AUTOMATIC APPEAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ARTURO JUAREZ SUAREZ, Defendant and Appellant.	DEATH PENALTY CASE NO. S105876 (Napa Co. Super. Ct. No. CR 103779)

Automatic Appeal from the Judgment of The Superior Court of The State of California in and for The County of Napa
The Honorable W. Scott Snowden, Presiding

APPELLANT'S SUPPLEMENTAL BRIEF

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APPELLANT'S SUPPLEMENTAL BRIEF

Appellant hereby files a brief supplementing Argument I, as allowed by California Rules of Court, rule 8.520, subd. (d).

I. DEATH QUALIFICATION ACTS AS A PROXY FOR RACIAL DISCRIMINATION AND VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS.

A substantial amount of research now makes it unmistakably clear that the process of death qualification produces unrepresentative juries that are not comprised of a fair cross-section of the community. Death qualification skews the jury pool away from proportionate representation, and violates equal protection.

An empirical study published in March of 2020 shows that racial disparities documented in prosecutors' exercise of for-cause exclusions in several states actually exceed the sizable disparities in their use of peremptory challenges. (Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury* (2020) 118 Mich. L.Rev. 785.) That same study showed that in the high court's leading *Batson*[1] cases (*Flowers v. Mississippi* (2019) ___U.S.___ [139 S. Ct. 2228]; *Foster v. Chatman* (2016) 136 S.Ct. 1737; *Snyder v. Louisiana* (2008) 552 U.S. 472) the bulk of eligible black jurors were *removed before the use of peremptory challenges even began*. (Frampton*, supra*, at pp. 799-805.)

A wide variety of social science evidence establishes the fact that based upon their opposition to capital punishment, blacks are significantly more likely than whites to be excluded from capital juries through death qualification. (Cover, *The Eighth Amendment's Lost Jurors* (2016) 92 Ind. L.J. 113; Levinson, Smith & Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 N.Y.U. L.Rev. 513; Beckett & Evans, *The*

[1] (*Batson v. Kentucky* (1986) 476 U.S. 79.)

Role of Race in Washington State Capital Sentencing, *1981–2014* (2016) 6 Col. J. Race & L. 77; Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Case*s, *1997-2012* (2017) 9 Ne.U. L.Rev. 299; Eisenberg, et al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014* (2017) 68 S.C. L.Rev. 373; Levinson, Smith & Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 N.Y.U. L.Rev. 513.) Research demonstrates a consistent difference in exclusion rates; the percentage of African–Americans who are typically excluded was consistently between 25 percent and 35 percent, as compared to the percentage of whites who were removed, which typically ranged from less than 10 percent to 20 percent.

The U.S. Supreme Court recently declared that "'the central concern' of the Fourteenth Amendment 'was to put an end to governmental discrimination on account of race.'" (*Flowers v. Mississippi, supra,* 139 S.Ct. 2228, 2240-2241. States may not discriminate on the basis of race in jury selection. (*Id*. at p. 2239.;

see also, *Ramos v. Louisiana* (2020) ___ U.S.___ [2020 U.S. LEXIS 2407] (striking down non-unanimous jury verdicts in large part because of their racist origins and effects).)

This Court has relied on *Lockhart v. McCree* (1986) 476 U.S. 162, 176, as authority to reject claims that death qualification improperly limits the participation of African-Americans and women in juries (*People v. Taylor* (2010) 48 Cal.4th 574, 603-604.) But *Lockhart* did so only in passing, noting that the point was not even argued by defendant.[2]

These studies, and many that preceded them, show the racist impact of death qualification. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (*Whole Woman's Health v. Hellerstedt* (2016) ___U.S.___ [136 S.Ct. 2292, 2306].)

Death qualification leads to the systematic exclusion of African-Americans and the empathy produced by their body of experience with the criminal justice system. (*People v. Wheeler*

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[2] "There is very little danger, therefore, and McCree does not even argue, that `death qualification' was instituted as a means for the State to arbitrarily skew the composition of capital-case juries." (*Lockhart v. McCree*, *supra*, 476 U.S. 162, 176.)

(1978) 22 Cal.3d 258, 576, fn. 17.) This is not an incidental effect, but rather a "feature," one of its chief purposes. Death qualification should be recognized for this, and struck down as violative of the Fourteenth Amendment.

II. THIS COURT SHOULD OVERRULE *PEOPLE v. RISER* AND ENFORCE CCP 229.

California Code of Civil Procedure section 229 limits challenges to jurors for bias against the death penalty in unambiguous terms:

> A challenge for implied bias may be taken for one or more of the following causes, and for no other: ... (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

The trial court followed the rulings of this Court, which has held since 1956 that the statute should be ignored:

> It would be doing violence to the purpose of these sections of the Penal Code [authorizing capital punishment], however, to construe the statutory language at issue here to permit these jurors to serve. It would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, it is hardly

> appropriate for this court to achieve by construction of an ambiguous statute.

(*People v. Riser* (1956) 47 Cal.2d 566, 576, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637-638.)

This Court has never explained what is "ambiguous" about this clearly written statute. The quoted statutory language was enacted in 1872 as part of the initial codification of California's penal laws and has remained intact since then. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 7, 9 (acknowledging language in the old statute, Pen. Code § 1074, subd. 8).) As noted in *Hovey*, the state court has long provided a "judicial gloss" to this statutory language so as to allow the "for cause" removal of jurors whose views would preclude them from imposing a death penalty, notwithstanding their ability to find the defendant guilty of a capital crime. (See *Hovey v. Superior Court, supra,* 28 Cal.3d 1, 9, fn. 7, 9, and cases cited therein interpreting the language of Code Civ. Proc., § 229, subd. (h) in former Pen. Code § 1074, subd. 8.)

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This "gloss," then, allows the removal of prospective jurors whose views would affect their penalty determination, even though those views would not affect their determination of guilt or innocence, thereby mandating exactly what the statute specifically sought to prevent—the removal of a prospective juror for any reason other than an inability to determine guilt. The "gloss" thus turns the statute on its head.

This Court's declaration that adherence to the statute would, de facto, abolish capital punishment in California was sheer hyperbole, and irrelevant to the proper construction of a statute. The legislature can amend that statute, or provide for additional peremptory challenges in capital cases, if it wishes to exclude from capital jury service Californians who will not impose the death penalty.

The *Riser* decision was a creature of a judicial tendency to relieve the legislature of its right and duty to revise statutes that courts find to be out-of-step with current affairs. That habit is on its way out, having been repudiated at the highest levels of the federal judiciary. (See O'Scainlain, *We Are All Textualists Now: The Legacy of Justice Antonin Scalia* (2017) 91 St. John's L.Rev. 303.)

When *Riser* was decided,

> [T]he approach was 'what should this statute be,' rather than what do 'the words on the paper say.' Our law schools made common law lawyers of future judges, who believed it was the role of the judiciary to make law, not merely to interpret it, as Justice Scalia famously observed in his book: A Matter of Interpretation. To quote Justice Kagan, the entire judicial endeavor was 'policy-oriented' with judges and law students alike 'pretending to be congressmen.'

(*Id*., at pp. 304-305.)

The language of the statute is not at all ambiguous. It authorizes removal of only those death penalty opponents who would be unable to return a guilty verdict in a capital case. "Where statutory text 'is unambiguous and provides a clear answer, we need go no further.'" (*Scher v. Burke* (2017) 3 Cal.5th 136, 148.)

In addition to being clear, the statutory language is also consistent with the governing federal constitutional law:

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering

> constitutional capital sentencing schemes
> by not following their oaths.'

(*Wainwright v. Witt* (1985) 469 U.S. 412, 423; *Gray v. Mississippi* (1987) 481 U.S. 648, 658-659.)

In California, that oath requires the return of a guilty verdict when guilt is shown beyond a reasonable doubt, but it does not require return of a death verdict under any circumstances.[3] If the plain language of the statute had been applied at Mr. Juarez's trial, no legitimate state interest would have been compromised. And the result would likely be the empanelment of a jury that would not have imposed the death penalty in this case.

Respect for the separation of powers under the California Constitution can and should require that state courts let the legislature determine whether new developments require an

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[3] The oath taken by California jurors in death penalty cases promises that they will "well and truly try the cause now pending before this Court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Code Civ. Proc., § 232, subd. (b).)

amendment or revision. (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053.)[4]

In addition to lacking federal constitutional footing, the persistence of the *Riser* rule violated Appellant's constitutional right to due process of law.

> Where ... a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion

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[4] As stated in *Steen*:

> The separation of powers doctrine owes its existence in California to article III, section 3 of the state Constitution, which provides that '[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' We have described the doctrine as limiting the authority of one of the three branches of government to arrogate to itself the core functions of another branch. Although the doctrine does not prohibit one branch from taking action that might affect another, the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another. [Citations]

(*Steen v. Appellate Division of Superior Court*, *supra,* 59 Cal.4th at p. 1053.)

> is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [Citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations.]

(*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) A statutory right to a jury that has not been purged of death penalty opponents able to decide guilt is, like the right to a jury with sentencing discretion in *Hicks*, one "that substantially affects the punishment imposed." (*Ibid*.)

Under the plain meaning of the statutory proviso for death qualification in California, no person charged with an offense exposing him to the death penalty can be convicted by a jury purged of death-scrupled jurors. *Riser* defied the Fourteenth Amendment due process clause, and deprived Mr. Juarez of due process at both phases of his trial.

Finally, we note that death qualification lacks any footing whatsoever in the text of the federal constitution or the expressed intent of the Framers. (Quigley, *Capital Jury Exclusion of Death Scrupled Jurors and International Due Process* (2004) 2 Ohio St.

Crim. L. 262, 269-271; Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. L.Rev. 87.) As stated in the latter article, "the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution" and "substantially weakens the people's check" on government power. (Cohen & Smith, *supra*, at p. 90.) Both phases of Mr. Juarez's trial were infected by the denial of due process of law as established by the state legislature and protected by the Fourteenth Amendment. The judgment should be reversed in its entirety.

III. CONCLUSION.

For the foregoing reasons, the judgment against Appellant must be reversed.

Respectfully submitted,

Dated: April 24, 2020

By:_____
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ARTURO JUAREZ SUAREZ

CERTIFICATE OF WORD COUNT

After conducting a word count on this supplemental brief, I have determined there are a total of 2787 words in a Century Schoolbook 13-point font.

Respectfully submitted,

Dated: April 27, 2020 By: /S/

MICHAEL R. SNEDEKER
LISA R. SHORT

Attorneys for Appellant
ARTURO JUAREZ SUAREZ

DECLARATION OF ELECTRONIC SERVICE

Re: *People v. Arturo Juarez Suarez*, Cal. Supreme Court No. S105876; Napa Co. Super Ct. No. CR 103779. I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. My electronic service address is m.snedeker@comcast.net. On April 27, 2020, I served a true copy of the attached

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on each of the following, by electronic mail, addressed as follows:

Patricia Daniels: pdaniels@capsf.org

California Appellate Project efiling: filing@capsf.org

DECLARATION OF SERVICE BY MAIL

Re: *People v. Arturo Juarez Suarez*, Cal. Supreme Court No. S105876; Napa Co. Super Ct. No. CR 103779. I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. My electronic service address is m.snedeker@comcast.net. On April 27, 2020, I served a true copy of the attached

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on each of the following, by placing same in an envelope (or envelopes) addressed as follows:

Arturo Juarez Suarez
#T-47397
CSP-SQ; 4-EB-36
San Quentin, CA 94974

Clerk, Napa County Superior Curt.
825 Brown Street
Napa, CA 94559

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that the foregoing is true and correct. Executed on April 27, 2020, in Portland, Oregon.

_____/s/_____
MICHAEL R. SNEDEKER

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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/s/Michael Snedeker
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