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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

THE STATE OF CALIFORNIA, Plaintiff, vs. 01 CLEAMON DEMONE JOHNSON, et al. Defendants.	Case No. BA424006 **MOTION # 32** **DEFENDANT JOHNSON'S MOTION TO STRIKE THE DEATH PENALTY BASED ON EXECUTIVE ACTION THAT IMPERMISSIBLY SHIFTS RESPONSIBILITY FOR DEATH DECISION FROM JURY (CALDWELL, RAMOS, *NEWSOM* MOTION); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SARAH S. SANGER** Date: May 3, 2019 Time: 8:30 Dept.: 103 The Honorable Curtis Rappe

TO THE CLERK OF THE COURT AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES:

Please take notice that Defendant Cleamon Johnson hereby moves and will further move on May 8, 2019 at 8:30 a.m., or as soon thereafter as counsel may be heard in the above-entitled court, for an order striking the death penalty as a potential punishment or for such other and further relief as the Court may deem just and proper. This motion is based on the grounds that, the Honorable Governor of the State of California, Gavin Newsom, has taken executive action that shifts the responsibility for a judgment of death from the jury and makes speculation regarding the actual implementation of a death sentence such that a California jury will not be able to provide a fundamentally fair capital trial or meet the heightened standard of reliability required in capital cases in violation of Mr. Johnson's rights to due process of law, a fair trial, to the effective assistance of counsel, to accurate, reliable, non-arbitrary, non-capricious guilt and penalty determinations and to be free from cruel and unusual punishment, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13, 14, 15, 17, 24, and 31 of the California Constitution.

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The motion will be based on this Notice of Motion, the Declaration of Sarah S. Sanger, the Memorandum of Points and Authorities served and filed herewith, such supplemental memoranda of points and authorities as hereafter may be filed with the court, all pleadings and documents heretofore filed with the Court and such oral argument as may be presented at the hearing on the motion.

Dated: April 12, 2019

Respectfully submitted,

SANGER SWYSEN & DUNKLE

Robert M. Sanger
Stephen K. Dunkle
Sarah S. Sanger

Victor Salerno

By: /s/ Sarah S. Sanger
Sarah S. Sanger
Attorneys for Defendant
Cleamon Demone Johnson

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The United States and California Supreme Courts have repeatedly emphasized the importance of a jury in capital cases and the importance of holding capital proceedings to a heightened standard of reliability. The penalty-phase decision must be made by the jury impartially, without believing that they do not have the ultimate responsibility of deciding death and without any speculation as to whether a death sentence will be, for example, overturned or commuted. In order for the system to work, capital jurors are required to assume that if a person is sentenced to death, that person will be executed.

Before Governor Gavin Newsom's Executive Order granting reprieve to the 737 people on death row, repealing the lethal injection protocol and dismantling the death chamber, California's death penalty system already prevented these constitutional safeguards from working. California jurors knew that there was only a *remote* possibility a sentence of death would lead to an execution. California's last execution was in 2006 and the capital punishment system was said to be dysfunctional and broken by no less than the former and current Chief Justices of California.

Governor Newsom made an executive order that was the logical extension of the reality of the death penalty in California. He believed that the death penalty is wrong but it is also dysfunctional, unfairly imposed and fallible. As Governor, he took the next logical step which resulted in reprieving the 737 people on death row, abandoning a search for a lethal injection protocol and dismantling of the Death Chamber at San Quentin. There was nationwide press and the dismantling of the chamber was shown on social media.

Given this executive action, and in light of the state of California's

death penalty system, a capital jury in California cannot meaningfully assume that a death sentence will be carried out. Everyone on Death Row received a reprieve, there is no protocol to impose death and the iconic Death Chamber at San Quentin has been dismantled. The jury can only speculate as to whether this Governor or a future Governor will extend reprieves or grant commutations or pardons. And, now, the jury would have to somehow assume, counter to fact, that a protocol to kill a prisoner will be enacted and that a death chamber will be rebuilt. A capital trial in California cannot meet the heightened standards of reliability required to safeguard Mr. Johnson's constitutional rights under the United States and California Constitutions.

Therefore, this Court must strike the death penalty in this case.

ARGUMENT

I.

A CAPITAL DEFENDANT HAS A RIGHT TO A FUNDAMENTALLY FAIR TRIAL WHICH REQUIRES A JURY THAT WILL NOT DELEGATE RESPONSIBILITY FOR ITS DETERMINATION AND WILL ASSUME A DEATH SENTENCE WILL RESULT IN AN EXECUTION BASED ON ITS DECISION

A capital defendant is entitled to "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 (*Zant*), emphasis omitted.) Recently, in *Hurst v. Florida*, the United States Supreme Court emphasized the importance of a defendant's right to an impartial jury in capital sentencing. (See *Hurst v. Florida* (2016) 136 S.Ct. 616, 619 (*Hurst*).) The Court held that the Sixth Amendment right to an impartial jury requires that a jury, not a judge, "find each fact necessary to impose a sentence of death." (*Id.*)

Moreover, because death is qualitatively different than other

punishments as it is final, "'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Zant, supra*, 462 U.S. at pp. 884-885, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (*Woodson*).) The Court has recognized that "many of the limits that [it] has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329 (*Caldwell*).)

Under the California Constitution, the due process clauses in Article I, sections 7 and 15 guarantee "a fundamentally fair decision-making process." (*People v. Ramos* (1984) 37 Cal.3d 136, 153 (*Ramos*).) This fundamental fairness requires that a penalty-phase jury not be "influenced by speculative and improper considerations." (*Id.* at p. 153 [finding a penalty-phase jury instruction unconstitutional because it invites the jury to be influenced by speculative and improper considerations].)

In *Caldwell*, the United States 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." (*Caldwell, supra*, 472 U.S. at pp. 328-329.) The Court's holding was in response to a prosecutor's penalty-phase argument to the jury that a death sentence is not final because it will be automatically reviewed by the Mississippi Supreme Court. (*Id.* at pp. 324-326.)

The *Caldwell* Court listed four reasons "to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." (*Caldwell, supra*, 472 U.S. at p. 330.) First, the jury, not the appellate court, is in the best position to determine the

appropriateness of a death sentence. (*Id.* at pp. 330-331.) Second, the prosecutor's "assurance" that death is not final will make juries more likely to sentence someone to death to "send a message" even when unconvinced death is appropriate. (*Id.* at pp. 331-332.) Third, "[b]ias could similarly stem from the fact that some jurors may correctly assume that a sentence of life in prison could not be increased to a death sentence on appeal." (*Id.* at p. 332.) Fourth, the jurors are in an "unfamiliar" situation and must make a "very difficult and uncomfortable choice," making the idea that they could delegate responsibility to the appellate courts attractive. (*Id.* at p. 332-333.)

For similar reasons, the California Supreme Court held that an instruction during the penalty phase of a capital trial referencing the California Governor's power to commute a sentence to life without possibility of parole (LWOPP) or a sentence to death is unconstitutional. (*Ramos*, *supra*, 37 Cal.3d at p. 155.) The Court found that the "most obvious problem is the speculative nature of the inquiry that the instruction invites." (*Id.* at p. 156.) The instruction "invites the jury to go beyond its proper role and attempt to 'preempt' the Governor's constitutional authority by imposing a sentence that will at least minimize the opportunity for such a commutation." (*Id.* at p. 158.) Essentially, it "may tend to diminish the jury's sense of responsibility for its action." (*Id.* at p. 157.) Therefore, the Court held that the instruction on the Governor's commutation power violated the defendant's right to a fundamentally fair decision-making process free from speculative inquiries that tend to diminish the jury's responsibility for its actions. (*Id.* at pp. 156-158; see also *People v. Davenport* (1985) 41 Cal.3d 247, 287-288 [finding that a prosecution's discussion of both the governor's power to commute LWOPP sentences and death sentences still violated the California Constitution].)

The California Supreme Court has also held that "[i]nforming a jury

that 'whether or not there were circumstances that might preclude either the death penalty or life without possibility of parole from being carried out, [the jury] should assume it would be carried out for determining the appropriate sentence for this defendant' is proper." (*People v. Ledesma* (2006) 39 Cal.4th 641, 737 (*Ledesma*), quoting *People v. Thompson* (1988) 45 Cal.3d 86, 131 (*Thompson*).)

The jurisprudence regarding the jury's role in the penalty phase of a capital trial emphasizes the need for fair and reasoned decisions free from speculation. Jurors cannot be led to view their decision to sentence someone to death as merely "send[ing] a message." (*Caldwell, supra*, 472 U.S. at pp. 331-332.) Jurors cannot be led to delegate their responsibility in deciding between life and death to the Governor or to the appellate process. (*Id.* at pp. 332-333; *Ramos, supra*, 37 Cal.3d at p. 157.) Jurors must be able to fully appreciate the weight of their decision, they must be able to assume that if they choose death, a person will be executed. (*Ledesmo, supra*, 39 Cal.4th at p. 737.) Without these safeguards it is impossible for a capital defendant to receive the fundamentally fair penalty phase required by the United States and California Constitutions.

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III.

THE DEATH PENALTY SHOULD BE STRICKEN BECAUSE THE STATE OF CALIFORNIA'S DEATH PENALTY SYSTEM, NOW INCLUDING GOVERNOR NEWSOM'S EXECUTIVE ORDER, PREVENTS A CALIFORNIA JURY FROM PROVIDING MR. JOHNSON THE FUNDAMENTALLY FAIR PROCESS SUBJECT TO HEIGHTENED STANDARDS OF RELIABILITY THAT IS REQUIRED UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Governor Newsom's Executive Order Indicates to California Jurors That a Person Sentenced to Death Will Not Be Executed

On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19 ordering an executive moratorium, a repeal of California's lethal injection protocol and the closure of the Death Chamber at San Quentin. (Declaration of Sarah S. Sanger ¶ 2, Exhibit A.) Governor Newsom "will not oversee execution of any person while Governor." (Exhibit A, p. 1.) While the Executive Order will be in effect only as long as Governor Newsom is Governor, his statements, his reprieves, the withdrawal of the lethal injection protocol and the images of the dismantling of the Death Chamber symbolize to potential jurors that a sentence to death does not mean an execution. Moreover, as Governor Newsom stated in his Order, it is already true that no one has been executed in California since 2006. (Exhibit A, p.1.)

The Executive Order was only one step towards abolishing the death penalty in California among many. After issuing the Order and speaking out strongly against the death penalty, it was reported that Governor Newsom is considering a plan to prohibit new death sentences in criminal cases. (Sanger Decl. ¶ 3; Exhibit B.)

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B. In Addition to the Executive Order, Both the Legislature and the Judiciary Have Also Made Public Statements Undermining Any Public Belief That the Death Penalty Will Be Carried out In California

Governor Newsom's message to the people, including all potential jurors, was further emphasized when, on the same day that Governor Newsom issued his Executive Order, Assembly Member Marc Levine introduced a Constitutional Amendment to the California Legislature to abolish the death penalty. (Sanger Decl. ¶ 4; Exhibit C.)

If that were not enough of an emphasis on the points made by Governor Newsom, two weeks later, on March 28, 2019, in *People v. Potts*, Justice Liu stated:

> "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* (March 28, 2019, S072161) ___ Cal.4th ___, [p. 1, conc. op. Liu, J.] (*Potts*).)

Justice Liu then discussed the various leaders of the judiciary who have called out the absurdity of California's death penalty scheme, including former Chief Justice Ronald George, current Chief Justice Cantil-Sakauye, U.S. District Judge Cormac Carney, Senior Judge Arthur Alarcón of the United States Court of Appeals for the Ninth Circuit. (*Id.* [pp. 2-4, conc. op. Liu, J.].)

Justice Liu also discussed the Legislature's blue-ribbon commission comprised of law enforcement officials, prosecutors, public defenders and scholars. (*Id.* [pp. 4-5, conc. op. Liu, J.].) However, the commission's recommendations were never implemented or put to the voters. (*Id.* [p. 5, conc. op. Liu, J.].) While discussing Proposition 66, meant to fix the broken

system, Justice Liu characterized the Proposition as "promis[ing] more than the system can deliver." (*Id.* [p. 7, conc. op. Liu, J.].)

The Governor, Legislators and members of the Judiciary recognize that California's death penalty system is unworkable and does not lead to the fair administration of justice. Governor Newsom and other public officials are working to abolish the death penalty in California. As a result of the Governor's direct orders, bolstered by the others, potential jurors see that the death penalty is on its way out and that a death sentence has only a remote possibility of being carried out.

C. A Jury Instruction Cannot Be Sufficient to Instill the Sense of Responsibility Required of a Capital Jury

In *Ledesma*, the Court found the following instruction proper:

> "'Whether or not there are circumstances that might preclude either the death penalty or life without possibility of parole from being carried out, you are to assume it would be carried out for purposes of determining the appropriate sentence for this defendant. You are to assume that if you sentence [defendant] to life in imprisonment without the possibility of parole he will spend the rest of his life in state prison, and you are to assume that if you sentence [defendant] to death he will be executed in the gas chamber.'"
> (*Ledesma, supra*, 39 Cal.4th at p. 737.)

While this was unlikely to have been effective even where there seemed to be some possibility that death sentences would be carried out, it is ludicrous now. All of the residents of Death Row have received reprieves, there is no protocol to execute anyone and the death chamber has been dismantled. To instruct jurors in a death penalty case to "assume [the death penalty] will be carried out" when the trial is over would be like asking them to decide a case involving gravity and to assume that they will be able to walk on the ceiling when the trial is over.

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D. Due to the Current State of California's Death Penalty System, a California Jury Would Not Be Able to Provide Mr. Johnson with a Fundamentally Fair Capital Trial

Due to the widely reported and dramatic steps taken by Governor Newsom in conjunction with the existing failures of the system and, now, the statements of others towards abolishing the death penalty in California, it is impossible to provide Mr. Johnson a "fundamentally fair decision-making process" as is required. (*Ramos*, *supra*, 37 Cal.3d at p. 153.) Jurors will be influenced by the speculative and improper considerations the Courts have warned against. (See *Ramos*, *supra*, 37 Cal.3d at p. 156; *Caldwell*, *supra*, 472 U.S. at pp. 331-333; *Ledesma*, *supra*, 39 Cal.4th at p. 737.) Given the likelihood of these considerations influencing California jurors and the requirement of heightened reliability in capital sentencing, the death penalty must be stricken as a potential punishment. (*Zant*, *supra*, 462 U.S. at pp. 884-885; *Woodson*, *supra*, 428 U.S. at p. 305.)

In *Caldwell*, the Court worried that if the prosecution told jurors about the appellate process, capital jurors would be more likely to sentence someone to death to "send a message" even when unconvinced death is appropriate. (*Caldwell*, *supra*, 472 U.S. at pp. 331-332.) Here, in California, Governor Newsom has made it clear that he will do whatever he can to end the death penalty. Jurors will know of the reprieve of everyone on Death Row and they will know that the Governor has done away with the protocol to execute. Jurors will have heard or seen the dramatic dismantling of the Death Chamber at San Quentin. Jurors will know that there have been no executions in California for the past thirteen years. Jurors in California are more likely to view a death sentence as a way to send a message regardless of the appropriateness of the sentence than as an actual decision to execute a person.

Moreover, in both *Caldwell* and *Ramos*, the Courts emphasized that considerations of post-conviction procedures invite the jury to delegate its responsibility to those who participate in the post-conviction procedures. (*Caldwell*, *supra*, 472 U.S. at pp. 332-333; *Ramos*, *supra*, 37 Cal.3d at p. 157.) In California, jurors will not believe an execution is likely to occur because of the actions of government officials and the fact they have not seen an execution in California since 2006. Under these circumstances, a jury will likely delegate its responsibility to the Governor and Legislators who have made it clear to the public they intend to abolish the death penalty.

Finally, when determining the appropriateness of a death sentence, jurors may be told that they must assume a death sentence would be carried out. (*Ledesma*, *supra*, 39 Cal.4th at p. 737.) A juror in California will have seen the Death Chamber dismantled, will have heard of or read Governor Newsom's Order preventing executions and will know that no one has been executed in California since 2006. Such a juror cannot meaningfully assume that the person before them will be executed in the currently dismantled Death Chamber in San Quentin.

Executions in California are a relic of the past and jurors know this. More importantly, now they are faced with an Executive Order denying the reality of the death sentence. As a result, a jury in California today would not be able to provide Mr. Johnson the fundamentally fair process subject to heightened standards of reliability as required under the United States and California Constitutions.

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CONCLUSION

For the above-stated reasons, this Court should strike the death penalty in this case.

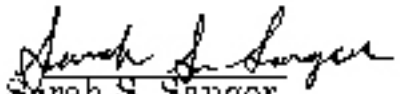
Dated: April 12, 2019

Respectfully submitted,

SANGER SWYSEN & DUNKLE

Robert M. Sanger
Stephen K. Dunkle
Sarah S. Sanger

Victor Salerno

By: 
Sarah S. Sanger
Attorneys for Defendant
Cleamon Demone Johnson

DECLARATION OF SARAH S. SANGER

I, Sarah S. Sanger, hereby declare:

1. I am an attorney duly licensed to practice in the State of California and an associate in the law firm of Sanger Swysen & Dunkle, assisting Robert Sanger, counsel of record for defendant Cleamon Demone Johnson in the above-entitled case.

2. On March 13, 2019, California Governor Gavin Newsom issued an Executive Order, a true and correct copy of which is attached hereto as Exhibit A. The Order basically does three things: it grants a reprieve to all of the people on California's Death Row; it repeals the lethal injection protocol; and it orders the dismantling of the death chamber in San Quentin.

3. On March 21, 2019, the Los Angeles Times reported that Governor Newsom is considering a plan to prohibit new death sentences in criminal cases. A true an correct copy of the article is attached as Exhibit B.

4. Assembly Member Marc Levine introduced a Constitutional Amendment to the California Legislature to abolish the death penalty on March 13, 2019. A true and correct copy of Assembly Constitutional Amendment No. 12 is attached as Exhibit C.

5. According to the records of the California Department of Corrections and Rehabilitation, at the time of Governor Newsom's Order, there were approximately 737 people on California's Death Row (Condemned Row).

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 12th day of April, 2019 at Santa Barbara, California.

Sarah S. Sanger

EXHIBIT A

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

Executive Order N-09-19

WHEREAS, California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer.

WHEREAS, the state's bedrock responsibility to ensure equal justice under the law applies to all people no matter their race, mental ability, where they live, or how much money they have.

WHEREAS, death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation.

WHEREAS, innocent people have been sentenced to death in California. Moreover, the National Academy of Sciences estimates that as many as one in 25 people sentenced to death in the United States is likely innocent.

WHEREAS, since 1978, California has spent $5 billion on a death penalty system that has executed 13 people.

WHEREAS, no person has been executed since 2006 because California's execution protocols have not been lawful. Yet today, 25 California death row inmates have exhausted all of their state and federal appeals and could be eligible for an execution date.

WHEREAS, I will not oversee execution of any person while Governor.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the Constitution and statutes of the State of California, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

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

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order shall be filed with the Office of the Secretary of State and that widespread publicity and notice shall be given to this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its departments, agencies, or other entities, its officers or employees or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 10th day of March 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

EXHIBIT B

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By PHIL WILLON and PATRICK MCGREEVY
MAR 21, 2019 | SACRAMENTO





Gov. Gavin Newsom announces a moratorium on California's death penalty during a news conference at the state Capitol on March 13. (Justin Sullivan / Getty Images)

A week after issuing an executive order imposing a blanket moratorium on the execution of California death row inmates, Gov. Gavin Newsom said he is considering a plan to prohibit any new death sentences in local criminal cases.

Newsom's pronouncement could create conflict with another top Democratic leader, state Atty. Gen. Xavier Becerra, who has supported capital punishment, even though the governor said he wants to work collaboratively with the attorney general.

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Newsom reiterated his desire to abolish the death penalty and said he hopes to work with Becerra and others to determine whether, as governor, he can act "on behalf of the people in this state to no longer prosecute death."

"There is a protocol of death and an administration of death in the state of California, and it consumes the court's time, it consumes the criminal justice system, it exhausts the soul and the pocketbook," Newsom said during a conference call with reporters from ethnic news outlets Tuesday. "I would ultimately like to shut down that system of death."

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Though it is not entirely clear how Newsom would carry out such an order, he could either have Becerra direct local district attorneys not to seek the death penalty or order Becerra to not defend appeals. Both approaches would probably face legal challenges.

The governor's comments put Becerra in an awkward spot.

Becerra last week praised Newsom's death penalty moratorium as a "bold, new direction" for the state and has expressed reservations about whether the death penalty is justly applied, but the attorney general has said previously he supports capital punishment. In fact, Becerra in 2017 sought a death sentence for the killer responsible for the mass shooting that left eight people dead at a Seal Beach salon in 2011.

Asked whether the attorney general will stop defending death sentences on appeal or direct county prosecutors to

stop seeking death sentences, a Becerra spokeswoman said he is reviewing what role his office will play

"The Department of Justice will work with Governor Newsom and his team as he implements his executive order and will continue to hold criminals accountable," spokeswoman Bethany Lesser said.

After the Times published this story, Becerra requested an opportunity to clarify his position on the death penalty. In a telephone interview Thursday, he declined to answer if he supported or opposed capital punishment. He said only that, as attorney general, it was his duty to enforce the laws in California, the death penalty among them.

"Where I stand personally on it, I have real reservations about the death penalty. I think there is ample proof that it has not worked the way we would want when it comes to undertaking the most severe form of punishment that's not reversible," Becerra said.

Becerra did say he voted in favor of Proposition 62 in November, which would have abolished the death penalty in the state. The measure was rejected by California voters.

The U.S. 9th Circuit Court of Appeals in San Francisco on Monday asked the attorney general's Department of Justice to indicate whether the governor's moratorium will affect a death penalty case involving Martin Kipp, who was convicted in the 1983 slaying of Antaya Yvette Howard of Huntington Beach, a former basketball star at Marina High School.

"The Office of the Attorney General is in the process of determining the full effect of the Executive Order on death penalty cases," the state Department of Justice told the court in a letter.

Even if Becerra disagrees with Newsom, he might not have a choice if the governor decides to force the issue.

Because the California Constitution gives the governor "supreme executive power" over the executive branch, Newsom could order Becerra to take action that could suspend all death penalty prosecutions across the state.

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"In California's executive branch, the governor has the final word," said David A. Carrillo, executive director of the California Constitution Center at Berkeley Law.

In 1981, the California Supreme Court ruled that the governor's constitutional powers give him direct authority over the attorney general.

"The constitutional pattern is crystal clear: If a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the last word to

over the uniform execution of the laws of the state, the governor retains the constitutional executive power to determine the public interest," the court decision stated.

That ruling came during a clash between Gov. Jerry Brown and Atty. Gen. George Deukmejian over a collective bargaining law for state workers. Deukmejian had sued the governor over the implementation of the law.

The constitution also states that the attorney general, as the state's chief law enforcement officer, has "direct supervision over every county district attorney "in all matters pertaining to the duties of their respective offices" — opening up the possibility that he could order locally elected prosecutors to cease seeking the death penalty in murder trials.

Any attempt by the attorney general to dictate how a county district attorney can handle murder prosecutions would almost assuredly be unconstitutional and challenged in court, said Assemblyman Jordan Cunningham (R-Templeton), a former deputy district attorney. District attorneys serve independent of the attorney general, he said.

"There's a lot of D.A.s who I have spoken to, who I know, who aren't happy with the moratorium that we have now," Cunningham said. "We don't live in a system where one person gets elected governor and they get to do what they want by executive fiat."

California District Attorneys Assn. President Birgit Fladager said her organization's members are elected by voters and "will determine how best to pursue justice on behalf of our constituents."

While death sentences have been on the decline across California, Los Angeles and Riverside counties have sent the most people to death row since 2012 — 21 from Los Angeles County and 19 from Riverside County, according to the Death Penalty Information Center, which provides information and analysis on the death penalty but does not take a position on that form of punishment.

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Both Los Angeles County Dist. Atty. Jackie Lacey and Riverside County Dist. Atty. Michael Hestrin declined to comment on the governor's remarks. In 2016, both Lacey and Hestrin supported Proposition 66, which accelerates the appeals process in capital cases. The measure was narrowly approved by California voters.

State officials in other states have intervened to take over cases in which prosecutors have refused to seek the death penalty, said Robert Dunham, executive director of the Death Penalty Information Center. Dunham said that he does not know the specific law in California but that district attorneys generally have independent powers to seek the death penalty in cases.

He added that the attorney general could always decide not to defend death sentences when they reach the

appeals courts.

Newsom emphasized that he planned to collaborate with the attorney general about the possibility of ending future death sentences, and he gave no indication that he would attempt to force Becerra to take action.

"The attorney general is a close friend of mine, a political ally, meaning someone I respect, and I want to work collaboratively with the attorney general's office," Newsom said Tuesday. "That said, I've not formally requested that of the AG's office as we continue to dialogue about the consequences of doing so. I want more clarity on what that means and [so do] that doesn't mean, and we're also not only working with his office, but trying to understand from the courts' perspective of what that will mean as well."

Locally elected district attorneys in California's 58 counties prosecute the vast majority of criminal cases in state, including first-degree murder cases, and also decide whether to seek the death penalty. The attorney general, however, has the legal authority to intervene in criminal cases. Those instances have traditionally been limited to cases in which the local district attorney's office has been recused or removed from a case for other reasons.

The attorney general's office in 2017, for example, took over the prosecution of Scott Dekraai, the man who confessed to slaughtering eight people in a Seal Beach salon in 2011. Becerra ordered his office to seek the death penalty against Dekraai. The judge later blocked prosecutors from pursuing the death penalty, and Dekraai eventually was sentenced to life in prison.

After being appointed California attorney general by Brown in 2017, replacing Kamala Harris, Becerra said he supported capital punishment but added that the state needs to put more reforms and resources into place to ensure it is fairly applied.

"I support the death penalty, but I hate the way it's being executed," Becerra said during his confirmation hearing in the state Senate.

Newsom last week announced he was using his constitutional powers to impose a blanket reprieve on all 737 death row inmates in California, and he vowed that no executions would take place while he served as governor. Newsom also ordered the dismantling of the death chamber at San Quentin State Prison and suspended the state's efforts to devise a method of lethal injection that would pass muster with the courts.

Newsom said he did so because studies show the death penalty discriminates against African Americans and Latinos, as well as the mentally ill and poor defendants who cannot afford high-priced lawyers. He also cited research showing that 164 condemned prisoners nationwide have been exonerated since 1973, evidence that California risked putting innocent inmates to death.

Because his reprieves are in essence temporary stays of execution and can be lifted by his successor in the governor's office, Newsom said he also is considering the prospect of permanently commuting death sentences to life sentences without the possibility of parole.

Newsom has constitutional authority to commute sentences to life in prison for condemned inmates convicted of a single felony. But the governor cannot commute the death sentence of a prisoner convicted of two separate felonies — a population that includes more than half the inmates on death row — without the concurrence of the California Supreme Court.



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Phil Willon

Phil Willon covers Gov. Gavin Newsom and California politics for the Los Angeles Times. His reports from Sacramento and his previous assignments included the state governor's race and the 2016 U.S. Senate race. Before heading north, Willon covered Los Angeles Mayor Antonio Villaraigosa and covered Southern California's mountains and deserts as the paper's state correspondent in the Inland Empire. Prior to joining The Times, Willon served as the Washington, D.C., correspondent for the Tampa Tribune. At the Tribune, Willon also covered Florida Gov. Lawton Chiles, Hurricane Andrew and the investigation leading to the arrest of serial killer Danny Rolling. He began his newspaper career as the Rent Island correspondent for the Capital in Annapolis, Md. Willon grew up in Southern California and graduated from UC San Diego.



Patrick McGreevy

Patrick McGreevy covers the California Legislature out of the Sacramento bureau. Since joining the Los Angeles Times in 1998, he has worked in the City Hall and San Fernando Valley bureaus, writing about subjects including Valley secession, LAPD reform and city government during the administrations of Mayors Richard Riordan, James Hahn and Antonio Villaraigosa. He is a native of San Diego and a graduate of San Jose State University.

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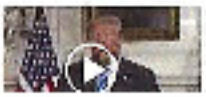

FEB 15, 2019

Newsom and Becerra announce plan to sue Trump over national emergency

California Atty. Gen. Xavier Becerra, accompanied by Gov. Gavin Newsom, said the state would probably sue President Trump over his emergency declaration to fund a wall on the U.S.-Mexico border.

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EXHIBIT C

Assembly Constitutional Amendment No. 12

Introduced by Assembly Member Levine
(Coauthors: Assembly Members Bloom, Bonta, Carrillo, Chiu, Chu, Eggman, Friedman, Gipson, Gonzalez, Holden, Kalra, McCarty, Nazarian, Robert Rivas, Mark Stone, Weber, and Wicks)
(Coauthors: Senators Bradford, Durazo, McGuire, Morrell, Wieckowski, and Wiener)

March 13, 2019

Assembly Constitutional Amendment No. 12—A resolution to propose to the people of the State of California an amendment to the Constitution of the State, by repealing and adding Section 27 of Article I thereof, relating to the death penalty.

LEGISLATIVE COUNSEL'S DIGEST

ACA 12, as introduced, Levine. Death penalty.

The California Constitution requires that all statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The California Constitution requires that the death penalty not be deemed to be, or to constitute, the infliction of cruel or unusual punishment.

This measure would amend the California Constitution to delete that provision and instead would prohibit the death penalty from being imposed as a punishment for any violation of law.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

Resolved by the Assembly, the Senate concurring, That the Legislature of the State of California at its 2019–20 Regular Session commencing on the third day of December 2018, two-thirds of the membership of each house concurring, hereby proposes to the people of the State of California, that the Constitution of the State be amended as follows:

First—That Section 27 of Article I thereof is repealed.

~~SEC. 27. All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect subject to legislative amendment or repeal by statute, initiative, or referendum.~~

~~The death penalty provided for under these statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.~~

Second—That Section 27 is added to Article I thereof, to read:

SEC. 27. The death penalty shall not be imposed as a punishment for any violations of law.

O

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On April 12, 2019 I served the foregoing document entitled: **DEFENDANT JOHNSON'S MOTION TO STRIKE THE DEATH PENALTY BASED ON EXECUTIVE ACTION THAT IMPERMISSIBLY SHIFTS RESPONSIBILITY FOR DEATH DECISION FROM JURY (CALDWELL, RAMOS, NEWSOM MOTION); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SARAH S. SANGER** on the interested parties in this action by depositing a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

X **BY ELECTRONIC TRANSMISSION** - I caused the above-referenced document(s) to be transmitted via electronic transmission to the interested parties at the email addresses referenced in the attached service list.

_ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

____ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address referenced on the attached service list.

X **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed April 12, 2019 at Santa Barbara, California.

Julie Swanson

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