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SUPREME COURT OF THE STATE OF CALIFORNIA

<p>In re</p> <p>MOHAMMAD MOHAMMAD</p> <p>on Habeas Corpus.</p>	<p>No. S259999</p> <p>(Court of Appeal, No. B295152; Superior Court No. BA361122, Los Angeles County)</p>
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OPPOSITION TO RESPONDENT’S MOTION FOR JUDICIAL NOTICE

Coincident with the filing of his opening brief on the merits (OB) on May4, 2019, respondent Secretary of Department of Corrections and Rehabilitation (“Department” or “CDCR”) filed a motion requesting that this Court take judicial notice of certain documents that are part of the Department’s rulemaking file for its regulations implementing Proposition 57.

As explained in more detail below, the Court should deny the motion for two independent reasons: 1) respondent has shown no good cause for failing to seek judicial notice of these

documents in the court below, given that they were part of the Department's rulemaking file at that time; and 2) the documents are not relevant to these proceedings, since determination of the intent of the electorate in enacting a proposition – the matter at issue here -- is confined to consideration of the four corners of the ballot material.

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION.

- A. The Motion Should Be Denied for Lack of Showing Good Cause for Its Belated Submission to This Court Rather Than Appropriate Submission to the Court of Appeal for Its Consideration.

This Court granted review of the Court of Appeal's decision on habeas corpus holding that CDCR's regulatory exclusion of Mohammad from the provision for early parole consideration that Proposition 57 extended to "any person convicted of a nonviolent felony offense" (California Constitution, article I, § 32, subd. (a)(1)) was unlawful. The Court of Appeal found that that exclusion conflicted with the plain meaning of the proposition, given that Mohammad's principal and controlling term of imprisonment was based on his conviction of a nonviolent felony offense – even those his subordinate terms were based on violent felony convictions.

Respondent couched the issue presented in his petition for this Court to review that determination as follows:

Does the text of Proposition 57 both preclude consideration of the ballot materials to discern the voters' intent and prohibit the Department

of Corrections and Rehabilitation from enacting implementing regulations that exclude inmates who stand convicted of both nonviolent and violent felonies from early parole consideration?

(Petn. Rev 6; see also OB 9.)

Respondent acknowledges both that he did not seek judicial notice of this material in the Court of Appeal – here, on habeas corpus, the court of original jurisdiction equivalent to the trial court – and that the evidence was in his files and thus available to him to do so when the parties were litigating the matter in that court. (See Motion 4 [“Here, the documents attached to the motion as exhibits A, B, and C were not presented to the court below and do not relate to any proceeding that occurred after the Court of Appeal issued its decision on November 26, 2019.”].) Conspicuously missing from his motion is any attempt to state good cause for requesting this Court to take judicial notice of these documents when he did not ask the Court of Appeal to do so.

Had respondent considered this material relevant to defending against Mohammad’s petition, he should have provided it to the Court of Appeal and made any argument based on that material in that court. Because he inexcusably failed to present this material to the Court of Appeal, he has waived his ability to do so in this Court. (See *People v. Peevy* (1998) 17 Cal.4<sup>th</sup> 1184, 1205 [“Further, it is our policy not to review issues that are dependent upon development of a factual record when those

issues have not been timely raised in the Court of Appeal or not reached in that court, when the latter omission was not brought to the attention of the Court of Appeal by petition for rehearing.”].) It is not fair to either the Court of Appeal or to Mohammad to sandbag facts and seek to add them later to a legal issue that was fully litigated and decided in the Court of Appeal and which this Court is reviewing. This Court should not countenance such piecemeal litigation, particularly in a habeas proceeding and particularly by the State. Respondent simply has no excuse, nor has offered any, why this Court this late in the litigation should consider facts that respondent deigned not to present in the court below.

The record on review here should include only material that was before the Court of Appeal for its appropriate consideration in resolving the matter. As one court has explained:

As the final ground of its motion to dismiss the appeal, defendant notes that the appendix contains material which is not part of the record in the trial court and plaintiff's opening brief improperly makes arguments relying on such material. As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.] Likewise disregarded are statements in briefs based on matter improperly included in the record on appeal. [Citations.]

(Pulver v. Avco Fin. Servs. (1986) 182 Cal. App.3d 622, 631-632.)

B. The Motion Should Be Denied Because the Documents Are Not Relevant.

Respondent fails to demonstrate the relevancy of these documents beyond asserting that they “are all part of the rulemaking file for the Department’s regulations implementing Proposition 57, which is the subject of the matter on appeal.” (Motion 4.) He then simply quotes *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186, fn. 15: “The agency’s responses to comments received in the rulemaking process must be included in its statement of reasons stating its intent in adopting a regulation (Gov. Code, § 11347.3) and thus constitutes part of the official statement of regulatory intent.” (Motion 4.)

But it is not the intent or meaning of the Department’s regulation that is at issue in this case, for that regulation very clearly disqualifies Mohammad from early parole consideration. Rather, at issue is whether that regulation conflicts with Proposition 57, which depends on the interpretation and meaning of Proposition 57. The Department’s rulemaking file obviously is irrelevant to that determination, which depends not on the intent of the Department but on the intent of the electorate. (See, e.g., OB 27 [acknowledging that the Court’s task here is interpretation of Proposition 57 to determine whether the Department’s regulation conflicts with it].)

As respondent further acknowledges, courts determine the intent of the electorate based on the language of the initiative itself and, if need be, the “extrinsic evidence” of the ballot materials that informed the voters about that language. (OB 34, citing *People v. Valencia* (2017) 3 Cal.5th 347.) As Valencia explained, where a court finds ambiguity in the text of the initiative, the extrinsic evidence to which it refers does not go beyond the ballot material:

We turn to evidence, outside the measure's express provisions, to ascertain the voter's intent in approving the initiative. Specifically, we examine the materials that were before the voters. [Citations.]

(*Id.* at p. 364.)

In short, the rulemaking file of the Department is decidedly irrelevant to this Court's determination of the meaning of Proposition 57, and respondent makes no claim otherwise. This Court thus need not and should not grant judicial notice of the documents at issue. Those documents simply are not relevant either to the Court's review of the decision of the Court of Appeal or to its determination of voter intent in the enactment of Proposition 57

CONCLUSION

For the foregoing reasons, this Court should deny respondent's motion for judicial notice

Dated: May 13, 2020

Respectfully submitted,

/s/Michael Satris

Michael Satris

Attorney for Petitioner

STATE OF CALIFORNIA  
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA  
Supreme Court of CaliforniaCase Name: **MOHAMMAD (MOHAMMAD) ON H.C.**Case Number: **S259999**Lower Court Case Number: **B295152**

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/s/Michael Satris

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