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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

In re GREGORY GADLIN on Habeas Corpus

on Habeas Corpus.

SUPPLEMENTAL BRIEF OF AMICI CURIAE SOCIAL SCIENCE AND LAW SCHOLARS IN SUPPORT OF PETITIONER GREGORY GADLIN

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INTRODUCTION

This supplemental brief is filed in response to the Court's question:

> Did the California Department of Corrections and Rehabilitation exceed its authority under article I, section 32 of the California Constitution by promulgating regulations excluding from nonviolent offender parole consideration inmates currently convicted of nonviolent offenses requiring registration pursuant to Penal Code section 290?

Mr. Gadlin is currently serving a sentence for a nonviolent offense that does not require registration under Penal Code section 290, but he was deemed ineligible for parole consideration by the Department because he is required to register by virtue of an earlier conviction for which he previously completed his sentence. Amici understand the Court to ask whether and how the arguments we offered on behalf of Mr. Gadlin apply to a prisoner whom CDCR excludes from parole consideration because he is *currently* serving a sentence for a registrable nonviolent offense.

ARGUMENT

I. CDCR'S SUPPLEMENTAL BRIEF GIVES A PROBLEMATIC ANSWER TO A QUESTION THE COURT DID NOT ASK, AND DOES NOT AFFECT THE RELEVANCE OF THE AMICI'S SUBMISSION.

The Court's question assumes the prisoner's current registerable offense is properly classified nonviolent, within the meaning of article I, section 32 of the Constitution. Therefore our response also proceeds on that assumption. The Department's supplemental brief, however, takes the opposite tack, ignores the Court's question, and instead answers a different

question of the Department's own choosing: whether CDCR may classify all registrable offenses as violent without regard to whether they fall within the statutory definition of "violent" that CDCR applies to all other potential parole applicants. We agree with Mr. Gadlin that CDCR may not redefine all registrable offenses as "violent," because to do so is to exceed the authority granted to CDCR by Proposition 57.

We add one observation to the points Mr. Gadlin makes. Even if CDCR's categorical exclusion of registrants did not violate the plain text of Proposition 57, CDCR would need some justification for imposing the "violent" label on all sex-offense registrants. CDCR classifies no other prisoners as "violent," and therefore ineligible for parole, unless their current offense is listed as violent under Penal Code § 667.5. (See Cal. Code Regs. Title 15, § 3490(a)(5) and (c) and 3495(a)(5) and (c).) We see no explanation in CDCR's supplemental brief for this special treatment of registrants, which denies them alone parole consideration without regard to whether their conviction for a registrable offense is current or prior, or is violent as defined by Section 667.5.

The arbitrary nature of the Department's singular departure from the Section 667.5 definition for these prisoners alone is reflected by their failure to provide any definition of "violent" to replace or supplement the statutory list they otherwise adopt. They assert that *registrable* offenses not listed in Penal Code § 667.5 are nonetheless violent if they are classified as

"serious" under Penal Code § 1192.7(c), but make no analogous claim about Section 1192.7(c) offenses that are not registrable. (CDCR Supplemental Brief at 15.) They describe registrable offenses that are in neither the "violent" or "serious" statutory list as violent because they involve "some degree of physical force, coercion, or duress," but make no analogous examination of non-registrable offenses that might be similarly described. (CDCR Supplemental Brief at 15.) CDCR simply offers no explanation at all for its assumption that only registrable crimes not listed in Section 667.5 can be violent.

The problem, of course, is that CDCR does not really attempt to define violent offenses, and without a definition it cannot possibly explain whether, much less why, one should treat *all* registrable offenses as violent, as their new rule does. The Department implicitly concedes (as does Justice Baker in his concurrence in the Court of Appeals) that there are registrable offenses whose treatment as violent it may be unable to justify, but suggests the court just ignore this problem until some future case in which it is "squarely presented" (CDCR Supplemental Brief at 7). But the logic of CDCR's arguments presents the issue now, because the argument is offered to defend a rule that denies *all* registrants their constitutional right to seek parole. CDCR acts arbitrarily as well as exceeding its constitutional authority when it issues a blanket rule that denies parole consideration on the basis of a subjective and unpublished definition of violent that is

selectively applied to registrants alone. This blanket exclusion of registrants, denying them alone the individualized parole consideration promised by the Constitution, recalls the Department's earlier attempt to impose uniform residency restrictions on all registrants as a group, without regard to their individual circumstances. As this court there held, such a rule violates registrants' "basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action." (*In re Taylor* (2015) 60 Cal.4th 1019, 1024.) That is no less true here.

To find an explanation for CDCR's classification of all registrable offenses as violent one must search beyond the Department's supplemental brief in this case, to its previous submissions. In its decision in *Alliance*, the pending case that presents the issue that the Court has now asked the parties to address, the Court of Appeals observed that CDCR's original explanation for excluding all registrants was that "sex offenders pose a potential high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." (*Alliance for Constitutional Sex Offense Laws v. Dept. of Corrections and Rehabilitation* (2020) 45 Cal.App.5th 225, 229.)

The "potential high risk" argument has no factual basis and CDCR offers none. As shown in our main brief, CDCR's own data contradict the claim. (Brief Of Amici Curiae Nineteen Social Science And Law Scholars

In Support Of Petitioner Gregory Gadlin at 22-26.) The claim relies not on facts but on a mantra that has been repeated for decades to support constantly escalating restrictions on registrants. More recently, CDCR said its rule follows from the Department's obligation to certify that the regulations it issues under Article I, Section 32 protect public safety—and invoked this same baseless assumption of "potential high risk" to explain why. (CDCR Reply Brief at 16.) While the Department's supplemental brief now attempts a third way of describing the basis for its rule, it offers no new explanation for it. So it would appear they implicitly adopt the same rationale they have previously offered, that registrants must be classified as violent because (it seems the rule assumes) registrants are more likely than others to re-offend and therefore present a significantly greater threat to public safety.

In its main brief amici explained why this assumption is inconsistent with both the scientific evidence and prevailing California law concerning assessment of registrant re-offense risk. That presentation is no less relevant to the case the Court has now asked the parties to address—the potential parolee currently serving a sentence for a registrable nonviolent offense—than it was to Mr. Gadlin, whose registrable offense was a prior. The remainder of this submission briefly reviews that data to show why. (For the sake of brevity, reference is sometimes made to the relevant

discussion of the original sources in Amici's main brief, rather than repeating the analysis here).

II. BOTH SCIENTIFIC EVIDENCE, AND THE PREVAILING CALIFORNIA PRACTICE BASED UPON IT, ARE INCONSISTENT WITH ANY CLAIM THAT ALL PRISONERS CURRENTLY SERVING A SENTENCE FOR A REGISTRABLE OFFENSE PRESENT A HEIGHTENED RE-OFFENSE RISK AT RELEASE.

As amici demonstrate in their main brief, CDCR's own data show that California registrants are much *less* likely than other released California felons to commit a new felony during the three years following their release (when CDCR stops tracking them). Indeed, even the proportion who commit either a felony or sexual misdemeanor (14%) is just a bit more than half the proportion (24%) of released felons overall who commit a felony. (Brief Of Amici Curiae Nineteen Social Science And Law Scholars In Support Of Petitioner Gregory Gadlin at 21-22.) CDCR data also allow one to compare felony re-offense rates by the crime of conviction before release. The single most common registerable offense separately identified in the CDCR data, "lewd act with a child", accounts for 74% of all the separately tabulated registrable crimes of conviction, and 9.5% of this group commit a new felony within three years of their release. (*Id.* at 26)[1]. By comparison, the re-offense rate for those released after

[1] The table on page 26 shows 899 convictions for Lewd Act with Child, which is 74% of the 1,221 convictions for all four registrable crimes tabulated by CDCR and shown in this table.

serving a sentence for assault with a deadly weapon is 44%, almost five times higher. (*Id.* at 26). Unfortunately, CDCR does not break down these data further to indicate, for each initial crime of conviction, the nature of the new felonies committed by those who reoffend. But they do tabulate the nature of new crimes committed during the three year follow-up period for released registrants as a whole, so we do know that only 1.1% of registrants re-offend with a new sexual felony. (Another 0.6% commit a sexual misdemeanor.) (*Id.* at 22.)

The fact is that the main threat of sexual offenses does not come from those who have already served a sentence for one. At least 95% of all those arrested for sexual offenses are first offenders with no sexual offense history, and this has been true for a long time.[2] And if we look at just those who previously served a sentence for some felony, we find that those who with no sexual offense history account for far more sexual offenses than those with such a history. A recent Department of Justice study followed those released from state prisons for nine years, and found that 84.4% of all the rape or sexual assault arrests in this group were of prisoners whose prior criminal records contained no sexual offenses. (Alper and Durose,

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[2] Craun, Simmons, and Reeves, *Percentage of Named Offenders on the Registry at the Time of the Assault: Reports From Sexual Assault Survivors*, 17 Violence Against Women 1374 (2011); Sandler, Freeman, and Socia, *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law*, 14 Psychology, Public Policy, and Law 284, 296-298 (2008).

Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14), Bureau of Justice Statistics NCJ 251773 (2019), at p. 11, Table 9.) The Justice Department study found that of released prisoners whose most serious prior offense was robbery, 3.4% were later arrested for violent rape or sexual assault. By comparison, a meta-analysis of studies on those convicted of possession of child pornography, conducted by the leading scholars in the area, found that only 25 of 1,247—two percent—committed a contact sexual offense of *any* kind after release. (Seto, Hanson, & Babshishin, *Contact Sexual Offending by Men With Online Sexual Offenses (2010)* 23 Sexual Abuse: J. Res. & Treatment 124, 136.)

Two things seem clear from these data. Registrants in general are less likely than other prisoners to commit a felony of some kind after their release, and many groups of registrants are less likely to commit a sexual offense after release than are prisoners with no sexual offense history. That tells us that putting prisoners into two groups, registrants and non-registrants, is a very poor way to sort people by either their threat to public safety generally, or their sexual offense risk. The voters excluded violent offenders from parole consideration, but there is no basis for CDCR's attempt to expand that exclusion to include all registrants on the ground they present distinctly higher threat to public safety, or even a distinctly higher sexual offense risk, than do all nonregistrant prisoners.

"Sex offender" is a legal classification, not a psychological diagnosis. The only thing registrants reliably have in common is their obligation to register. There is no basis for extending the classification's reach to matters beyond those for which the law requires it. Registrants, no less than other eligible prisoners, are entitled to an individualized assessment of their parole suitability. In applying Proposition 57, CDCR relies on the parole process to make this judgment for all prisoners whose crime of conviction is not included in Section 667.5's list of violent offenses, with the single exception of registrants who are all barred from it. The exception is inconsistent with scientific evidence.

It is also inconsistent with other California practice that relies upon that evidence to evaluate registrants individually. A key premise of the "containment model" California adopted (California Sex Offender Management Board, Containment Team Approach) for managing released registrants is that the risk they present can be assessed individually. To that end, California Penal Code § 290.04 establishes a committee (known as the SARATSO (State Authorized Risk Assessment Tools for Sex Offenders) Review Committee) to identify scientifically validated tools for assessing individual registrant re-offense risk. The most important risk assessment found valid by this committee is the Static-99R, which measures the re-

offense risk of adult male registrants convicted of contact sex offenses as of the time of their release from custody.[3]

California is not alone in using this instrument; it is the most widely-used tool in the world to assess the sexual re-offense likelihood of individuals convicted of a sexual offense.[4] One can use the scores to classify registrants into five risk groups, from "very low" to "well above average." More than 70% of the adult male California registrants for whom this instrument has been validated (which are most contact offenders) fall into the three lowest risk groups who at the time of release present a re-offense risk ranging from 2% (for the lowest) to 7% (for the highest). (Brief Of Amici Curiae Nineteen Social Science And Law Scholars In Support Of Petitioner Gregory Gadlin at 38-39.)

We do not need the Static-99R to know some registrant groups are low-risk. Two examples are female offenders, and males whose only known sexual offense is possession of illicit images of minors. There are so few repeat offenders in both groups that it is a difficult challenge for risk

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[3] Lee, Hanson, Fullmer, Neeley & Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*, http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf. The Static 99R is not designed or validated for assessing the sexual re-offense risk of women, juveniles or of certain non-contact sexual offenders, such as those whose only sexual offense conviction is for possession of illicit images of minors. The SARATSO Committee has approved a separate assessment instrument for juvenile offenders, the JSORRAT- II.

[4] See Clearinghouse, Static-99/Static-99R, http://www.static99.org/.

assessment experts to sample them in sufficient numbers to identify their distinctive traits, which is necessary to develop statistically valid tools for predicting those most likely to offend again.[5] So the Static-99R is not validated for either group, and the SARATSO committee simply advises, at least with respect to female offenders, that they should all be considered low risk.[6]

In sum, sexual offenders, like all groups of offenders, vary in the re-offense risk they present, and assessing that risk presents no special challenge to a parole board considering a prisoner's suitability for parole.

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[5] Marshall, Miller, Cortoni, & Helmus, *The Static-99R Is Not Valid For Women: Predictive Validity in 739 Females Who Have Sexually Offended.* — Sexual Abuse — (2020) (in press, available at https://doi.org/10.1177/1079063220940303); Cohen, *Predicting Sex Offender Recidivism: Using the Federal Post Conviction Risk Assessment Instrument to Assess the Likelihood of Recidivism Among Federal Sex Offenders*, 15 Journal of Empirical Legal Studies 456 (2018).

[6] Possession of sexualized pictures of minors is a "Category B" offense for purposes of the Static-99R; the test is not valid for assessing the re-offense risk of those whose only sexual offense is Category B. PHENIX, FERNANDEZ, HARRIS, HELMUS, HANSON, & THORNTON, STATIC-99R CODING RULES REVISED – 2016, at 21-25, available at http://www.static99.org. As to females, see the "frequently asked questions" section of the SARATSO committee website at http://saratso.org/pdf/Females_Who_Sexually_Offend_FAQ_Edits_2018_06_13.pdf.

> At this time, there is no actuarial or structured professional judgment instrument validated to assess the risk of sexual recidivism for females. Cortoni (2016) stated, "because of their low risk of sexual recidivism, female sexual offenders would virtually never be considered to pose a high risk for sexual recidivism".

CONCLUSION

Rather than attempt to explain why everyone convicted of a registrable offense should be denied parole consideration, CDCR now simply defines them ineligible, by deeming them violent, along with those convicted of an offense so classified by statute. But their argument by definition does not free them from providing some reasoned rationale for their conclusion. Any reasoned rationale requires a definition of "violent" that in fact includes all registrable offenses and no other offenses not listed in Penal Code Section 667.5. But CDCR offers no such definition, much less any rationale. Rather than define violent, they simply make their conclusion its definition. Selecting out a single group for harsh treatment without any reasoned explanation is the very meaning of arbitrary action.

CDCR has previously argued that it may categorically exclude registrants from parole consideration because they all present a distinctly higher risk of reoffending than do parole-eligible prisoners. That claim is simply wrong, as shown by the scientific evidence (including CDCR's own data) and is also inconsistent with prevailing California practice based upon that evidence. Registrants, like other prisoners, vary individually in the

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likelihood of reoffending after release, and individually assessing their re-offense risk presents no special challenge to a parole board considering them.

DATED: Oct. 30, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 2976 words.

/s/ Ernest Galvan
Ernest Galvan