Criminal Justice Legal Foundation

Board of Trustees

Chairman Emeritus
Jan J. Erteszek
(1913 - 1986)

Chairman
Rick Richmond

Vice Chairman
Terence L. Smith

President & CEO
Michael Rushford

Secretary-Treasurer
Faye Battiste-Otto

William E. Bloomfield, Jr.
Jerry B. Epstein
Michael H. Horner
Samuel J. Kahn
Gino Roncelli
Mary J. Rudolph
Mr. William A. Shaw
Hon. Pete Wilson

Legal Advisory Committee

Hon. George Deukmejian
Hon. Malcolm M. Lucas
Hon. Edwin Meese, III
Hon. Edward Panelli

Legal Director & General Counsel

Kent S. Scheidegger

Academic Review Board

Prof. George L. Kelling
Prof. Steven Levitt
Prof. Joseph M. Bessette

EmeritusTrustees

Barron Hilton
James B. Jacobson
Robert S. Wilson

February 29, 2016

Via E-Submission and Federal Express

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Attention: Supreme Court Clerk/ Administrator Frank A. McGuire
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Brown v. Superior Court (CDAA), No. S232642

Dear Chief Justice Cantil-Sakauye and
Associate Justices of the Supreme Court:

Pursuant to Rule 8.500(g)(1), the Criminal Justice Legal Foundation (CJLF) submits this amicus curiae letter in opposition to the petition for an original writ.

CJLF is a California non-profit corporation formed to advance the rights of victims of crime and the law-abiding public in the criminal justice system. CJLF is greatly concerned that the many years of needed reforms that have achieved dramatic reductions in the criminal victimization of law-abiding Californians not be undone by hastily drafted, ill-conceived, and deceptively packaged measures such as the one at issue in this case.

The initiative has aptly been described as "one of the outstanding achievements of the progressive movement of the early 1900s" and "one of the most precious rights of our democratic process," and for this reason it is "the duty of the courts to jealously guard this right of the people." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1140 (citations and internal quotation marks omitted)). The initiative is a powerful tool for bypassing entrenched interests and enacting needed legislation that governing officials have blocked. (See *id*. at pp. 1140-1141.)

Like any power tool, though, the initiative can be dangerous. Initiatives are presented to the public for an all-or-nothing vote with no mechanism to separate wheat from chaff. Bad law that the people do not really favor can make its way into statutes or even into the Constitution through sloppy drafting or intentional "logrolling." (See *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 749 (defining "logrolling").)

In order to preserve this precious right, courts do not pass judgment on the wisdom of initiative measures. (See *Strauss v. Horton* (2009) 46 Cal.4th 364, 456.) At the same time, the Constitution and the implementing statutes impose conditions that must be met to qualify an initiative for the ballot. Enforcement of these conditions provides some degree of protection against dangerous misuse of the initiative power.

The law provides a long lead time for those who would change the law by initiative. (See Exhibit A to Real Parties in Interests' letter of February 26, 2016.) The Legislature recently added provisions for publication, public comment, and amendments by the proponents by the 2014 amendments to section 9002 of the Elections Code. These provisions provide at least a small measure of protection against hastily drafted and ill-conceived measures with unintended or poorly understood consequences.

Petitioners would have the Court believe that the initiative before it is the product of a careful drafting process. (Petition, ¶ 15, p. 9.) It certainly does not read like it. Section 3, the constitutional amendment, reads like it was scratched out on a cocktail napkin. To note a nonsubstantive but telling point, proposed section 32 has a subdivision (a)(1)(A) but no (B). This is not the work of a careful drafter.

More substantive issues in the language of this section also indicate a lack of care in its drafting. Subdivision (a)(1) purports to make it apply only to "person[s] convicted of a non-violent felony offense." Yet "non-violent" is not defined, and while many crimes are either clearly violent or clearly not, the distinction can be notoriously difficult in the gray zone between the poles. The United States Supreme Court had so much difficulty with one portion of Congress's definition that it finally threw up its hands and declared the subdivision void for vagueness. (See *Johnson v. United States* (2015) 135 S.Ct. 2551, 2560, 192 L.Ed.2d 569, 581.)

One could argue that the proposed constitutional section implicitly defines "non-violent" by adopting the inverse of a definition of "violent felony" in a statute, subdivision (c) of section 667.5 of the Penal Code. It is problematic for a constitutional provision which cannot be changed by the Legislature to depend upon a statute which can, but it is not unheard of. (See, e.g., Cal. Const. art. I §28, subd. (g).) But this is not a matter to leave to implication. The particular list in 667.5(c), written for a particular purpose, leaves out a lot of violent crimes. For example, aggravated assault is not included unless it is accompanied by a great bodily injury enhancement or use of a firearm; battery with serious bodily injury is not included unless it involves domestic violence. (See 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment §401(8).)

If the 667.5(c) list is inversely incorporated, the promise that the section applies only to non-violent felons is false. If it is not, we are in for years and possibly decades

of litigation over what the term means, as the undefined term is even more vague than the definition in *Johnson v. United States*, *supra*. A careful drafter would have spelled it out. The question will not be answered before the election. If this initiative goes on the ballot as-is, the people will be asked to buy a pig in a poke.

The deeper problem with this hastily conceived constitutional provision – jammed in at 11:59 on the initiative clock – is that the connection between its provisions and the stated purpose appears to be nothing more than wishful thinking. Releasing more prisoners is going to enhance public safety? It has not so far.

The first indication we have of the efficacy of Proposition 47, sold to the public with similar arguments, comes from the FBI's Preliminary Semiannual Uniform Crime Report, which reports crime in cities over 100,000 population for the first half of the year. Comparing California cities which reported for the first halves of both 2014 and 2015 (before and after Proposition 47) with non-California cities meeting the same criteria, violent crimes rose only a modest 1.4% in the rest of the country but shot up 12.9% in California. Property crimes *fell* 4.5% in the rest of the country but jumped 9.3% in California. (See Scheidegger, California v. Other States Crime Index Changes, Crime & Consequences (Jan. 28, 2016), http:// www.crimeandconsequences.com/crimblog/2016/01/california-v-other-states-crim.html.)

Amici supporting the petition have spammed this Court with letters which are verbatim copies for most of their substantive argument. (See Letter Brief Amicus Curiae of California Alliance for Youth and Community Justice, Feb. 26, 2016; Letter Brief Amicus Curiae of National Center for Youth Law, Feb. 26, 2016; Letter Brief Amicus Curiae of Alliance for Boys and Men of Color, Feb. 26, 2016.) Yet no amount of repetition can transform an unsupported assertion that is contrary to common sense into a fact. There is good reason, supported by recent experience, to believe that this initiative would be severely detrimental to the very goal it purports to enhance, public safety.

If the Governor had an initiative that really would enhance public safety, CJLF would be first in line to support it. This is not it. While the detrimental effects of the initiative are not a reason to remove it from the ballot, there is certainly no reason to bend the rules to push it on to the ballot when the proponents have not taken the needed steps in time to qualify.

An additional consideration is worth noting here. As noted in *Perry*, *supra*, the initiative was conceived as a mechanism for ordinary citizens to bypass the elected officials. The petitioner in this action is the highest elected official in the state. He is the one who signs bills in the normal course of legislation. His party has an iron grip on the Legislature. There is no reason that these proposals cannot be enacted as ordinary legislation or, to the extent they conflict with earlier, unamendable initiatives, be put on the ballot by the Legislature.

There is no emergency here. The proponents of this amendment to the Constitution conceived it too late in the electoral cycle to make the 2016 ballot as an initiative. There is no compelling reason to let them escape the consequences of their lateness by misusing the amendment process to create a chimera, grafting it on to an unrelated juvenile justice initiative. The only consequence of letting the Superior Court's correct decision stand is that this proposal will have to go before the Legislature, where it can be properly vetted and its sloppy drafting can be corrected.

The petition should be denied.

Sincerely,

Kent S. Scheidegger