IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Cleamon Johnson, Petitioner, v. **Superior Court of Los Angeles County**, Respondent, **The People**, Real Party in Interest.	**Case No. S256657** 2d Dist. No. B297659 LASC No. BA424006

Answer to Petition for Review

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SUMMARY OF ISSUES AND ARGUMENT

Petitioner Cleamon Johnson faces the death penalty for five counts of murder. He argued in the trial court that he should not be subject to a death sentence in light of Governor Gavin Newsom's recent moratorium on the death penalty. The trial court denied his motion, and the Court of Appeal denied his petition for a writ of mandate. He now petitions this Court for review, which it too should deny.

At the outset, these issues are not appropriately addressed in a pretrial writ of mandate to block the death penalty. Johnson is raising these issues in a vacuum. Any concerns about his particular jury can be explored in voir dire and assessed on appeal. This situation is no different than any other serious matter that might arise in voir dire. There is not a situation that requires extraordinary relief.

On the merits, Johnson's argument fails. The crux of Johnson's argument is that the existence of the Governor's moratorium will tend to lessen the jury's sense of responsibility for a death sentence, in violation of *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329 [105 S.Ct. 2633, 86 L.Ed.2d 231]. He further argues that they will not be able to follow any instructions to the contrary. This is not so. *Caldwell* only forbids arguments or instructions that affirmatively mislead the jury about their role under local law. (See *Dugger v. Adams* (1989) 489 U.S. 401, 407 [109 S.Ct. 1211, 103 L.Ed.2d 435].) This will not happen here: The court will instruct the jury accurately, and nothing about the Governor's order alters the jury's role in the system. Any concerns about the moratorium can be handled in voir dire, just like any other issue involving potential outside knowledge or personal beliefs. Jurors are routinely asked to set aside these types of things in order to reach a just verdict based on the evidence and the law.

The real goal of this petition is to turn Governor Newsom's moratorium, which is nominally a "reprieve," into a judicial abolition of the death penalty in California, at least prospectively. But if the death penalty is to be abolished in California, it must be by an act approved by the voters, not executive order. The voters have consistently declined to abolish the death penalty in California, most recently declining to do so in 2016. If the Governor's order is truly incompatible with continued death verdicts,

why must the death penalty give way, rather than the Governor's order?

As will be set forth, this Court should deny the petition.

STATEMENT OF THE CASE AND FACTS

Johnson and codefendant Michael Allen were convicted of the 1991 murders of Payton Beroit and Donald Loggins. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 63.) Both received death sentences. (*Id.* at p. 64.) In 2011, this Court reversed both defendants' convictions because the trial court erroneously discharged a juror during deliberations. (*Ibid.*) Johnson is currently pending trial on five capital counts, including the retrial of the murders of Beroit and Loggins. (Exh. A,[1] pp. 31–34.)

On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19. Citing several practical problems and substantive disagreements with the death penalty, Governor Newsom ordered the following:

> 1. An executive moratorium on the death penalty shall be instituted in the form of a reprieve for all people sentenced to death in California. This moratorium does not provide for the release of any person from prison or otherwise alter any current conviction or sentence.
>
> 2. California's lethal injection protocol shall be repealed.

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[1] Exhibit citations are to those filed in the Court of Appeal in support of Johnson's petition for writ of mandate.

> 3. The Death Chamber at San Quentin shall be immediately closed in light of the foregoing.

(Governor's Exec. Order No. N-09-19 (March 13, 2019); see Exh. B, pp. 54–55.) This was accompanied by the statement he "will not oversee execution of any person while Governor." (*Ibid*.)

On April 12, 2019, Johnson moved to strike the death penalty based on Governor Newsom's order, as well as the well-known fact that there have been very few executions in California since the death penalty was reinstated in 1977. (Exh. B, p. 37.) The gist of the motion was that by removing the realistic possibility of execution, jurors would believe that the ultimate responsibility for imposing the death penalty lay elsewhere, or would not take their responsibility seriously. (Exh. B, pp. 42–49.) The People opposed. (Exh. C, p. 73.) Johnson filed a reply, which further argued that jurors would not be able to follow "counterfactual" instructions to assume that Johnson would be executed. (Exh. D, p. 80.)

On May 3, 2019, the trial court denied the motion. (Exh. E, p. 168.) The court noted that the Governor's order really had not changed the practical reality that California executes very few prisoners. (Exh. E, p. 153.) It also noted that jurors could reasonably base their decision on the premise that the defendant would be executed. (Exh. E, pp. 155–156.)

On May 17, 2019, Johnson filed a petition for a writ of mandate challenging the denial of his motion. The Court of Appeal summarily denied the petition on June 20. This petition for review followed on July 1.

ARGUMENT

I. The conduct of voir dire and the instructions to the jury are not grounds for extraordinary relief.

The Court of Appeal summarily denied Johnson's writ petition, stating only that he had not demonstrated that he was entitled to extraordinary relief. The court could have believed that the issues Johnson raises are not appropriately decided by a pretrial writ of mandate. If so, they were right.

For issuance of a writ of mandate, the petitioner must show 1) that there is no plain, speedy, and adequate alternative remedy; 2) a clear, present, ministerial duty on the part of the respondent; and 3) corresponding clear beneficial right to the performance of that duty. (Code Civ. Proc., §§ 1085–1086; *People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) "A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act." (*People v. Picklesimer*, *supra*, at p. 340.) Mandate is also appropriate when the issues are of great public importance and must be resolved promptly. (*Agric. Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 402.)

Here, the case does not involve any clear ministerial duty on the part of the court. Crucially, Johnson raises his claims in a vacuum. His premise is that many jurors will necessarily know about the Governor's order and have strong opinions on it, but this not at all clear. This is no different than any other

potentially serious issue—such as pretrial publicity of a notorious case—that might affect a trial, but will normally be handled with appropriate voir dire and instructions. At this stage, it is not appropriate to rule on these issues as a matter of law.

There will be no prejudice to Johnson from proceeding to trial as normal. Johnson does not seek relief from the trial itself or potential imprisonment. There is no chance that Johnson will be executed before he can prosecute his appeal to completion. If he is successful, he would still be subject to a sentence of life without parole. Johnson has therefore not demonstrated that he is entitled to extraordinary *pretrial* relief. The Court of Appeal correctly denied his writ petition, and this Court should deny review.

II. The Governor's executive order did not create *Caldwell* error because it does not affirmatively mislead the jury about its role under state law.

Johnson's chief argument is that Governor Newsom's order has effectively signaled to the jury that they do not have ultimate responsibility for determining whether the death penalty is appropriate. This is not so.

To impose a sentence of death, the jury must make an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235], italics in original.) To that end, the jury must appreciate their personal responsibility for the sentence: "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a

sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328–329.)

Johnson argues here that the Governor's executive moratorium on the death penalty, coupled with the general lack of executions since the reinstatement of the death penalty in 1977, run afoul of *Caldwell*. (Petition for Review, p. 16.) He misunderstands the law in this area.

Despite the broad language in *Caldwell*, the United States Supreme Court has since clarified that this type of error only occurs when certain affirmative comments "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1].) Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." (*Dugger v. Adams*, *supra*, 489 U.S. at p. 407.) This Court has also acknowledged this narrower definition of *Caldwell* error. (See, e.g., *People v. Murtishaw* (2011) 51 Cal.4th 574, 592; *People v. Homick* (2012) 55 Cal.4th 816, 902.)

Here, there is nothing that the court has said or done, nor anything that it proposes to say or do, that will affirmatively mislead the jury about its role in the process. Indeed, this Court has previously rejected the argument that a comment about the

lack of executions in California lessens the jury's sense of responsibility in violation of *Caldwell*. (*People v. Osband* (1996) 13 Cal.4th 622, 694 [holding voir dire comment that "in the last twenty years no one has been executed in the State of California" did not affirmatively mislead a juror about her role; "indeed it did not hint at such a notion."].) There is no reason to believe that the Governor's order, by itself, has or will mislead the jury about its role under state law. The trial court will presumably instruct the jury correctly.

The Oregon Supreme Court addressed a similar issue to the one raised by Johnson in *State v. Taylor* (Or. 2019) 434 P.3d 331, 345. In 2011, Oregon's governor announced that no prisoner would be executed while he is in office.[2] Despite this, the Court in Taylor held that the trial court's instructions to the jury had dispelled any *Caldwell* error:

> The court instructed the jury that, "[i]n legal terms," the Governor's moratorium granted "temporary reprieves of existing death sentences" but that the jury "should assume that death sentences handed down while he is Governor will ultimately be carried out." That instruction corrected any impression that the jurors may have had about the meaning of the moratorium and reinforced that, if they voted to

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[2] See Jung, *Gov. John Kitzhaber stops executions in Oregon, calls system 'compromised and inequitable'*, The Oregonian (Nov. 22, 2011), available at <https://www.oregonlive.com/pacific-northwest-news/2011/11/gov_john_kitzhaber_stops_all_e.html.>

> sentence defendant to death, that sentence would "ultimately be carried out."

(*Id.* at pp. 386–387.) Here, if necessary, the trial court will instruct the jury that they must base their sentence on only the evidence presented and the law given. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 206.) Like in *Taylor*, this will not mislead the jury and should dispel any potential problem that could theoretically exist.

In sum, since the Governor's executive order does not mislead the jury about its role under state law—in fact, it does not instruct the jury about anything—it cannot run afoul of *Caldwell*.

III. The Governor's order does not undermine longstanding law on how courts should instruct jurors, nor is this situation any different from those where the jurors must put aside their own personal beliefs or knowledge.

Apart from *Caldwell* (though somewhat relatedly), Johnson argues that the jury will not be able to follow the court's "counter-factual" instructions because they will inevitably know that the defendant will not actually be executed. (See Petition for Review, p. 17.) This is not so; this type of situation has existed in California for a long time in various guises yet has never posed an insurmountable problem for imposing a death sentence.

Initially, Johnson has provided no evidence that any problem actually exists. It is not a foregone conclusion that jurors will necessarily have heard of the Governor's order, much less understand its scope and effect. Lay jurors are not necessarily

concerned with the same things that preoccupy criminal lawyers and judges. It is not appropriate to rule categorically that Johnson cannot receive a fair trial (which again is why a pretrial writ of mandate is not appropriate here).

On the law, this Court has long wrestled with what courts should do when jurors express concern that a sentence may not be carried out, either because a life-without-parole prisoner would be released, or because a condemned defendant will not actually be executed. (See *People v. Letner and Tobin*, *supra*, 50 Cal.4th at pp. 203–207 [discussing history].) But the Court has largely settled these issues without concern that the jury will disregard the instructions or base its decision on improper concerns.

One of the first cases to consider the issue, and the case on which Johnson principally relies, was *People v. Ramos* (1984) 37 Cal.3d 136, 150. There, this Court considered the so-called "Briggs Instruction," which instructed jurors in capital cases that the Governor may commute or modify a sentence of life without parole to one that includes the possibility of parole. (*Id.* at p. 150.) This Court held that the instruction violated the due process clauses of the California Constitution[3] because it was both misleading (it was a "half-truth" since the Governor could also commute a death sentence) and because it invited the jury to be

[3] Cal. Const., art. I, §§ 7, 15.

influenced by speculative and improper post-conviction considerations.[4] (*Id.* at p. 153.) Even if the instruction was complete (i.e., informed the jury that the Governor could commute a death sentence) it would still invite speculation, and further, there was a potential danger that the instruction would diminish the jury's sense of responsibility or induce them to act beyond their proper role by attempting to "preempt" the Governor's power. (*Id.* at pp. 157–158.) It was improper for the jury to base its sentencing decision on such considerations. (*Id.* at p. 158.) Thus, the Briggs Instruction was improper. (*Id.* at p. 159.)

Importantly, neither *Ramos* nor any other decision has ever held that mere *knowledge* of post-conviction procedures, such as the commutation power, prejudices a jury or renders it incapable of following the court's proper instructions. Indeed, *Ramos* itself contemplated that the jury could learn about commutation, either through an initial cautionary instruction from the judge at the request of the defense, or if raised by the jury at some point, via an explanation followed by instructions to only base the sentencing decision on the evidence. (*People v. Ramos, supra,* 37 Cal.3d at p. 159, fn. 12.) The problem with the Briggs Instruction was that it drew the jury's attention to facts for no legitimate reason.

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[4] Incidentally, this was after the United States Supreme Court had upheld the Briggs Instruction on federal constitutional grounds. (*California v. Ramos* (1983) 463 U.S. 992, 1013 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

(*Id.* at p. 158.) But there was no suggestion that if the jurors knew of such facts they could not follow the court's instructions.

The current state of the law is that the existing jury instructions—without any special attention to speculative future contingencies regarding punishment—are sufficient to inform the jury of its duty. The trial court should not even instruct the jury to "assume" or "presume" that their sentence will be carried out, since this just invites them to speculate about matters that should play no part in their deliberations. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 206; *People v. Dalton* (2019) 7 Cal.5th 166, 265.) If the parties and the court decide that an instruction is nevertheless warranted in a particular case, the court should instruct as follows: "It is your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard in court, informed by the instructions I have given you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed you." (*People v. Letner and Tobin*, *supra*, at p. 206.) Jurors are presumed to follow the court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 834.)

The situation Johnson presents is just another variant of the situation contemplated in *Ramos*. True, the precise question is not whether the Governor might commute a death or life-without-parole sentence; the Governor has purported to grant a reprieve in all death cases, stating that this will last for his entire term as Governor. But relying on this order in any way would

still be speculative and improper. A reprieve is a *temporary* stay or deferment in execution of a sentence. (*Way v. Superior Court* (1977) 74 Cal.App.3d 165, 176.) Assuming it is lawful in the first place, this Governor could lift it at any time, or another Governor could lift it in the future. It is speculative to assume that Johnson will never be executed because of this order, just as it is speculative to say that a condemned prisoner might receive a commutation. It would be improper for a jury to rely upon this Executive Order in any way, the court will instruct them accordingly, and presumably they can and will rely on that instruction.

Johnson attempts to circumvent this by arguing that it will be impossible for the jury to follow any "counterfactual" instructions in light of the Governor's moratorium. (Petition for Review, pp. 17, 19, 20.) This is not true.

To start, there will not actually be any "counterfactual" jury instructions. It has long been improper to tell a jury that any sentence will *inexorably* be carried out, since this is not factually accurate. (See *People v. Thompson* (1988) 45 Cal.3d 86, 130.) If there is any concern, the court will tell the jury to base its decision on the evidence. This does not tell them to do anything counterfactual.

This is really a question of whether jurors will bring outside knowledge into their deliberations, but this is no different than any other situation where jurors may have preexisting knowledge or beliefs about a case. For example, potential jurors may have learned facts of a notorious case from news reports and have

formed an opinion about guilt. Nevertheless, this by itself does not prevent the juror from being fair or impartial:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. *To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

(*Irvin v. Dowd* (1961) 366 U.S. 717, 722–723 [81 S.Ct. 1639, 6 L.Ed.2d 751], italics added.) "If a juror is able to set aside impressions and opinions to render a verdict based on the evidence presented in court, the juror is impartial." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 485.) The situation presented by the Governor's moratorium is no more difficult than one where jurors have heard the facts of the case. If jurors can follow the court's instructions in the latter situation, then they can certainly do so in the former. What punishment may *likely* be carried out in the future has no bearing on what punishment is *appropriate* in an individual case based on the evidence. Indeed, putting aside some knowledge, if any, about whether the death penalty will actually

be carried out is significantly easier than disregarding news accounts of a notorious crime.

Johnson tries to analogize this situation to ones where jury instructions are not adequate to cure improper uses of evidence that was introduced for a limited purpose, but those situations are very different. He primarily cites to *Bruton v. United States* (1968) 391 U.S. 123, 137 [88 S.Ct. 1620, 20 L.Ed.2d 476]. There, the trial court admitted a hearsay confession of a codefendant that inculpated Bruton, instructing the jury that they were to only use the statement against the codefendant. (*Id.* at pp. 124–125.) The United States Supreme Court held that such a limiting instruction was inadequate to protect the defendant at a joint trial. (*Id.* at p. 137.) The California Supreme Court previously held the same in *People v. Aranda* (1965) 63 Cal.2d 518, 529, finding that the jury could not perform the "overwhelming task" of considering the evidence as true for one defendant but not the other.

But the *Aranda-Bruton* rule is not analogous. The issue there was whether jurors could effectively compartmentalize damning evidence of guilt. "A limiting instruction does not cure *Aranda-Bruton* error because courts have repudiated the premise that it is reasonably possible for a jury to follow an instruction to disregard evidence that expressly incriminates the defendant." (*People v. Song* (2004) 124 Cal.App.4th 973, 982.) There are plenty of similar situations where a limiting instruction is not sufficient to cure the potential prejudice of incriminating information that is

theoretically limited. (See, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [limiting instruction insufficient where expert relates case-specific hearsay to the jury].) Here, the Governor's executive order creates no similar mental gymnastics. There is no incriminating evidence to disregard, no "bell" to "unring." Indeed, it does not involve anything related to Johnson's individual guilt or what penalty is appropriate. Jurors are often asked to disregard things that, as a practical matter, they probably believe to be inevitable to render a verdict as the court instructs. For example, the jury must not consider penalty or punishment when deciding on guilt (see *People v. Nichols* (1997) 54 Cal.App.4th 21, 25), even though many jurors must know that many defendants will be punished, probably with a prison sentence. The jury has no trouble with that instruction, so they should similarly have no trouble here confining their consideration to the facts and the law.

In sum, there is no basis to believe that the Governor's moratorium will improperly induce the jury to disregard the law. This is no different than other issues that are routinely handled in voir dire and appropriate jury instructions.

IV. Granting Johnson's petition is tantamount to judicial abolition of the death penalty in violation of the wishes of California voters.

The death penalty was reinstated in California by an act of the Legislature in 1977. (Stats. 1977, ch. 316.) The voters then

repealed, reenacted, and expanded the scheme in 1978 with Proposition 7, often called the Briggs Initiative. (See Ballot Pamp., Gen. Elec. (Nov. 7, 1978) Text of Proposed Law, Prop. 7, pp. 33, 41–46.) Because it is now a product of an initiative that does not itself allow amendment by the Legislature, the death penalty can only be abolished by the voters. (Cal. Const., art. II, § 10, subd. (c).) California voters have declined to do so twice, in 2012 and 2016. (See Ballot Pamp., Gen. Elec. (Nov. 6, 2012), Text of Proposed Law, Prop. 34, pp. 95–100; Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Text of Proposed Law, Prop. 62, pp. 156–163.) In fact, they instead chose to retain the death penalty and speed up the process. (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Text of Proposed Law, Prop. 66, pp. 212–218.) Whether California will carry out their wishes remains to be seen.

Regardless, Johnson quite clearly hopes that the courts will now use Governor Newsom's moratorium to do what the Legislature may not do: abolish the death penalty. It goes without saying that this would contradict the will of the voters. The People are not mounting a challenge to Governor Newsom's moratorium here, but in light of the above mentioned history, if this Court truly believes that the order is irreconcilable with new death verdicts, it is worth asking why it is the death penalty that must give way, rather than the Governor's order.

CONCLUSION

The Court should deny the petition for review. This issue is not ripe for review and should instead be handled on direct appeal when there is a proper factual record. On the merits, the Governor's death-penalty moratorium does not create a danger of *Caldwell* error. Jurors can also reasonably follow any instruction to base their decision on the evidence presented.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed **Answer to Petition for Review** is produced using 13-point Roman type, and contains approximately 4,251 words, including footnotes, which is less than the 8,400 words permitted by this rule. This count excludes signature lines and the verification. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: This 16th day of July, 2019

Los Angeles County
District Attorney's Office
Appellate Division

_____

Matthew Brown
Deputy District Attorney
Attorney for Real Party in Interest

DECLARATION OF SERVICE

Johnson v. Superior Court (People)
Case No. S256657 (2d Dist. No. B297659; LASC No. BA424006)

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over 18 years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. I am readily familiar with my office's business practice for collection and processing of correspondences for mailing with the United States Postal Service, and that correspondences are ordinarily deposited with the USPS the same day. On the date of execution hereof, and at the above-stated location, I served the attached document entitled **Answer to Petition for Review** by placing a true copy thereof for collection, with postage fully prepaid, for deposit with the USPS according to our ordinary business practices, in a sealed envelope addressed as follows:

Hon. Curtis Rappe
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The following parties were electronically served via TrueFiling (with separate proof of service also generated by TrueFiling):

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Executed on July 16, 2019 at Los Angeles, California.

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Monica Tsai Chen