.

/s/ Janice M. Bellucci
Janice M. Bellucci

DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: **In re Gregory Gadlin** No. **S254599**

I declare:

I am 18 years of age or older and not a party to this matter. My business address is 1215 K Street, 17th Floor, Sacramento, CA 95814. In accordance with the practice of my office, correspondence is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 22, 2020, I e-Submitted the attached **APPLICATION AND BRIEF OF AMICUS CURIAE ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC. IN SUPPORT OF PETITIONER GREGORY GADLIN** by transmitting a true copy via the California Courts website e-Submissions system. In addition, I placed one original copy and eight true copies thereof enclosed in a sealed envelope, and deposited the same with the United States Postal service, addressed as follows:

Supreme Court of the State of California
Supreme Court California S.F.
350 McAllister Street
San Francisco, CA 94102-4797

On January 22, 2020, I served the attached **APPLICATION AND BRIEF OF AMICUS CURIAE ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC. IN SUPPORT OF PETITIONER GREGORY GADLIN** by transmitting a true copy via electronic mail as follows:

Michael Satris
satrislaw.eservice@gmail.com
E-mail Address:
satris@sbcglobal.net
Attorney for Petitioner Gregory Gadlin
Served via email

Charles Chung,
Deputy Attorney General
E-mail Addresses:
DocketingLAAWT@doj.ca.gov
Charles.Chung@doj.ca.gov
Attorneys for Respondent
Served via email

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 22, 2020, at Sacramento, California.

Janice M. Bellucci