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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MARCUS RUBEN  
ELLINGTON

on

Habeas Corpus.

B296112

(Los Angeles County  
Super. Ct. No.  
YA095609)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Superior Court of Los Angeles County, William C. Ryan, Judge. Petition granted.

Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Senior Assistant Attorney General, Charles Chung, Deputy Attorney General, for Respondent.

## **I. INTRODUCTION**

Petitioner Marcus Ruben Ellington contends the California Department of Corrections and Rehabilitation (CDCR) improperly found him ineligible for early parole consideration under Proposition 57, or the Public Safety and Rehabilitation Act of 2016, because he is required to register as a sex offender under Penal Code section 290 due to a current conviction for misdemeanor sexual battery and five prior convictions for felony sex offenses. We agree and grant his petition for writ of habeas corpus.

## **II. BACKGROUND**

Petitioner Marcus Ruben Ellington is currently serving a 55 years to life sentence for possession of a collapsible baton (Pen. Code, § 22210) and criminal threats (Pen. Code, § 422, subd. (a)), plus 360 days for two counts of sexual battery (Pen. Code, § 243.4, subd. (e)(1).) Possession of a collapsible baton and criminal threats are nonviolent felony convictions. Sexual battery is a misdemeanor sex offense registrable under Penal Code section 290 (section 290).

Prior to sentencing on April 20, 2018, petitioner admitted he had five prior strike convictions under the Three Strikes law. The five prior strikes were sustained on November 20, 1989, when a jury convicted him of three counts of forcible rape, one count of forcible sexual penetration, and one count of forcible oral copulation. All five convictions are registrable sex offenses under section 290.

Following his commitment to state prison in this case, petitioner learned CDCR considers him ineligible for an early parole hearing under Proposition 57 because he is subject to registration under section 290 for his prior felony sex offense convictions and his current misdemeanor sexual battery conviction. On March 8, 2019, petitioner filed a petition for writ of habeas corpus, seeking an order directing CDCR to grant him an early parole hearing. We appointed counsel, issued an order to show cause to CDCR, and now grant the petition.

### III. DISCUSSION

Approved by California voters on November 8, 2016, Proposition 57 provides that “[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 of his or her primary offense.” (Cal. Const, art. I, § 32, subd. (a)(1) (section 32(a)(1)).) The “full term” of the “primary offense” is “the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.” (Cal. Const., art I, § 32, subd. (a)(1)(A) (section 32(a)(1)(A)).) Proposition 57 directs CDCR to adopt regulations “in furtherance of [section 32(a)]” and “certify that these regulations protect and enhance public safety.” (Cal. Const., art I, § 32, subd. (b).)

After this court partially invalidated CDCR’s initial set of implementing regulations (see generally *In re Edwards* (2018) 26 Cal.App.5th 1181 (*Edwards*)), CDCR promulgated new regulations effective in 2019. These regulations exclude from early parole consideration any inmate who “is convicted of a

sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in Sections 290 through 290.024 of the Penal Code.” (Cal. Code Regs., tit. 15, § 3491, subd. (b)(3).)

In *In re Gadlin* (2019) 31 Cal.App.5th 784, review granted May 15, 2019, S254599 (*Gadlin*), we held these regulations invalid insofar as they bar early parole consideration for an inmate who is subject to registration under section 290 for a prior crime for which the inmate has already fully served his or her sentence. *Gadlin* disposes of CDCR’s argument that petitioner is ineligible for early parole consideration due to his prior sex offense convictions.

In *In re Mohammad* (2019) 42 Cal.App.5th 719 (*Mohammad*), we held “under sections 32(a)(1) and 32(a)(1)(A), an inmate who is serving an aggregate sentence for more than one conviction will be eligible for an early parole hearing if one of those convictions was for ‘a’ nonviolent felony offense.” (*Id.* at p. 726.) That holding describes petitioner, who is currently serving an aggregate sentence for a nonviolent felony offense—actually two: possession of a collapsible baton and making criminal threats. *Mohammad* therefore disposes of CDCR’s argument that petitioner is ineligible for early parole consideration by virtue of now serving a sentence that includes time for a misdemeanor sexual battery conviction. (*Id.* at pp. 726–727.)

#### **IV. DISPOSITION**

The petition for writ of habeas corpus is granted. CDCR is directed to evaluate petitioner for early parole consideration within 60 days of remittitur issuance.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.