IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **GREGORY GADLIN,** **On Habeas Corpus.**	**Case No. S254599** Court of Appeal of California Second District, Div. Five Case No. B289852 Superior Court of California County of Los Angeles Case No. BA165439 Hon. William C. Ryan

RESPONDENT GREGORY GADLIN'S SUPPLEMENTAL BRIEF PER COURT ORDER DATED OCTOBER 8, 2020

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INTRODUCTION

Pursuant to C.R.C. 8.520(d)-(e) and this Court's order dated October 8, 2020, Respondent Gadlin hereby respectfully submits this supplemental brief addressing whether "the California Department of Corrections and Rehabilitation ["CDCR"] exceeded its authority under Article I, Section 32 of the California Constitution ["Section 32"] by promulgating regulations excluding from nonviolent offender parole consideration inmates who are currently convicted of nonviolent offenses requiring registration pursuant to Penal Code section 290 ["registrable offense"]."

The category of inmates addressed in this supplemental brief is situationally distinct from the category of inmates who (like Mr. Gadlin) are currently incarcerated for a non-registrable offense, but were convicted of a registrable offense in the past. However, in excluding inmates with a current registrable offense from early parole consideration, CDCR exceeds its authority under Section 32 for the same reasons that CDCR exceeds its authority in excluding inmates because of a prior registrable offense. That is because the criterion for eligibility for early parole consideration is the same for both categories of inmate: Section 32(a)(1) mandates early parole consideration for "any person convicted of a nonviolent felony offense." Yet, for both categories of inmate, CDCR has replaced the mandatory eligibility criterion of nonviolence with the separate and improper criterion of "an unreasonable risk to public safety." (Apr. 30, 2020, Final Stmt. of Reasons, at p. 20.) In so doing, for both categories of inmate, CDCR has impermissibly conditioned eligibility for early parole consideration upon an inmate's "status" as a registrant rather than the definition of "nonviolent felony offense." (*Alliance for Const. Sex Offense Laws v. CDCR* (2020) 45 Cal. App. 5th 225, 232, *rev. granted* S261362. *In re Schuster* (2019) 42 Cal. App. 5th 943, 955, *rev. granted* S260024.)

It is true that, in this case, the Court of Appeal below distinguished inmates currently incarcerated for a registrable offense from inmates currently incarcerated for a non-registrable offense, but who have a past registrable conviction. (*In re Gadlin* (2019) 31 Cal. App. 5th 784, 790.) The Court below ruled that inmates may not be excluded from early parole consideration on the basis of a past registrable conviction because Section 32(a)(1) conditions eligibility solely upon the current conviction. (*Ibid.*) The Court below issued no ruling regarding the second category of inmate, *i.e.*, those presently incarcerated for a nonviolent registrable offense, because such a ruling was not necessary to decide Mr. Gadlin's case. (*Id*. at p. 790.)

However, as concerns the scope of CDCR's authority under Section 32, the distinction between the two categories of inmate is immaterial. That is, while the plain text of Section 32(a)(1) as construed by the Court below provides an additional reason why CDCR cannot consider a past registrable conviction in determining eligibility for early parole consideration, the authority claimed by CDCR to exclude registrants from early parole consideration does not turn on the distinction between a past or present registrable conviction. Instead, CDCR claims authority to categorically exclude both categories of inmate on the same basis – public safety – even when the inmates in either category "would be eligible for early parole consideration under the Amendment but for the Department's decision to exclude them as a risk to public safety." (See *Alliance*, *supra*, 45 Cal. App. 5th at p. 231.)

Because the grounds upon which CDCR claims authority to rewrite Section 32(a)(1) are inadequate to deny early parole consideration for inmates with a prior registrable conviction, those grounds are likewise inadequate to deny early parole consideration for inmates currently incarcerated for a nonviolent registrable offense. This was the holding of

the Third District Court of Appeal in the *Alliance* action. Therefore, should this Court reach the issue of inmates presently incarcerated for a nonviolent registrable offense in this matter, Petitioner respectfully submits that the Court should adopt the reasoning of *Alliance*, and rule that CDCR has exceeded its authority by categorically excluding those inmates as well.

ARGUMENT

I. CDCR HAS EXCLUDED REGISTRANTS ON THE BASIS OF "PUBLIC SAFETY DETERMINATIONS," NOT THE DEFINITION OF "NONVIOLENT FELONY"

Both parties agree that Section 32(a) sets forth a single eligibility criterion for early parole consideration, that is: "any person" convicted of a "nonviolent felony offense" "shall" receive early parole consideration by the Board of Parole Hearings. (Section 32(a)(1).) The dispute in this case concerns CDCR's authority to issue regulations that purportedly "implement" this provision by categorically excluding inmates who satisfy this criterion, because they have been convicted of a registrable offense.

CDCR has no more authority to categorically exclude inmates presently incarcerated for a registrable offense than it has authority to exclude inmates with a past registrable conviction. To see why, it is critical to note that CDCR has not based the categorical exclusion of registrants on a determination that registrable offenses are "violent." Nor has CDCR determined that persons with registrable convictions cannot be persons "convicted of a nonviolent felony offense" within the meaning of Section 32(a). As CDCR explains in its reply brief, "the Department's sex offender exclusion regulation does not merely interpret particular terms, such as "nonviolent" or "nonviolent felony offense." Instead, it reflects the Secretary's public safety determinations . . . ." (ARB, at p. 20, emphasis

added. *See also Alliance*, *supra*, 45 Cal. App. 5th at p. 231 "[T]he Department does not argue that all sex offenses requiring registration under Penal Code section 290 are excluded from the term 'nonviolent felony offense' . . . ."].)

In fact, CDCR's regulation implementing Section 32(a)(1), found at 15 C.C.R. section 3490(a)(5), defines "nonviolent felony" as any offense not listed in Penal Code section 667.5(c). By incorporating Section 667.5(c) in this manner, CDCR has conceded that many registrable offenses (*i.e.*, those not listed in PC 667.5(c)) meet the definition of "nonviolent felony offense," and would qualify for early parole consideration "but for" CDCR's decision to exclude them. (*Alliance*, *supra*, 45 Cal. App. 5th at p. 231.) Notably, CDCR's exclusion of registrants appears in a wholly separate provision, 5 C.C.R. section 3491(b)(3), which provides that persons who are "convicted of a sexual offense that currently requires or will require registration" are ineligible for early parole consideration "notwithstanding [their eligibility for early parole under] Section 3490(a)."

The Final Statement of Reasons ("FSR") accompanying the regulations at issue further confirms that CDCR's exclusion of registrants is not based upon the definition of nonviolent, but instead upon the substitute basis of "public safety." CDCR first declares that "**public safety** requires that sex offenders be excluded form nonviolent parole consideration." (Apr. 30, 2020, FSR, at p. 20.) CDCR then explains its reasoning:

> 3,256 inmates are currently convicted of sex offenses that are not listed as violent or serious, but in which the offense involves some degree of physical force, coercion, or duress with the victim, often a minor. . . . The department has determined that these offenses demonstrate a sufficient degree of violence **to represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration**.

(*Ibid.*)

Therefore, as acknowledged in *Alliance*, CDCR's sole rationale for excluding registrants is "public safety," which is a "policy consideration" unrelated to the definition of "nonviolent felony offense." (See *Alliance*, *supra*, 45 Cal. App. 5th at pp. 232, 237. ["[T]he issue presented here is whether the Department is authorized to exclude from early parole consideration all sex offenders regardless of their undisputed status as convicted of 'nonviolent offenses' on the basis that they are more likely than other offenders to recidivate and are therefore dangerous to public safety."].) Said another way, CDCR has conditioned early parole consideration not upon the criterion of nonviolence as required by Section 32(a)(1), but instead upon the inmate's "status" as a registrant. (*Schuster*, *supra*, 42 Cal. App. 5th at p. 955, noting same).

II. CDCR LACKS AUTHORITY TO SUBSTITUTE THE CRITERION OF "NONVIOLENCE" WITH "PUBLIC SAFETY" FOR ANY CATEGORY OF REGISTRANT

If CDCR lacks authority to substitute the criterion of "nonviolence" with "public safety" in the case of inmates with past registrable convictions, then CDCR lacks authority to substitute the criterion of nonviolence with "public safety" in the case of inmates presently incarcerated for a registrable offense. That is because none of the grounds asserted by CDCR for excluding registrants from early parole consideration distinguish between the two categories of registrants, and, more importantly, none of the grounds asserted by CDCR are adequate to override the plain text of Section 32(a)(1) as concerns either category of registrant.

A. The Certification Requirement of Section 32(b) Does Not Authorize the Exclusion of Either Category of Registrant

CDCR principally claims that the agency may exclude registrants based upon "public safety determinations" (ARB at p. 20) rather than the

criterion of "nonviolence" because Section 32(b) of Proposition 57 directs CDCR to "adopt regulations in furtherance of these provisions, and . . . certify that these regulations protect and enhance public safety." As the Court of Appeal has repeatedly determined, CDCR's interpretation of Section 32(b) is erroneous because it permits CDCR to override, rather than "further," "the[] provisions" of Section 32(a) by substituting its preferred "policy determinations" for the "provisions" of Section 32(a). (*E.g.*, *In re Chavez* (2020) 51 Cal. App. 5th 748, 754-55, *rev. granted* S263584 ["CDCR could not have reasonably concluded that its restrictive regulation was 'in furtherance' of the broad mandate that the voters had explicitly required to be liberally construed."].)

During oral argument, this Court noted the untenable implications of CDCR's interpretation of Section 32(b). For example, the Court queried whether CDCR could, on the basis of "public safety," exclude any inmate currently incarcerated for a nonviolent offense because that inmate had once committed a violent felony of any type. CDCR could not articulate a principle grounded in the text of Proposition 57 by which an expansive authority to protect "public safety" could be limited to registrants without reaching other inmates whose characteristics implicate "public safety."

Furthermore, as noted above, the scope of CDCR's erroneous claim of authority to make "public safety determinations" under Section 32(b) is not limited to persons with prior registrable convictions. Instead, CDCR cites Section 32(b) as the basis of its authority to replace the criterion of nonviolence with "public safety" for all inmates with a registrable conviction. Yet, if Section 32(b) does not authorize CDCR to ignore Section 32(a)(1)'s criterion of "nonviolence" regarding inmates with a prior registrable conviction, then Section 32(b) does not authorize CDCR to

ignore the criterion of nonviolence regarding inmates presently incarcerated for a nonviolent registrable offense, either.[1]

B. The Ballot Materials Do Not Distinguish Between Registrants with Present and Past Convictions, and Do Not Replace the Plain Text of Section 32(a)

The Proposition 57 ballot materials likewise provide no basis for distinguishing between inmates with present and past registrable convictions for the purpose of eligibility for early parole consideration. The single (and factually erroneous)[2] statement in the ballot materials upon which CDCR relies is: "[Proposition 57] [d]oes NOT and will not change the federal court order that excludes sex offenders, as defined in Penal Code 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) This statement does not distinguish between an inmate whose obligation to register arises from a past or present

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[1] As noted in Respondent's Brief, Section 32(b) is properly construed as a limit on CDCR's authority under Section 32(a), not a separate basis of authority unconstrainted by the "provisions" of Section 32(a). (ABM at pp. 30-34, 48-49.) When viewed in this context, the discretion granted to CDCR by Section 32(b) extends to matters such as the development of programs to award sentence-reduction credits under Subdivision (a)(2), or the process by which eligible inmates are referred to the Board of Parole Hearings. (15 C.C.R. §§ 3491, subds. (c)-(g); 3493; 2449.2-2449.7.) CDCR has, in fact, exercised that discretion by developing a complex credit earning program, and has certified that its regulations on that subject protect and enhance public safety. (*See, e.g.*, *id*. §§ 3042-3044.) Regarding eligibility for early parole consideration, however, the voters have determined that the sole criterion of "nonviolence" should dictate eligibility, and that "all" persons with "nonviolent" convictions "shall" receive early parole consideration.

[2] The statement is erroneous because the "federal court order" does not "exclude sex offenders from parole," or even refer to sex offenders or Proposition 57. Instead, the order addresses a limited, preexisting parole process for second strike inmates, which Proposition 57 was intended to replace with a much broader program.

conviction. Thus, if this oblique reference to a federal court order is insufficient to override the plain text of Section 32(a)(1) by disqualifying those with a prior registrable conviction from early parole consideration, there is no reason why the reference to the federal court order would override the measure's application to those presently incarcerated for a registrable offense.

Referencing the ballot materials, the concurring opinion by Justice Baker below tentatively proposes that CDCR could exclude some inmates presently incarcerated for a registrable offense that is not listed in Penal Code section 667.5(c), but cautions that such discretion may not extend to patently nonviolent registrable offenses such as indecent exposure. (*Gadlin*, *supra*, 31 Cal. App. 5th at p. 795-96 & n.4.) Critically, Justice Baker's concurring opinion does not conclude that CDCR may categorically exclude all registrants from early parole condition, as CDCR has done. Instead, the concurring opinion addresses CDCR's discretion "to clarify[] the margins of what constitutes a nonviolent felony offense." (*Id.* at p. 793-94, emphasis added. *See also ibid.* ["[T]he precise scope of who is meant to benefit from early parole consideration relief is left fuzzy at the margins."].) However, as explained above, CDCR has not excluded persons presently incarcerated for a registrable offense by defining "nonviolent felony offense" in a manner that excludes them. Rather, CDCR has categorically excluded all such inmates "notwithstanding" the fact that many are presently convicted of a "nonviolent felony offense." As the Court of Appeal noted in *In re McGhee*, "Proposition 57 delegated rulemaking authority to the department to 'fill up the details,' . . . [but] the exclusion of otherwise eligible inmates from board consideration is hardly a detail." (*In re McGhee* (2019) 34 Cal. App. 5th 902, 911.) Regardless, the tentative reasoning of the concurring opinion below does not address whether CDCR can do what it has done, that is, to categorically exclude

inmates presently incarcerated for a registrable offense that is "nonviolent" under CDCR's own regulatory definition of that term.

Ultimately, as determined by every court to consider the matter, the ballot materials do not authorize CDCR to categorically exclude either category of registrant by substituting the criterion of nonviolence with "public safety." (*E.g.*, *Chavez*, *supra*, 51 Cal. App. 5th at p. 755 n.10 [rejecting CDCR's interpretation of ballot materials].) That is because the voters enacted the text of Section 32, not a statement by the measure's proponents in the ballot materials, particularly a statement that is refuted by opponents of the measure in the same document. (See ABM at pp. 37-38.) More fundamentally, an oblique statement in the ballot materials cannot imbue CDCR with authority that the text of the measure does not itself grant: "[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." (*Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 802-803.)

In the case of Proposition 57, "the measure itself" confirms that early parole consideration is available for "any person convicted of a nonviolent felony offense," including persons presently convicted of a nonviolent registrable offense. A "possible inference" based upon an uncited and erroneously characterized "federal court order" cannot replace and surmount the actual language approved by voters, because nothing in the text of Proposition 57 informs voters that CDCR's "policy considerations," rather than the criterion of "nonviolence," will determine which inmates qualify for early parole consideration. (*Alliance*, *supra*, 45 Cal. App. 5th at p. 237, quoting *Schuster*, *supra*, 42 Cal. App. 5th at p. 955, quoting *Gadlin*, *supra*, 31 Cal. App. 5th at p. 790. *See also Chavez*, *supra*, 51 Cal. App. 5th at p. 756 ["Permitting the Department to restrict the number of eligible inmates due to perceived danger to public safety does

not broadly construe the stated goals of the proposition."]; *In re King* (2020) 54 Cal. App. 5th 814, 181 ["[P]olicy considerations do not trump the plain text of section 32(a)(1)."]; *McGhee*, *supra*, 34 Cal. App. 5th at p. 902 ["Despite the policy considerations advanced by the department, section 32, subdivision (a)(1) mandates that [] prisoners receive parole consideration if they have been convicted of a nonviolent felony and have served the full term of their primary offense."].)

CONCLUSION

For these and the other reasons set forth in his briefing, Respondent respectfully requests that the Court adopt the reasoning of the Third Appellate District in *Alliance* and affirm the decision of the Court below.

Date: October 19, 2020

Respectfully submitted,

/s/ Janice M. Bellucci
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CERTIFICATE OF COMPLIANCE
(Cal. Rule of Court 8.520, subd. (c)(1))

The undersigned hereby certifies that this supplemental brief has been prepared using 13-point Times New Roman typeface. The brief consists of 2,799 words as counted by the Microsoft Word word processing program, up to the signature block that follows the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 19, 2020.

/s/ Janice M. Bellucci
Janice M. Bellucci

DECLARATION OF SERVICE

Case Name: **In re Gregory Gadlin** No. **S254599**

I declare:

I am 18 years of age or older and not a party to this matter. My business address is 1215 K Street, 17th Floor, Sacramento, CA 95814.

Pursuant to the Supreme Court of California's March 18, 2020 amendment to Rule 2 of the Supreme Court Rules Regarding Electronic Filing, on October 19, 2020, I e-Submitted the attached **RESPONDENT GREGORY GADLIN'S SUPPLEMENTAL BRIEF PER COURT ORDER DATED OCTOBER 8, 2020** by transmitting a true copy via the California Courts website e-Submissions system, TrueFiling. As instructed by the Court, paper copies were submitted.

On October 19, 2002, I also served the attached **RESPONDENT GREGORY GADLIN'S SUPPLEMENTAL BRIEF PER COURT ORDER DATED OCTOBER 8, 2020** through the TrueFiling system, as well as by e-mail, on the following:

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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 October 19, 2020, at Sacramento, California.

Janice M. Bellucci