SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME **JUDGE**	**February 9, 2018, 10:30 a.m.** **HON. ALLEN SUMNER**	**DEPT. NO** **CLERK**	**42** **M. GARCIA**
ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, et al., **Petitioners,** **v.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,** **Respondents.**		**Case No.: 34-2017-80002581**	
Nature of Proceedings:	**PETITION FOR WRIT OF MANDATE**		

Following is the court's tentative ruling granting the petition for writ of mandate, in part, setting aside regulations promulgated by the Department of Corrections and Rehabilitation to implement Proposition 57.

INTRODUCTION

Petitioners are the Alliance for Constitutional Sex Offense Laws, an organization advocating the rights of those required to register as sex offenders, and John Doe, an inmate incarcerated for what Petitioners claim is a nonviolent sex offense.[1] By this action they

[1] Doe received approval to proceed under a pseudonym. (See Minute Order dated 7/28/17.) He is currently incarcerated for conviction of several counts of violating Penal Code section 288(a) (lewd acts with a minor under 14), section 288(c) (lewd acts with a minor 14 or 15) and section 311.4 (posing or modeling a minor for purposes of preparing sexual images).

Respondent argues Doe lacks standing to bring this action because he is serving time for a sex offense defined as "violent" by Penal Code section 667.5 (i.e., lewd acts with a minor under 14 in violation of Penal Code section 288(a)). Petitioners disagree, arguing Doe is serving sentences for both violent and nonviolent offenses. The court need not resolve this issue because Respondent does not suggest the Alliance for Constitutional Sex Offense Laws lacks standing. Thus, regardless of whether Doe has standing to bring this action, the Alliance does.

challenge emergency regulations adopted by Respondent California Department of Corrections and Rehabilitation ("CDCR") implementing a 2016 ballot initiative known as Proposition 57. Proposition 57 amended the California Constitution to provide, "Any person convicted of a ***nonviolent felony offense*** and sentenced to state prison shall be eligible for parole consideration after completing the full term of his or her primary offense." (Cal. Const., art. I, § 32(a)(1), emphasis added.)

Proposition 57 did not define what is a "nonviolent felony offense." CDCR's regulations define a "nonviolent offender" as any inmate who, among other things, has not been convicted of a sexual offense requiring registration under Penal Code section 290.[2]

Petitioners claim CDCR's regulations impermissibly exclude nonviolent sex offenders from early parole consideration, contravening the voters' intent in passing Proposition 57. By this action Petitioners seek a writ of mandate directing CDCR to do two things: (1) set aside the challenged regulations; and (2) adopt new regulations making those serving sentences for offenses requiring registration under section 290 eligible for early parole consideration, unless the individual is currently serving a sentence for a "violent felony" listed in section 667.5, subdivision (c).[3]

The court agrees the challenged regulations are overbroad and must be set aside. But the court does not direct CDCR to adopt any particular replacement regulations. Instead, the court remands this case to CDCR to adopt new regulations defining the term "nonviolent felony offense" consistent with this ruling.

BACKGROUND

Proposition 57 ("Public Safety and Rehabilitation Act of 2016") was passed by the voters on November 8, 2016. It added the following provision to California's Constitution:

> (a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:
>
> (1) Parole Consideration: ***Any person convicted of a nonviolent felony offense and sentenced to state prison shall***

[2] All statutory references are to the Penal Code, unless otherwise indicated.

[3] Petitioners also seek related declaratory relief.

> ***be eligible for parole consideration after completing the full term for his or her primary offense.***
>
> . . . .
>
> (b) ***The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions***, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

(Cal. Const., art. I, § 32, emphasis added.)[4]

Proposition 57 did not define what it meant by the term "nonviolent felony offense." But the Legislature has listed felonies it considers "violent" offenses in section 667.5, subdivision (c).

In April 2017 CDCR adopted emergency regulations implementing Proposition 57. Under CDCR's regulations all "nonviolent offenders" are eligible for early parole consideration. CDCR defines the term "nonviolent offender" as any inmate who is ***not***:

1. Sentenced to death or incarcerated for a term of life;
2. Serving a term of incarceration for a "violent felony" listed in section 667.5, subdivision (c); or
3. Convicted of a sexual offense requiring registration under section 290.

(15 Cal. Code Regs § 3490, subds. (a), (c). ["Regulations"])

Petitioners challenge only the third part of CDCR's definition – precluding early parole consideration for anyone convicted of a sexual offense requiring registration under section 290, even if the offense is not listed by the Legislature as "violent" in section 667.5.

A) "Violent" offenses

Section 667.5 enhances prison terms for those convicted of 23 designated "violent felonies," stating: "The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation of these

[4] Proposition 57 also contains a provision giving CDCR authority to award credits for good behavior and participation in rehabilitative or educational programs, and several provisions governing when juveniles may be tried as adults. These provisions are not at issue here.

extraordinary crimes of violence against the person." (§ 667.5, subd. (c).) The list includes some sex offenses. (*Id.*)[5]

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[5] Section 667.5, subdivision (c) states:

"For the purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) **Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.**
(4) **Sodomy as defined in subdivision (c) or (d) of Section 286**.
(5) **Oral copulation as defined in subdivision (c) or (d) of Section 288a**.
(6) **Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.**
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.
(9) Any robbery.
(10) Arson, in violation of subdivision (a) or (b) of Section 451.
(11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
(12) Attempted murder.
(13) A violation of Section 18745, 18750, or 18755.
(14) Kidnapping.
(15) Assault with the intent to commit a specified felony, in violation of Section 220.
(16) **Continuous sexual abuse of a child, in violation of Section 288.5.**
(17) Carjacking, as defined in subdivision (a) of Section 215.
(18) **Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.**
(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
(23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person."(Emphasis added.)

The issue here is the difference between felonies the Legislature lists as "violent" in section 667.5, and the Legislature's separate list of sex offenses requiring registration under section 290.

B) Sex offender registration

Section 290, part of the Sex Offender Registration Act, lists sex crimes for which registration is required.[6] There is some overlap between the list of "violent" felonies in section 667.5 and the list of registrable sex offenses in section 290. For example, assault with intent to commit rape, rape by force or fear, and lewd or lascivious acts with a child under the age of 14 are listed in both sections.

There are, however, numerous offenses for which registration is required by section 290 but which the Legislature does not define as "violent" felonies in section 667.5, including:

- Rape of a drugged or unconscious victim. (§ 261, subd. (a)(3) and (a)(4).)
- Touching the intimate part of another person while that person is unlawfully restrained. (§ 243.4.)
- Pimping a minor. (§ 266h.)
- Incest. (§ 285.)

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[6] Section 290, subdivision (c), states:

"The following persons shall register:

> Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses."

- Sodomy with a person while confined in state prison. (§ 286, subd. (e).)
- Sending or exhibiting certain harmful (i.e., sexual) matter to a minor. (§ 288.2.)
- Sexual penetration with a foreign object while the victim is unconscious. (§ 289, subd. (d).)
- Advertising or possessing child pornography. (§§ 311.10, 311.11.)
- Indecent exposure. (§ 314.)

(§ 290, subd. (c).)

Petitioners argue CDCR's regulations implementing Proposition 57 are overbroad for two reasons: First, the regulations deny early parole consideration for any person incarcerated for a registerable sex offense not listed in section 667.5. Second, CDCR's regulations preclude early parole consideration for any one ever convicted of a registerable sex offense, even if the person is not ***currently*** incarcerated for a crime listed in either section 290 or 667.5. Petitioners are correct on both points.

STANDARD OF REVIEW

The standard for the court's review of CDCR's regulation was recently summarized by the Third District Court of Appeal as follows:

> Government Code section 11342.2[7] provides the general standard of review for determining the validity of administrative regulations. That section states that "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute."
>
> Under the first prong of this standard, the judiciary independently reviews the administrative regulation for consistency with controlling law. … In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency.

[7] Section 11342.2 is part of the Administrative Procedure Act, which sets procedural requirements state agencies must follow when adopting regulations.

> By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise; therefore, it receives a much more deferential standard of review. The question is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis.

(*California Chamber of Commerce v. State Air Resources Bd*. (2017) 10 Cal.App.5th 602, 619-20; see also *In re Lucas* (2012) 53 Cal.4th 839, 849 [courts "do not accord deference to an [administrative] interpretation that is clearly erroneous. [Citations.] If a regulation does not properly implement the statute, the regulation must fail."]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn.4 ["A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has final responsibility for the interpretation of the law under which the regulation *was* issued."] [internal quotes omitted].)

As explained by another Court, "the rulemaking authority of an agency is circumscribed by the substantive provisions of the law governing the agency. [Citation.] Thus, the first task of the reviewing court is to decide that the agency reasonably interpreted its legislative mandate as regulations that alter or amend the statute or enlarge or impair its scope are void. [Citation.] This standard of review is one of respectful nondeference." (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App. 4th 968, 982.)].)

Here, Petitioners claim CDCR's regulations conflict with the voters' language and intent in Proposition 57. The standard of review is thus "respectfully nondeferential."

ANALYSIS

1. General principles of construction

A) The voters' intent controls

CDCR's authority in adopting these regulations is conferred – and limited – by Proposition 57. In interpreting a voter initiative, courts apply the same principles governing statutory construction. (*Citizens to Save California v. California Fair Political Practices Commission* (2006) 145 Cal.App.4th 736, 747.) The fundamental purpose of construction is to ascertain the voters' intent to effectuate the purpose of the law. (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014.)

In determining the voters' intent, the court begins by examining the language of Proposition 57 itself, viewed as a whole, and giving its words their usual and ordinary meaning. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.) When the language is clear and unambiguous, there is no need for construction. (*Cervantes*, *supra*, 225 Cal.App.4th at 1014.) If the terms of Proposition 57 are unambiguous, this court presumes the voters meant what they said; the plain meaning of Proposition 57's language governs. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.)

However, if the language of Proposition 57 is ambiguous or permits more than one reasonable interpretation, the court may refer to extrinsic indicia of the voters' intent, particularly the analyses and arguments in the Official Voter Information Guide. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747; *Blue v. Bonta* (2002) 99 Cal.App.4th 980, 988.) The Court of Appeal directs, "Using these extrinsic aids, we select the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Cervantes*, *supra*, 225 Cal.App.4th at 1014, internal quotes and cite omitted, brackets in original.)

B) Proposition 57 is ambiguous

Again, Proposition 57 does not define the term "nonviolent felony." The court finds the term is not clear or unambiguous; it is susceptible to more than one reasonable interpretation.

Indeed, this very ambiguity was identified by the California Supreme Court before Proposition 57 went to the voters. The petitioners in *Brown v. Superior Court* (2016) 63 Cal.4th 335 challenged placing Proposition 57 on the ballot without submitting substantial amendments to its initial draft for public comment pursuant to Elections Code section 9002. Although the Supreme Court allowed Proposition 57 to proceed to the voters, in his dissent Justice Chin foresaw the issue now before this court:

> [Proposition 57] never defines the term 'non-violent felony offense.' …The Penal Code contains various lists of crimes satisfying various definitions, including a list of 'violent' felonies. (Pen. Code § 667.5, subd. (c).) Does that statute apply to mean that any crime not listed in it would be a nonviolent felony, even though many such crimes are arguably violent? ... The amended measure could greatly benefit from a definition of the term.

(*Id*. at 360.)

This ambiguity of the term "nonviolent felony" in Proposition 57 is presumably why CDCR issued regulations defining it.

2. CDCR's definition of "nonviolent offender" is overbroad

A) CDCR would preclude parole consideration for nonviolent offenses

Proposition 57 gave CDCR authority to promulgate implementing regulations. (See Cal. Const., art. I, § 32(b). However, CDCR's definition must comport with some colorable meaning of the term "nonviolent felony." It does not.

CDCR never defines of the term "nonviolent." Instead, as noted, CDCR defines "nonviolent" by what it is not: Not convicted of any sex offense requiring registration under section 290.

CDCR's definition of the term "nonviolent offender" thus excludes those convicted of registrable sex offenses which the Legislature has not designated "violent felonies" in section 667.5. In defining what is a "nonviolent" offense for purposes of Proposition 57, CDCR may perhaps not be limited to the Legislature's list of "violent" offenses in section 667.5. However, Petitioners argue some of the sex offenses listed in section 290 are not "violent" under any colorable definition of the term. CDCR offers no argument they are "violent."

Proposition 57 states any person convicted of a "nonviolent felony offense" is eligible for early parole consideration. CDCR essentially inserts the phrase "except registered sex offenders" into the text of the initiative. The court cannot insert words into an initiative to achieve what the court presumes to be the voters' unexpressed intent; neither can CDCR. (*Citizens to Save California, supra*, 145 Cal.App.4th at 747 ["a court cannot insert or omit words to cause the meaning of a statute to conform to a presumed intent that is not expressed."]; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827 [noting "cardinal rule that courts may not add provisions to a statute."].) As the Court of Appeal put it: "the voters should get what they enacted, not more and not less." (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.)

Whether some registered sex offenders ***should*** be eligible for early parole release is a question of public policy for the voters and the Legislature. The question here is what did the voters actually direct in adopting Proposition 57?

The court finds CDCR's language overbroad in excluding anyone ever convicted of a registrable sex offense from Proposition 57's parole procedures.[8]

B) CDCR may not substitute its policy preference for that of the voters

CDCR argues excluding all sex offenders from early parole consideration is appropriate, because California voters believe sex offenders have a particularly high recidivism rate. Perhaps. But assuming, arguendo, sex offenders recidivate at a higher rate than other offenders, does this support defining all sex offenses as "***violent***"? There is nothing contradictory between sex offenders having high ***recidivism rates*** and the voters' intent to reduce prison overcrowding by making "***nonviolent***" sex offenders eligible for early parole consideration. Again, whether all sex offenders registered under section 290 should be eligible for early parole release is a question of public policy not before this court. Rather, the question is what did the voters mean in Proposition 57 by "nonviolent"?

The same analysis applies to CDCR's argument California voters want to protect children from sexual exploitation. Presumably they do. But once again, CDCR's policy argument does not override the voters' clear directive to reduce prison overcrowding by making "nonviolent" offenders eligible for early parole consideration. The question is still one of construction – what did the voters say? The voters chose to make all "nonviolent" felony offenders eligible for early parole consideration, with no caveat for sex offenses the Legislature has not listed as "violent" in section 667.5.

CDCR notes a stated purpose of Proposition 57 was to "protect and enhance public safety." From this CDCR concludes that, as long as its regulations protect public safety, it can define the term "nonviolent" felony as it chooses. It may not. CDCR's argument would effectively nullify Proposition 57's provisions for early parole eligibility. As Petitioners argue, the voters decided early parole consideration for those convicted of "nonviolent" felony offenses

[8] Although not dispositive, the court notes the Legislative Analyst also opined CDCR's regulation "appears to violate the language of Proposition 57" by "exclude[ing] nonviolent . . . sex registrants from the new parole consideration" process. (Legis. Analyst's Off., The 2017-18 Budget: Implementation of Proposition 57 (April 2017), p. 10.)

is consistent with public safety. (See Cal. Const., art. I, sec. 32(a)(1).) CDCR cannot override the voters' decision under the guise of CDCR's differing view of enhancing public safety.[9]

Finally, CDCR argues the voters understood persons convicted of any sex offense listed in section 290 would be excluded from early parole consideration because such persons are excluded from parole procedures it previously adopted implementing a federal court order directing CDCR to reduce California's prison population. (See *Brown v. Plata* (2011) 562 U.S. 493.)

CDCR cites assurances in the ballot materials that Proposition 57 would not override the federal court order. (Rebuttal to Argument Against Proposition 57.) This mixes apples and oranges. A detailed discussion of the federal court's order and the litigation leading up to it is beyond the scope of this action. For present purposes it is sufficient to note the federal court order never mentions sex offenses, sex offenders or section 290. Rather, it simply set a deadline to reduce the state's prison population. It also specified one of the ways the prison population would be reduced was by creation of "a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence." (CDCR's Req. for Jud. Not., Ex. A.)[10] The federal court order does not define "non-violent second-strikers."

In implementing the federal court order, CDCR excluded registered sex offenders. (CDCR's Req. for Jud. Not., Ex. C.)[11] CDCR's decision to exclude registered sex offenders from the federal court's parole process for non-violent, second-striker offenders does not demonstrate the voters intended Proposition 57 would also exclude sex offenders from Proposition 57's new, separate early parole process.

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[9] Proposition also directs it is to be "broadly construed" to accomplish its purposes, one of which is to "save money by reducing wasteful spending on prisons."

[10] CDCR's request to judicially notice this order is granted.

[11] CDCR's request to judicially notice its report to the federal court "on new parole process for non-violent, non-sex-registrant, second strike inmates in response to November 14, 2014 order" is granted.

C) CDCR impermissibly precludes individuals from early parole consideration based on prior offenses

CDCR's definition is overbroad in a second way. Proposition 57 states "[a]ny 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." (Cal. Const., art. I, sec. 32, subd. (a)(1), emphasis added.) It is clear the voters intended any person ***currently sentenced to prison*** for a nonviolent felony offense would be eligible for early parole consideration. But CDCR's definition of the term "nonviolent offender" limits Proposition 57 to those not "[c]onvicted of a sexual offense that requires registration as a sex offender under Penal Code section 290." (15 Cal. Code Regs § 3490, subd. (a)(3).) Thus any inmate ever convicted of a registrable sex offense is precluded from early parole consideration, even if he or she is not ***currently serving*** a term for that offense. Here CDCR defines parole eligibility by the individual's ***status***, rather than the individual's ***commitment offense***.

For example, a person incarcerated for tax evasion (not a violent felony listed in section 667.5) would be ineligible for early parole consideration under Proposition 57 if he or she had ever been convicted of a registrable sex offense, even if they had already served their time and been released for the sex offense. This contravenes the plain language of Proposition 57.

CDCR points to no language in Proposition 57 supporting such a construction.

For all of the above reasons, the court finds CDCR's regulations are overbroad and not within the scope of authority conferred on CDCR by Proposition 57. CDCR's regulations are thus void.

3. The court will not advise how CDCR may define the term "nonviolent felony"

Petitioners ask the court to go one step further and order CDCR to adopt regulations making all persons convicted of registrable sex offenses not listed in section 667.5 eligible for early parole. The court will not.

Petitioners argue the term "nonviolent felony offense" in Proposition 57 must be interpreted to exclude only those serving a term for an offense listed in section 667.5. Petitioners contend the voters understood any felony not listed in section 667.5 is, by definition, "nonviolent" for purposes of Proposition 57.

This would be one way to define the term "nonviolent" as used in Proposition 57. For example, the judiciary's criminal law experts Justice Tricia Bigelow and Judge Richard Couzens (Ret.) state, "A review of the materials provided by the 2016 voter information pamphlet suggests that the enactors define 'nonviolent felony' as any crime not listed in section 667.5, subdivision (c)." (Couzens and Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016" (2017) Barrister Press, pg. 6.)

However, the Legislature's list of violent offenses in section 667.5 may not be the only way to define what is a "nonviolent" offense. The court notes Proposition 57 never mentions section 667.5. If the voters intended to define the term "nonviolent" felony to mean any felony the Legislature has not listed in section 667.5, they presumably would have said so.

For example, when the voters approved Proposition 36 ("Three Strikes Reform Act of 2012") they expressly declared Proposition 36's resentencing was limited to inmates serving life sentences "for a conviction of a felony or felonies that are **not defined as** … **violent felonies by subdivision (c) of Section 667.5** … (§ 1170.126, subd. (e), emphasis added; see also, generally, *People v. Conley* (2016) 63 Cal.4th 646, 652-53 [describing purposes and effect of Three Strikes Reform Act].)

The language of Proposition 36 demonstrates the voters know how to limit sentencing relief to exclude those convicted of felonies listed in section 667.5. The fact the voters did not use similar language in Proposition 57 suggests they intended a different meaning. (See, e.g., *County of San Diego v. Department of Health Services* (1991) 1 Cal.App.4th 656, 661 ["Where different language is used in different parts of a statute, we must presume the Legislature intended a different meaning and effect."].)[12] At the very least, it suggests CDCR may have

[12] A similar argument can be made in response to CDCR's position the term "nonviolent" offender excludes any person convicted of a sex offense listed in section 290. If the voters had intended to exclude all registered sex offenders from early parole consideration under Proposition 57, they presumably would have said so.

The voters did just that when they approved Proposition 47 ("Safe Neighborhoods and Schools Act") in 2014. Proposition 47 authorizes resentencing persons incarcerated for felonies which Proposition 47 reduced to misdemeanors. But Proposition 47's procedures expressly do not apply persons required to register pursuant to section 290. (§ 1170.18, subd. (i).)

Here again, the voters clearly know how to exclude registered sex offenders from the scope of propositions they enact. The fact they did not do so in Proposition 57 conflicts with CDCR's interpretation.

discretion to define the term "nonviolent" felony offense somewhere between the two extremes the parties urge here.

Petitioners point to arguments, statements and analyses in the Official Voter Information Guide to support their argument voters understood the term "nonviolent" felony offense meant any offense other than those listed in section 667.5.[13] The court is not convinced. The ballot materials on Proposition 57 do not define the term "nonviolent felony," and only mention section 667.5 once, in a way not particularly enlightening.

For example, the official title and summary prepared by the Attorney General notes the initiative "[a]llows parole consideration for persons convicted of nonviolent felonies." The Attorney General did not identify those felonies deemed nonviolent, nor did she mention section 667.5.

Similarly, the proponents of Proposition 57 stated the initiative "[k]eeps the most dangerous offenders locked up" and "[a]llows parole consideration for people with non-violent convictions." But the proponents did not explain what they meant by "the most dangerous offenders" or which convictions would be deemed "non-violent." (Argument in Favor.) Although the proponents stated "[v]iolent criminals as defined in Penal Code 667.5(c) are excluded from parole," they did not state ***only*** such individuals would be excluded.[14] (Rebuttal to Arguments Against.)

For their part, the opponents told voters Proposition 57 "deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities: • Rape by intoxication • Rape of an unconscious person • Human Trafficking involving sex act with minors . . . • Failing to register as a sex offender . . . • Lewd acts against a child 14 or 15." (Argument Against; see also Rebuttal to Argument in Favor.)

The Legislature has listed rape of a drugged, intoxicated or unconscious victim, sex trafficking of a minor, and lewd acts with a child who is 14 or 15 as registrable sex offenses under section 290. But the Legislature has not listed these as "violent" felonies in section 667.5. It thus appears the opponents assumed the term "nonviolent" in Proposition 57 was defined by

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[13] CDCR asks the court to judicially notice those portions of the Official Voter Information Guide regarding Proposition 57. The request is granted.

[14] As far as the court can tell, this is the only reference to section 667.5 in the Official Voter Information Guide.

reference to the "violent" felonies listed in section 667.5. If so, it would not apply to registerable sex offenses not listed in section 667.5.

At a minimum, the arguments against Proposition 57 show voters knew Proposition 57 would make some sex registered offenders eligible for early parole consideration. This provides further support for the court's conclusion CDCR's regulations are overbroad. But it does not go as far as petitioners urge: It does not demonstrate the voters intended the term "nonviolent" felony to mean any offense other than those listed in section 667.5.

Similarly, the Legislative Analyst's Official Voter Information Guide on Proposition 57 stated:

> The measure changes the State Constitution to make individuals who are convicted of "nonviolent felony" offenses eligible for parole consideration after serving the full prison term for their primary offense. As a result, [the Board of Parole Hearings] would decide whether to release these individuals before they have served any additional time related to other crimes or sentencing enhancements.
>
> The measure requires CDCR to adopt regulations to implement these changes. ***Although the measure and current law do not specify which felony crimes are defined as nonviolent, this analysis assumes a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent***.

(Emphasis added.) But the Legislative Analyst did not explain the basis for this assumption, nor did the Legislative Analyst ever mention section 667.5.[15]

Petitioners point to statements made by CDCR ***after*** passage of Proposition 57 to show CDCR itself interpreted the term nonviolent felony to mean any felony not listed in section 667.5. As a general rule, after-the-fact interpretations shed little light on how the voters understood the term when they approved Proposition 57. (See, e.g., *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 618 ["after-the-fact declaration of intend by a draft of [initiative] may deserve some consideration [citation]; but by no means does it govern our determination how the *voters* understood the ambiguous provisions."], italics in original.)

Petitioners additionally argue Proposition 57 must be construed in light of existing laws, including section 667.5. True, the voters are "deemed to be aware of existing laws . . . and to

[15] Like the opponents' arguments, the Legislative Analyst's analysis of Proposition 57 does provide support for the argument voters understood Proposition 57 defined "nonviolent" felonies as those felonies not specifically defined in statute as "violent."

have enacted or amended a statute in light thereof." (*Cervantes*, *supra*, 225 Cal.App.4th at 1015.) However, section 667.5 states it defines the term "violent felony" only "[f]or purposes of ***this section***." (§ 667.5, subds. (a) and (c), emphasis added.) Assuming voters were aware of this language, it is hardly conclusive evidence they intended the term "nonviolent felony" in Proposition 57 to mean any crime not listed as a "violent" felony in section 667.5

Petitioners cite Welfare and Institutions Code section 6600, dealing with sexually violent predators. Section 6600 defines the term "violent" as "committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person." From this definition, Petitioners argue the term "nonviolent" as used in Proposition 57 must mean without force, violence, duress, menace, fear of bodily injury or threats of retaliation. Perhaps. But here too neither Proposition 57 nor the ballot materials mention Welfare and Institutions Code section 6600. It is hard to conclude the voters intended to sub silentio incorporate its definition.

Finally, Couzens and Bigelow point out the proponents of Proposition 57 assured the voters "Proposition 57 [d]oes NOT authorize parole for violent offenders." (Rebuttal to Argument Against Proposition 57.) From this Couzens and Bigelow conclude, "it is clear that the ballot argument was attempting to convince the voters that persons who commit crimes with violence would not benefit from the new parole provisions" (Couzens & Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016, *supra*, at p. 8.) This could be more than the felonies listed in section 667.5.

This discussion demonstrates it is by no means clear what the voters understood, or intended, the term "nonviolent" to mean in Proposition 57. But the sole issue before the court today is the challenge to CDCR's regulations defining "nonviolent" to exclude anyone ever convicted of a sex offense listed in section 290. That is all the court addresses. The court holds CDCR's definition conflicts with the plain language of Proposition 57. The court will not go on to issue an advisory opinion on the viability of other possible definitions not before it. The voters gave CDCR responsibility to promulgate regulations implementing Proposition 57. How CDCR chooses to define the term in light of this decision is a question for another day.

To paraphrase Justice Cardozo, the court today does not fix the outermost line. It is enough for present purposes that wherever the line may be, CDCR's regulations are not within it.

"Definition more precise must abide the wisdom of the future." (*Steward Machine Co. v. Davis* (1937) 301, US 548, 591.)

CONCLUSION

Under Proposition 57, "Any person convicted of a nonviolent felony offense . . . shall be eligible for parole consideration after completing the full term for his or her primary offense." CDCR adopted regulations defining the term "nonviolent offender" to exclude anyone required to register under section 290, regardless of their current commitment offense. CDCR's overbroad definition must thus be set aside.

Because Petitioners fail to convince there is only one way to define the term "nonviolent felony offense," the court remands this case to CDCR to define that term in the first instance, consistent with this ruling.

* * *

The tentative ruling shall become the court's final ruling unless a party wishing to be heard so advises the clerk of this department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event this tentative ruling becomes the final ruling of the court, counsel for Petitioners is directed to prepare a formal judgment and writ, incorporating this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

The court prefers any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3.670; Sac. County Superior Court Local Rule 2.04.)

In the event a hearing is requested, oral argument shall be limited to no more than thirty (30) minutes per side.

If a hearing is requested, any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour,

and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.