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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S174886

The People,
Plaintiff and Respondent,

v.

Ricky Rene Madison,
Defendant and Appellant.

CAPITAL CASE

Superior Court of California
Los Angeles County
No. SA062408
Hon. James R. Dabney

SUPPLEMENTAL REPLY BRIEF

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Supplemental Reply Brief

I. Respondent Agrees: Nine Prior Prison Term Enhancements Should Be Stricken, and Two Prior Serious Felony Conviction May Be Struck in the Trial Court's Discretion

Respondent agrees that the enhancements for service of prior prison terms are now unauthorized by law and must be stricken in "furtherance of justice" (RB 12) and that two prior serious felony enhancements may be struck in the trial court's discretion on remand. (RB 14.)

II. Respondent's Denial That Appellant Is Entitled To a Full Resentencing Hearing on Remand Defies the Plain Meaning of Statutory Terms, All Legislative History, and the Defendant's Constitutional Rights to Due Process and Equal Protection of the Law

Respondent claims that appellant is "Not entitled to a full resentencing hearing because section 1172.75 does not apply to a non- final judgment like his, implicate a judgment of death, or apply to stayed enhancements; in any event, remand for resentencing would be futile." (RB 14.)

Respondent's claims defy the terms of the statute. Section 1172.75 contains no "carve outs" for individuals sentenced to death, with or without a final judgement on appeal. (See *People v. Thompson* (Oct. 25, 2024, No. E079255) 2024 Cal. App. LEXIS

672 [_ Cal.App.5th _] [noting the lack of a "carve out" for death-sentenced prisoners in section 1172.6 and concluding that they are entitled to seek resentencing accordingly].)[1]

Indeed, implying or creating carve outs for death sentenced prisoners would create Fourteenth Amendment Equal Protection issues recognized in *Thompson* – and Due Process issues not noted in *Thompson*.

"By its plain terms, section 1172.75 requires a full resentencing, not merely that the trial court strike the newly `invalid' enhancements." (*People v. Monroe* (2022) 85 Cal.App.5th 393, 402.) State statutes mandating a particular procedure that effectively creates, and by its plain terms protects, the liberty interest of the criminal defendant invoke the Due Process right under the federal if not the state constitution, directly and decisively. (U.S. Const., amend. 14, Cal. Const., art. I § 7; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Redd v. Guerrero* (9th Cir 2023) 84 F.4th 874, 894–896.)

Construing section 1172.75 to exclude death sentenced defendants is particularly inappropriate where, as here, the

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[1] Subdivision (a) of the new section 1172.75 declared:

Any sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code is legally invalid. (Pen. Code, § 1172.75, subd. (a).)

The information filed in this case shows no convictions for sexual offenses, and only two serious felony convictions.

legislative history behind a recent amendment reveals that such exclusion was contemplated and rejected. This year, Senate Bill 285 amended 1172.75 to include subdivision (f), which states:

> "Commencing on January 1, 2025, an individual who has been convicted of a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code and sentenced to death or a life term without the possibility of parole, who, as of January 1, 2025, has not had their judgment reviewed and verified by the sentencing court as provided in subdivision (c), is not eligible for recall and resentencing under this section. This subdivision does not apply retroactively."

Respondent avers:

> The Attorney General's best reading of this amendment is that individuals who have been convicted of a sexually violent offense (as defined), as well as individuals who have been sentenced to death or life without the possibility of parole, whose sentences have not yet been reviewed under section 1172.75 as of January 1, 2025, are not eligible for recall and resentencing under this statute. (*See People v. Reynoza* (2024) 15 Cal. 5th 982, 991 ["But the word and is not always to be taken conjunctively. It is sometimes, in a fair and rational construction of a statute, to be read as if it were or, and taken disjunctively . . . ."; see *People v. Bigelow* (1984) 37 Cal.3d 731, 755 ["the word `and' is often carelessly used when `or' is intended"]; 1A Singer & Singer, Statutes and Statutory Construction (7th ed. 2022) § 21:14 ["There has been . . . such laxity in the use of these terms [`and' and `or'] that courts have generally said the words are interchangeable and that one may

> be substituted for the other, if consistent with legislative intent"], some citations and internal quotations omitted.) (RB 24, fn. 6)

"The Attorney General's best reading" defies the legislative history, as well as the text, of that amendment.

The public safety committee analysis confirms that the legislature as a whole agreed to amend the statute to exclude only the sexually violent offenders condemned to death, and why.

> "Effect of this Bill: Earlier this year, Richard Allen Davis, a convicted murderer and sexually violent offender serving a death penalty sentence, petitioned for recall and resentencing under SB 483 on the basis that his sentence included enhancements declared legally invalid by SB 483. This petition was denied on May 31, 2024. SB 285 seeks to clarify that persons convicted of the most serious of offenses, such as Richard Allen Davis, are not eligible for resentencing under SB 483. Specifically, it states that an individual: 1) sentenced to death or life without parole; 2) who has been convicted of a sexually violent offense; and 3) who, as of January 1, 2025, has not had their judgement reviewed and verified by a sentencing court to confirm that the individual's term includes a specified legally invalid sentence enhancement, is not eligible for recall and resentencing under SB 483."[2]

An earlier version of the bill would have made section 1172.75 inapplicable to anyone sentenced to death, life without parole, or an indeterminate life sentence, or to anyone convicted of a sexually violent offense. But the bill that passed excludes only a

[2] https://apsf.assembly.ca.gov/system/files/2024-07/sb-285-allen-updated-analysis.pdf

subgroup of that larger group, i.e., individuals convicted of a sexually violent offense *and* sentenced to death. This mark-up shows the legislative response to the State's wish list:

> (f) This section does not apply to an individual currently sentenced to death, to a term of life without the possibility of parole, or to an indeterminate life sentence, or to any person currently serving a sentence for a Commencing on January 1, 2025, an individual who has been convicted of a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code and sentenced to death or a life term without the possibility of parole, who, as of January 1, 2025, has not had their judgment reviewed and verified by the sentencing court as provided in subdivision (c), is not eligible for recall and resentencing under this section. This subdivision does not apply retroactively.[3]

The legislative digest confirms that the legislature meant what it wrote in using the conjunctive term "and" rather than the disjunctive "or" that respondent reads to defy the text. "This bill would, commencing January 1, 2025, make an individual sentenced to death or a term of life without the possibility of parole, who has been convicted of a sexually violent offense, and who, as of January 1, 2025, has not had their judgment reviewed and verified by the sentencing court, as specified, ineligible for recall and resentencing under these provisions."[4]

The question of whether the section applies to stayed enhancements is currently under review in this Court in several

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[3] https://legiscan.com/CA/text/SB285/id/3013438

[4] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB285

cases. For purposes of the present case, the same doctrine applies: the plain language of the statute is controlling. (*People v. Saldana* (2023) 97 Cal.App.5th 1270, 1277.)

Respondent also claims that a remand for a full re-sentencing hearing would be futile. The claim assumes that this Court will affirm the single special circumstance finding that exposed appellant to the death penalty, and leave the trial court no discretion to reduce appellant's sentence based on his age, health, changes in the law, and how his character has changed in the decades of time he has served.

That assumption is unwarranted. The single special circumstance finding is fragile. It rests on evidentiary and instructional errors explicated in appellant's prior briefing. This Court could well conclude that the finding should be reversed, and that the murder conviction can be affirmed as one rendering him eligible for parole based on the facts and law at that time. The trial court will be unable to do so without a remand under section 1172.75.

III. REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED FOR FAILURE TO COMPLY WITH THE LEGISLATURE'S CLEARLY EXPRESSED LIMITATION ON DEATH QUALIFICATION OF CALIFORNIA JURIES IN THE WAKE OF *HICKS V. OKLAHOMA*

Urging a literal reading of this Court's request for supplemental briefing while arguing that this Court should *not*

read California *statutes* to mean what they say, respondent argues that this claim should be rejected because it is not based on any Post-Reply-Brief change in the law.

But as set out in the Introduction to appellant's supplemental opening brief (and *not* acknowledged by respondent), counsel's development of this claim is only half the story of the post-briefing action on the issue. As set out there:

> ... Appellant's Opening and Reply Briefs ... were filed prior to counsel's development, in *People v. Thomas*, No. S219382 (AOB filed 12/17/2019), of an independent claim based on California's statutory limitation on death qualification and *Hicks v. Oklahoma* (1980) 447 U.S. 343. **That claim was referenced, but the *Hicks* issue was not fully acknowledged or addressed – indeed, *Hicks* was nowhere cited – in this Court's decisions in *People v. Helzer* (S0123256, filed 1/22/24) and *People v. Suarez* (2020) 10 Cal.5th 116.** (SAOB p. 3, emphasis added.)

Respondent offers one argument on the merits that was not anticipated in appellant's prior briefing: *Hicks* and the plain meaning of the terms of Code of Civil Procedure section 229 are inapposite because "this Court has repeatedly held that Code of Civil Procedure section 229 and its predecessor can reasonably be read to comport with the legislative intent only if it includes the ability to strike jurors who have indicated that their ability to consider the possibility of imposing either the death penalty ... is substantially impaired." (RB pp. 36–37.)

This argument fails because none of this Court's decisions consider *Hicks* and its progeny. No good reason to continue to refrain from considering *Hicks* and its progeny is apparent.

State statutory language that plainly restricts the exercise of judicial discretion to abridge the liberty interests of criminal defendants must be followed under the federal mandate. See *Redd v. Guerrero*, *supra*, 84 F.4th at pp. 893–896 [capital habeas counsel appointment statute]; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957 [state statute setting number of peremptory challenges]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [state law established procedure for determination of "habitual offender"].)

Code of Civil Procedure section 229, by its plain terms, limits judicial discretion to remove capital jurors for implied bias 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." (Emphasis added.)

Here, as in *Hicks,* a liberty interest created by a state statute and protected by the federal constitution was not recognized as such by the state trial court. In both cases, the State argues that the predicates for a statutory mandate were not met. The arguments are similar. In *Hicks*, the State told the high court that the statute did not create an "an absolute right in view of "the revisory authority of the Oklahoma Court of Criminal Appeals." (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343*)* The asserted "revisory authority" was statutory, and it did not authorize the

state court to revise the statute, only the sentence imposed by a jury. Even so, the Court found the argument "unpersuasive." (*Id.* at pp. 346–347.)

Respondent does not and cannot claim that California's judge-made death qualification scheme protects the liberty interest of the capital defendant as would adherence to the statute's limiting terms. It favors the seating of jurors sympathetic to the prosecution on questions of guilt as well as capital punishment. As noted by Justice Liu in a relevant concurrence:

> [A] range of studies have continued to emerge post-Lockhart that build on the research [submitted in Lockhart] showing that death-qualified jurors are quite different from non-death-qualified jurors. (Levinson et al., *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, 569, fn. 247 (hereafter Levinson); see *id.* at pp. 543, 568–569 [critiquing Lockhart and citing studies finding that death-qualified jurors tend to be more conviction-prone than ordinary jurors]; Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation* (2006) 38 Ariz. St. L.J. 769, 784–785 [study of 1,201 capital jurors from over 350 trials found that death-qualified jurors have disproportionately punitive orientations, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution and conviction-prone]; see also Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process* (2007) 25 Behav. Sci. & L. 857; Butler & Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense* (2006) 36 J. Applied Soc. Psych. 1744.)

(*People v. Suarez* (2020) 10 Cal.5th 116, 192–193, Liu, J. Concur.)

The *Hicks* issue is ripe for examination under federal law, and must be given the benefit of that law in this case. *(Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 432 [after state law creates interest, federal law determines how it must be respected]; *Redd v. Guerrero*, *supra*, 84 F.4th at pp. 895–896 [same].)

As stated by the Supreme Court:

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." [Citations.] *Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest*. The Court has considered and rejected such an approach: "'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [The] *adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms*.'" [Citations.]

(*Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. at p. 432; emphasis added.)

Adherence to the plain language of the statute is likewise appropriate in deference to the state constitutional separation of powers.

The legislature was and is empowered to determine whether California courts should exclude prospective jurors for bias, express or implied, in capital cases as in all others. Relieving the legislature of that power and responsibility encroaches on that branch's power. (*Steen v. Appellate Div. of Superior Court* (2014) 59 Cal.4th 1045, 1053.)[5]

CONCLUSION

The requested relief should be granted.

Respectfully submitted,

Dated: November 13, 2024 By: /s/ Jeanne Keevan-Lynch

Attorney for Defendant and Appellant
Ricky Rene Madison

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[5] 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 Div. of Superior Court*, *supra*, 59 Cal.4th at p. 1053.)

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