KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013
(213) 897-2000

Direct Dial: (213) 897-6863
Fax: (213) 897-2808
E-mail: gary.lieberman@doj.ca.gov

August 3, 2011

Frederick K. Ohlrich
Court Administrator and Clerk
of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *People v. Michael Allen and Cleamon Johnson*
No. S066939
Oral Argument Date: Sept. 6, 2011

Dear Mr. Ohlrich:

Pursuant to Rule 8.520, subdivision (d)(1), respondent respectfully requests leave to file this letter brief, discussing the following cases that were decided by this Court after the filing of the Respondent's Brief on March 21, 2006.

Appellants contend that the trial court abused its discretion in dismissing Juror No. 11 during the guilt-phase deliberations. (See Allen AOB 620-650; Johnson AOB 29-73; RB 238-268.) The court excused Juror No. 11 based on his comments: (a) "[W]hen the prosecution rested, I knew she [the prosecutor] didn't have a case"; and (b) "I know Hispanics, they never cheat on timecards, so this witness [Connor] was at work, end of discussion." (See RB 240, 244, 248-249, 251-253.)

In *People v. Lomax* (2010) 49 Cal.4th 530, this Court thus summarized the standard of review for juror-removal claims:

> Although decisions to investigate juror misconduct and to discharge a juror are matters within the trial court's discretion [citation], we have concluded "a somewhat stronger showing" than is typical for abuse of discretion review must be made to support such decisions on appeal. [Citation.] . . . [T]he basis for a juror's disqualification must appear on the record as a "demonstrable reality." This standard involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence in the record supports the trial court's decision. [Citation.] It must appear "that the court as trier of fact

> *did* rely on evidence that, in light of the entire record, supports its conclusion that [disqualification] was established." [Citation.] However, in applying the demonstrable reality test, we do not reweigh the evidence. [Citation.] The inquiry is whether "the trial court's conclusion is manifestly supported by evidence on which the court actually relied."

(*Id.* at pp. 589-590, citing, inter alia, *People v. Wilson* (2008) 44 Cal.4th 758, 821, and *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053; italics in original.)

The *Lomax* court also noted that "trial courts are frequently confronted with conflicting evidence on the question whether a deliberating juror has exhibited a disqualifying bias. [Citation.] . . . In such circumstances, the trial court must weigh the credibility of those testifying and draw upon its own observations of the jurors . . . . We defer to factual determinations based on these assessments." (49 Cal.4th at p. 590.)

In *People v. Wilson*, *supra*, this Court concluded that the evidence did not show to a demonstrable reality that the juror in question, Juror No. 5, had relied on facts not in evidence. Rather, he "was merely relying on his life experiences to interpret the evidence presented." (44 Cal.4th at pp. 825, 832.) Juror No. 5 "asserted he . . . found th[e] mitigating circumstances predominated because, being African-American himself and having raised a son, he believed he had some insight into the negative family dynamics and harsh circumstances in which defendant was raised." (*Id.* at p. 814.)

The *Wilson* court observed:

> *That the alleged problems with Juror No. 5 arose during deliberations at the penalty phase rather than the guilt phase is significant.* Rather than the factfinding function undertaken by the jury at the guilt phase, "the sentencing function [at the penalty phase] is inherently moral and normative, not factual . . . . Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct. . . . A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct."

(44 Cal.4th at p. 830, italics added.)

Here, in contrast, Juror No. 11's misconduct in prejudging the case and relying on his extraneous knowledge, "I know Hispanics . . . never cheat on timecards," arose during deliberations in the guilt phase, where the jury was undertaking its core factfinding function.

Because the record established Juror No. 11's disqualification to serve as a demonstrable reality, appellants' claim that the trial court abused its discretion in removing that juror must fail.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General

GARY A. LIEBERMAN
Deputy Attorney General
State Bar No. 150876
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Michael Allen and Cleamon Johnson***
No.: **S066939**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 4, 2011, I served the attached **LETTER BRIEF**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Brent F. Romney
Attorney at Law
BLUMENTHAL LAW OFFICES
3993 Market Street
Riverside, CA 02501
Attorney for Michael Allen

Jennifer Lentz Snyder
Deputy District Attorney
L.A. County District Attorney's Office
320 West Temple Street, Room 766
Los Angeles, CA 90012

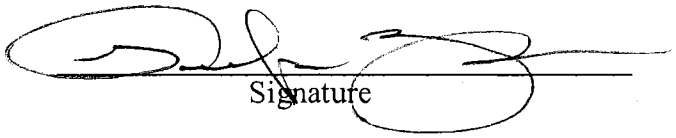
Andrew S. Love
Assistant State Public Defender
State Public Defender's Office - San Francisco
221 Main St., 10th Floor
San Francisco, CA 94105
Attorney for Cleamon Johnson

The Hon. Charles E. Horan, Judge
Los Angeles County Superior Court
East District
Pomona South Courthouse
400 Civic Center Plaza
Department M
Pomona, CA 91766
Attn: Clerk of the Court

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 4, 2011, at Los Angeles, California.

G. Zavala
Declarant



Signature

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