IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **MOHAMMAD MOHAMMAD** on Habeas Corpus.	No. S259999 Court of Appeal 2nd District, Div. 5 No. B295152 Los Angeles County Superior Court No. BA361122 Hon. William C. Ryan

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

I. THIS COURT IN *IN RE GADLIN* (2020) 10 CAL.5TH 915 REJECTED SIMILAR ARGUMENTS BY THE DEPARTMENT, CONCLUDING THAT CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 32 IS NOT AMBIGUOUS AND THAT THE DEPARTMENT VIOLATED SECTION 32 BY EXCLUDING PRISONERS CONVICTED OF NONVIOLENT FELONIES FROM EARLY PAROLE CONSIDERATION.

In his supplemental brief, petitioner asserted that this Court should follow the approach it took in *In re Gadlin* (2020) 10 Cal.5th 915 to conclude that California Constitution, Article I, section 32, subdivision (a) requires early parole eligibility for "[a]ny person convicted of a nonviolent felony and sentenced to state prison after completing the full term for his or her primary offense," including a prisoner with a nonviolent primary offense and subordinate terms for one or more violent felonies. In opposition, the Department argues that nothing in *Gadlin* undermines its claims that section 32, subdivision (a) is ambiguous as to the treatment of mixed offense prisoners and that the ballot materials evince an intent to exclude all mixed offense prisoners. (Supp. Resp. Brief [SRB] 6-9.) The Department also cites recent court of appeal cases as persuasive authority for its position that the voters did not intend for section 32, subdivision (a) to apply to mixed offense prisoners. (SRB 9-10; citing *In re Douglas* (2021) 62 Cal.App.5th 726, pet. for rev. pending, and *In re Viehmeyer* (April 6, 2021) __ Cal.App.5th __, 277 Cal.Rptr.3d 163, pet. for rev. and req. for depub. pending.) Contrary to the Department's position, section 32, subdivision (a)

sets forth clear and simple eligibility criteria and the ballot materials do not show that the voters intended for the Department to bar early parole consideration for prisoners who meet those criteria.

The Department attempts to support its argument that section 32, subdivision (a) is ambiguous by citing this Court's observations that Proposition 57 "contain[s] some terms that might be ambiguous," or "arguably ambiguous" and that the Department's authority "may include some discretion to define what constitutes a 'nonviolent felony offense' for purposes of nonviolent offender parole consideration." (SRB at 6-8, quoting *In re Gadlin, supra,* 10 Cal.5th at pp. 928, 932, 935.) Regardless, this Court interpreted the terms at issue here in a manner that favors inclusion of mixed offense prisoners whose primary offenses are nonviolent felonies. "Convicted" is not ambiguous; eligibility for early parole consideration must be premised on the current conviction. (*In re Gadlin, supra,* 10 Cal.5th at p. 932.) Under the Department's regulations, a "violent felony" is a crime or enhancement as defined in subdivision (c) of Section 667.5 of the Penal Code," and offenses that do not fall under this definition "amount to 'nonviolent felonies.' " (*Id.* at pp. 929-930.) As a whole, "the framework described by the language of the constitutional provision establishes a parole consideration process for '[a]ny person convicted of a nonviolent felony.' " (*Id.* at p. 935.) The Department may not promulgate regulations that are in conflict with this constitutional provision "mandating that

inmates convicted of nonviolent felony offenses 'shall be eligible' for parole consideration." (*Id.* at p. 933.)

The Department asserts that *Gadlin*'s discussion of the Proposition 57 ballot materials helps its position that the voters were promised that anyone with a current conviction for a crime defined as violent by Penal Code 667.5, subdivision (c) would be excluded from early parole. (SRB, pp. 7-8, citing *In re Gadlin, supra,* 10 Cal.5th at pp. 936, 939, 941.) To the contrary, this Court firmly stated that consideration of the ballot materials was unwarranted because the constitutional text " 'is unambiguous and provides a clear answer;' " this Court then discussed the materials only because they buttressed the conclusion the Court had already reached -- the voters did not intend for the Department to exclude a person convicted of a nonviolent felony based on a factor not specified in section 32, subdivision (a). (*In re Gadlin, supra,* 10 Cal.5th at pp. 935-936.) Furthermore, as with the sex offenses at issue in *Gadlin*, the ballot materials do not clearly state that mixed offense prisoners will be excluded. Rather, the materials are ambiguous and sometimes conflicting. (See *id.* at pp. 939-942.) Assertions in the ballot arguments can hardly be construed as "promises" to the voters, who were warned that these were "opinions of the authors, and have not been fact checked for accuracy," (*Id.* at pp. 940-941.) Thus, even if there is tension between the language of the constitutional provision and some of the ballot arguments, "the text must govern the measure's interpretation." (*Id.* at p. 942.)

This Court should find unpersuasive the Department's reliance on *In re Douglas*, *supra*, 62 Cal.App.5th 726 and *In re Viehmeyer*, *supra*, __ Cal.App.5th __, 277 Cal.Rptr.3d 163.[1] (See SRB 9-10.) The majority justices in those cases actually agreed with petitioner's position that section 32, subdivision (a) on its face includes mixed-offense prisoners in early parole consideration. (*In re Douglas, supra*, 62 Cal.App.5th at p. 870 ["the words of section 32(a)(1), in isolation, support a conclusion that an inmate is eligible for early parole consideration if the inmate was convicted of a nonviolent offense, even if the term for that nonviolent offense was not designated as the primary offense, and even if the inmate was also convicted of one or more violent offenses"]; *In re Viehmeyer, supra*, 277 Cal.Rptr.3d at p. 169 ["The constitutional language does not necessarily appear to be limited to those convicted only of a nonviolent felony offense, and the reference to a term of imprisonment "for any offense" could indicate that it applies to those convicted of at least one other offense, which may be violent or nonviolent."].) Nonetheless – and contrary to the approach in *Gadlin* -- both courts relied on ballot arguments to infer that the voters did not intend to allow early parole consideration for mixed offense prisoners. (*In re Douglas, supra,* 62 Cal.App.5th at pp. 871-872; *In re Viehmeyer,*

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[1] Should this Court be interested in further appellate decisions regarding the Department's exclusion of mixed offense prisoners, petitioner notes that the Sixth District Court of Appeal has heard oral arguments and is expected to soon issue opinions in *In re Guice*, No. H047989 and *In re Rogers*, No. H047991.

supra, 277 Cal.Rptr.3d at pp. 171-172.) Without mentioning *Gadlin*, the *Douglas* court justified excluding mixed offense prisoners on the belief that it would be absurd to "encourage and reward" commission of a nonviolent offense in addition to one or more violent crimes. (*In re Douglas, supra,* 62 Cal.App.5th at p. 870.) The *Viehmeyer* court acknowledged *Gadlin's* statement that a regulation is illegal if it amends the provision authorizing it, but nonetheless found that the ballot materials did not warn the voters that mixed offense prisoners would be included and concluded that early parole consideration for mixed offense prisoners would create an anomaly and jeopardize public safety. (*In re Viehmeyer, supra*, 277 Cal.Rptr.3d at pp. 170-173.) Taking a different tack, the concurring justice in *Douglas* cited *Gadlin* in the course of criticizing the majority's reliance on unclear ballot arguments, then concluded it was appropriated to exclude only people actively serving sentences for violent offenses; under that view, a person with a violent felony term would become eligible once they are incarcerated only due to a concurrent nonviolent felony term. (*In re Douglas, supra,* 62 Cal.App.5th at pp. 872-873, conc. opn. of Robie, Acting PJ.)

At their core, the Department's arguments (and the *Douglas* and *Viehmeyer* decisions) are grounded in the faulty assumption that Proposition 57's goals are best served by denying early parole consideration to prisoners with mixed offenses, even those whose primary offense is nonviolent. But as this Court observed, the stated purposes of section 32, subdivision (a) are to " 'enhance public safety, improve rehabilitation, and avoid the

release of prisoners by federal court order.' " (*In re Gadlin*, *supra*, 10 Cal.5th at p. 923.) As for the first goal, promoting public safety is not synonymous with keeping the most people in prison for the longest periods of time at all costs. With few exceptions, prisoners eventually become eligible for parole even if they are convicted of violent offenses. Proposition 57 merely provides prisoners whose primary offenses are nonviolent with a chance for earlier parole consideration, after they serve the longest term of imprisonment imposed for any of their offenses. This does not threaten public safety because the Board of Parole Hearings is obligated to consider all relevant factors -- including whether a person has been committed on multiple counts and whether some of those counts are for violent offenses -- and is required by the regulations to deny parole to anyone who poses a danger to public safety. (*Id.* at p. 934, citing Cal. Code Regs., tit. 15, § 2449.4, subds. (b)-(c).) As to the second and third goals, including mixed-offense prisoners furthers their motivation to demonstrate that they are rehabilitated, and promotes orderly individual consideration for release by the Board, rather than indiscriminate releases by federal courts. There thus is nothing absurd, anomalous, or unreasonable about adhering to the "the constitutional provision declaring inmates convicted of nonviolent felonies to be eligible for parole consideration." (See *In re Gadlin, supra*, 10 Cal.5th at p. 933.)

In sum, as in *Gadlin*, this Court should conclude that the best measure of the voters' intent is the text of the proposition they approved: "[a]ny person convicted of a non-violent offense

and sentenced to state prison" is eligible for early parole consideration "after completing the full term for his or her primary offense." The ballot materials provide no compelling reason to exclude persons who meet these simple criteria, even if they have subordinate terms for violent offenses. Rather, including such mixed offense prisoners is consistent with Proposition 57's goals of promoting public safety, rehabilitation, and reduction of the prison population.

II. THE VOTERS' REJECTION OF PROPOSITION 20 INDICATES THAT THEIR INTENT IS FOR CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 32 TO PROVIDE EARLY PAROLE CONSIDERATION TO MIXED OFFENSE PRISONERS WHOSE PRIMARY OFFENSE IS A NONVIOLENT FELONY.

In his supplemental brief, petitioner asserted that the voters' rejection of Proposition 20 ("The Reducing Crime and Keeping California Safe Act of 2018") indicates that they did not intend for the Department to deny early parole consideration to mixed offense prisoners whose primary offense is a nonviolent felony. The Department counters this contention by observing that (1) courts generally accord little value to subsequent unpassed measures as evidence of intent in a previous action and (2) it is impossible to divine exactly why the voters rejected Proposition 20's suite of proposed changes to the sentencing and parole laws. (SRB 10-12.) Nonetheless, the "no" vote on Proposition 20 at least tends to rebut the Department's claims that the voters who passed Proposition 57 implicitly intended to bar early parole eligibility for all mixed offense prisoners.

Courts do occasionally consider whether the Legislature's or voters' subsequent actions (or inactions) might imply disagreement with or acceptance of a current policy. (*Dyna-Med, Inc. v Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1397 [Legislature's rejection of proposal to grant a power to one commission at the same time that it awarded such power to another commission supported inference that intent of prior enactment was to withhold authority from the non-empowered agency]; *Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133-134 [Legislature's failure to modify statute to require interpretation contrary to the policy in effect may indicate that policy is consistent with Legislature's intent].) Also, voter initiatives are unique in that they "enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1125; see also *StandUp for California v. California* (May 13, 2021) __ Cal.App.5th __, 2021 WL 1933336 at *12, not yet final ["No" vote on Proposition 48, rejecting statute on ratification of Indian gaming contracts, "is reasonably interpreted as an expression of [voters'] intent" to disapprove prior ratifications by the Governor and Legislature].) Conversely, by rejecting Proposition 20, the voters declined to overrule the *Mohammad* appellate decision and codify the Department's exclusion of mixed offense prisoners. This Court should acknowledge the voters' response to their sole opportunity to weigh in on the issue.

The Department relies on cases in which courts in a variety of circumstances have declined to rely on subsequent unpassed bills or propositions. (See SRB 10-11, and cases cited therein.) However, most of those cases are distinguishable in that the nexus between the original measure, the disputed issue, and the subsequent failed bill or initiative was much more attenuated than the link between the Department's 2017 policy excluding mixed offense prisoners, the 2019 *Mohammad* court of appeal decision inviting the Department to present its policy to the voters, and the November 2020 defeat of Proposition 20. In any event, the courts in every one of those cases ultimately took the approach advocated by petitioner in the current case – they based their interpretation on the plain language of the disputed statute or proposition. (See *Am. Civil Rights Foundations v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 217-219; *Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1393; *Central Bank of Denver v. First Interstate Bank of Denver* (1994) 511 U.S. 164, 187-188; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 233-236.)

In sum, even if the voters' rejection of Proposition 20 did not amount to condemnation of the Department's policy, this development injects additional doubt as to the credence of the Department's claim that the Proposition 57 voters had a clear intention to exclude mixed offense prisoners from early parole eligibility. In a broader sense, the failure of Proposition 20's various proposals to limit early parole and impose harsher

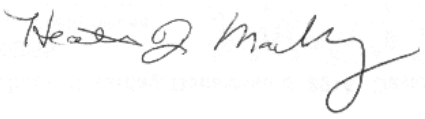
punishments contravenes the Department's notion that the voters view public safety as a goal best achieved by keeping more people in prison longer. Finally, if nothing else, this history demonstrates why ballot materials are an unsteady foundation for interpreting an initiative. If members of the diverse group called the "electorate" might have rejected Proposition 20 for various reasons, they might also have had a multiplicity of reasons for approving Proposition 57 and disparate views as to which ballot arguments were accurate and what they meant in regards to mixed offense prisoners. The only reliable evidence of consensus is the language of the initiative.

CONCLUSION

This Court should affirm the judgment of the Court of Appeal.

DATED: June 2, 2021

Respectfully submitted,



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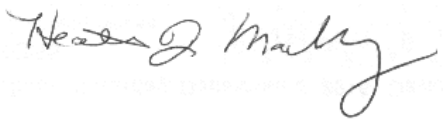

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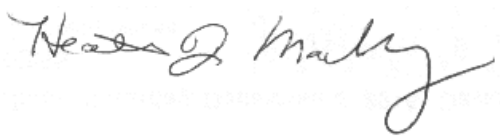

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