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

SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

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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.

The Department argues that the text of California Constitution, Article I, section 32, subdivision (1) is ambiguous as to whether it grants early parole consideration to mixed offense prisoners (regardless of whether the primary offense is a nonviolent felony), and that therefore this Court should look to the Proposition 57 voters' guide to interpret that provision. (Opening Brief on the Merits (OB), at pp. 26-40.) The Department further has argued that section 32, subdivision (b) confers on the Department's Secretary the authority to "fill up the details" by enacting regulations that exclude inmates from early parole consideration based on the Department's own public safety preferences. (OB, at pp. 40-43.) On December 28, 2020, this Court rejected similar analytical approaches proposed by the Department in *In re Gadlin* (2020) 10 Cal.5th 915, voiding regulations that excluded from early parole consideration any person with a prior or current conviction requiring sex offender registration, even if the current conviction was for an offense not classified as a violent felony by Penal Code section 667.5, subdivision (c) or the regulations. (*In re Gadlin*, *supra*, 10 Cal.5th at pp. 943.)

As in the current case, the Department argued in *Gadlin* that the section 32, subdivision (a)'s use of the terms "convicted" and "nonviolent offense" was ambiguous. (*In re Gadlin, supra*, 10 Cal.5th at pp. 928-929, 931.) This Court held otherwise: "Parole eligibility under the provision is conditioned on an inmate's current conviction for a nonviolent felony, the inmate's being sentenced to prison, and the inmate's completion of the 'full term' for the 'primary offense.' " (*Id.* at p. 932.) Indeed, this Court opined that the purpose of Proposition 57 was to permit "inmates convicted of nonviolent felonies to be eligible for parole consideration." (*Id.* at p. 933; see also *id.* at p. 35 ["the framework described by the language of the constitutional provision establishes a parole consideration process for '[a]ny person convicted of a nonviolent felony offense.' ".)

In *Gadlin*, as in the current case, the Department asserted that section 32, subdivision (b) requirement that the Department certify that its regulations "protect and enhance public safety" gave it the authority to exclude people convicted of nonviolent offenses from early parole consideration based on the Department's public safety preferences. (*In re Gadlin, supra*, 10 Cal.5th at pp. 928-929, 931, 933.) This Court rejected that argument. This Court stated:

> [T]his requirement does not authorize the Department to promulgate regulations that are in conflict with the constitutional provisions. To conclude otherwise would eviscerate the language of article I, section 32(a)(1) mandating that inmates convicted of nonviolent felony offenses "shall be eligible" for parole consideration.

(*Id.* at p. 933.) Furthermore, this Court observed, broad eligibility for parole does not leave the Department without the tools necessary to protect public safety:

> Nor can it be said that the initiative's overall focus on public safety is sufficient to grant the Department the broad authority it claims. A conclusion that the electorate made certain inmates *eligible* for parole consideration does not require the Department to find each of those inmates *suitable* for parole. Indeed, many factors relevant to public safety may best be addressed through parole suitability determinations. The Department is left with ample room to protect public safety by crafting the specific processes under which parole suitability is determined on a case-by-case basis.

(*Id.* at p. 934.) Although the Department asserted its regulations would merely "fill up the details" of section 32, "carving out wholesale exclusions from an otherwise broad mandate 'is hardly a detail.' " (*Id.* at p. 935, quoting *In re McGhee* (2019) 34 Cal.App.5th 902, 911.)

Finally, as in the current case, the Department argued in *Gadlin* that the voter materials supported its exclusion. (*In re Gadlin, supra*, 10 Cal.5th at pp. 928, 933-934.) This Court observed that the voters approved Proposition 57 despite the opponents' warnings that it would allow for parole of "career criminals," supporting a conclusion that the voters intended to provide parole consideration without regard for prior convictions. (*Id.* at p. 940.) However, the fact that the voters were warned that the arguments in the guide had not been verified for accuracy reduced the reliability of those arguments as evidence of

the voters' intent. (*Id.* at p. 940-941.) To any extent there were tensions in the ballot arguments, this Court presumed that the voters relied on the text of Proposition 57. (*Id.* at p. 940.) In the end, this Court rejected the Department's whole analytical approach to the ballot arguments.

> "[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. It would be a strained approach to constitutional analysis if we were to give more weight to a possible inference in an extrinsic source (a ballot argument) than to a clear statement in the Constitution itself."

(*Id.* at p. 942, quoting *Delaney v. Superior Court* (1990) 50 Cal.3d, 785, 803.) This Court went on to state:

> The Department reprises yet again its arguments that the voters would have understood from the constitutional provision directing the Department to adopt regulations in furtherance of the initiative that the initiative provided only a "framework" for nonviolent offender parole consideration, that the Department would fill up the details, and that the focus on public safety considerations in the constitutional language and ballot materials would give the Department broad authority to determine what inmates would be eligible for parole consideration under the initiative. These assertions are no more persuasive in the context of the ballot materials than they are in the context of reviewing the language of the constitutional provisions at issue. Without language in the constitutional provision that expressed or strongly implied the authority of the Department to carry out such exclusions, we cannot say the voters intended such exclusions.

(*Id.* at p. 943.)

In sum, although *Gadlin* addressed the eligibility of non-violent sex offenders and not prisoners with mixed nonviolent and violent convictions, its analysis highlights the weaknesses of the Department's analytical approach in the current case. The Department's goal in both situations was not to uphold the intent of the voters by implementing regulations that adhere to the text of section 32, subdivision (a). Rather, it has cast about for ad hoc justifications for restricting early parole eligibility to people, regardless of whether their primary offense is a nonviolent felony.

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.

The Department's argument in this case is based largely on supposed voter intent that it claims can be derived from vague arguments by proponents and opponents of Proposition 57 that were presented to the voters in 2016. (OB, at pp. 34-40.) However, the November 3, 2020 General Election subsequently presented California voters with Proposition 20, which gave the voters a clear opportunity to restrict early parole eligibility in exactly the manner the Department wants this Court to adopt. The voters overwhelmingly rejected Proposition 20 by a margin of 61.7% to 38.3%. (Request for Judicial Notice, Exhibit A, at p. 11: California Secretary of State, *Statement of Vote, General*

Election, November 3, 2020 (excerpt), available at https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf (last checked March 30, 2021).)

This is a rare situation in which the voters were re-consulted about their precise intent in approving Proposition 57. Indeed, the lower court in the current case had told the Department to consult with the voters if it disagreed with its holding. "If voters want a different result, the ballot box is open every two years to change what the Constitution now says." (*In re Mohammad* (2019) 42 Cal.App.5th 719, 728, review granted Feb. 19, 2020, No. S259999.) Accordingly, supporters of the Department's regulations presented Proposition 20 to the voters.

The text of Proposition 20 told the voters, in both general and specific terms, that their approval of the measure would result in exclusion of people with mixed violent and nonviolent offenses from early parole consideration. The Introductory portions of Proposition 20 proclaimed that one purpose of the proposed law was to "Reform the parole system so violent felons are not released early from prison," as "[m]urderers, rapists, child molesters, and other violent criminals should not be released early from prison." (Req. for Jud. Notice, Exh. B, at p. 13 [§§2(a) and 3(a)(1)]: California Secretary of State, *Proposition 20: Text of Proposed Law*, available at https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop20.pdf (last checked March 30, 2021).) Section 4.4 of the proposition would have added a new Penal Code section 3040.3 invalidating the lower court's holding in the

current case. The proposed section read in pertinent part as follows:

> 3040.3 (a) An inmate whose current commitment includes a concurrent, consecutive, or stayed sentence for an offense or allegation defined as violent by subdivision (c) of Section 667.5 or Section 3040.1 shall be deemed a violent offender for purposes of Section 32 of Article I of the Constitution.

(Req. for Jud. Notice, Exh. B, at p. 18.) The other two subdivisions of the section would have deemed people to be violent offenders for purposes of California Constitution Article I, Section 32 if their current commitment included an indeterminate sentence (thereby invalidating *In re Edwards* (2018) 26 Cal.App.5th 1181) or any enhancement which made the underlying offense a violent felony under section 667.5, subdivision (c). (Req. for Jud. Notice, Exh. B, at p. 18.)

The voter materials likewise explained that Proposition 20 would limit the scope of Proposition 57 early parole. As described in the Official Title and Summary and the Legislative Analyst's Overview, Proposition 20 proposed changes to the criminal justice system that fell into four categories. One category was changing the Proposition 57 parole process. The others were increasing penalties for some theft offenses, changing how people are supervised after release from prison, and requiring people convicted of certain misdemeanors to provide DNA samples. (Req. for Jud. Notice, Exh. C, at p. 26: California Secretary of State, *Official Voter Information Guide, California General Election, November 3, 2020* (excerpt), available at https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf (last

checked March 30, 2021).) If the voters read nothing else in the ballot pamphlet, they likely read the introductory paragraph explaining one of the purposes of the proposition as follows:

> Limits access to parole program established for non-violent offenders who have completed the full term of their primary offense by eliminating eligibility for certain offenses.

(Req. for Jud. Notice, Exh. C, p. 26.) The Legislative Analyst's discussion of the Background of the Proposition 57 Release Consideration Process then explained that:

> People in prison have been convicted of a primary crime. This is generally the crime for which they receive the longest amount of time in prison. They often serve additional time due to the facts of their cases (such as if they used a gun) or for other, lesser crimes they were convicted of at the same time. . . .. ¶In November 2016, voters approved Proposition 57, which changed the State Constitution to make prison inmates convicted of nonviolent felonies eligible to be considered for release after serving the term for their primary crimes.

(Req. for Jud. Notice, Exh. C, at pp. 28-29.) The Legislative Analyst told the voters that Proposition 20 would change the Proposition 57 release consideration process by, among other things, "excluding some inmates from the process." (Req. for Jud. Notice, Exh. C, at p. 29.) The Argument Against Proposition 20 likewise warned voters that Proposition 20 would limit the scope of Proposition 57, stating that "Backers of Prop. 20 are trying to scare you into rolling back effective criminal justice reforms you just passed . . ." (Req. for Jud. Notice, Exh. C, at p. 33.)

In sum, Proposition 20 offered the voters the opportunity to override the lower court's decision in the current case by

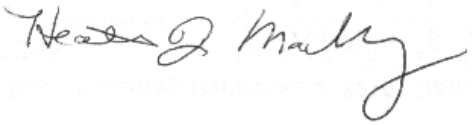
endorsing the parole eligibility limitation the Department included in its regulations. The voters' rejection of Proposition 20 indicates that voters intend that section 32, subdivision (a) provide early parole consideration to people with mixed offenses whose primary terms are for nonviolent felonies.

CONCLUSION

For the foregoing reasons, and the reasons presented in the Answer Brief on the Merits, this Court should affirm the judgment of the Court of Appeal.

DATED: April 1, 2020

Respectfully Submitted,



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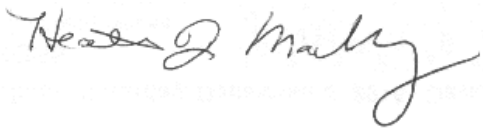

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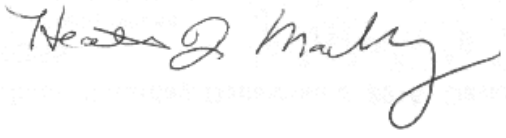

/s/ Heather J. MacKay

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/s/Heather MacKay

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