CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

June 17, 2020

Please respond to:
JOHN T. PHILIPSBORN
Law Office of John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94102

The Honorable Charles D. Johnson
Clerk/Executive Officer
Court of Appeal of the State of California
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Re: *Estrada v. Superior Court of the County of Alameda (People)*, No. A160148, First District Court of Appeal, Division 1

LETTER OF AMICUS CURIAE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND REQUEST FOR STAY (RULE 8.485 (e))

Dear Mr. Johnson:

California Attorneys for Criminal Justice (hereafter "CACJ") respectfully submits this letter as amicus curiae in support of the petition for writ of mandate and request for stay in the above-entitled case.

Identification of CACJ

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws.) CACJ's membership consists of approximately 1,300 criminal

defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before reviewing Courts in California as an *amicus curiae* on matters of importance to the administration of justice and to its membership.

Interest of CACJ In This Matter

As an organization focused on the fair application and defense of Constitutional rights in the criminal courts in California, CACJ has been concerned to appear as an *amicus curiae* in matters implicating the death penalty.

Numerous CACJ members currently represent, and have represented, individuals who are facing capital charges and the possibility of the imposition of death. CACJ has repeatedly taken the position that it is vital that there is fair and uniform application of constitutionally-rooted substantive and procedural law to the litigation capital cases. The issues raised by the Petitioner are intertwined with the highly significant actions of California's current Governor in declaring a moratorium on the imposition of the death penalty during his tenure in Office. The questions in this case arise because of the lack of current guidance for trial courts on the frame for current death penalty litigation in California.

The record lodged in this Court contains evidence of Respondent Court's uncertainties about the state of the law, combined with inconsistent, unwarranted, and at times illegal admonitions, explanations and instructions to jurors about California's current death penalty calculus. The record here frames the question of whether it is sensible for a reviewing court to avoid providing guidance on these matters to lower courts at this point.

Petitioner and supporting *amici* seek a reasoned decision that will provide guidance to Respondent court and to other trial courts within the reach of this Court that need clarity, regularity, and guidance on the conduct of trials involving the death penalty and whether there are legally tenable instructions, admonitions,

and interactions with prospective and actual jurors given the moratorium that has been, for the time being, settled upon by the Executive Branch in California.

CACJ's objective in seeking to appear in this litigation is to encourage this Court to put order into what is now a disorderly process that is being settled upon in capital cases by trial judges who clearly have varying views on the state of the law. As will be demonstrated here – and in other briefing submitted to the Court by other parties – at the very least, if capital cases are permitted to proceed, there is a structure imposed by existing decisions in California that explain why trial courts need to avoid statements and procedures that undermine the need for jurors to apply specified legal standards in their consideration of the imposition of death.

CACJ previously submitted a letter brief addressing these issues in support of a petition for review in the California Supreme Court in *People v. Holifield*, No. S258390 (Court of Appeal Case No. H047239; Monterey County Superior Court No. SS170597A). CACJ urges this Court to allow it to appear to support Petitioner in his quest of relief, and for a reasoned, explanatory ruling that will provide guidance to trial courts.

ARGUMENT AND AUTHORITIES

For more than 30 years, CACJ, together with the California Public Defenders Association (CPDA), has hosted an annual seminar focused on issues in the defense of death penalty cases. It is said to be the largest single continuing education program in the country for lawyers who defend death penalty cases. The sessions often involve lecturers who are accomplished and experienced lawyers – including in a number of instances former prosecutors who have become criminal defense lawyers – together with a wealth of representatives from other sectors, including on occasion judicial officers, forensic scientists of various kinds, social scientists who studied the many aspects of issues raised in and by death penalty litigation, experts on mitigation development, and the like. For years, one of the key topics for discussion was the state of the law in jury selection, juror preinstruction, and in the final jury instructions in California State cases. The goal

has been for attending California practitioners to understand the standards and the latest law on point.

A standard practice guide for members of the judiciary and lawyers who practice in criminal courts in California, CEB's annually updated book length publication *California Criminal Law Procedure and Practice* devotes a chapter to death penalty cases in which the author explains:

> Although many features of a capital trial are identical to other felony trials, the differences are vital and must be understood by the practitioner engaged in capital litigation. Both the California Supreme Court and the U.S. Supreme Court have long noted that 'death is different.' Consequently, issues that may receive short shrift in a non-capital appeal will frequently receive greater attention in an appeal from a death sentence.

2019 CEB, *California Criminal Law Procedure and Practice*, at p.1857.

Justices sitting on this Court are no doubt aware of the ongoing debates about the cost and efficacy of the death penalty in California. See, for example, "Will Ending the Death Penalty Save California More Money than Speeding Up Executions?" [www.latimes.com/politics November 1, 2016, explaining that: "prominent supporters of the measure (referencing Proposition 62 replacing the death penalty with life without parole) have repeatedly pointed out that the State's taxpayers have spent $5 billion on the executions of only 13 people in almost 40 years."] And indeed, Governor Newsom's public announcement of a moratorium on the death penalty in California "...cited its high cost, racial disparities in its application and wrongful convictions, and questioned whether society has the right to take a life." [www.nytimes.com/2019/03/12.]

The juxtaposition of these sources of information on the death penalty in California underscores part of CACJ's reasoning for urging this Court to step in to

provide instruction and guidance as a result of the issues framed in this case. While there may be public debate about the death penalty that will make the continued existence of the penalty a matter of electoral discussion in California, the reality is that members of the judiciary and practicing professionals in the criminal courts in California, including the Judges, prosecutors, and defense lawyers who participate in death penalty trials are supposed to adhere to and employ defined legal standards. Invitation to improvise, speculate, and invent is not a hallmark of a constitutionally based legal process.

CACJ is aware of the issues that have been framed in this case, and of the arguments that have been presented to the Court, including those extensive arguments made by the Office of the State Public Defender, with which CACJ has on occasion collaborated in litigation involving death penalty related issues.

CACJ underscores its agreement with those who explain and argue to this Court that regardless of whether the Court agrees with Petitioner that pursuit of the death penalty in this case should not be permitted because of the issues that have been framed by Petitioner, the Court should employ its authority to provide guidance on the issues framed.

The record of proceedings below, and particularly the record of arguments made by Petitioner to Respondent Court (Petition Exhibit C), as well as the Respondent's clearly stated concern about the lack of guidance provided to it (Petition Exhibit C, at pp.64-81), when viewed together with Respondent's digressive, inconsistent, and seemingly improvised statements and admonishments during jury selection (excerpted by other parties from Petition Exhibits E, I, and J, including Exhibit J at pp.716-720), serve to illustrate the problems that are caused when a trial court attempts to provide prospective jurors its best guess of today's 'guided discretion' that is to characterize death penalty decision-making in California.

And as pointed out in other briefing and a review of further Petition Exhibits, including Exhibits K through L, evidences Respondent's shorthand,

incomplete, and at times inaccurate explanations of how death penalty sentencing can be reviewed after imposition of judgment.

In the absence of action that grants one of Petitioner's requested remedies – namely, the prohibition of the pursuit of death given the moratorium in California – the question that is acknowledged by Petitioner and others supporting action from this Court is centered around the impact and application of the doctrines examined by the U.S. Supreme Court in *Caldwell v. Mississippi* (1985) 472 U.S. 320, in which the U.S. Supreme Court held that it 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." *Id.*, at 328-29.

The California Supreme Court has acknowledged the difficulty it has had in analyzing statements and instructions given to California jurors in an attempt to appropriately direct them as to the meaning of a death verdict – this even before the current moratorium. In 2010, the court explained: "We must acknowledge that our cases have displayed some inconsistency concerning instructions akin to the following one requested [in this case by the defense] ...." *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 204-05. Part of the instruction sought by Letner in that case asked jurors to "...'presume that if a defendant is sentenced to death, he will be executed in the gas chamber.'" *Ibid.*

In the *Letner and Tobin* decision, the California Supreme Court harkened back to its ruling in *People v. Ramos* (1984) 37 Cal.3d 136, a case in which the court expressed its concern about the 'half-truth' and misleading aspects of the Briggs Instruction, which was found to invite too much speculation regardless of how it might be modified: "...[E]ven if the Briggs Instruction were modified so that it is totally accurate, the instruction would still violate the state constitutional due process guarantee because its reference to the commutation power invites the jury to consider matters that are both totally speculative and that should not, in any event, influence the jury's determination." *Id.*, at 155-56.

In *Letner and Tobin, supra*, the court decided that informing jurors to 'assume' or 'presume' that a sentence would be carried out is also misleading. 50 Cal.4th at 206. The concern expressed by the *Letner and Tobin* court was that asking jurors to assume or presume that a death sentence would be carried out would be misleading in the sense that some jurors would be aware "...that the sentence will not be carried out." *Id.*, at 206. Arguably, that situation is the state of affairs in California today. Nonetheless, the Supreme Court's recommendations, should an instruction be sought, would focus on directing jurors to make a decision based on the evidence and instructions given, without influence by speculation or 'any considerations other than those upon which I have instructed you.' [Paraphrase and partial quotation 50 Cal.4th, at 206.]

As the parties in this case agreed in various arguments made before Respondent court, part of the difficulty in attempting to choose persuasive and effective reference points from existing law and prior decisions on the so-called '*Caldwell* issue' is that, as demonstrated by the record here, it can readily be anticipated that many prospective jurors (more than three-quarters in this case) will have heard something about a death penalty moratorium in California by the time they attend a jury selection process and are available for *voir dire*, preinstruction, and admonitions from the trial court during the jury selection process.

CACJ's main purpose here is to underscore that the courts that are bypassing the opportunity to provide guidance to the trial courts and to the parties in pending capital cases are avoiding questions that will need to be answered, if not now then at some point in the future – and given that California's prosecutors continue to pursue the death penalty in pending cases, it is inevitable that unstandardized, improvised, irregular, and likely unconstitutional processes will continue to attend the litigation of death penalty cases during the current California death penalty moratorium, unless reviewing courts assert themselves.

At the very least, the Court should issue a ruling, hopefully in the form of an opinion, that underscores the risks of improvisation and a standardless approach

that undermines *Caldwell, supra*, and those California rulings in death penalty cases that caution the need to avoid jurors' speculations.

That said, CACJ respectfully urges the Court not to pass on the opportunity for a reasoned ruling in this case.

CONCLUSION

For the reasons stated here, CACJ urges this Court to grant relief to Petitioner.

Respectfully submitted,
STEPHEN K. DUNKLE, *Chair*
JOHN T. PHILIPSBORN, *Vice Chair*
CACJ Amicus Curiae Committee

By: s/ John T. Philipsborn
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SBN 83944
Counsel for CACJ

PROOF OF SERVICE

I, Stephen K. Dunkle, declare:

That I am over the age of 18, employed in the County of Santa Barbara, California, and not a party to the within action; my business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, CA 93101

On today's date, I served the within document entitled:

LETTER OF AMICUS CURIAE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND REQUEST FOR STAY (RULE 8.485 (e))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Barbara, CA, addressed as set forth below;

(X) By electronically transmitting a true copy thereof;

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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 17th day of June, 2020, at Santa Barbara, California.

Signed: s/ Stephen K. Dunkle