

Death Penalty FOCUS

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Via TrueFiling

July 31, 2019

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Johnson v. Superior Court*, Case No. S256657
Amicus Letter of Death Penalty Focus
in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Death Penalty Focus (DPF) submits this letter as amicus curiae in support of the petition for review by petitioner Cleamon Demone Johnson.¹ DPF urges the Court to settle an important question of law raised by Governor Gavin Newsom's issuance of Executive Order N-09-19 effectively imposing a moratorium on death sentences, repealing California's lethal injection protocol, and closing the Death Chamber at San Quentin State Prison. Notwithstanding these actions, county district attorneys continue to seek new death sentences. Since every prosecution is brought in the name of the People of the State of California, direct conflict has been created by these subordinate executive officers following the action of the governor as chief executive. (Cal. Const., art. V, § 13 ["Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officers of the State. . . . The Attorney General shall have direct supervision over every district attorney When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office."].) Continued death penalty prosecutions in the face of the Governor's action creates an unacceptable and unconstitutional risk that jurors will be unable to carry out their duty to render a moral judgment concerning an appropriate penalty-phase decision.

¹ Robert M. Sanger, counsel for Johnson, is a member of the Board of Directors of DPF. He played no role in the deliberations regarding whether to provide amicus support in this case or in the preparation of this letter.

DPF’S INTEREST IN THIS CASE

Founded in 1988, Death Penalty Focus is California non-profit corporation committed to the abolition of the death penalty through public education, grassroots organizing and political advocacy, media outreach, and domestic and international coalition building. DPF believes that the death penalty is an ineffective, cruel, and simplistic response to the serious and complex problem of violent crime. It institutionalizes discrimination against the poor and people of color, diverts attention and financial resources away from preventative measures that would actually increase public safety, risks the execution of innocent people, and does not deter crime. Since 2017, DPF has been in Special Consultative Status with the United Nation’s Economic and Social Council.

DPF supports Governor Newsom’s executive action. On March 13, 2019, the day the executive action was issued, DPF issued a press release applauding the Governor’s “historic step of declaring a moratorium on executions. By ensuring that no person is executed during his tenure, the governor has shown that he is a bold leader on criminal justice reform who is willing to tackle California’s broken death penalty system head on” (<https://deathpenalty.org/press/press-room/ca-gov-newsom-announces-moratorium-executions/>). DPF is alarmed that the political opposition of prosecutors is being manifested by decisions to unfairly seek new death sentences.

THE COURT SHOULD GRANT REVIEW

The standard California jury instruction on the death penalty weighing process states, in part:

To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified. (Judicial Council of California Criminal Jury Instructions (2019 ed.), CALCRIM No. 766.)

In addition, upon request, a trial judge is required to inform the jury as follows: “In making your decision about penalty, you must assume that the penalty you impose,

death or life without the possibility of parole, will be carried out.” (CALCRIM No. 766.)

The decision of prosecutors to continue to seek death sentences despite the Governor’s executive action, will make it impossible for jurors to carry out their weighing responsibility. Substantial literature exists on the problems with both the death-qualification of jurors and jury decision-making in capital cases. E.g., Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions* (1993) 27 Law & Soc. Rev. 157; (1993) Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995), 70 Ind. L.J. 1043; Bowers, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. L. Bull. 51; Bowers, Sandys & Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors’ Predispositions, Attitudes and Premature Decision-Making* (1998) 83 Cornell L.Rev. 1476; Butler & Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials* (2007) 25 Behav. Sci. & L. 57; Costanzo & Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda* (1992) 16 Law & Hum. Behav. 185; Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors’ Predisposition To Convict and on the Quality of Deliberation* (1984) 8 Law & Hum. Behav. 53; Dillehay & Sandys, *Life under Wainwright v. Witt: Juror Dispositions and Death Qualification* (1996) 20 Law & Hum. Behav. 147; Garrett, Krauss & Scurich, *Capital Jurors in an Era of Death Penalty Decline* (2017) 126 Yale L.J. F. 417; Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L.Rev. 26; Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538; Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials* (1989) 15 Am. J. Crim. L. 1; Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447; Haney, Sontag & Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Soc. Issues 149; Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death-Qualified Californians* (1992) 19 CACJ Forum, No. 4, 43; Jurow, *New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process* (1971) 84 Harv. L.Rev. 567; Kleinstuber, *“Only A Recommendation”: How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors’ Feelings of Responsibility* (2013) 19 Widener L.Rev. 323;

Lynch & Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries* (2018) 40 Law & Pol’y 148; Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity* (2010) 62 Hastings L.J. 103.

The empirical evidence is overwhelming that the death qualification process and the complexity of sentencing rules can lead to arbitrary decision-making by capital juries. This is supported by a recent study of individuals reporting for jury service in Orange County (Garrett, Krauss & Scurich, *Capital Jurors in an Era of Death Penalty Decline* (2017) 126 Yale L.J. F. 417), which found:

- “In an era in which public support for the death penalty is quite divided, prosecutors may be able to remove still larger numbers of potential jurors from capital cases, and perhaps most importantly, from the guilt phase of the trial, because they have some substantial doubts about the death penalty.” Id. at 418.
- “Existing studies also indicated that death qualification continued to disproportionately lead to the exclusion of minorities and women; death-qualified jurors were more likely to be male, White, politically conservative, and Christian.” Id. at 424.
- “35% or more of jurors reporting for jury service were *Witherspoon/Witt* excludable as having such substantial doubts about the death penalty that it would ‘substantially impair’ their ability to perform their role as jurors.” Id. at 420.
- As result of the lack of executions in California since 2006, “67% were less likely to sentence a person to death, while 23% were more likely to sentence a person to death.” Id. at 427.

This study is alarming and highlights the dysfunction of California’s capital sentencing scheme. This Court must consider whether continued use of the death qualification process advances the fair administration of justice. Any process that disproportionately excludes woman and people of color should be re-evaluated by the Court.

Moreover, the combined impact of the Governor’s executive action and the decision of prosecutors to nonetheless continue to seek death sentences will create impermissible confusion for jurors about what a death sentence means. The United States Supreme Court has already recognized that “[p]ublic opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term ‘life imprisonment.’” (*Simmons v. South Carolina* (1994) 512 U.S. 154, 170, fn. 9.) In light of California’s chief executive declaring “I will not oversee execution of any person while Governor” while prosecutors simultaneously seek new death sentences will make it impossible for juries to have a common understanding about what a death sentence means. Prosecutors cannot in good faith lead jurors to believe they are making a life or death decision when in fact many of jurors are aware there is a Moratorium on executions.

As the Orange County study indicated, lack of enforcement of death penalty can result in some jurors being more likely to sentence someone to death. This calls into question the fair administration of the death penalty and can only contribute to wanton and freakish results. As one member of this Court observed following the Governor’s action:

And yet, as the Executive Order underscores, our decision affirming the judgment does not alter a fundamental reality: A death sentence in California has only a remote possibility of ever being carried out. As leaders of the judiciary have long observed, the death penalty presents serious challenges for the fair and efficient administration of justice. For decades, those challenges have not been meaningfully addressed. As a result, California’s death penalty is an expensive and dysfunctional system that does not deliver justice or closure in a timely manner, if at all. (*People v. Potts* (2019) 6 Cal.5th 1012, 1062-1063 (conc. opn. Liu, J.)

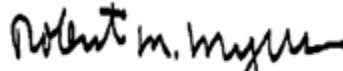
CONCLUSION

DPF urges the Court to grant review to resolve this important issue. Should the Court grant review, DPF intends to seek leave to file an Amicus Curie brief in support of petitioner Cleamon Demone Johnson.

Respectfully submitted,

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PROOF OF SERVICE

Johnson v. Superior Court
Case Number S256657

The undersigned does declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 14001 Ventura Boulevard, Sherman Oaks, California 91423.

On July 31, 2019, I served the Amicus Curiae Letter of Death Penalty Focus by depositing it in a post office mailbox regularly maintained by the United States Postal Service for receipt of First Class Mail, in a sealed envelope, with postage fully prepaid, addressed as follows:

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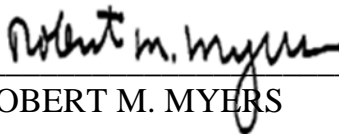
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 31st day of July, 2019, at Sherman Oaks, California.



ROBERT M. MYERS

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