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Supreme Court of California
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE MOHAMMAD MOHAMMAD,
on Habeas Corpus,

No. S259999

On review from the decision of the Court of Appeal,
Second Appellate District, Division Five, Case No. B295152,
granting habeas corpus relief regarding
Los Angeles County Superior Court, Case No. BH011959
The Honorable William C. Ryan, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

KENT S. SCHEIDEGGER
State Bar No. 105178
*KYMBERLEE C. STAPLETON
State Bar No. 213463
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345
Fax: (916) 446-1194
Email: Kym.Stapleton@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

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OF THE STATE OF CALIFORNIA

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF NON-TITLE RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Non-Title Respondent pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeal interpreted the constitutional provisions of Proposition 57 in a manner that ignores clear evidence of voter intent and makes eligible for early parole consideration every inmate who is serving an aggregate sentence for both nonviolent and violent felonies. The Court of Appeal's overly literal interpretation is contrary to the interests CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional authorities and argument relevant to the question presented.

July 23, 2020

Respectfully Submitted,

KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FILED 7/29/2020 WITH PERMISSION

IN RE MOHAMMAD MOHAMMAD,
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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

SUMMARY OF FACTS AND CASE

In early 2012, Mohammad pled no contest to nine counts of second degree robbery (violent felonies) and six counts of receiving stolen property (nonviolent felonies). (*In re Mohammad* (2019) 42 Cal.App.5th 719, 722-723.) The sentencing court designated one of the receiving stolen property convictions as the principal sentencing term and ordered him to serve three years in prison. The court then ordered consecutive one-year sentences on each of the nine robbery convictions and consecutive eight-month sentences on each of the five remaining receiving stolen property convictions. With sentencing enhancements added, Mohammad's aggregate sentence for all 15 convictions was 29 years. (*Id*. at p. 723.)

In late 2017, Mohammad requested an early parole hearing pursuant to Proposition 57. Mohammad claimed he was entitled to early parole consideration because he had completed the entire three-year term imposed by the court for his nonviolent primary offense (receiving stolen property). (*Id.* at p. 724.)

Proposition 57 added article I, section 32 to the state's constitution to increase early parole eligibility for state prisoners "convicted of a nonviolent felony offense." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) ("2016 Voter Guide") text of Prop. 57, p. 141.)[2]

As pertinent to this case, article I, section 32, subdivision (a)(1) provides that "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (*Ibid*.) The provision does not define what constitutes a "nonviolent felony offense." However, it does define the "full term for the primary offense" as the "longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (Cal. Const., art. I, § 32, subd. (a)(1)(A).)

The voter-enacted amendment further directed the California Department of Corrections and Rehabilitation (CDCR) to "adopt regulations in furtherance of these provisions, and . . . certify that [they] protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b).) CDCR subsequently promulgated regulations as directed. As relevant to this case, the regulations define a "determinately-sentenced nonviolent offender" as an inmate who was sentenced to a determinate term and not currently serving a term of incarceration for a violent felony. (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).)[3]

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2. Proposition 57 also made significant changes to Welfare and Institutions Code sections 602 and 707—the process by which juvenile delinquents are transferred to adult criminal court. This brief addresses only the early parole eligibility provisions of article I, section 32.

3. In full, a "determinately-sentenced nonviolent offender" is defined as an inmate who "was sentenced to a determinate term and none of the following are true: [¶] (1) The inmate is condemned to death; [¶] (2) The inmate is currently incarcerated for a term of life without the possibility of parole; [¶] (3) The inmate is currently serving a term of life with the possibility of parole; [¶] (4) The inmate is currently serving a determinate

Because Mohammad was convicted of both violent and nonviolent felony offenses and was therefore "currently serving a term of incarceration for a violent felony," CDCR denied Mohammad's request for early parole consideration. (*Mohammad*, *supra*, 42 Cal.App.5th at p. 724 & fn. 2.)

After Mohammad exhausted all of his administrative appeals through CDCR, he unsuccessfully petitioned for a writ of habeas corpus in the trial court. He then renewed his petition in the Court of Appeal. (*Id.* at p. 724.) The Court of Appeal granted his petition. (*Id.* at p. 729.) The Court of Appeal held that because it is undisputed that Mohammad's primary offense was for the receiving stolen property conviction and that the "full term" served for that primary offense was three years, under the "plain meaning" of section 32, subdivision (a)(1), Mohammad was eligible for early parole consideration because he had completed the full three-year term of his primary offense. (*Id.* at p. 726.)

The Court of Appeal declined CDCR's request to consider voter intent as reflected in the official ballot materials that were presented to the voters. In so declining, the court stated "[t]here is nothing ambiguous about what section 32, subdivision (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.) The court further stated that the plain meaning of the text "compels the result" they reached and it was not "absurd." (*Id*. at p. 728.)

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term prior to beginning a term of life with the possibility of parole or prior to beginning a term for an in-prison offense that is a 'violent felony;' [¶] (5) The inmate is currently serving a term of incarceration for a 'violent felony;' or [¶] (6) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a 'violent felony.' " (Cal. Code Regs., tit. 15, § 3490, subd. (a).)

The Court of Appeal further held that CDCR's promulgated regulations "dictate a different result, but only by impermissibly defining and limiting the universe of eligible inmates to 'nonviolent *offenders*' . . . ." (*Id*. at p. 726, italics in original.) According to the Court of Appeal, such a "misinformed offender-based premise" is "unjustifiable and inconsistent with the constitutional text" and is therefore invalid. (*Id*. at p. 727.)

This court granted CDCR's petition for review on February 19, 2020.

SUMMARY OF ARGUMENT

A majority of California voters enacted Proposition 57 to help the state grapple with its overcrowded prison population. Voters understood that pursuant to the measure, only inmates convicted of nonviolent felony offenses would be eligible for early parole consideration after completing the full term of their primary offense.

The Court of Appeal interpreted the proposition's text to require early parole consideration for inmates serving multiple sentences if at least one of the convictions was for a nonviolent felony offense. This is true even if the inmate is currently serving time for violent offenses. The court's erroneous interpretation essentially sweeps the entire state prison population into the measure's purview. Such an interpretation would lead to the absurd result that inmates convicted of more crimes would be eligible for early parole consideration whereas inmates convicted of less crimes would not. The Court of Appeal's overly literal interpretation is contrary to voter understanding and intent.

ARGUMENT

I. The Court of Appeal's overly literal interpretation of article I, section 32 is contrary to the purpose and intent of Proposition 57.

The Court of Appeal's analysis and interpretation of article I, section 32 would make eligible for early parole consideration every mixed offense inmate with multiple consecutive sentences who finished his or her principal term. (See Opening Brief on the Merits 37 [96% of the prison population would be eligible for parole consideration].) This is true even if he or she had consecutive terms still to serve for the remaining subordinate violent felonies. (See *Mohammad*, *supra*, 42 Cal.App.5th at p. 727.) The Court of Appeal expressly concluded that "an inmate who is serving an aggregate sentence for more than one conviction will be eligible for an early parole hearing if *one of those convictions* was for '*a*' nonviolent felony offense." (*Id*. at p. 726, italics added.)

Did a majority of the California electorate truly vote for a constitutional amendment that would grant early parole consideration to essentially every inmate in state prison? Of course not. Yet, the Court of Appeal's abbreviated interpretation would lead not only to the absurd reality that parole consideration is available for nearly all inmates, but also to the very real possibility that a mixed offense inmate's remaining violent offense terms could be wiped out if early parole was in fact granted. Such an interpretation is contrary what was presented to the electorate, and thus is not what the electorate intended when voting it into law.

The Court of Appeal's conclusion rests on a three-legged stool. The court held that Proposition 57 is not ambiguous in the aspect at issue here, the result is not absurd, and in the absence of either ambiguity of this phrase, considered in isolation, or absurd results, resort "to ballot materials or other extrinsic evidence of the voters' intent" is not allowed. (See *Mohammad*, 42 Cal.App.5th at p. 727.) If only one of these three legs breaks, the conclusion is unsupported. In fact, all three legs are broken.

First, as CDCR has shown, the text of Proposition 57 is not as clear as the Court of Appeal believed. (See Opening Brief on the Merits 25-33.) Second, even absent ambiguity of the particular passage, "manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole" may warrant departure from the literal meaning. (*Silver v. Brown* (1966) 63 Cal.2d 841, 845.) Third, the result reached by the Court of Appeal is indeed absurd.

The people of California have expressly reserved to the electorate the power of initiative and referendum. (Cal. Const., art. IV, § 1; *id*., art. II, § 8; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) On November 8, 2016, a majority of California voters exercised their reserved power of initiative and amended the California Constitution when they enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016. (Statement of Vote, Gen. Elec. (Nov. 8, 2016) statement of vote summary pages, p. 12, https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf.)

Since 1911, California has stood out as a "hybrid republic that combines elected representatives with powerful direct democracy institutions." (Carrillo, et al., *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L.J. 731, 735.) The power of the electorate to "propose statutes and . . . adopt or reject them" (see Cal. Const., art. II, § 8, subd.(a)) has been described by this court as " 'one of the most precious rights of our democratic process.' " (*Associated Home Builders*, *supra*, 18 Cal.3d at p. 591, quoting *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563.)

Long ago, the United States Supreme Court declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177; see also *Nougues v. Douglass* (1857) 7 Cal. 65, 70.) "The Constitution itself is a law" to be construed in the last resort by the judiciary. (*Nougues*, 7 Cal. at p. 70.) When courts are asked to construe voter-enacted law, voter intent is of "paramount

consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889; see also *People v. Buycks* (2018) 5 Cal.5th 857, 879.)

Courts have the duty

> "to ascertain the meaning of the Constitution by an examination of all of it; and in making such examination, effect is to be given, if possible, to every section and clause. It is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. . . . The real question in the construction of the Constitution, as in the construction of a statute or of a contract, is, What is meant by the language employed? We should read it with a view to finding out the *thoughts intended to be expressed*." (*People v. Lynch* (1875) 51 Cal. 15, 28, italics in original.)

Proposition 57 was placed on the November 2016 ballot to address California's overcrowded prison population. (See Opening Brief on the Merits 11-16; see also *In re McGhee* (2019) 34 Cal.App.5th 902, 911.) When voters enacted Proposition 57, they declared that their multifarious "Purpose and Intent" was:

> "1. Protect and enhance public safety.
>
> 2. Save money by reducing wasteful spending on prisons.
>
> 3. Prevent federal courts from indiscriminately releasing prisoners.
>
> 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
>
> 5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (2016 Voter Guide, *supra*, text of Prop. 57, § 2, p. 141.)

The measure was designed to increase "parole eligibility review" "but *only* [for] prisoners convicted of nonviolent felonies." (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 352, italics added.) It was not designed or understood to dramatically increase the pool of eligible inmates to *all* inmates

serving time for both violent and nonviolent felonies given the very real possibility that many could have their violent felony sentences wiped out if granted early parole. Quite the contrary, the "nonviolent" limitation was intended to be "restrictive." (See *ibid*.) "The apparent purpose of a statute will not be sacrificed to a literal construction." (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.)

The analytical "steps" a court must take when construing voter-approved statutes and constitutional amendments are well established. (See, e.g., *People v. Orozco* (2020) 9 Cal.5th 111, 117-118; see also *People v. Valencia* (2017) 3 Cal.5th 347, 357-358.) The Court of Appeal's truncated construction of article I, section 32 pursuant to that familiar and oft-cited framework did little to effectuate the intent and purpose of the act as understood by the electorate. The text of the amendment must be examined within the context of Proposition 57 as a whole so as to ascertain the intended purpose of the provisions at issue in light of voter intent. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-934; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

Furthermore, "long standing principals of interpretation" require that the "entire substance" of the amendment must be examined "in context, keeping in mind the nature and obvious purpose" of the law. (*People v. Arroyo* (2016) 62 Cal.4th 589, 594-595, internal quotation marks omitted.) Different provisions of the entire measure must be " 'harmonize[d] . . . by considering the particular clause or section in the context of the [legal] framework as a whole.' " (*Ibid*.)

The Court of Appeal found that "CDCR's regulatory approach is founded on a misinformed offender-based premise." (*Mohammad*, *supra*, 42 Cal.App.5th at p. 727.) According to the Court of Appeal, because section 32, subdivision (a)(1) makes no reference to the term "nonviolent offender," the

“leap taken by CDCR from ‘a nonviolent felony offense’ to a ‘nonviolent offender’ is unjustifiable and inconsistent with the constitutional text.” (*Ibid*.)[4]

The Court of Appeal, in its overly literal reading of article I, section 32, subdivision (a) found that the text “is in no way ambiguous” and thus there was “no cause to look beyond the text to ballot materials or other extrinsic evidence of the voters intent.” (*Mohammad, supra*, 42 Cal.App.5th at pp. 726-727.) However, this court has acknowledged that a finding of ambiguity is not always a condition precedent to interpretation in all cases. (See *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 7; see also *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.) Courts, even if finding that a literal interpretation of the text alone is clear and “in no way ambiguous,” continue to have the leeway to “ ‘test [their] construction against those extrinsic aids that bear on the enactors’ intent.’ ” (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560, quoting *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93.)[5]

Public safety is a principal purpose of the initiative, expressed in the text not once but three times. It is the first purpose listed in section 2 of the initiative. (See 2016 Voter Guide, *supra*, text of Prop. 57, p. 141.) It is listed first again in the purpose statement of the constitutional amendment. (Cal. Const., art. I, § 32, subd. (a).) It is stated alone in the certification that CDCR must make when it promulgates implementing regulations. (See *id*., subd. (b).)

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4. Proposition 57 actually refers to “*any person* convicted of a nonviolent felony offense” (Cal. Const., art. I, § 32, subd. (a), italics added), and thus *is* offender-based. “Nonviolent offender” is merely shorthand for this longer term if “nonviolent” is understood to refer to all of the offenses of conviction.

5. “The ballot arguments are highly significant in my view because they help establish how voters expected, and we can infer intended, CDCR to more precisely define the group of offenders who would benefit from Proposition 57 . . . .” (*In re Gadlin* (2019) 31 Cal.App.5th 784, 795 (conc. opn. of Baker, J.), review granted May 15, 2019, No. S254599.)

Allowing parole for violent felons merely because they have also committed nonviolent felonies would detract from, not enhance, public safety. Extending eligibility for parole as a reward for committing additional crimes when inmates who have committed fewer crimes are not eligible does not advance in any logical way the other purposes listed in section 2, "reducing wasteful spending," "[p]reventing federal courts from indiscriminately releasing prisoners," or "emphasizing rehabilitation." It would increase the number of prisoners on parole rather than in prison, to be sure, but it would not do so by distinguishing among prisoners on any rational basis. Given these mixed signals from the text, a review of the "legislative history," i.e., the Voter Guide, is not only proper, it is essential.

In the ballot materials accompanying Proposition 57, voters were told several times that the measure "focuses resources on keeping dangerous criminals behind bars" and it "[k]eeps the most dangerous offenders locked up . . . ." (2016 Voter Guide, *supra*, argument in favor of Proposition 57, p. 58.) Furthermore, the Official Title and Summary as prepared by the Attorney General, declared that the measure would allow "parole consideration for persons convicted of nonviolent felonies . . . ." (*Id.*, Official Title and Summary, *supra*, p. 54.) The Official Title and Summary of a ballot measure "plays an important role in preempting voter confusion and manipulation in the initiative process." (*Valencia, supra*, 3 Cal.5th at p. 371.) As understood by the "average voter" (see *ibid.*), only "persons convicted of nonviolent felonies" would be eligible for Proposition 57 relief, and not those who were also convicted of, sentenced to, and are still serving time for violent felonies in addition to the nonviolent felonies.

The Court of Appeal's narrow construction of the text in this matter is also at odds with the measure's explicit requirement that it must be "liberally construed to effectuate its purposes." (2016 Voter Guide, *supra*, text of Prop. 57, § 9, p. 146.) CDCR followed the measure's explicit mandate and, consistent with the measure's express purpose to "protect and enhance public safety," promulgated regulations that excluded mixed offense inmates who are

"currently serving a term of incarceration for a 'violent felony.' " (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).) As explained by Respondent, it is not unreasonable to surmise that the electorate left the " 'margins of' who may benefit from parole consideration deliberately undefined, allowing [CDCR] to fill in the details through its rulemaking authority . . . ." (Reply Brief on the Merits 20.)

An initiative cannot be interpreted "in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *Robert L., supra,* 30 Cal.4th at p. 909.) "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." (*Riggs v. Palmer* (1889) 115 N.Y. 506, 509, 22 N.E. 188, 189; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

The Court of Appeal commented that this "case is an unusual one" because the trial court designated one of the nonviolent felony offenses as the principal term of his aggregate determinate sentence. (*Mohammad*, 42 Cal.App.5th at p. 728.) The Court of Appeal further noted that in most mixed offense cases, trial courts will usually impose the longest term of imprisonment to the most serious felony. Nevertheless, the court's analysis and interpretation of article I, section 32 does not rest upon the fact that Mohammad's nonviolent felony offense was designated as his primary offense. Rather, the court expressly concluded that an inmate is eligible for early parole consideration if any *one* of the convictions was for "a" nonviolent felony offense. (*Id.* at p. 726.)

The "makers" (i.e., electorate) did not intend for Proposition 57 to make eligible for early parole consideration nearly every state prison inmate. It was

marketed to and understood by voters as a means by which to "[p]revent federal courts from indiscriminately releasing prisoners" (2016 Voter Guide, *supra*, § 2, p. 141) by making eligible for early parole consideration inmates "convicted of nonviolent felonies." (*Id*., Official Title and Summary, p. 54.) Inmates, like Mohammad, who are still serving time in prison for their violent felony convictions were not intended to benefit from Proposition 57's provisions.

II. The Court of Appeal's interpretation leads to absurd results not intended by the electorate.

Consideration should also be given by this court to the "consequences that will flow from a particular interpretation." (*Valencia*, *supra*, 3 Cal.5th at p. 358, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Alford*, *supra*, 27 Cal.App.3d at p. 688.) It is indisputable that prison terms should be proportionate to the "seriousness of the offense" and uniform to the sentences of other offenders who committed the same offense or offenses under similar circumstances. (Pen. Code, § 1170, subd. (a)(1).) It is not uncommon for a district attorney to charge a defendant with more than one criminal offense. In many instances, a defendant will be charged with both violent and nonviolent felony offenses.

When a guilty verdict is returned on those charges, a judge must determine what sentences to impose on each convicted charge. (See Pen. Code, §§ 1170, 1170.1; see also *People v. Neely* (2009) 176 Cal.App.4th 787, 797-798.) "[T]he purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice." (Pen. Code, § 1170, subd. (a)(1).) When a defendant is convicted of multiple felonies, the sentencing judge can order the sentences to run concurrently or consecutively. (*People v. Nguyen* (1999) 21 Cal.4th 197, 201.) When a judge is making this difficult decision, he or she can consider objectives such as "[¶] (1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; [¶]

(4) Deterring others from criminal conduct by demonstrating its consequences; [¶] (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration; [¶] (6) Securing restitution for the victims of crime; [¶] (7) Achieving uniformity in sentencing; and [¶] (8) Increasing public safety by reducing recidivism through community-based corrections programs and evidence-based practices." (Cal. Rules of Court, Rule 4.410(a).)

As noted *supra*, the Court of Appeal rebuffed CDCR's request to examine voter materials or other extrinsic sources finding "nothing ambiguous about what section 32(a)(1) means in this case." (*Mohammad*, *supra*, 42 Cal.App.5th at p. 727.) Curiously, however, the court then made this acknowledgement.

> "[T]he argument for reaching a different result has some intuitive appeal. It cannot be, the argument goes, that voters intended a defendant who is convicted of more crimes, i.e., both violent and nonviolent felonies, to be eligible for early parole consideration while a defendant convicted of fewer crimes, is not. But, we look for evidence of the voters' intent, not intuition, and as our Supreme Court has said repeatedly, the best evidence we have is the text the voters put in the Constitution." (*Ibid.*)

The court then continued that the plain meaning of the text "compels the result" they reached and it was not "absurd." (*Id*. at p. 728.)

There is no question that pursuant to a plain reading of the text that an inmate who was convicted of only one or more nonviolent felony offenses *would* be eligible for Proposition 57 relief. There is also no question that an inmate who was convicted of only one or more violent felonies *would not* be eligible for Proposition 57 relief. Why then would it make sense from average voter's understanding of the measure that an inmate who was convicted of both violent and nonviolent felonies would fall within the same category of inmates convicted only of nonviolent felonies?

Under the Court of Appeal's interpretation, a mixed offense inmate like Mohammad is eligible for early parole consideration after serving only three years of his aggregate sentence despite still having nine consecutive violent felony sentences to serve. Whereas a fellow inmate who committed the same offenses as Mohammad, but was only charged with the nine violent felonies (and not the nonviolent felonies) would not be entitled to Proposition 57 relief at all. Both, however, are considered violent felons as defined in Penal Code section 667.5, subdivision (c).

Both inmates were initially given similar prison sentences that were proportionate to the "seriousness" of the offenses they committed. (Pen. Code, § 1170, subd. (a)(1).) Yet, one inmate is eligible for Proposition 57 relief and the other inmate is not. The Court of Appeal's overly literal interpretation of article I, section 32(a) has disparate consequences and is incompatible with voter understanding and with many of the objectives the trial court considered when crafting each inmate's sentence.[6]

This court adheres to a narrow exception to the plain meaning rule that permits courts to depart from the language of the law, even if unambiguous, if its literal application would lead to an absurd result not intended by either the Legislature or the electorate. (See *Orozco*, 9 Cal.5th at p. 122; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583; *In re Michele D.* (2002) 29 Cal.4th

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6. The Court of Appeal "recognize[d] it is possible prosecutors will exercise their charging discretion in multiple offense cases in a way that may affect early parole consideration eligibility [due to] . . . the change in the law worked by Proposition 57. . . ." (*Mohammad, supra*, 42 Cal.App.5th 719, 728, fn. 3.) All criminal prosecutions are conducted on behalf of the people. (Gov. Code, § 26500.) The "people" rely on the district attorney's office to protect their safety and ensure that justice will be served. (*People v. Eubanks* (1996) 14 Cal.4th 580, 589-590.) In carrying out their prosecutorial functions, district attorneys should not be forced to charge an offender with fewer crimes simply to avoid the early parole consequences resulting from the Court of Appeal's erroneous, overly literal interpretation of article I, section 32.

600, 606; *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14; *People v. Broussard* (1993) 5 Cal.4th 1067,1071; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113; accord, *Silver v. Brown* (1966) 63 Cal.2d 841, 845; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.) "In such circumstances, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' " (*Broussard*, *supra*, 5 Cal.4th at p. 1071, quoting *Lungren*, *supra*, 45 Cal.3d at p. 735.)

Michele D., *supra*, illustrates this court's utilization of the "absurd results" exception. In that case, this court was asked to decide what level of force, if any, was required to sustain a kidnapping conviction when the victim is an unresisting infant or small child. (29 Cal.4th at p. 600.) Michele D. took a friend's 12-month old baby without her friend's permission. Law enforcement later found Michele D. with the baby behind a car dealership in a restricted access dark alleyway. (*Id*. at p. 604.) At first Michele D. told the police that she was simply babysitting, but later admitted that she took the baby "with the hope she could raise the child herself." (*Ibid*.)

Michele D. was charged with and convicted of kidnapping. On appeal, she argued that because the statute required proof that she had "forcibly seized" the unresisting baby, her conviction could not stand. (*Id*. at p. 605.) It was her contention that the word "force" as used in the kidnapping statute meant a "forcible seizure" and required "more than the mere quantum of physical force necessary to effect movement." (*Ibid*.)

This court acknowledged that the "force element" of the kidnapping statute, by its plain terms, required more than simply moving a victim from one location to another. (*Id*. at p. 606.) Regardless, this court held that Michele D.'s conduct fell within the "ambit of the statute" because "it is settled that the "language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. To this

extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment." (*Ibid*.)

Thus, even though Michele D. did not use force as "conventionally understood," when the unresisting infant was taken and carried away with illegal purpose or intent, that was the only force necessary to satisfy the force element of the kidnapping statute. (*Id*. at p. 610.) In so holding, this court stated it is the court's duty "to construe the statute in a manner that avoids the absurd consequence of allowing a defendant who carries off an infant or small child under circumstances similar to those in the present case to escape liability." (*Id*. at p. 613.)

A similar application of the "absurd results" exception was utilized in *United States v. Lazarenko* (9th Cir. 2010) 624 F.3d 1247. In that case, Lazarenko was convicted of money laundering and conspiracy to commit money laundering. Lazarenko had used his political power to "crush" the business competition of a man named Kiritchenko. (*Id*. at p. 1250.) In exchange, Kiritchenko paid Lazarenko kickbacks from the "enormous profits" he has been receiving. A jury found that a conspiracy had existed between Lazarenko and Kiritchenko. Thus, albeit "exceedingly rare," Kiritchenko was both a victim and a co-conspirator in the money laundering scheme. (*Ibid*.)

In a separate proceeding, Kiritchenko sought restitution under the Mandatory Victims Restitution Act of 1996 and the Victim and Witness Protection Act of 1982. (*Id*. at p. 1249.) The District Court held that Kiritchenko was a "victim" under the two statutes and Lazarenko was ordered to pay Kiritchenko more than $19 million in restitution. Lazarenko appealed and the Ninth Circuit was asked to resolve "whether Kiritchenko–a co-conspirator in the crimes of conviction–is nevertheless also a 'victim' under the restitution statutes." (*Id*. at p. 1250).

The Ninth Circuit panel stated that under the plain text of the restitution statutes "co-conspirators have just as much right to restitution as do innocent victims." (*Ibid*.) But, such a literal plain text application of the statute would

lead to the absurd situation upon which "federal courts would be involved in redistributing funds among wholly guilty co-conspirators, where one or more co-conspirators may have cheated their comrades." (*Id.* at p. 1251.) Thus, the court held that the "plain text does not control." (*Ibid*.)

Michele D. and *Lazarenko* are instructive because both cases found that a literal interpretation and application of the law's text lead to a result that was inconsistent with legislative intent. It is this court's "task . . . to interpret *and* apply the initiative's language so as to effectuate the electorate's intent." (*Robert L.*, *supra*, 30 Cal.4th at p. 901, italics added.) "While legislative intent must be ascertained from the words used to express it, a law's manifest reason and obvious purpose should not be sacrificed to a literal interpretation of such words." (2A Sutherland, Statutory Construction (7th ed. 2014) § 46:7, pp. 274-275 (hereafter Sutherland).

While true that a law's text is generally the first and usually best evidence of intent, it is also true that "[d]espite the standard, explicit, almost universal doctrinal embrace of the plain meaning rule, in practice courts have evinced an unwillingness to take such an absolutist approach to statutory interpretation." (Sutherland, *supra*, § 46.1, at p. 161.) This court has followed this principle. When construing a voter-enacted law, courts must interpret it through the lens of voter intent and understanding. (See *Robert L.*, 30 Cal.4th at p. 901; *Lance W.*, 37 Cal.3d at p. 889.) The electorate did not intend for mixed offense inmates like Mohammad who are still serving multiple consecutive terms of imprisonment for violent offenses to be eligible for early parole consideration after completing the full term of his nonviolent primary offense. Furthermore, the Court of Appeal's interpretation would lead to the absurd result that an inmate convicted of more crimes would be eligible for parole consideration, while an inmate convicted of less crimes would not. The Court of Appeal's overly literal interpretation of the amendment was erroneous.

CONCLUSION

The judgment of the Court of Appeal for the Second District should be reversed.

July 23, 2020

Respectfully Submitted,

KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

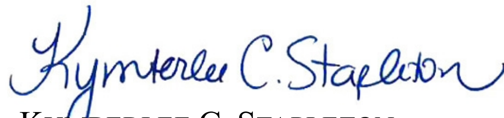
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee C. Stapleton, hereby certify that the attached **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT** contains 5,462 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: July 23, 2020

Respectfully Submitted,



KYMBERLEE C. STAPLETON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On July 23, 2020, I served true copies of the following document described as:

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Executed on July 23, 2020, Sacramento, California.

Kymberlee C. Stapleton

SERVICE LIST

Helen H. Hong Deputy Solicitor General California Department of Justice 600 West Broadway, Suite 1800 San Diego, CA 92101 helen.hong@doj.ca.gov	Attorney for Non-Title Respondent Via TrueFiling
Charles Chung Office of the Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	Attorney for Non-Title Respondent Via TrueFiling
Michael Satris Law Offices of Michael Satris P.O. Box 337 Bolinas, CA 94924 satrislaw.eservice@gmail.com	Attorney for Petitioner Via True-Filing
Clerk of the Court For: The Honorable William C. Ryan Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012	Via U.S. Mail
Los Angeles Co. District Atty.'s Office truefiling@da.lacounty.org	Via TrueFiling
Court of Appeal Second Appellate District, Div. 5 2d1.clerk5@jud.ca.gov	Via TrueFiling
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
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Case Number: **S259999**
Lower Court Case Number: **B295152**

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Michael Satris Court Added 67413	satrislaw.eservice@gmail.com	e-Serve	7/23/2020 2:49:12 PM
Helen Hong Office of the Attorney General 235635	helen.hong@doj.ca.gov	e-Serve	7/23/2020 2:49:12 PM
Charles Chung Office of the Attorney General 248806	charles.chung@doj.ca.gov	e-Serve	7/23/2020 2:49:12 PM

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Stapleton, Kymberlee (213463)

Last Name, First Name (PNum)

Criminal Justice Legal Foundation

Law Firm