

No. S259999

**In the Supreme Court of the State of California**

---

IN RE MOHAMMAD MOHAMMAD,  
ON HABEAS CORPUS.

---

Second Appellate District, Division Five, Case No. B295152  
Los Angeles County Superior Court, Case No. BH011959  
The Honorable William C. Ryan, Judge

---

**RESPONDENT'S SUPPLEMENTAL BRIEF**

---

|   |  |
|---|--|
| ROB BONTA (SBN 202668)<br>Attorney General of California          | JANILL L. RICHARDS (SBN 173817)<br>Principal Deputy Solicitor General  |
| MICHAEL J. MONGAN (SBN 250374)<br>Solicitor General               | PHILLIP J. LINDSAY (SBN 204444)<br>Senior Assistant Attorney General   |
| LANCE E. WINTERS (SBN 162357)<br>Chief Assistant Attorney General | *HELEN H. HONG (SBN 235635)<br>Deputy Solicitor General  |
|   | AMANDA J. MURRAY (SBN 223829)<br>Supervising Deputy Attorney General   |
|   | CHARLES CHUNG (SBN 248806)<br>Deputy Attorney General  |
|   | California Department of Justice<br>600 West Broadway, Suite 1800<br>San Diego, CA 92101<br>(619) 738-9693<br>helen.hong@doj.ca.gov<br><i>Attorneys for Respondent</i> |

May 6, 2021

## TABLE OF CONTENTS

|  | <b>Page</b> |
|--|-------------|
| Introduction and summary of argument .....   | 5           |
| Argument.....  | 7           |
| I.    The reasoning of <i>Gadlin</i> supports the exclusion of<br>mixed-offense inmates currently serving a sentence for<br>section 667.5 felonies ..... | 7           |
| II.   The failed effort to pass Proposition 20 provides no<br>evidence of what voters intended when passing<br>Proposition 57 .....                      | 10          |
| Conclusion .....   | 13          |

## TABLE OF AUTHORITIES

|   | <b>Page</b>   |
|---|---------------|
| <b>CASES</b>  |               |
| <i>Am. Civil Rights Foundation v. Berkeley Unified School Dist.</i><br>(2009) 172 Cal.App.4th 207 ..... | 10            |
| <i>Central Bank of Denver v. First Interstate Bank of Denver</i><br>(1994) 511 U.S. 164 .....           | 10, 12        |
| <i>Dyna-Med, Inc. v. Fair Employment &amp; Housing Com.</i><br>(1987) 43 Cal.3d 1379 .....              | 6, 10         |
| <i>In re Douglas</i><br>(2021) 62 Cal.App.5th 726 .....   | 6, 9, 10      |
| <i>In re Gadlin</i><br>(2020) 10 Cal.5th 915 .....  | 6, 7, 8       |
| <i>In re Viehmeyer</i><br>(Apr. 6, 2021, G059162) __ Cal.App.5th __ [2021 WL 1259464] .....             | 3, 9          |
| <i>Santa Clara County Local Transportation Authority v. Guardino</i><br>(1995) 11 Cal.4th 220 .....     | 10            |
| <i>Yoshisato v. Superior Court</i><br>(1992) 2 Cal.4th 978 .....  | 12            |
| <b>STATUTES AND REGULATIONS</b>   |               |
| California Code of Regulations, Title 15, § 3490, subd. (a)(5) .....                                    | 5             |
| Penal Code  |               |
| § 667.5 .....   | <i>passim</i> |
| § 3040.1 .....  | 11            |

**TABLE OF AUTHORITIES  
(continued)**

**Page**

**CONSTITUTIONAL PROVISIONS**

California Constitution, Article I, § 32 .....*passim*

## INTRODUCTION AND SUMMARY OF ARGUMENT

As set out in the California Department of Corrections and Rehabilitation's opening and reply briefs, Proposition 57 (Cal. Const., art. I, § 32) does not clearly and unambiguously state that the nonviolent parole program must be open to mixed-offense inmates currently serving a sentence for violent felonies listed in Penal Code section 667.5. (See generally OBM 26-33; RBM 6-12.) And because the text of Proposition 57 does not speak clearly about the program's application to mixed-offense inmates, the Court may consult extrinsic sources to determine the voters' intent. (OBM 34-40; RBM 12-17.) That evidence shows that individuals convicted of violent felonies under Penal Code section 667.5 must be excluded from Proposition 57's parole program. (OBM 35-39; RBM 12-20.) Including mixed-offense offenders would have the perverse effect of benefitting inmates who have been convicted of *more* crimes: An inmate who committed only a violent felony would not be eligible, but an inmate who committed a violent felony *plus* any nonviolent offense would be. And even if the text and evidence of voter intent did not *require* the Department to exclude mixed-offense inmates serving sentences for Penal Code section 667.5 violent felonies, the Department did not clearly overstep its regulatory authority in excluding this group from the nonviolent parole program. (OBM 40-43; RBM 21-22; see Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).)

Neither of the supplemental sources discussed in Petitioner Mohammad Mohammad's Supplemental Answer Brief

undermines those conclusions. Petitioner first contends that the Court “rejected” the Department’s “analytical approach” in *In re Gadlin* (2020) 10 Cal.5th 915, when the Court purportedly “conclud[ed]” that Proposition 57 “is not ambiguous.” (Supplemental Answer Brief (SAB) 4.) But that misreads *Gadlin*. The Court expressly acknowledged Proposition 57 “contain[s] some terms that might be ambiguous” and that such ambiguity may authorize the Department “to define what constitutes a ‘nonviolent felony offense’ for purposes of nonviolent offender parole consideration” in certain circumstances. (*Id.* at pp. 928, 932, 935.) As other courts of appeal have concluded, those circumstances support the exclusion of mixed-offense inmates currently serving a sentence for a violent felony from nonviolent parole. (See *In re Viehmeyer* (Apr. 6, 2021, G059162) \_\_ Cal.App.5th \_\_ [2021 WL 1259464]; *In re Douglas* (2021) 62 Cal.App.5th 726.)

Nor does the failed effort to pass Proposition 20 in November 2020 provide any evidence about what voters intended four years earlier when passing Proposition 57. In general, “[u]npassed bills” have “little value” in ascertaining the intent of previously-enacted laws (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396). In the circumstances of this case, voter rejection of Proposition 20 offers no support for petitioner’s view that Proposition 57 must extend to mixed-offense inmates whose primary terms are for nonviolent felonies. (SAB 12).

## ARGUMENT

### I. THE REASONING OF *GADLIN* SUPPORTS THE EXCLUSION OF MIXED-OFFENSE INMATES CURRENTLY SERVING A SENTENCE FOR SECTION 667.5 FELONIES

Petitioner contends that the Court’s decision in *Gadlin* “highlights the weaknesses of the Department’s analytical approach in the current case.” (SAB 8.) Petitioner both misreads *Gadlin* and fundamentally misunderstands the Department’s arguments.

In *Gadlin*, the Court invalidated a Proposition 57 regulation that excluded inmates from nonviolent offender parole based on a prior or current conviction that requires registration as a sex offender. In voiding the regulation, the Court held that Proposition 57’s terms were “not ambiguous” with respect to “offenders who were previously convicted of a registrable sex offense or who are currently convicted of a registrable sex offense that the Department has itself defined as nonviolent.” (*Gadlin, supra*, 10 Cal. 5th at p. 932.) And the Court reasoned that ballot materials “buttresse[d]” that reading of the constitutional text: the ballot arguments were at best “ambiguous” on this point, and no “reasonable voter, after reviewing the ballot materials and the language of the proposed constitutional provision” would conclude that the Department was authorized to exclude all historical and current sex offenders from the nonviolent parole process. (*Id.* at pp. 936, 939, 941.) Although Proposition 57 directed the Department to issue regulations in furtherance of its provisions, the Court reasoned that such regulatory authority did not authorize “regulations that are in conflict with constitutional provisions.” (*Id.* at p. 933.)

None of those concerns is present in the Department’s regulation applying to mixed-offense inmates. The Court in *Gadlin* acknowledged that the initiative “contain[s] some terms that might be ambiguous” in other contexts. (*Gadlin, supra*, 10 Cal.5th at p. 932.) Indeed, the Court agreed with the Department’s arguments—also made in this case (OBM 26-33; RBM 6-12)—that the term “nonviolent felony offense” is “not defined in the constitutional language,” 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.” (*Id.* at p. 928.)<sup>1</sup> While the ballot materials were “ambiguous” on the sex-offense related issues in *Gadlin* (*id.* at pp. 939, 940), the ballot materials here clearly promised voters that “[v]iolent criminals as defined in Penal Code 667.5(c)” would be “excluded” from the proposed parole program and contained no suggestion from opponents to the voters that mixed-offense inmates would be eligible for nonviolent parole if Proposition 57 passed. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) And the Department here has never asserted (SAB 5) the argument rejected in *Gadlin*: that a regulation excluding otherwise eligible inmates is supportable solely

---

<sup>1</sup> See also *id.* at p. 935 [describing some “arguably ambiguous terms of Proposition 57”]; *id.* at p. 928 [Court “need not decide the full scope of the Department’s authority in this context . . . given the limited question before us”].



through the initiative’s directive that the Department promulgate regulations to assure public safety.

Consistent with those arguments, courts of appeal have recently issued published decisions upholding the Department’s exclusion of mixed-offense inmates serving sentences for both violent and nonviolent felony offenses. (*In re Viehmeyer* (Apr. 6, 2021, G059162) \_\_ Cal.App.5th \_\_ [2021 WL 1259464]; *In re Douglas* (2021) 62 Cal.App.5th 726.) In *Viehmeyer*, the court of appeal explained that the language of Proposition 57 was ambiguous and did not “automatically entitle[]” mixed-offense inmates to parole eligibility. (*Viehmeyer, supra*, 2021 WL 1259464, at \*7.) The court examined the ballot materials and explained that such evidence confirmed that “voters intended to enact a mechanism for providing early parole consideration only to nonviolent felons, and not to violent felons who by happenstance were also convicted of a nonviolent felony.” (*Ibid.*)<sup>2</sup> In *Douglas*, the court of appeal likewise focused on evidence of voter intent, observing that “nothing in the election materials”—other than a narrow reading of section 32(a)(1)—“evinces an intent on the part of the voters to extend early parole consideration to persons convicted of violent felony offenses. To the contrary, Proposition 57 was presented to the voters as

---

<sup>2</sup> The court of appeal concluded in the alternative that *Viehmeyer*’s only conviction that is not a violent felony listed in section 667.5 is not a “nonviolent felony offense” under Proposition 57. (*Viehmeyer, supra*, 2021 WL 1259464, at pp. \*8-10.) The Department does not rely on such arguments here.

excluding violent offenders from early parole consideration.”

(*Douglas, supra*, 62 Cal.App.5th at p. \*4.)

## **II. THE FAILED EFFORT TO PASS PROPOSITION 20 PROVIDES NO EVIDENCE OF WHAT VOTERS INTENDED WHEN PASSING PROPOSITION 57**

The failed effort to pass Proposition 20 in 2020 offers no evidence of what voters intended when passing Proposition 57 in 2016. In general, “[u]npassed bills, as evidence[] of legislative intent, have little value.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396; see also *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238 [“same is true of unpassed constitutional amendments”].) Instead, courts “focus . . . attention on the voters’ intent” at the time a law is passed. (*Am. Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 219, fn.9.) For that reason, courts have typically denied requests for judicial notice of failed post-enactment initiatives when offered as evidence of voter intent in passing a prior law. (*Ibid.*; see generally *Central Bank of Denver v. First Interstate Bank of Denver* (1994) 511 U.S. 164, 187 [“[F]ailed legislative proposals are “a particularly dangerous ground on which to rest an interpretation of a prior statute.”].)<sup>3</sup>

Petitioner does not address or attempt to distinguish any of those principles. Instead, he simply asserts that Proposition 20 presented the “rare situation in which voters were re-consulted

---

<sup>3</sup> The Court should deny Petitioner’s request for judicial notice of Proposition 20 materials on the same ground.

about their precise intent in approving Proposition 57.” (SAB 9.) That view of Proposition 20 is wrong in any event. Proposition 20 presented voters with broad reforms that would have expanded DNA collection, authorized greater penalties for certain theft crimes, and addressed “[r]ecent changes to parole laws that allowed the early release of dangerous criminals by the law’s failure to define certain crimes as ‘violent.’” (RJN 13.) With respect to those parole reforms, the ballot materials focused on amendments that would eliminate eligibility for inmates convicted of some offenses that the general public might consider to be violent—like assault and domestic violence—but that are not listed in Penal Code section 667.5. (RJN 29.) Those proposed amendments would have expanded the class of violent felonies to at least 51 offenses listed in a new Penal Code section 3040.1. (RJN 16-17.)

While Proposition 20 also proposed to amend the Penal Code to eliminate nonviolent parole eligibility for a mixed-offense “inmate whose current commitment includes a concurrent, consecutive or stayed sentence for an offense defined as violent” under section 667.5 or the proposed list of 51 additional violent offenses, that proposal was not discussed in any of the ballot arguments. (RJN 18.) More importantly, there is no basis to accept petitioner’s view that voters rejected an opportunity through Proposition 20 “to override the lower court’s decision in the current case by endorsing the parole eligibility limitation the Department included in its regulation.” (SAB 11-12.) As this Court has explained in analogous contexts, it is “equally plausible

that the voters viewed” the failed initiative as a whole to be “unnecessary,” “undesirable,” or “unduly” expansive. (*Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 990, fn.7; cf. *Central Bank of Denver, supra*, 511 U.S. at p. 187 [“inaction lacks persuasive significance because several equally tenable inferences may be drawn” “including the inference that the existing legislation already incorporated the offered change”].)

## CONCLUSION

The judgment of the court of appeal should be reversed.

Respectfully submitted,

ROB BONTA  
Attorney General of California  
LANCE E. WINTERS  
Chief Assistant Attorney General  
MICHAEL J. MONGAN  
Solicitor General  
JANILL L. RICHARDS  
Principal Deputy Solicitor General  
PHILLIP J. LINDSAY  
Senior Assistant Attorney General

s/ Helen H. Hong  
HELEN H. HONG (SBN 235635)  
Deputy Solicitor General  
AMANDA J. MURRAY  
Supervising Deputy Attorney General  
CHARLES CHUNG  
Deputy Attorney General  
California Department of Justice  
600 West Broadway, Suite 1800  
San Diego, CA 92101  
(619) 738-9693  
helen.hong@doj.ca.gov  
*Attorneys for Respondent*

May 6, 2021

**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Century Schoolbook font and contains 1,757 words.

ROB BONTA  
*Attorney General of California*

s/ Helen H. Hong

HELEN H. HONG  
*Deputy Solicitor General*  
*Attorneys for Respondent*

May 6, 2021

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: **In re Mohammad Mohammad** Case No.: **S259999**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 6, 2021, I electronically served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 6, 2021, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following:

Clerk of the Court  
For: The Honorable William C. Ryan  
Los Angeles County Superior Court  
111 North Hill Street  
Los Angeles, CA 90012  
***Served via U.S. Mail***

Los Angeles County District Attorney's Office  
[truefiling@da.lacounty.org](mailto:truefiling@da.lacounty.org)  
***Served via Truefiling***

Heather Mackay, Esq.  
[mackaylaw@sbcglobal.net](mailto:mackaylaw@sbcglobal.net)  
***Served via Truefiling***

California Appellate Project (LA)  
[capdocs@lacap.com](mailto:capdocs@lacap.com)  
***Served via Truefiling***

Court of Appeal  
Second Appellate District-Div. 5  
[2d1.clerk5@jud.ca.gov](mailto:2d1.clerk5@jud.ca.gov)  
***Served via Truefiling***

Richard Sachs, Esq.  
[richard.sachs@sdceda.org](mailto:richard.sachs@sdceda.org)  
***Served via Truefiling***

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 May 6, 2021, at San Diego, California.

---

B. Romero  
Declarant

---

***s/ B. Romero***  
Signature

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **MOHAMMAD (MOHAMMAD) ON H.C.**

Case Number: **S259999**

Lower Court Case Number: **B295152**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **helen.hong@doj.ca.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

| <b>Filing Type</b> | <b>Document Title</b>                            |
|--------------------|--|
| APPLICATION        | Respondent's Application for Relief from Default |
| BRIEF              | Respondent's Supplemental Brief                  |

Service Recipients:

| <b>Person Served</b>                                       | <b>Email Address</b>       | <b>Type</b> | <b>Date / Time</b>   |
|--|----------------------------|-------------|----------------------|
| Heather Mackay<br>Attorney at Law<br>161434                | mackaylaw@sbcglobal.net    | e-Serve     | 5/6/2021 11:42:53 AM |
| Richard Sachs<br>Office of the District Attorney<br>113547 | richard.sachs@sdca.org     | e-Serve     | 5/6/2021 11:42:53 AM |
| Los Angeles District Attorney's office                     | truefiling@da.lacounty.org | e-Serve     | 5/6/2021 11:42:53 AM |
| California Appellate Project                               | capdocs@lacap.com          | e-Serve     | 5/6/2021 11:42:53 AM |
| Court of Appeal-Second Appellate District-Div 5            | 2d1.clerk5@jud.ca.gov      | e-Serve     | 5/6/2021 11:42:53 AM |

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/6/2021

Date

/s/BLANCA ROMERO

Signature

Hong, Helen (235635)

Last Name, First Name (PNum)

California Department of Justice, Office of the Solicitor General



