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Revised 4/02/2019

SUPREME COURT
FILED

MAR 27 2019

Jorge Navarrete Clerk

S251861

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DEAN A. SCHWARTZMILLER on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

JOINT APPENDIX A

Revised

10/15/2018

Court of Appeal, Sixth Appellate District

Susan S. Miller, Clerk/Executive Officer

Electronically FILED on 10/10/2018 by M. Chang, Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re DEAN ARTHUR SCHWARTZMILLER on Habeas Corpus.

H046018

Santa Clara County No. CC592684

BY THE COURT:

The petition for writ of habeas corpus is denied.

(Bamattre-Manoukian, Acting P.J. and Danner, J. participated in this decision.)

Date: 10/10/2018

Patricia Bamattre Manoukian

Acting P.J.

JOINT APPENDIX B

Rec'd 6/20/2018

FILED

JUN 15 2018

Chief Executive Officer/Clerk
Superior Court of Santa Clara
BY [Signature] DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

In re

DEAN ARTHUR SCHWARTZMILLER,

On Habeas Corpus

No.: CC592684

ORDER DENYING
HABEAS CORPUS PETITION

Mr. Schwartzmiller, who is currently serving a sentence of 152 years to life, has filed a habeas corpus petition asserting (1) Penal Code section 288(a) is unconstitutionally void for vagueness and (2) CDCR is improperly denying him the benefits of Proposition 57.

Petitioner's first claim was the subject matter of a demurrer which was denied by the trial court. It may also have been the subject matter of writ petition H030517 filed in, and denied by, the Sixth District shortly thereafter. Petitioner renews his claim based on the new authority of *Johnson v. United States* (2015) 576 U.S. ____ [192 L.Ed.2d 569] (*Johnson*). (See also *Sessions v. Dimaya* (United States Supreme Court, April 17, 2018).) In *Johnson, supra*, the United States Supreme Court ruled that the "residual clause" of the federal "Armed Career Criminal Act" was unconstitutionally vague. (United States Code § 924(e)(2)(B).) Because petitioner was convicted in State Court, and not sentenced under

the Federal Code, *Johnson* is not directly applicable. However this Court understands petitioner to be arguing that the reasoning of *Johnson* is applicable to California's crime of lewd act on a child because there are numerous different ways the crime can be committed. This is not a sound analogy and petitioner's position must be rejected. The defect of the "residual clause" was that it called for an analysis of a crime hypothetically and in the abstract. It did so by requiring a "categorical approach," to assessing the "potential risk of physical injury to another" theoretically. A substantive conviction for Penal Code section 288(a) is not at all analogous. Petitioner's convictions were based directly on his own actions not on anything hypothetical or in the abstract.

The *Johnson* court explained their problem as follows: "Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.' Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." (*Johnson* quoting *Begay v. United States* (2008) 553 U.S. 137, 141 [170 L.Ed.2d 490] and *James v. United States* (2007) 550 U.S. 192, 208 [167 L.Ed.2d 532].) The *Johnson* court elaborated: "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements."

In contrast, California's crime of lewd act on a child is not based on an assessment of any "ordinary case." Instead, it is determined based on the defendant's individual actions and culpability. *Johnson v. United States* is completely inapplicable. The *Johnson* court was careful to limit the reach of its holding. Foreseeing that others might focus only on the phrase being invalidated it cautioned: "As a general matter, we do not doubt the constitutionality of laws that call for the application of a

1 qualitative standard such as 'substantial risk' to real-world conduct" because these "laws require
2 gauging the riskiness of conduct in which an individual defendant engages on a particular occasion."
3 (Original emphasis.) The High Court's statement here speaks directly to petitioner's claim and is why
4 it must be rejected. Petitioner's present sentence is based on his multiple convictions for what he
5 personally and individually did "on [those] particular occasion[s]."
6

7 Petitioner's second claim concerns CDCR determination that he is not entitled to any benefits
8 pursuant to Proposition 57. This claim presents a procedural issue. It does not involve either the merits
9 of petitioner's conviction or the merits of a parole decision. It involves events occurring at petitioner's
10 place of confinement and the implementation of rules, and interpretation of statutes, as decided by
11 CDCR administratively. Because the subject matter of this petition does not relate to anything
12 reviewable by the Superior Court in the county of commitment there are two uniquely applicable rules.
13 First, petitioner must exhaust his administrative remedies. (See *Upshaw v. Superior Court* (2018) 22
14 Cal.App.5th 489, 505, quoting *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627,
15 632. See also *People v. Antonio* (2017) 10 Cal.App.5th 1064, 1069.) Second, because it is a
16 "conditions of confinement" issue, any habeas corpus petition should be filed in the Superior Court in
17 the county of the inmate's confinement. (See California Rule of Court 4.552(b).)
18

19 The petition is DENIED. This denial is without prejudice to the presentation of claim two to the
20 appropriate Superior Court after exhaustion of administrative remedies.
21

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23 DATED: 6/14, 2018

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HON. JOSHUA WEINSTEIN
JUDGE OF THE SUPERIOR COURT

cc: Petitioner
District Attorney (Motions unit)
Research (4-25A)
CJIC

