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Attorney for Petitioner
GREGORY GADLIN

SUPREME COURT OF THE STATE OF CALIFORNIA

In re GREGORY GADLIN on Habeas Corpus.	No. S254599 (Court of Appeal, No. B289852; Superior Court No. BA165439, Los Angeles County)

OPPOSITION TO RESPONDENT'S MOTION FOR JUDICIAL NOTICE; AND COUNTER-MOTION TO STRIKE RESPONDENT'S OPENING BRIEF ON THE MERITS AND REQUIRE HIM TO FILE A NEW MERITS BRIEF WITHOUT REFERENCE TO THE DOCUMENTS THE SUBJECT OF HIS MOTION

Coincident with the filing of his opening brief on the merits (OB) on August 15, 2019, respondent Secretary of Department of Corrections and Rehabilitation (CDCR) filed a motion requesting that this Court take judicial notice of records filed in 2014 in the United States District Court for the Eastern District of California in the consolidated cases *Coleman v. Brown* (E.D.Cal., No. 90-cv-0520) and *Plata v. Brown* (N.D.Cal., No. C01-1351). As explained

in more detail below, the Court should deny the motion for two independent reasons: 1) respondent has shown no good cause for failing to seek judicial notice of these *Coleman/Plata* documents in the court below, given that they have been in respondent's possession since their 2014 filings; and 2) the documents are not relevant to these proceedings, since determination of the intent of the electorate in enacting a proposition is confined to consideration of the four corners of the ballot material.

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION.

A. The Motion Should Be Denied for Lack of Showing Good Cause for Its Belated Submission to This Court Rather Than Appropriate Submission to the Court of Appeal for Its Consideration.

This Court granted review of the Court of Appeal's decision on habeas corpus holding 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 for which he was required to register as a sex offender pursuant to Penal Code section 290. Respondent couched the issue presented in his petition as follows:

> Did the Court of Appeal interpret article I, section 32 of the Constitution contrary to voter intent by holding that the Department of

> Corrections and Rehabilitation must give parole consideration to offenders with a prior conviction for a registrable sex offense, despite the Department's regulatory public safety determination and the assurances to the voters that sex offenders would be excluded from parole consideration?

(Petn. Rev 6; see also OB 10.)

Respondent acknowledges both that he did not seek judicial notice of this material in the Court of Appeal – here, on habeas corpus, the court of original jurisdiction equivalent to the trial court – and that the evidence was available to him to do so when the parties were litigating the matter in that court. (See Motion 4 ["Here, the documents attached to the motion as exhibits A, B, C, D, and E were not presented to the court below and do not relate to any proceeding that occurred after the Court of Appeal issued its decision on January 28, 2019."].) Conspicuously missing from his motion is any attempt to state good cause for requesting this Court to take judicial notice of these documents when he did not ask the Court of Appeal to do so.

Had respondent considered this material relevant to defending against Gadlin's petition, he should have provided it to the Court of Appeal and made any argument based on that material in that court. Because he did not present this material to the Court of Appeal and make the argument there that he presents here, he has waived his ability to do so in this Court. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1205 ["Further, it is our policy not to review issues that are dependent upon

development of a factual record when those issues have not been timely raised in the Court of Appeal or not reached in that court, when the latter omission was not brought to the attention of the Court of Appeal by petition for rehearing."].) It is not fair to either the Court of Appeal or to Gadlin to sandbag facts and seek to add them later to a legal issue that was fully litigated and decided in the Court of Appeal and which this Court is *reviewing*. This Court should not countenance such piecemeal litigation, particularly in a habeas proceeding. Respondent simply has no excuse, nor has offered any, why this Court this late in the litigation should consider facts that respondent deigned not to present in the court below.

The record on review here should only include material that was before the Court of Appeal for its appropriate consideration in resolving the matter. As one court has explained:

> As the final ground of its motion to dismiss the appeal, defendant notes that the appendix contains material which is not part of the record in the trial court and plaintiff's opening brief improperly makes arguments relying on such material. As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.] Likewise disregarded are statements in briefs based on matter improperly included in the record on appeal. [Citations.]

(*Pulver v. Avco Fin. Servs.* (1986) 182 Cal. App. 3d 622, 631-632.)

B. The Motion Should Be Denied Because the Documents Are Not Relevant.

Respondent asserts the documents are relevant, stating:

> The documents described in this motion are relevant to this matter for the reasons explained in the opening brief on the merits. These documents relate to the parole reforms preceding Proposition 57, the Department's consistent policy of excluding sex offenders from parole reforms, and Proposition 57's intent to exclude from parole an inmate previously convicted of a sex offense.

(Motion 5.) But neither the parole reforms preceding Proposition nor the Department's policy of excluding sex offenders from parole reforms are relevant to the meaning of Proposition 57, which depends on the intent of the electorate when it enacted Proposition 57. (See *People v. Valencia* (2017) 3 Cal.5th 347, 375.)

Courts determine the intent of the electorate based on the language of the initiative itself and, if need be, the ballot materials that informed the voters about that language. (*People v. Valencia, supra,* 3 Cal.5th at p. 357.) As *Valencia* explained, where a court finds ambiguity in the text of the initiative, it does not go outside the ballot material:

> We turn to evidence, outside the measure's express provisions, to ascertain the voter's intent in approving the initiative. Specifically, we examine the materials that were before the voters. [Citations.]

(*Id.* at p. 364.)

None of the *Coleman/Plata* documents were part of the ballot material or otherwise before the voters, so that they are irrelevant to this Court's determination of the meaning of Proposition 57. As respondent himself admits, "[T]he constitutional text cannot be read in isolation, but must be informed by the voters' understanding of Proposition 57, *as set out in the ballot pamphlet.*" (OB 11, italics added; see also OB 25 [In determining the scope of its charge under Proposition 57, the Department reasonably considered not just the words of subdivision (a)(1), but also what voters were told in Proposition 57's ballot pamphlet."].)

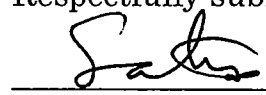
This Court thus need not and should not grant judicial notice of the documents at issue. Those documents simply are not relevant either to the Court's review of the decision of the Court of Appeal or to its determination of voter intent in the enactment of Proposition 57

CONCLUSION

For the foregoing reasons, this Court should deny respondent's motion for judicial notice, strike his opening brief on the merits because it depends on that material, and order him to file a new opening brief on the merits that confines itself to the record before this Court.

Dated: August 23, 2019

Respectfully submitted,



Michael Satris
Attorney for Petitioner

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 August 23, 2019, I electronically served the attached **OPPOSITION TO MOTION FOR JUDICIAL NOTICE** by direct email as indicated, or 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*	Attorney General of California docketinglaawt@doj.ca.gov *served via email*
Charles Chung, Deputy Attorney General Charles.chung@doj.ca.gov *served via email*	California Appellate Project capdocs@lacap.com *served via email*

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 August 23, 2019, at Bolinas, California.

/s/ Sarah Bruce

Signature