IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S254599

In re
GREGORY GADLIN
on Habeas Corpus.

Court of Appeal of California
Second District, Division Five
No. B289852

Superior Court of California
Los Angeles County
No. BA165439
William C. Ryan

Answer to Petition for Review

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ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Comes now Gregory Gadlin, habeas petitioner in the court below, in Answer to the Petition for Review filed March 11, 2019, by respondent Secretary of the California Department of Corrections (CDCR or Department). For the reasons set forth below, the Court should deny the petition.

QUESTION PRESENTED

Did the Court of Appeal correctly conclude that CDCR's exclusion of Gadlin from the provision for early parole consideration that Proposition 57 extended to "any person convicted of a nonviolent felony offense" (California Constitution, article I, § 32, subd. (a)(1)) was unlawful because the exclusion was based on a *prior* conviction?

SUMMARY OF ANSWER

"Section 32(a)(1) provides, 'Any 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.'" (Typ. opn. 7.) The Court below held that respondent's exclusion of persons convicted of a nonviolent felony offense based on their prior conviction of a registrable sex offense "runs afoul of section 32(a)(1)." (Typ. opn. 7.)

The petition makes no claim that this Court's review of that determination is necessary to secure uniformity of decision. Rather, the petition claims that "this decision raises important questions of law that warrant the Court's review" because it is "the first ruling of its kind in the appellate courts." (Petn. 7.) But the first ruling of its kind– that is, a ruling on whether respondent's exclusion from section 32(a)(1) of admittedly nonviolent offenders due to their legal status based on *prior* convictions was unlawful -- was issued in *In re Edwards* (2018) 26 Cal.App.5th 1181. *Edwards* held that respondent's exclusion of persons convicted of a nonviolent felony from consideration for early parole based on the fact that they had at least two prior serious or violent convictions under the Three Strikes Law was inconsistent with the proposition's provision for early parole consideration and thus unlawful. Respondent did not petition for review of that decision, nor did this Court find review of that decision warranted. The remittitur in that case thus issued, and the Department accordingly is providing early parole consideration to such third-strike offenders -- and releasing those it finds can be paroled consistent with public safety concerns.

Gadlin did no more than follow *Edwards* in holding that "early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history." (Typ. opn. 7.) And no court in the state has confronted questions about the reach of the provision for early parole consideration in disagreement with what the Court of Appeal now has twice held; i.e., that early parole consideration must be based on the nature of the current offense, not the nature of any past offense. *Gadlin*

went no further than seconding the *Edwards* holding, stating: "We express no opinion on whether CDCR's application of its regulations to exclude inmates whose current offense requires registration as a sex offender similarly violates section 32(a)(1)." (Typ. opn. 8.)

As the concurring opinion stated:

> The opinion of the court resolves the appeal before us on narrow grounds, correctly concluding that regulations promulgated by the California Department of Corrections and Rehabilitation (CDCR) are unconstitutional as applied to bar early parole consideration for petitioner Gregory Gadlin (petitioner) based on two prior sex offenses committed in the 1980s for which petitioner has already been imprisoned.

(Typ. opn. 1 (conc. opn. of Baker, Acting P.J.).)

There is no important issue of law here for which the lower courts require guidance. Rather, the courts are all in agreement that eligibility for early parole consideration under Proposition 57 depends not on the nature of a prisoner's past offense, but on the nature of a prisoner's current offense. That point is now well-settled and inarguable. As the Court of Appeal rightly noted, the criminal history of a person convicted of a nonviolent offense becomes relevant under Proposition 57 only when, in the course of consideration for early parole, the Board determines whether or not that individual can be released consistent with public safety:

> We note that this holding only permits Gadlin early parole consideration, not release. The Board of Parole

> Hearings will be permitted to consider his full criminal history, including his prior sex offenses, in deciding whether a grant of parole is warranted. (§ 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c).)

(Typ. opn. 8, fn. 8.)

For these reasons, as set forth in greater detail below, the Court should deny review.

ARGUMENT

I. The Question Whether Respondent May Exclude Prisoners Serving Sentences for a Nonviolent Offense from Early Parole Consideration Under Proposition 57 Based on Their Criminal History – in this Case, Their Prior Conviction of a Registrable Offense – Does Not Warrant Review by This Court.

A. The Court of Appeal's Resolution of the Question of the Electorate's Intent to Include Nonviolent Offenders with Prior Registrable Offenses in the Early Parole Consideration Provision of Proposition 57, Which the Court Based on the Plain and Unambiguous Text of that Provision, Does Not Present a Question that Requires This Court's Consideration.

This Court may grant review of a decision by a Court of Appeal "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The petition fails to show any such need. Instead, it concedes by its silence that there is no need to grant review to secure uniformity of decision. To be sure, the decision here is

altogether consistent with that of *Edwards*, where the court – as here – found that the Department's exclusion of a nonviolent offender on the basis of his criminal history was inconsistent with the proposition. (See *In re Edwards*, *supra*, 26 Cal.App.5th at p. 1192 ["CDCR's adopted regulations impermissibly circumscribe eligibility for Proposition 57 parole by barring relief for Edwards and other similarly situated inmates serving Three Strikes sentences for nonviolent offenses."].)

Respondent determined that the Court of Appeal's decision in *Edwards* provided no basis to petition for review, and this Court likewise found no basis to grant review of it. Its uncontested holding that the electorate did not intend to exclude those convicted of nonviolent offenses from early parole consideration based on their criminal history is now settled law that respondent is fully implementing. Thus, if anything, grant of review here would promote uncertainty and confusion on this point of law rather than uniformity. Indeed, while respondent notes that "[a] similar issue is pending" in the Court of Appeal in two other cases (Petn. 7–8, fn. 1), he neglects to further note that the trial court in both of those cases found that his exclusion of prisoners from early parole consideration based on their prior commission of a registrable offense went beyond the authority that the proposition vested in him to implement it.

Nevertheless, characterizing the decision below as "the first ruling of its kind in the appellate courts," respondent submits that "this decision raises important questions of law that warrant the Court's review." (Petn. 7.) The decision does no such thing; rather, it largely reiterates the central holding of *Edwards*, as revealed by respondent's own description of the decision below:

> In its published decision, the Court of Appeal held the exclusion of inmates for past sex offenses is not consistent with Proposition 57's intent. (Slip opn., at pp. 7–8.) It found the Amendment's plain text "make[s] clear that early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history." (*Id*., at p. 7.) The court deduced that the omission of any reference to an inmate's past convictions in article I, section 32, subdivision (a) of the Constitution forbids the Department from excluding any offenders based on past registrable sex crimes. (*Ibid*.)

(Petn. 7, brackets in quote deleted.)

This understanding of Section 32(a)(1) is reflected as well in a treatise by the judiciary's criminal law experts, who have explained how that provision for early parole consideration operates. (See Couzens & Bigelow (May 2017 Barrister Press) Proposition 57: "The Public Safety and Rehabilitation Act of 2016" [available on line at www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf.].) As the treatise explains, the proposition makes a nonviolent offender's prior record of felony convictions irrelevant to that offender's qualification for parole consideration:

> Eligibility for parole will be based solely on the crimes that result in the current prison commitment: "any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration…." The person's past criminal record is irrelevant to statutory eligibility for early release on parole. Accordingly, so long as the current offense is not a "violent felony," the person will be

> eligible for early release on parole on that offense, even though he or she has previously been convicted of a violent felony.

(*Id*. at pp. 8–9.)

In sum, the Department's categorical exclusion from early parole consideration of prisoners like Gadlin with the commission of a registrable sex offense in their prior record impermissibly limits the scope of the early parole consideration process that the electorate unambiguously intended when it enacted Section 32(a)(1). Such a determination properly ends the analysis of the issue respondent here presents, as the courts uniformly have found.

B. Respondent's Argument that Other Considerations in Proposition 57 Overcome the Plain Meaning of Its Text and Establish that the Electorate Intended to Exclude Nonviolent Offenders with a Prior Registrable Conviction from Early Parole Consideration Is Meritless and Undeserving of this Court's Review.

Respondent persists, however, arguing that the holding below "would result in an application of the law that is contrary to the voters' intent when considered in the context of the Amendment's stated purpose, the textual provision granting the Department rulemaking authority to implement a regulatory scheme that protects and enhances public safety, the Department's exercise of that authority, and the ballot materials." (Petn. 8.) As detailed below, respondent is wrong on each of those counts.

1. The Official Ballot Material.

First, Gadlin addresses respondent's last-mentioned indicator, "the ballot materials," because it *reinforces* the inference from the text itself that the electorate intended to apply the early parole provision based on the nature of the current felony conviction rather than the nature of any prior felony conviction. To begin with, the Attorney General himself explained in his summary that Proposition 57, among other things, "allows parole consideration for persons convicted of nonviolent felonies, upon completion of prison term for their primary offense as defined." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), Prop. 57, Official Title and Summary prepared by the Attorney General, p. 54.[1])

In addition, the Legislative Analyst advised the voters of the assumption that "a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent." (Voter Information Guide, *supra*, Prop. 57, Analysis by the Legislative Analyst, p. 57.) Indeed, to distinguish between violent and nonviolent offenders, respondent adopted in his final regulations the list of offenses defined as violent in Penal Code section 667.5, subdivision (c), the single Penal Code section that purports to define a "violent felony" for any purpose. (See Cal. Code Regs., tit. 15, § 3490.) But then respondent provided that "notwithstanding" the definition of a nonviolent offender, a sex-offender registrant was ineligible for early parole consideration.

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[1] The Official Voter Information Guide can also be found in the record as Exh. 3 to the Return.

(See Cal. Code Regs., tit. 15, § 3491, subd. (b) (3); see also *In re Edwards*, *supra*, 26 Cal.App.5th at p. 1188 [explaining changes in respondent's final regulations].)

Perhaps most obviously informing the voters that prior convictions did not impact a nonviolent offender's qualification for early parole consideration (aside from the plain text of the provision itself) were the arguments of the opponents, who urged the electorate to vote against Proposition 57 for this very reason. In this regard, the opponents argued that Proposition 57 provided that those serving sentences for nonviolent offenses with even the most serious or violent prior offenses – including prior sex offenses -- were eligible for early parole consideration, advising the voters: "Those previously convicted of MURDER, RAPE and CHILD MOLESTATION would be eligible for early parole." (Voter Information Guide*, supra*, Rebuttal to Argument in Favor of Proposition 57, p. 58, capitalization in original.) In their own argument against Proposition 57, the opponents urged voters to reject the proposition because it "*permits the worst career criminals to be treated the same as first time offenders*." (Voter Information Guide*, supra*, Argument Against Proposition 57, p. 59, italics in original.) In like vein, the opponents argued that the "poorly drafted measure deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities," and included certain registrable offenses in that list. (*Ibid*., capitalization in original.)

This prominent list of nonviolent sex offenses in the ballot materials that made *current* offenders assertedly eligible for early parole consideration could only have reinforced the voters' understanding that those with *prior* convictions for those offense

inarguably qualified for early parole consideration. The list of violent offenses in Penal Code section 667.5 includes many, but not all, sex offenses. (See *People v. Pelayo* (1999) 69 Cal.App.4th 123, 123–24 [noting distinction between nonviolent and violent sex offenses]; *People v. Johnson* (2010) 185 Cal.App.4th 520, 535 [same]; *Doe v. Brown* (2009) 177 Cal.App.4th 408, 423 [statutory exclusion from Megan's Law Website under Pen. Code, § 490.46, subd. (e)(2)(C) exists only for "nonviolent" offenses]; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1078 [failing to register as a sex offender is a "passive, nonviolent, regulatory offense"]; see also typ. opn. 4–6 (conc. opn. of Baker, Acting P.J.).) It is in the context of "answer[ing] the charge that those convicted of [and serving sentences for] sex crimes like human trafficking would benefit from Proposition 57," that the "proponents asserted Proposition 57 'does not and will not change the federal court order that excludes sex offenders, as defined in Penal Code section 290, from parole.'" (Typ. opn. 10 (conc. opn. of Baker, Acting P.J.), quoting the ballot pamphlet's rebuttal to argument against Prop. 57, p. 59, brackets in quote omitted.)

Respondent's reliance on this rebuttal argument to support his petition fails because respondent isolates that argument from the other arguments in the ballot that make clear the early parole provision applies regardless of an individual's criminal history. There may have been debate among the proponents and opponents as to which current sex offenders were eligible for early parole consideration under Proposition 57, but there was no debate or allegation by the opponents that a prior sex offense affected the nonviolent offender's eligibility for early parole

consideration. (See, e.g., typ. opn. 8–11 (conc. opn. of Baker, Acting P.J.).) Thus, that rebuttal argument has no bearing on the issue presented in the petition.

Moreover, respondent takes the rebuttal statement further out of context by only partially quoting it, asserting that "[t]he proponents rebutted these arguments, assuring voters that 'sex offenders, as defined in Penal Code 290' would be excluded from parole and that Proposition 57 will be implemented through Department of Corrections and Rehabilitation regulations developed with public and victim input and certified as protecting public safety." (Petn. 10; see also Petn. 15, again quoting the rebuttal argument, brackets in quote deleted ["The proponents, including Governor Brown, made a clear statement to the voters that the Department would implement a parole scheme with regulations 'certified as protecting public safety' and that 'sex offenders, as defined by Penal Code section 290' are excluded from parole."].)

Respondent's omission in these quotes of the reference to a "federal court order" is telling, for the full quotation shows that the proponents made no such "clear statement" as respondent asserts. Not only is "[t]he 'federal court order' referenced by the proponents … left unspecified" (typ. opn. 10 (conc. opn. of Baker, Acting P.J.)), but there was no explanation given the voters as to how or even if the federal court order affected sex offenders. Indeed, as far as the voters knew (and as actually is the case), the federal court order did not mention sex offenses, sex offenders, or Penal Code section 290; rather, it merely proposed that an early parole process be set up for nonviolent second-strike offenders to reduce the prison population. The reed upon which respondent

relies to assert that the voters were assured that the early parole provision excluded nonviolent offenders with prior registrable sex offenders is much too slender to bear the weight of that reliance.

Section 32(a)(1), after all, concerns "any person" convicted of a nonviolent felony. It applies independent of any court order – or implementation of it by respondent – and to a much larger portion of the inmate population. Moreover, the term "nonviolent conviction," which the section sets forth as the only criterion for eligibility for early parole consideration, is a term peculiar to that section. Finally, Proposition 57 was designed to supersede rather than codify existing prison reduction orders and plans, the perceived inadequacy of which was one of the moving forces behind Proposition 57, as its proponents advised the voters:

> Overcrowded and unconstitutional conditions led the U.S. Supreme Court to order the state to reduce its prison population. Now, without a common sense, longterm solution, we will continue to waste billions and risk a court-ordered release of dangerous prisoners. This is an unacceptable outcome that puts Californians in danger— and this is why we need Prop. 57.

(Voter Information Guide, *supra*, Argument in Favor of Proposition 57, p. 58.)

As will be discussed further below, an express purpose of Proposition 57 is to "prevent federal courts from indiscriminately releasing prisoners." There is nothing in the text of Proposition 57 that either obligates or authorizes respondent to bend or stretch the meaning of "nonviolent conviction" to conform to the parameters of any separate program he may have for second-

strikers. In fact, the reference to a federal court order in the Voter Information Guide that respondent relies on here directly follows the proponents' statement that "[v]iolent criminals as defined by Penal Code 667.5(c) are excluded from parole." (Voter Information Guide, *supra*, Rebuttal to Argument Against Proposition 57, p. 59.)

In short, respondent's reliance upon the proponents' oblique reference to the federal order to support his argument that the voters were "clearly advised" that the early parole provision of Proposition 57 excluded nonviolent offenders with prior registrable convictions is a red herring. The Court of Appeal properly found that reference unhelpful to determination of the voters' intent on the limited question before it.

2. The Provision's Stated Purposes.

Respondent invokes the "public safety" purpose of Proposition 57 as a shibboleth of the "lock 'em up and throw away the key" mentality that led to mass incarceration, an evil in the eyes of the electorate that Proposition 57 was intended to mitigate as broadly as it could for nonviolent offenders. It did so by being "smart on crime" rather than "tough on crime," advancing public safety by reducing incarceration and improving rehabilitation. As one step in that advancement, Section 32(a) (1) reforms blanket lengthy imprisonment for nonviolent offenders by providing for consideration of them for early parole.

The provision for early parole consideration sets forth several specific and equal purposes in its introductory language that illustrate its progressive approach to crime and punishment:

> The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law.

(Section 32(a) (1).) These express purposes are not only fully consistent with an intention to apply the Amendment to all nonviolent offenders, but also furthered by application of its provision for early parole consideration to those who can safely be released regardless of their prior record. To be sure, simply warehousing Gadlin and those like him to mete out prison terms imposed upon them for punishment and incapacitation purposes is contrary to the proposition's reform purposes.

In addition to the Amendment's stated purposes, Proposition 57's preamble expressed the measure's overall "Purpose and Intent." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.) The first four of the preamble's five stated purposes related to the proposition's early parole provision (the fifth relating solely to the propositions provision concerning prosecution of juvenile), to wit:

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 ….

(*Ibid.*)

Deprivation of early parole consideration for those convicted of a nonviolent felony to determine if they can safely be released earlier than their sentences otherwise call for is diametrically *opposed* to each of these express purposes. This is so because the Amendment is designed to permit the release of those convicted of nonviolent felonies that the Board deems can be safely released so that they do not waste valuable space and resources better reserved for offenders who pose a current danger – regardless of how long was the term actually imposed upon them for whatever other crimes they committed past or present and whatever the nature and gravity of those past crimes. The fact that the Department's regulatory exclusion here subverts the proposition's "expressly stated central objectives" in enacting Proposition 57 is a strong indicator that respondent has misinterpreted the initiative's language and that the lower court's interpretation of the parole provision according to its plain language is the correct one. (See *People v. Valencia* (2017) 3 Cal.5th 347, 363; see also *ibid*. [fact that proffered interpretation "would conflict with the measure's stated purpose" contributed to court's rejection of it].)

3. The Proposition's Command to Respondent to Adopt Regulations to Further the Implementation of the Amendment and Certify that They Protect and Enhance Public Safety.

"Proposition 57 directed CDCR to adopt regulations 'in furtherance of section 32(a)' and 'certify that these regulations protect and enhance public safety.'" (*In re Edwards*, *supra*, 26

Cal.App.5th at p. 1187, quoting Cal. Const., art. I, § 32, subd. (b).) Respondent argues that by doing so, "the Amendment entrusts the Secretary to enforce its public safety purpose ...." (Petn. 15.) But the Amendment's trust in the Secretary is subordinate to its broad direction to the Secretary to carry out and enforce its purposes by enacting regulations that ensure any person serving a sentence for a nonviolent felony is considered for early parole. Here, the Secretary has betrayed that trust by refusing to comply with the Amendment's direction to provide early parole consideration to any person who is serving a sentence for a nonviolent felony.

The initiative did not grant unbridled discretion to respondent to act under the banner of public safety. Rather, it required respondent to enact regulations "in furtherance of" the provision providing early parole consideration to any person serving a sentence for a nonviolent felony. This limitation serves as a hedge on respondent, so that he may not under the guise of regulation substitute his view for that of the electorate as to who is too dangerous to qualify for early parole consideration. As *Edwards* noted, in striking down respondent's regulation that excluded nonviolent third-strikers:

> "[T]he rulemaking authority of the agency is circumscribed by the substantive provisions of the law governing the agency." [Citation.] "'The task of the reviewing court in such a case is to decide whether the [agency] reasonably interpreted [its] legislative mandate. … Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. … [T]here is no agency

> discretion to promulgate a regulation which is inconsistent with the governing statute. … Whatever the force of administrative construction … final responsibility for the interpretation of the law rests with the courts. … Administrative regulations that alter or amend the statute or enlarge or impair its scope are void ….' [Citation.]" (*Id.* at pp. 757–758.)

(*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1189, quoting *Henning v. Div. of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757–758.)

Ultimately, respondent's defense of his exclusion of nonviolent offenders with a prior conviction for a registrable offense is based on *his agency's determination* that Proposition 57 should have excluded nonviolent offenders with a prior registrable offense from consideration for early release. (See, e.g., Retn. Exh. 6, p. 51 [Cal. Dept. of Corrections, Credit Earning and Parole Consideration Final Statement of Reasons, Apr. 30, 2018, p. 20], italics added [justifying the exclusion on the ground that "[*t]he Department has determined* that these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration"]; see also typ. opn. 5 [quoting this CDCR finding] and *id*. at 7, italics added ["CDCR argues that its application of the regulations to exclude inmates who have sustained prior registrable convictions is consistent *with its determination* that registrable sex offenses involve a sufficient degree of violence and registrable inmates represent an unreasonable risk to public safety."].)

In this fashion, respondent explains the exclusion at issue is based on his determination that "[t]here are substantial public

safety implications in affording sex offenders early opportunities to be released into society." (Petn. 17.) But this explanation ignores that 1) there are substantial public safety implications in affording *any* category of offenders an early opportunity to be released into society, and 2) Proposition 57 reflected its appreciation of those public safety implications by providing that *only* persons convicted of nonviolent offenses would be eligible for early parole consideration – but that *all* of them would be considered regardless of their criminal history. The dividing line for early parole consideration that the electorate established was between those imprisoned for violent offenses and those imprisoned for nonviolent offenses -- not between those imprisoned who must register upon their release and those imprisoned who need not so register.

In the face of the electorate's policy determination that *all* offenders committed to prison for a nonviolent felony should be granted early parole consideration, respondent had no power to enact his own public-safety policy that certain categories of nonviolent offenders should be denied early parole consideration based on their criminal history. The Department cannot simply override the voters' decision under the guise of its differing agency view of enhancing public safety. (See *In re Lucas* (2012) 53 Cal.4th 839, 849–850 [general "public safety" purpose underlying the sexually violent predator (SVP) commitment statutes did not permit the Department to adopt an expansive definition of the phrase "good cause" that conflicted with the terms and function of other statutes in the SVP framework]; see also *Blue v. Bonta* (2002) 99 Cal.App.4th 980, 989 [agency not permitted to adopt "its own specialized and restrictive meaning"

of the term "medical" that conflicted with commonsense definition].) As the Court of Appeal stated, "These policy considerations … do not trump the plain text of section 32(a)(1)." (Typ. opn. 7.))

The Amendment did not authorize the Department to pick and choose among those imprisoned for nonviolent offenses the few or the many who should be *considered* for early parole. In doing so, the Department ran aground on the words of the proposition itself, for the electorate made a policy determination that all offenders committed to prison for a nonviolent offense should be granted early parole consideration. Thereafter, respondent properly issued regulations providing just how that consideration would be accomplished; that is, the Board would determine on an individual basis those suitable for early release. But its exclusion of certain categories of nonviolent offenders from qualification for such consideration was in derogation of the Amendment and thus unlawful.

The initiative process gives the electorate direct democracy powers to make policy decisions. Although respondent's rhetoric otherwise fails[2], here it rings true: "The exercise of the initiative power has been called 'one of the most precious rights of our

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[2] For example, respondent asserts without any substantiation that the decision below "will impact thousands of incarcerated sex offenders …." (Petn. 31.) In fact, of the "state prison inmates required to register for a sex offense based on a current or prior felony conviction, the vast majority … are currently convicted of a violent offense under Penal Code section 667.5, subdivision (a)." (Retn., Exh. 6, p. 51 [CDCR's Final Statement of Reasons supporting its final regulations implementing Proposition 57, p. 20].) Thus, that vast majority is excluded from early parole consideration by the provision's own terms. The CDCR has not

democratic process' whereby the People submit legislation for a direct vote." [Citation.].) (Petn. 16, inside quotation marks deleted.) "This precious right is abridged" (Petn. 6) when respondent usurps that power to substitute his own policy choices for that of the electorate. Here, respondent has wrongly arrogated to the Department critical policy choices that were in the domain of the electorate.

The initiative unambiguously provides that any person currently imprisoned for a nonviolent felony offense is eligible for early parole consideration. Yet, the CDCR excludes current nonviolent offenders if they were *ever* convicted of any registrable sex offense. Determination of eligibility for early parole dependent on the individual's status rather than commitment offense is untethered to the initiative. For example, Gadlin, convicted of a nonviolent offense, is ineligible for early parole consideration under the Department's regulation even though he committed sex offenses in the 1980's and completed his sentences for them decades ago.

Respondent claims his blanket exclusion of registrable sex offenders past and present from the reach of Proposition 57 comes within "the 'spirit' of the law." (Petn. 14.) To the contrary: The extension of consideration for early parole to all nonviolent offenders, with the actual release decision dependent on the Board's assessment of the danger to public safety posed by the individual, comes within both the spirit *and* the letter of the law.

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disclosed what number of remaining offenders concern ones, like Gadlin, who are serving terms for a nonviolent felony conviction but have a prior felony conviction for a registrable offense.

Such implementation of Proposition 57 achieves "the Amendment's overall purpose" (Petn. 13) of reducing the prison population consistent with public safety.

In the final analysis, whatever public safety concerns the electorate had about application of the Amendment to all those imprisoned for a nonviolent offense regardless of their criminal history is reflected in the fact that the provision is not one for early parole, but for early parole *consideration*. The voters understood that any release pursuant to that consideration would be conditioned on the Board's finding that the inmate could be safely paroled, for they were advised:

> *No one is automatically released, or entitled to release from prison, under Prop. 57.*
>
> To be granted parole, all inmates, current and future, must demonstrate that they are rehabilitated and do not pose a danger to the public. The Board of Parole Hearings – made up mostly of law enforcement officials – determines who is eligible for release.

(Voter Information Guide, *supra*, Argument in Favor of Proposition 57, p. 58, italics in original.)

The Department's categorical exclusion of nonviolent offenders with a prior registrable sex offense from parole consideration under Section 32(a)(1) contradicts the informed intent and purpose of the voters who enacted Proposition 57. The exclusion not only prevents Gadlin and his class from demonstrating their fitness for release from their life sentences, but also prevents the Board from identifying the very best candidates for early parole

in furtherance of all the stated goals of Proposition 57, including enhanced public safety. Here, again, the Court of Appeal's opinion is on point, and need not be disturbed:

> We note that this holding only permits Gadlin early parole consideration, not release. The Board of Parole Hearings will be permitted to consider his full criminal history, including his prior sex offenses, in deciding whether a grant of parole is warranted. (§ 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c).)

(Typ. opn. 8, fn. 8.)

Conclusion

For these reasons, the Court should deny respondent's petition for review.

Respectfully submitted,

Dated: March 28, 2019 By: /s/ Michael Satris

Attorney for Petitioner
Gregory Gadlin

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **5,136** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.504(d) or by Order of this Court.

Dated: March 28, 2019 By: /s/ Michael Satris

DECLARATION OF SERVICE

Case Name:In re Gadlin

No.: S254599 / B289852

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Marin, State of California. My business address is P.O. Box 337, Bolinas, California 94924. My electronic service address is satrislaw.eservice@gmail.com. On March 28, 2019, I electronically served the attached **ANSWER TO THE PETITION** either by transmitting a true copy via this Court's TrueFiling system or by direct email as indicated. 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 March 28, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Law Office of Michael Satris, addressed as follows:

Gregory Gadlin, C-23429 CTF Fac. C, GW-203L P.O. Box 689 Soledad, CA 93960-0689 (Petitioner) Served via U.S. Mail	Clerk of the Court California Court of Appeal Second Appellate District, Divison 5 2dl.clerk5@jud.ca.gov Served by the California Supreme Court and via email
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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 March 28, 2019, at Bolinas, California.

/s/ Sarah Bruce
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GADLIN (GREGORY) ON H.C.**
Case Number: **S254599**
Lower Court Case Number: **B289852**

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

3/28/2019
Date

/s/Michael Satris
Signature

Satris, Michael (67413)
Last Name, First Name (PNum)

Law Office of Michael Satris

Law Firm