

No. S284496

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OFFICE OF THE STATE PUBLIC DEFENDER et al.
Petitioners,

vs.

ROB BONTA, as Attorney General, Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

AND

PROPOSED BRIEF OF *AMICUS CURIAE* JEFFREY F. ROSEN,
DISTRICT ATTORNEY OF SANTA CLARA COUNTY, CALIFORNIA
IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2
APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF 3
INTERESTS OF *AMICUS CURIAE* 3
BRIEF OF *AMICUS CURIAE* 4
INTRODUCTION..... 4
BACKGROUND..... 4
ARGUMENT 7
CONCLUSION 11
CERTIFICATE OF WORD COUNT 12

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**APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amicus curiae* respectfully request leave to file the accompanying Proposed *Amicus Curiae* Brief in Support of Plaintiffs.

INTERESTS OF *AMICUS CURIAE* ¹

The Santa Clara County District Attorney represents the 1.9 million people of Santa Clara County.

¹ Pursuant to Rule 8.520(f)(4), *amicus* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

BRIEF OF *AMICUS CURIAE*

INTRODUCTION

The Petitioners have raised grievous allegations concerning the death penalty in California. They have backed these allegations with expansive, robust and statistically valid evidence. If these allegations are true, the death penalty in California is inextricably bound with structural racism in a knot that simply cannot be untangled. Let us put this clearly and simply, if these allegations are true, then every day that California prosecutors pursue, seek or defend a death sentence is another day that people of color are subordinated and sentenced to death based in part upon their race. This is simply unconscionable. If these allegations are true, then the practice must cease immediately. No District Attorney wants to pursue an unconstitutional sentence. This is not a moment for further years of contemplation and debate. This is a vital question that must be answered by the Justices of the Supreme Court of California. Time is of the essence.

BACKGROUND

Like all large California counties, Santa Clara County has convicted men now sentenced to death who are serving life terms while they await their execution date. Like all large California counties, these cases have been mired in decades of litigation, and virtually none of these cases are final. The emotional toll is tremendous on the next of kin and all family members enmeshed in the process. Since Proposition 66 returned many of these cases

back to Superior Court for certain *habeas* proceedings, the burden on the local District Attorney is considerable. If these sentences are Constitutionally valid, then these tremendous costs to both the victims and the County are valid, if it is not, these costs and delays are inexcusable.

Having concluded that the death penalty in California is irredeemably broken, the District Attorney of Santa Clara County, Jeffrey F. Rosen, decided to seek resentencing on all our remaining death penalty cases with the stipulation that the defendant agree to a Life without the possibility of Parole (“LWOP”) sentence. This stipulation was made without prejudice to other legal claims.

The petitions were based upon facts specific to each case as specified in Penal Code §1172.1. The petitions were also based upon structural factors which applied to each of these cases. In each case, we observed that:

First, we had lost confidence in the integrity of the death sentence, because of the evidence of systemic racial bias. We could not defend these sentences when we believed that actual bias, implicit bias and structural racism played some significant role in the death sentences. We did not charge that any particular actor exhibited bias, but we know that capital convictions do not happen in a vacuum. If the structure itself was infected with racial bias, then we could not have faith in the integrity of the ultimate sentence.

Second, the cases were usually decades old. They had all become stuck in a tortuous legal limbo waiting for a penalty that

will never arrive.² And yet, enormous time and resources are being expended on this fruitless litigation at the expense of current victims and criminal cases.³

Third, eliminating further penalty phase litigation will narrow the scope of the post-conviction litigation, expedite the conclusion of appellate review and pave the way for the long-awaited finality of these judgments.

Fourth, the Santa Clara County District Attorney's Office created the first Conviction Integrity Unit in the nation, which has exonerated individuals falsely convicted of egregious crimes. Law enforcement, prosecutors, and juries were certain of their guilt, until time allowed evidence to develop that proved these people were in fact innocent. While we do not currently believe any of these men convicted of murder and sentenced to death are innocent, only an arrogance incompatible with seeking justice would allow us to deny the possibility of error. Only callousness would allow us to foreclose all possibility of review.

² For example, in Santa Clara County there are two inmates who were sentenced to death in 1997, and yet the direct appeal has not been fully briefed. This, of course, is prior to any *habeas* litigation. In addition, there are several Santa Clara County cases in which the defendants still do not have *habeas* counsel even assigned with no counsel on the horizon.

³ Furthermore, this litigation usually results in reversal of the death verdict in any case. Of the California capital cases that are final, over 80% of them result in a reversal. Habeas Corpus Resource Center Annual Report (2023), p. 12 (<https://www.hcrc.ca.gov/documents/HCRC%20Annual%20Report%202023.pdf>)

Fifth, even a casual review of California death penalty cases reveals manifest inconsistencies so that some people are sentenced to death when others who committed nearly identical acts were sentenced to incarceration alone.

Originally, there were nineteen men on death row out of Santa Clara County cases. One case was reversed on other grounds prior to resentencing. One defendant died while his appeals were pending. Four individuals declined to stipulate to an LWOP sentence, and as such, they were not included in our petitions. The Superior Court has thus far granted twelve petitions and resentenced these men from death to life without the possibility of parole.⁴ One case is pending.⁵

ARGUMENT

Implicit in the issues posed by the Court are three related questions. First, why not wait and refer the matter to Superior Courts of the fifty-eight counties of California? Second, would not the Superior Courts be better positioned to clarify the legal and factual issues related to this question? Third, would not the Racial Justice Act, Penal Code §745, serve as the appropriate legal vehicle for this question as opposed to a constitutional challenge?

⁴ Two of these fourteen were actually sentenced to life terms at the request of the People.

⁵ The case is set for December 6, 2024.

Why not wait?

While one might look at the current system where cases are routinely delayed decades without closure and wonder what could waiting a few more years matter, this is only because such a miasma of weary cynicism has settled on our entire approach to the death penalty in California.

The Petitioners purport to have evidence demonstrating systemic racial bias with the death penalty. This is a very serious charge. It should be resolved expeditiously. Delay has tremendous practical impact. What should a prosecutor do with pending capital cases? Should they be stayed pending the outcome of the petitioners' challenge? Of course, staying the litigation is hardly fair to the accused or the victims, many of whom are quite elderly. On the other hand, proceeding forward as if these concerns had not been raised runs the risk of mooting the core of the litigation.

What should an ethical prosecutor do? It is easy enough to think a prosecutor can just ignore these issues until they are ultimately resolved by this Court after a lengthy detour back to the Superior Courts of the various California counties. But, if the data presented is accurate, then it follows there are systemic racial inequities in these sentences which should not be countenanced.

Why not refer to the Superior Courts?

Why not just send this issue back to the various Superior Courts for a more contemplative resolution that would allow a more thorough exploration of the legal and factual issues? As argued above, the price of this pace will be years and years of further delay. It inevitably invites forum shopping. Furthermore, for this particular challenge it hardly seems likely that the issue will be developed further in any notable way by further exploration in various Superior Courts. That might not be true if this were some obscure area of the law, or if it involved a new statute. By contrast, the racial implications of the death penalty have been debated and studied and discussed for literally generations. This question does not need more time to explore. Sending this back to Superior Courts for unnecessary litigation inevitably delays other pressing criminal matters. It is hardly news that post-Covid our Superior Courts are deeply impacted and stressed. Time and resources spent in every county on this issue is time and resources not spent on pending criminal matters. Finally, the Superior Courts do not have any specialized skill set to handle the statistical issues presented by the Petitioners that are absent in the Supreme Court.

Why not the Racial Justice Act?

First, the RJA is designed for case-by-case adjudication, it is not designed for systemic flaws. By necessity, a finding in one RJA case would not necessarily apply to any other death penalty case and each would need to make an individual claim. Second, the RJA is focused on statistical claims focusing on the specific *county*. Aside from Los Angeles, there are probably no counties that have a sufficient number of death penalty cases to allow for a robust statistical analysis. For example, prior to our own examination of structural bias and the death penalty, Santa Clara County had nineteen remaining death penalty cases. It is hardly practical to look for statistical patterns in such a small sample. The entire state of California, however, offers ample evidence, but the Racial Justice Act is limited to statistical explorations of a particular county's practices. The Racial Justice Act is not the right lens with which to explore this issue.

In sum, the Petitioners have provided compelling evidence of a problem of the strongest ethical magnitude. If the Petitioners are correct, and the data presented suggests that they are, then simple justice demands expeditious resolution not further delay. The price of delay is high in both human and systemic costs. The Superior Courts are ill suited to handle this question and could only do so by diverting scarce resources away from current cases. The same is true for the local District Attorneys who will need to divert resources to litigate this complex statistical issue. The Racial Justice Act is a deeply

inadequate tool for resolving this question. For all these reasons, we urge the Supreme Court to resolve this seminal question expeditiously.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to take this case as requested by Petitioners.

Dated: December 3, 2024

Respectfully submitted,

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Attorney

/s/ David A. Angel
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amicus Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 1,810 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File *Amicus Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: December 3, 2024

Respectfully submitted,

/s/ David A. Angel
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