IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANTHONY G. BANKSTON,<br><br>Defendant and Appellant. | No. S044739<br><br>(Los Angeles County Superior Court Case No. VA007955)<br><br>**CAPITAL CASE** |

Appeal from Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Nancy Brown

# APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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## INTRODUCTION

In the nearly 30 years since Mr. Bankston was tried and sentenced to death, the Legislature has stepped in to address racial disparities in the criminal legal system, to prohibit certain tactics that activate implicit racial bias in criminal trials, and to provide defendants a remedy in cases where they were used.[1] The prosecution deployed at least two tactics in Mr. Bankston's trials that have since been specifically prohibited by the Legislature: the use of an accused person's artistic expression to invoke racial stereotypes of Black men as violent and threatening and the use of

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[1]See The Decriminalizing Artistic Expression Act, Assem. Bill No. 2799 (2021-2022 Reg. Sess.); and The Racial Justice Act, Assem. Bill No. 2542 (2019-2020 Reg. Sess.) as amended by Assem. Bill No. 256 (2021-2022 Reg. Sess.)

dehumanizing animal imagery to appeal to these same stereotypes. Indeed, the "Bengal Tiger" argument the prosecutor used in this case was condemned specifically in the legislative history of the Racial Justice Act. These new laws require that Mr. Bankston's conviction and sentence, which were tainted by racism, be vacated.

* * *

## I.
## MR. BANKSTON'S CREATIVE WRITING SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTIONS 352 AND 352.2; ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS RISK OF PREJUDICE AND OF INJECTING RACIAL BIAS INTO THE PROCEEDINGS

During both guilt-innocence trials, the court permitted the prosecution to introduce creative writings and drawings found in a red photo album in Mr. Bankston's room. The poetry in the album was figurative and relied heavily on metaphor. It referenced gang subculture and explored Black identity and the struggle for empowerment in the face of oppression. But the prosecutor urged a literal interpretation as evidence that Mr. Bankston was a hardcore gang member who intended to patrol the gang's territory and kill rival gang members. And the prosecutor explicitly appealed to racial bias with expert gang testimony that Black gang members were more likely to commit outwardly violent criminal acts.

Admission of the minimally probative and highly prejudicial creative writing violated Evidence Code sections 352 and 352.2 and it should have been excluded. The writing had virtually no probative value. It did not discuss or concern the allegations at trial and was irrelevant to Mr. Bankston's state of mind at that time of the alleged crimes because there was no evidence it was created contemporaneously.

Instead, the poetry evidence injected racial bias into the proceedings by priming[2] jurors with the stereotype that African American men are violent and threatening. (See *Bias on Trial*, *supra*, 2018 Mich. St. L.Rev. at pp. 1267-1274 [priming with stereotypes can affect interpretation of ambiguous facts, fact recall, and create false memories].) The prosecution urged a literal interpretation of the poetry, asserting that it was evidence of Mr. Bankston's propensity for violence and his risk of future danger. And the gang expert connected Mr. Bankston's identity as a Black man in a Black gang to his potential for future violence. His status and race, the gang expert opined, increased the likelihood that he would be involved in outwardly violent criminal activities.[3]

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[2]Implicit biases may be primed or activated, or prepared for activation, through direct or indirect reference to historical, cultural, or popular racial stereotypes. (See Levinson, *Race, Death, and the Complicitous Mind* (2009) 58 DePaul L.Rev. 599, 605, 608-609, 632.) Priming works subliminally and evokes prejudice regardless of the listener's intent or awareness of the triggering information. (See Kaye, *Schematic Psychology and Criminal Responsibility* (2009) 83 St. John's L.Rev. 565, 577.) "Just as propensity evidence might prime a jury to find that an individual acted in conformity with past behavior, race-coded language might prime a jury to find that an individual acted in conformity with widely-known stereotypes about the individual's racial or ethnic group." (Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) 2018 Mich. St. L.Rev. 1243, 1258 (*Bias on Trial*).)

[3]The prejudicial impact of this evidence was exacerbated by the trial court's refusal to root out bias in the jury pool with adequate voir dire. The court's restrictions on jury selection—its denial of a jury questionnaire, its refusal to permit anything but close-ended voir dire questions on attitudes about Los Angeles's

### A. The Red Photo Album Poetry

The album found in Mr. Bankston's room[4] included a drawing of a prison guard tower and dragon on one page, several short sayings on another page (discussed *infra*, at pp. 24 & 26) and three page-long poems:

*The U.B.N. Warrior*

> From this! day forward I shall not slip! or falter! I will remain forever firm! and with "rage" undamned! I'll give them what they give "me." If "war" is the outkcome then "I" shall proceed with "force" and strength! of a dragon, for I've komitted "myself" to excellence! and aktion!! ¶ I am the "young brave blood" of the "Umoja Damu tribe." We are the righteous Krowd. Thee "men" who fear not! a thousand kuts. . .

(People's Exhibit 25 & 42.)

*Poison of Thee Blood Streme*

> There's a krying need, all of us know. ¶ For units! At this time, more than ever "B"-fore. We seem too "B"

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gang problem, and its use of short-cut group voir dire—left Mr. Bankston with a jury with unexplored biases in violation of the Sixth Amendment. (See Claim IV, Appellant's Opening Brief, at pp. 123-149; *In re Hamilton* (1999) 20 Cal.4th 273, 295 ["Voir dire is the crucial means for discovery of actual or potential juror bias"].)

[4]The photo album was admitted as People's Exhibit 23 in the first guilt-innocence trial and People's Exhibit 41 in the second guilt-innocence trial. (21RT 2709; 40RT 5149.) The poem entitled "U.B.N. Warrior" from the red photo album was also admitted separately as People's Exhibit 25 at the first guilt-innocence trial, and People's Exhibit 42 in the second guilt-innocence trial. (21RT 2712; 42RT 5520.) The page with several short statements was also separately admitted as People's Exhibit 43 during the second guilt-innocence trial. (42RT 5521.)

> dying of a slower!, more painful "death." ¶ Trapped in a shell of fearful mistrust! ¶ It is important! Too "view" thee "attempts" made in thee past. Too transcend these "barriers" that encircle us "U.B.N." We must start at the kore! And "eliminate" our "enemies!" ¶ Our "movement" is true!, dedicated; blackism, leadership, organization, order, defeating our "oppressors" by any means necessary. ¶ Kijana ¶Hodarin¶ Unoja Ilamu Nation! ¶ Death "B"fore Dishonor!

(People's Exhibit 23 & 41.)

*The Blood Gaidi*

> I, thee true gangster! Shall walk this impoundable earth! I am! The autobiography of man now suggest that "I", thee true gangster! "am" in "Afrika" a "warrior" of "exotic-quintessence" of a universal gangster. Thee true gangster. ¶ I have lost by force, my land, my language and in a sense my life, but so help me, I will seize it back. If necessary "I," thee true gangster, will krush the korners of the earth and the world shall "forever tremble" in fear. When "I," thee true gangster, emerge upon society. Thee most hated, feared, loved and respected "blood" gangster the world has ever known.

(People's Exhibit 23 & 41.)

### B. Admission of creative expression under Evidence Code sections 352 and 352.2

Evidence Code section 352 permits the exclusion of evidence when its "probative value" is "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice[.]" Prejudicial evidence "inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v.*

*Valdez* (2012) 55 Cal.4th 82, 133, 145.) A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion and will be reversed "only if 'the probative value of the [evidence] clearly is outweighed by [its] prejudicial effect.' [Citation.]" (*People v. Carey* (2007) 41 Cal.4th 109, 128.)

Special considerations apply where, as here, the evidence involves creative expression which the prosecution relies on for its literal truth. A.B. 2799, effective January 1, 2023, was signed into law by California Governor Newsom on September 30, 2022, to "provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence." (Stats. 2022, ch. 973, § 1, subd. (b).) The Legislature specifically found that existing precedent permitted creative expression to be admitted as evidence in criminal proceedings without a sufficiently robust inquiry into whether such evidence introduces bias or prejudice into the proceedings. (*Id.* at subd. (a).)

A.B. 2799 added section 352.2 to the Evidence Code, which requires trial courts to conduct a balancing test in any criminal proceeding where a party seeks to admit creative expression as evidence. The statute defines creative expression as "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media." (Evid. Code, § 352.2, subd. (c).)

Probative value under section 352.2 expands the standard section 352 inquiry by requiring consideration of whether the creative expression was (1) "created near in time to the charged crime or crimes;" (2) "bears a sufficient level of similarity to the charged crime or crimes;" and (3) "includes factual detail not otherwise publicly available." (§ 352.2, subd. (a).) Creative expression that does not meet at least one of these requirements has "minimal" probative value as a matter of law. (§ 352.2, subd. (a)(1).)

Further, any probative value must be weighed against the risk of substantial danger of undue prejudice, which "includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition" and "the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings." (§ 352.2, subd. (a)(2).)

### C. Evidence Code 352.2 is retroactive to nonfinal cases on direct appeal

In *People v. Venable* (2023) 88 Cal.App.5th 445, 456 (*Venable*), Division Two of the Fourth District Court of Appeal held as a matter of first impression that section 352.2 is retroactive because it is an ameliorative statute that "provides defendants of color charged with gang related crimes an ameliorative benefit, specifically, a trial conducted without evidence that introduces bias and prejudice into the proceedings, limitations designed to increase the likelihood of

acquittals and reduce punishment for an identified class of persons." *(Ibid.,* citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).)[5]

The *Venable* court got it right. In *Estrada*, this Court held that an amendatory statute lessening criminal punishment applied retroactively to judgments that were not yet final when the statute took effect. (*Estrada, supra*, 63 Cal.2d at pp. 744-745.) This Court subsequently extended *Estrada* to new rules that provide a potentially ameliorative benefit to a class of criminal defendants. For example, in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303, this Court concluded that procedural changes for prosecuting juveniles in adult court were retroactive because they made a reduced punishment *possible*. And in *People v. Frahs* (2020) 9 Cal.5th 618, 631 this Court applied *Estrada* to hold that a new rule making pretrial diversion available to people suffering from mental disorders was retroactive to nonfinal cases because it offered a "possible benefit to a class of criminal defendants[.]" In *People v. Burgos* (2022) 77 Cal.App.5th 550, rehg. den. Apr. 27, 2022, review granted July 13, 2022, S274743, 512 P.3d 654, the Sixth District Court of Appeal held that new legislation making procedural changes (requiring a bifurcated trial on gang enhancements) applied retroactively because it removed the prejudice attendant to gang allegations at trial and "increased possibility of acquittal—which necessarily reduces possible punishment" and is therefore "sufficient

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[5]Division One of the Fourth District Court of Appeal subsequently found that section 352.2 was not retroactive under *Estrada* because it did not lessen criminal punishment or reduce criminal liability. (*People v. Ramos* (Apr. 13, 2023, D074429) __ Cal.Rptr.3d __ [2023 WL 2926302, p. 26].)

to trigger retroactivity under the *Estrada* rule." (*Id.* at p. 567.) The same is true here with respect to section 352.2.

But A.B. 2799 was more than an ameliorative change to the evidence code; it sought to reduce racial bias in the criminal justice system, by ensuring "creative expression will not be used to introduce stereotypes or activate bias against the defendant[.]" (Stats. 2022, ch. 973, § 1, subd. (b); see *Id.* § 1, subd. (a).) And bias "in any form or amount . . . is intolerable, inimical to a fair criminal justice system . . . [and] a miscarriage of justice." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (i).) In determining whether a statute applies retrospectively "legislative intent is the 'paramount' consideration[.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Allowing convictions and sentences, tainted by racism, to persist runs contrary to A.B. 2799's express purpose.

### D. Mr. Bankston's poetry had little probative value for its literal truth

The prosecution theory at Mr. Bankston's guilt-innocence trials was that the shootings were the result of street gang rivalries between Bloods, Crips, CV 70s, and the Compton Chicano Gang. (17RT 2048; 23RT 2932-2933.)[6] To prove their theory, the

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[6]The prosecution argued that the Jones brothers were members of the Atlantic Drive Crip street gang while Mr. Bankston was a member of a rival street gang, the Nine Deuce Bishops Bloods. (23RT 2932-2933.) The prosecution maintained that Ernest Jones (Mr. Bankston was ultimately acquitted of the related count six) was a member of a rival gang, the Hat Gang Crips. (17RT 2048.) And the prosecution argued that Mr. Bankston was also an affiliate of the CV 70s and that Noel Sanchez was a member of the rival Compton Chicano Gang. (*Ibid.*)

prosecution's street gang expert witnesses–Los Angeles County Deputy Sheriff Alexander MacArthur and Compton Police Department Lieutenant Reginald Wright—testified that Mr. Bankston was an active gang member of the Nine Deuce Bishops Bloods at the time of the shootings.[7] They also relied on their interpretations of undated creative writings and drawings from the red photo album seized from Mr. Bankston's home, which they maintained demonstrated Mr. Bankston's gang status as well as his potential for committing gang-related violent crime.[8]

The prosecution argued the writing was relevant to prove motive and intent because it documented Mr. Bankston's affiliation

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[7]As pled separately, their testimony relied on inadmissible hearsay (from police gang databases) admitted in violation of Mr. Bankston's Sixth Amendment confrontation clause rights and state evidentiary rules. (See Claim IX, Appellant's Opening Brief, at pp. 229-256, and Claim I Appellant's Supplemental Opening Brief, at pp. 1-22.) Wright also testified that he "ha[d] information" that Mr. Bankston was a member of the Nine Deuce Bishops street gang, and was affiliated with the CV 70s street gang, but he did not identify the source. (20RT 2579-2580.) This also violated the Sixth Amendment and state evidentiary rules and is addressed in Claim IX, Appellant's Opening Brief, *supra*, and Claim I, Appellant's Supplemental Opening Brief, *supra*.

[8]In the first trial, Deputy MacArthur cited a tattoo on Mr. Bankston's right ear with a letter "C" with an equal sign on it, followed by the letter K as evidence that he was a hardcore gangster and a Crip killer (17RT 2075, 2078, 2118-2119, 2086-2087) and testified the crossed-out letter "C" could either be similar to notches on a gunfighter's weapon or an attempt to cross out the letter "C." (17RT 2078.) Although the majority of the time it was the latter case, he testified. (40RT 5138.) Lt. Wright contradicted Deputy MacArthur when he testified that tattoos do not necessarily indicate an active gang member because they are permanent and difficult to have removed. (20RT 2604; 43RT 5540.)

with the Nine Deuce Bishops. (17RT 2047-2048.) The writing, the prosecution argued, "and the explanation of why he writes it, how he writes it, and the order that he writes it would have a significant impact in proving" motive.[9] (17RT 2054.) Over objection, the trial court admitted the photo album finding it relevant to motive and intent and not unduly prejudicial under Evidence Code 352. (17RT 2047-2050 2056; 21RT 2709.)[10]

The creative writing had minimal value for its literal truth under Evidence Code Section 352.2. Nothing in the poetry was similar to the allegations at trial. The poems contained no factual details about the charges. (Evid. Code, § 352.2, subd. (a)(1).) The author did not explicitly declare an intent or plan to kill anyone, rival gang members or otherwise. There were no "listed enemies." (17RT 2100.) Deputy MacArthur initially interpreted the substitution of the letter "K" for the letter "C" as an anti-Crip message, but he agreed that the letter "C" appeared many times in the poems and that the alteration could also be an Afrocentric writing style and a rejection of European phonetics. (17RT 2042, 2097-2098, 2115-2117, 2126, 2130-2131.) And Lt. Wright agreed

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[9]The prosecution also argued it was relevant to prove identity but did not elaborate why. (17RT 2054.) Identity was disputed and uncertain because of shaky eyewitness testimony. (See discussion, *infra*, at pp. 32-36.) The writings, however, were not identity evidence; nothing described in them shared with the charged offenses "common features that are so distinctive as to support an inference that the same person" did them both. (*People v. Scott* (2011) 52 Cal.4th 452, 472-473.)

[10]The trial court admitted the photo album over defense objection at Mr. Bankston's second trial under the same theory. (35RT 4264; 40RT 5140.)

that substituting the letter "K" for the letter "C" could be an expression of the writer's African heritage and Black identity. (20RT 2605.)

Nor was there any evidence the creative writing was created close to when the charged offenses occurred; thus it was irrelevant to Mr. Bankston's mind at the time of the alleged conduct. (Evid. Code, § 352.2, subd. (a)(1).) Deputy MacArthur admitted he simply did not know when the album was created. (17RT 2095.) While he initially "assumed" the material was created after 1988—because that year was written on the drawing—he conceded it was "very possible" that 1988 could be a release year from prison since it was written along with a drawing of a prison guard tower. (17RT 2096, 2120; People's Exhibit 23.)

The metaphorical style of the writing resisted the prosecution's literal interpretation. For example, in *Poison of Thee Blood Streme*, the author identifies feelings of "dying of a slower!, more painful 'death[]'," and being "trapped in a shell of fearful mistrust," as barriers to unity, and calls to transcend those barriers and "'eliminate' our 'enemies'." (17RT 2064-2065; People's Exhibit 23.) Deputy MacArthur initially assumed the "enemies" in the poem referred to Crip gang members based on his belief that it was written by a Bloods gang member. (17RT 2098-2099.) But the poem did not identify Crips as the "enemy" or mention them at all. The following line—"defeating our 'oppressors' by any means necessary"—suggests a different "enemy." Even the title—*Poison of Thee Blood Streme*—suggests the enemy may lie within. Deputy MacArthur ultimately conceded that "enemies" in the poem could

also refer to institutional oppressors, illiteracy, or alcoholism. (17RT 2098-2100.)

The prosecution's literal interpretation was at odds with the style of the album as a whole and its focus on inspirational sayings and poetry. (17RT 2061-2070.) MacArthur read several of the sayings to the jury: "A man pressed to the earth by another man's foot would be . . . 'a fool' not to use any and all means necessary for his release." (17RT 2063.) "I'd rather be dead than not try. Our burning desire for freedom is more powerful than the fear for their guns." (*Ibid.*) And "A warrior does what he has to. A soldier does what he's told." (*Ibid.*)

Nearly 20 years ago, this Court recognized that "musical lyrics and poetic conventions" are "figurative expressions," which "are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory." (*In re George T.* (2004) 33 Cal.4th 620, 636-637 (internal citations omitted).) The conventions of poetry resist literal interpretations—even a graphic poem should not be interpreted literally. As the Third District Court of Appeal observed in the context of a painting graphically depicting a student shooting a police officer in the back of the head, "a painting—even a graphically violent painting—is necessarily ambiguous because it may use symbolism, exaggeration, and make-believe." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 857.) "Painting is silent poetry and poetry painting that speaks." (*In re George T.*, *supra*, 33 Cal.4th at p. 637, internal citations omitted.)

The Afrocentric themes in the writings supported reading them as figurative calls to action rather than literal statements of

criminal intent. Deputy MacArthur noted the references to political prisoners and the African National Congress made the writings unusual among those attributed to gang members. (17RT 2097.) And he agreed the writings could be read as an expression of pride in African heritage and a commentary on social ills. (17RT 2123.) Lt. Wright testified that the writings "show[ed] a certain intellect . . . rhyming but making points." (20RT 2601.) He acknowledged that some of the writings paralleled language used by historical figures, like Malcolm X, and that certain images in the book – including an Asian dragon – were symbols of strength and unity. (20RT 2605-2608.) To Wright, the creative writing in the red album reflected "somebody aware of themselves as an African person" and "the forcefulness of . . . [the author's] Blackness coming out in a sense[.]" (20RT 2604-2606.)

### E. The use of the creative writing injected racial bias into the trial

The creative writings explored intense emotions and themes and it was possible the jury would treat them as evidence of a violent or criminal disposition. (Evid. Code, § 352, subd. (a)(2).) MacArthur read to the jury *U.B.N. Warrior*, which discusses war and feelings of rage. (17RT 2125.) MacArthur also read *The Blood Gaidi*, in which the author laments the loss, "by force," of "my land, my language, and in a sense my life" and pledges to "seize it back[.]" (17RT 2068.) The author writes in metaphor that he will seize back what was stolen and pledges, if necessary, to "krush the korners of the earth" and make the world "'forever tremble' in fear" until he

becomes the "most hated, feared, loved, and respected 'blood gangster the world has ever known." (People's Exhibit 23.)[11]

The prosecution urged a literal interpretation of Mr. Bankston's poetry, which invited the jury to consider it evidence of his "propensity for violence or general criminal disposition[.]" (Evid. Code § 352.2, subd. (a)(2).) The prosecution's emphasis on how the poetry proved Mr. Bankston's purported status as a "hardcore gang member," and what he would be willing to do as "hardcore gang member," was racially coded[12] and primed the jurors with the stereotype that African American men are violent and threatening. (See Thompson*, Bias on Trial, supra.*) All of this "implicitly inject[ed] racial bias into the proceedings." (Evid. Code, § 352.2, subd. (a)(2).)

At the end of Mr. Bankston's first guilt-innocence trial, the prosecutor urged the jury to read the album and offered a selectively edited version of *The Blood Gaidi* as a literal answer to the question, "why Mr. Bankston shot those individuals?" (23RT 2935):

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[11]In Mr. Bankston's second guilt-innocence trial, the prosecution again introduced, over defense objection, the same writings from the red photo album. (40RT 5140, 5146-5147.) As in the first trial, MacArthur read *Poison of the Blood Streme* and *The Blood Gaidi*. (40RT 5173-5174, 5175-5179; see II Supp. 1CT 117, 216.)

[12]"The prototype of a gang member is metaphorically related to deeply buried racist schema or beliefs and justifies the demonization of the other." (Hagedorn, Gangs on Trial: Challenging Stereotypes and Demonization in the Courts (2022), p. 86.) The gang stereotype and the "demonizing" language used to describe gangs and their members lead to assumptions of guilt that are hard to overcome. (*Id.* at pp. 190-191.)

> I will seize it back if necessary.
> I, the true gangster, will crush the corners
> of the earth and the world shall forever
> tremble in fear when I the true gangster
> emerge upon society. The most hated,
> feared, loved, and respected Blood -- Blood
> gangster the world has ever known.

(23RT 2935.)[13] The prosecutor argued that Mr. Bankston's writing revealed him as a "hardcore" gang member and gave him motive to commit the charged offenses. "You need to decide whether or not Mr. Bankston is, in fact, a hardcore member back in 1991. And if you do find that, what effect is that? Well, of course, that goes to the motive." (24RT 3018.)

The prosecution offered a more explicitly violent and literal interpretation of the poetry during the second guilt-innocence trial. Deputy MacArthur testified that one of the sayings in the red photo album—"'a warrior does what he has to do. A soldier does what he's told'"—proved its author was among the "most . . . hardcore gang members"—the type that are "often used to do shootings or driveby shootings of rival gangs." (40RT 5171.)

The prosecution gang expert's testimony regarding the writings injected explicit racial bias into the proceedings. (Evid. Code, § 352.2, subd. (a)(2).) Compton Police Lt. Wright testified that

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[13]Mr. Bankston, as counsel on his own behalf, responded that the poetry and drawings had artistic, cultural, and political value and identified how the prosecution had selectively edited the poem to give it an entirely different meaning: "Mr. Wong failed to relate to you the top portion of that that talks specifically about a person's land being seized, a person losing their land, a person in a sense losing their life." (24RT 2992.) The full text of the poem is *supra*, at page 17.

the writings "very much" indicated its author was a "hardcore" Bloods gang member. (43RT 5553.) Wright offered his expert opinion that because a Black gang was involved, there was an increased risk of violent criminal activity because "*especially with Black gangs* . . . it's all about showing how . . . down[] . . . you get." (43RT 5552, italics added.) Wright testified, "in the totality of this writing and all, my opinion is . . . [t]his is a man with, as I stated, maybe some violent tendencies and, you know, outward gang involvement." (43RT 5567.)

During guilt-innocence summation, the prosecutor emphasized the writings as evidence of Mr. Bankston's dangerousness. She directed the jury to "take a good look at the writings" and argued that Mr. Bankston, "based upon his words, his words, mind you, is a very dangerous individual." (43RT 5673.) She emphasized the special danger he posed as a member of the Bloods when she argued that "through the writings" the jury can see that Mr. Bankston "is a man with a mission, a man who was totally committed to the gang, to his Blood culture." (43RT 5604.) The prosecutor urged the jury to disregard "how Mr. Bankston is dressed in trial or how articulate he is," because he is a "totally different" person in the streets. (43RT 5605.) "The person out in the street is just filled with the desire for power and to be the gangster Blood." (43RT 5605.)

As part of its effort to avoid another hung jury, the prosecution read an even more heavily-edited version of *The Blood Gaidi*, the same poem it had presented during the first trial. Despite having originally been written as an attempt to take back what had

been stolen from the author ("my land, my language and . . . my life"), the prosecutor re-told the poem as a declaration of war on the earth:

> The true gangster, will crush the corners
> of the earth and the world shall forever
> tremble in fear when I, the true gangster,
> emerge upon society, the most hated,
> feared, loved, and respected blood
> gangster the world has ever known.

(43RT 5630-5631.) According to the prosecutor, the poem was Mr. Bankston's "motivating factor." (43RT 5631.) "His mission in life is to be the gangster Blood." (43RT 5631.)

During penalty summation, the prosecutor read the same poem again and argued that Mr. Bankston's writings revealed him to be a Blood gangster whose desire to become "the worst of the worst" is "so ingrained into his soul" that he will never stop. (52RT 6493.) "His goal in life, as we see in his writings, is to become the Blood gangster and that he will attain this goal by any means possible." (52RT 6493.) "Based upon the writings" the prosecutor argued, it was clear that Mr. Bankston would kill Crips members: "He would kill them in a second." (43RT 5673.)

The prosecution argument relied on a literal reading of Mr. Bankston's poetry to fill in the gaps of the mens rea requirement at issue. In lieu of arguing why Mr. Bankston's actions before the shootings demonstrated premeditation and deliberation, the prosecutor argued that Mr. Bankston was a killer "in his soul"—he had a general criminal propensity that rendered any more specific inquiries into his mental state unnecessary. And the emphasis on Bloods, a Black gang, incorporated Wright's expert

testimony that there was an increased risk of violent criminal activity because "*especially with Black gangs* . . . it's all about showing how . . . down[] . . . you get." (43RT 5552, italics added; cf. *Buck v. Davis* (2017) 580 U.S. 100, 122 ["Some toxins can be deadly in small doses."].)

The risk of undue prejudice—that the jury would consider the poetry as evidence of propensity for violence and that it would inject racial prejudice into the proceeding—substantially outweighed its minimal probative value and it should have been excluded. (Evid. Code, §§ 352, 352.2.)

### F. The section 352.2 violation was prejudicial

Absent fundamental unfairness, state law error in admitting evidence is subject to the *Watson*[14] test: "whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439, citations omitted.) Without the writings, there was a reasonably probable chance of a more favorable verdict. The prosecution relied on the writings as motive and intent evidence to shore up what was otherwise a weak case with substantial misidentification issues. And, as discussed more fully, *infra*, in Claim II, the prosecution relied on the writings to present Mr. Bankston as a racialized threat to society and to convince the jury to sentence him to death.

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[14]*People v. Watson* (1956) 46 Cal.2d 818.

The closeness of this case cannot be overstated. Mr. Bankston's first jury could not reach a verdict on at least one count from each of the three charged incidents. As to the shooting at Walter's Market, the jury could not reach a verdict as to the charged assault on Linda Jones. The jury could not reach a verdict as to the killing of Jesus Sanchez. And the jury could not reach a verdict as to the alleged attempted murder of Ernest Johnson, a charge on which Mr. Bankston would later be acquitted. (3CT 649-650, 657-658, 661-662, 664.)

As for the only two charges of which Mr. Bankston was convicted at the first guilt-innocence trial – the first-degree murder of Benson Jones, and the attempted murder of Benjamin Jones in front of Walter's Market – the evidence of Mr. Bankston's guilt was far from compelling. (3CT 654, 656.)

The only direct evidence linking Mr. Bankston to the shooting at Walter's Market was the eyewitness identification testimony of Linda and Benjamin Jones, which proved to be shaky, at best. At the time of the shooting, Linda Jones gave conflicting descriptions of the shooter and the other men at the scene of the crime. (22RT 2816-2818, 2780; 16RT 1836-1856.) And it was Etta Jones – who was not even present at Walter's Market when the shooting occurred – who first named Mr. Bankston as a possible shooter, and who first picked Mr. Bankston's picture from a mug book. (19RT 2384; 22RT 2775-2776.) When Linda was shown the picture, she said it looked similar to the shooter, but she was not certain whether it was him. (19RT 2384-2385.)

Benjamin Jones's testimony was equally unconvincing. Not only did he make various inconsistent statements about the appearance of the shooter, he also lied to the capital jury when he denied ever having been a gang member. Benjamin Jones's status as a rival gang member gave him a strong bias against Mr. Bankston, and his untruthfulness on that particular question undercut his own credibility as to his identification of Mr. Bankston, the prosecution's theory that the shooting was gang-motivated,[15] and Benjamin's denial that he and his brother were armed during the shooting. (15RT 1773; 16RT 1884.)

As with Mr. Bankston's first trial, the principal evidence against him at his second trial was eyewitness identification evidence, which was again fraught with uncertainty. The second jury heard from three witnesses who were at the scene when Jesus Sanchez was killed. Florentino Melendez was walking with Sanchez when the shooting started. (35RT 4298-4299.) After the shooting, Mr. Melendez was shown a photo lineup that included a photo of Mr. Bankston, but Mr. Melendez was unable to make a positive

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[15]The defense challenged the witness identifications placing Mr. Bankston at the scene of the shooting and argued that another man named "Nate" may have been the shooter. (15RT 1761; 16RT 1850-1851; 22RT 2764-2766, 2769-2770; 24RT 3013.) Benson Jones had recently learned his wife, Debra Jones, was pregnant with Nate's baby. (16RT 1851; 22RT 2764-2766.) On the day of the shooting, Benson had a physical altercation with Debra. (15RT 1761; 16RT 1850.) The police were called, but Benson left Debra's house with his brother (Benjamin) and sister (Linda) before the police arrived. The three then drove directly to the neighborhood where Nate lived and hung out, which is where the shooting occurred. (22RT 2769-2770.)

identification, and was uncertain whether the photo of Mr. Bankston was that of the shooter. (35RT 4307, 4339; 37RT 4651-4652.) At the first trial, Melendez was again unable to identify Mr. Bankston as the shooter. Only at the second trial—after repeatedly seeing photos of Mr. Bankston in lineups and seeing Mr. Bankston in court as the defendant in the preceding trial—did Mr. Melendez identify Mr. Bankston as the shooter. (35RT 4330-4331, 4335-4337.)

Similarly, sisters Catalina Franco and Maria Lopez could not positively identify the shooter when shown a photographic lineup that included Mr. Bankston's picture. (37RT 4523, 4530-4531; 39RT 5012-5013; 40RT 5059.) In court, Ms. Lopez also could not make a positive identification. Rather, when asked whether she saw the man who did the shooting in the courtroom, Lopez said, "Well, no, no. Since it's many years ago, I don't know whether he's here or not." (37RT 4524-4525.) When the prosecutor pushed, asking if there was someone who looked like the shooter, Ms. Lopez pointed at Mr. Bankston—the only defendant in the courtroom—and said, "Perhaps him." (37RT 4525.)

Likewise, Ms. Franco admitted she could not identify Mr. Bankston at a prior proceeding. (39RT 5014-5015; 40RT 5069.) During that proceeding, Ms. Franco said that Mr. Bankston "looks like him, but it's not him. I'm certain of that. . . .[¶] It looks a bit like him." (40RT 5053.)

Although all three eyewitnesses testified that a photograph of Mr. Bankston's car – a 1970 Audi Fox – was similar to the one driven by the shooter, that testimony was dubious in light of the witness descriptions of the car. (35RT 4319-4320; 37RT 4527; 39RT

5016; 40RT 5106-5107.) Mr. Melendez testified the shooter was driving a Volvo. (35RT 4298.) Ms. Franco was never asked to describe the car until she came to court, three years after the shooting. (37RT 4523; 38RT 4721-4722). And Ms. Lopez initially testified she did not recall the car, then later testified that she told the police the car looked like a Nissan Sentra, then later still claimed that she told the police the car was a Toyota. (37RT 4531-4533.)

Other evidence offered at Mr. Bankston's second trial regarding the Sanchez killing was equally equivocal and dubious. The prosecution tried to show that Mr. Sanchez was shot by one of two weapons taken from Mr. Bankston upon his arrest. But the forensic testing – comparing slug from bullets fired from Mr. Bankston's guns to the slug found in Sanchez's body – was inconclusive. (41RT 5322-5323, 5328-5329, 5333-5336.)

The prosecution also tried to rely on police informant Paul Torrez, who claimed that Mr. Bankston admitted committing the shooting. But Torrez's testimony was thoroughly impeached with his contradictory prior statements and testimony, and the fact the police supplied him important details about the crime, including the location of the shooting and the make of Mr. Bankston's car. The defense also showed that Torrez came forward with his "information" about the Sanchez shooting because he feared being sent to state prison after being arrested for narcotics and weapon possession while on probation, and the police had offered him a deal in exchange for information about the shooting. (37RT 4568-4569.)

As to the assault with a deadly weapon charge, the evidence at the first trial failed to show that Mr. Bankston shot at Linda Jones, and for the same reasons, that evidence failed at the second trial. Although at trial Linda Jones claimed that Mr. Bankston fired a shot in her direction after shooting her brothers, Benjamin Jones testified that Mr. Bankston fired only four shots: two at Benson and two at him (Benjamin). (38RT 4798.) Linda's own testimony created a reasonable doubt as to whether Mr. Bankston shot at her. When asked how many shots were fired, Linda agreed that she heard and saw two shots fired at Benson, and two at Benjamin, and that she earlier claimed that only four shots were fired. (39RT 4863.) As to the fifth shot supposedly fired in her direction, Linda said "there was a shot somewhere in between there that I missed." (*Id.*)

The poetry, taken as an admission, filled in the weaknesses of the identification case. In the first guilt-innocence trial, the prosecution cited the creative writings as proof that Mr. Bankston was a "hardcore gang member" who was willing and motivated to commit the charged killings. (23RT 2932; 24RT 3017.) As he argued, "You need to decide whether or not Mr. Bankston is, in fact, a hardcore member back in 1991. And if you do find that, what effect is that? Well, of course, that goes to the motive." (22RT 3018.) And, as explained more fully, *infra*, in Claim II, during the second trial, the prosecution went even further when it relied on the poetry to present Mr. Bankston as a racialized threat to society, if he were not convicted and put to death.

The prosecution's correlation of the poetry's subject matter and Mr. Bankston's race with his potential for violent criminal acts

introduced racial bias into the proceedings, primed implicit bias in the jury, and lessened the prosecutor's burden of proof. (See Levinson & Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence* (2010) 112 W. Va. L.Rev. 307, 332, 339 ["studies demonstrate powerfully that racial stereotypes are activated easily and that they can affect a broad range of decisions"]; Levinson, et al., *Guilty by Implicit Bias: The Guilty/Not Guilty Implicit Association Test* (2010) 8 Ohio St. J. Crim. L. 187, 207 [study participants "held implicit associations between Black and Guilty . . . [which] predicted judgments of the probative value of evidence"].)

Had the juries not been exposed to the poetry, it is reasonably probable that Mr. Bankston would not have been convicted of the charges or sentenced to death. Racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State, [citation]." (*Pena-Rodriguez v. Colorado* (2017) 580 U.S. 206, 223; see also *People v. Simon* (1927) 80 Cal.App.675, 677-686 ["it is the duty of this court not to allow the fountains of justice to be poisoned by what, in the instant case, savors so strong of race prejudice"].) Stoking racial bias taints guilt determinations by effectively putting the defendant's racial group on trial rather than sticking to the facts of the defendant's offenses. (See *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 596 [reversal for improper reference to "Cuban drug dealers" that had the "cumulative effect of putting the city of Las Vegas's Cuban community on trial"].)

The effects of racial prejudice are especially pernicious in a capital sentencing trial because "the range of discretion entrusted to a jury in a capital sentencing hearing" provides "a unique opportunity for racial prejudice to operate but remain undetected." (*Turner v. Murray* (1986) 476 U.S. 28, 35; see also *People v. McWilliams* (2023) 14 Cal.5th 429, 450 (conc. opn. of Liu, J.) ["discretionary nature of . . . . decision-making may be vulnerable to implicit biases"].) "When a decision-maker feels fear, anger, or both, the need for retribution automatically becomes heightened" and the resulting dehumanization and "othering" of the defendant makes the decision-maker more likely to justify violence against them. (Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Res. L.Rev. 39, 59-61, citations omitted.) And "a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the [required] aggravating factors . . . . Such a juror might also be less favorably inclined toward petitioner's evidence of . . . mitigating circumstance. . . . Fear of blacks, which could easily be stirred up . . . . might incline a juror to favor the death penalty." (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.)

Mr. Bankston's conviction and death judgment should be reversed.

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## II.
## THE USE OF RACIALLY DISCRIMINATORY LANGUAGE DURING MR. BANKSTON'S TRIALS RENDERS HIS SENTENCE AND CONVICTION INVALID UNDER THE RACIAL JUSTICE ACT

The prosecution used racially discriminatory language during the guilt and penalty case including comparing Mr. Bankston to a "Bengal tiger . . . [an] enormous tiger . . . muscles all flexed out . . . claws out" and labeling him a "thug," a "killing machine." And it correlated Mr. Bankston's race with his potential for violence, with expert testimony that, Black gang members were more likely to commit outwardly violent criminal acts. All of this reinforced a racist myth—deeply imbedded in American culture—of Black men as inherently and preternaturally dangerous and threatening.[16] The message was unmistakable: Mr. Bankston was wild, animalistic, and posed a racialized threat to society and the jurors, as the "members of society," needed to impose a death sentence or "basically there's no stopping him" and he would continue to do what killing machines, Bengal tigers in the jungle, thugs, and Black gang members do: victimize other members of society.

The newly codified section 745, subdivision (a)(2) is explicitly retroactive to nonfinal cases and strictly prohibits racial bias and racially discriminatory language at trial, including language that compares a person of color to an animal. The Legislature cited the "Bengal Tiger" argument deployed in Mr. Bankston's trial as an example of prohibited argument. (A.B. 2542, Stats. 2020, ch. 317, §

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[16]The same myth the prosecution reinforced through its literal interpretation of Mr. Bankston's poetry. (See *supra*, Claim I.)

2, subd. (e).) Under Penal Code section 745, subdivision (e)(2) and (e)(3), Mr. Bankston's death sentence and conviction are legally invalid, and he is no longer eligible for the death penalty.

### A. The California Racial Justice Act is expressly retroactive to nonfinal judgments.

In 2020, the California Legislature declared, "we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (g) [findings and declarations].) The Legislature enacted the California Racial Justice Act ("RJA"), creating a comprehensive statutory scheme for combatting racial discrimination and disparities in every facet of the criminal legal system. (*Ibid.*)

The Legislature expressly repudiated *McCleskey v. Kemp* (1987) 481 U.S. 279, and its progeny, which require proof of purposeful discrimination — a standard "nearly impossible to establish." (A.B. 2542, Stats. 2020, ch. 317, § 2, subds. (c) and (f).) Rejecting "a fear of too much justice" (*McCleskey v. Kemp, supra*, 481 U.S. at p. 339 (dis. opn. of Brennan, J.)), the Legislature set out to "eliminate racial bias from California's criminal justice system," whether that bias be implicit or intentional. (A.B. 2542, Stats. 2020, ch. 317, § 2, subds. (f), (i), and (j).) To that end, the Legislature designed the RJA as a remedial mechanism rather than a punitive one. The Legislature explained its intent was "not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system." (*Id.* § 2, subd. (i).)

In sum, the Legislature replaced the legal status quo with a new paradigm: "We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (b).)

In 2022, the Legislature expanded the scope of the RJA. (Assem. Bill No. 256 (2020-2021 Reg. Sess.) ("A.B. 256").) The original RJA, passed in 2020, applied prospectively to cases with judgments entered on or after January 1, 2021. (Pen. Code § 745, former subd. (j).) The Legislature enacted A.B. 256 with "the intent . . . to apply the California Racial Justice Act of 2020 retroactively, to ensure equal access to justice for all." (A.B. 256, § 1, italics added.) Effective January 1, 2023, A.B. 256 made the RJA retroactively applicable to all cases in which judgment is not final. (§ 745, subd. (j)(1), as amended by Stats. 2022, ch. 739, § 2.)

### B. Racially discriminatory language during Mr. Bankston's trials legally invalidates his sentence and conviction

The rhetoric and themes during Mr. Bankston's trials "tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation." (*Calhoun v. United States* (2013) 568 U.S. 1206 (Statement of Sotomayor, J.).) Comparing Mr. Bankston to a "Bengal tiger . . . this enormous tiger" with "muscles all flexed out, . . . claws out, . . . fangs [and] teeth" (52RT 6523), and labeling him a "hardcore gang member," a "thug," and a "killing machine" (43RT 5673; 52RT 6520, 6524),

all invoked the caricature of Black men as brutes that has persisted since the time of Reconstruction, and which portrays "Black men as innately savage, animalistic, destructive and criminal—deserving of punishment . . . [and in this case] death." (Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J.Race & L. 325, 345.)

Mr. Bankston was tried and sentenced to death at a time when bias and racist tropes against Black men were both prevalent and pernicious. Three events reflect the potency of these biases at the time and illustrate how racist tropes (and animal-themed racist tropes, in particular) lead to unjust results.

1. The criminal justice policies of the '90s and the resulting over policing of minority communities marginalized a generation of Black men and boys and invoked racialized images of "wolf-packs" threatening the White community.[17]

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[17]The draconian criminal justice policy of the 1990s, whether from the War on Drugs, or broken windows theory of policing, generated a growing disproportionate number of arrests of Africans American men and boys and an overrepresentation of Black men among the incarcerated. (See Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) pp. 58, 188 ["the War on Drugs has given birth to a system of mass incarceration that governs not just a small fraction of a racial or ethnic minority but entire communities of color"].) In the year preceding the L.A. riots, following the acquittal of the four police officers who assaulted Rodney King, one third of all young Black men in Los Angeles had been jailed at least once. (Miller, *African American Males In the Criminal Justice System* (1997) 78 The Phi Delta Kappan 10, p. K2.) And in California, rates of incarceration among African American

2. The unjust conviction of the Central Park Five broadcast similar themes of young Black men accused of committing animalistic savagery, with terms like "wilding[,]" "wolf packs," "rat packs," "savages," and "animals" being used to describe them.[18]

3. The assault on Rodney King and state court acquittal of his assailants evoked images of law enforcement navigating the

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men had grown to nine times greater than that for nonhispanic Whites. (McCormick, *Number of State Prisoners Soared in '90s / One in 33 Blacks Was Behind Bars in April Last Year,* S.F. Chronicle (Aug. 9, 2001), p. A1.)

Around the time of Mr. Bankston's trials, these more punitive (and racialized) approaches to criminal justice were gaining strength through the 1990s with the myth of young and predominantly Black men and boys labeled "superpredators," who were purported to commit animalistic acts of violence in "wolf-packs." (Bogert, *Superpredator: The Media Myth That Demonized a Generation of Black Youth* https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [as of March 26, 2023].)

[18]On April 18, 1989, following a rape and brutal assault in New York's Central Park, five Black teenagers were arrested, charged, and ultimately convicted of the attack. From the moment the teens were reported to have confessed, press coverage focused, not on the barbarism of the crime, but on the animalistic savages who committed it. "Wilding," the term the press and the public used to refer to the crime, implied a level of savagery as did the other terms used to refer to the youths, including "wolf packs," "rat packs," "savages," and "animals." (Duru, *The Central Park Five*, *the Scottsboro Boys, and the Myth of the Bestial Black Man* (2004) 25 Cardozo L.Rev. 1315, 1348.) The teens were convicted following trial in 1990. Their convictions were ultimately vacated in 2002, after the actual assailant confessed.

threat of inner-city barbarians and a preternaturally powerful Black man who posed a potential threat to White Simi Valley.[19]

Age-old racist tropes against Black men were a part of the culture of 1994 Los Angeles where Mr. Bankston was tried, convicted, and sentenced to death.

### 1. Hardcore Black gang members

The meaning and significance of "hardcore gang member" evolved over the course of the trials. During the first guilt-innocence trial, Deputy MacArthur testified it meant a "very active" or "more active" gang member. (17RT 2041-2042, 2112.) Wright agreed. (20RT 2594.) The label "hardcore gang member" was racially charged, (s*ee* discussion at pp. 27-30, *supra*), but it

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[19]The assault on motorist Rodney King by four Los Angeles police officers, their acquittal after the 1992 state trial—despite a videotape of them in flagrante delicto—involved the successful defense strategy by the four police officers that "drew upon the stock story of the heroic team of roving police officers defending civilized society against rampaging hordes of wild inner-city barbarians and barely holding their own by a combination of courage, discipline, skill, strength and teamwork." (Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial* (2005) 12 Clinical L.Rev. 1, 16.) The defense portrayed Mr. King as a supernatural threat to the officers. "The defense team repeatedly pointed out how large King was, how he appeared crazed. He wouldn't go down." (Greenberg & Ward, *Teaching Race and the Law Through Narrative* (1995) 30 Wake Forest L.Rev. 323, 339.) "The defense, overtly and subliminally, portrayed Rodney King as a crazed savage on his way to do evil in the bedrooms of Simi Valley." (Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom* (1993) 20 Fordham Urb. L.J. 571, 577.)

took on an explicit racial meaning in the second guilt-innocence trial, after the first trial ended with a hung jury on several counts.

During the second guilt-innocence trial, Lt. Wright testified that Mr. Bankston's race, specifically, made him a more lethal type of "hardcore gang member" more likely to commit outward violent criminal activities because he was a Black gang member. (43RT 5552-5553.) Lt. Wright explained, a "hardcore gang member" "is the part of the group that is actively involved in the criminal activities . . . violent activities, anything . . . to further the gang's prominence for that matter, usually outward *especially with Black gangs because it's all about showing* – to get respect, it's all about showing how – for a term they use – down, . . . you get[.]" (43RT 5552, italics added.) Wright testified "one of the main things is to do violent acts against enemies . . . . being Crips or rival gangs." (43RT 5570.) MacArthur agreed. (40RT 5152.) Based on one of the sayings written in the photo album—"A warrior does what he has to do. A soldier does what he's told"—MacArthur concluded the author was the "most . . . hardcore gang member," the type "often used to do shootings or driveby shootings of rival gangs." (40RT 5171.) By testifying that Black people in gangs have a heightened need—over and above gang members of other races—to "get respect," and that respect was won by "violent acts against enemies," the prosecution witness clearly argued that Mr. Bankston's race elevated the threat he posed as a Black hardcore gang member.

### 2. Thugs, Killing Machines, and Bengal Tigers in the Jungle

The prosecutor opened the penalty phase trial with a warning to the jury to disregard "how Mr. Bankston is dressed in trial[20] or how articulate he is" because "[t]he person out in the street is just filled with the desire for power and to be the gangster blood." (43RT 5605.)

In her penalty phase summation, the prosecution urged the jury not to be fooled by the fact the Mr. Bankston was "articulate" and well dressed. "You know, we see him here in court. We know that he's able to represent himself. You see him in a nice little tie and a suit. You see that he's articulate." (52RT 6522.)[21] The

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[20]Mr. Bankston never alluded to his clothing. (See 47RT 5918-5922 [penalty phase opening statement]; 35RT 4291-4294 [guilt phase opening statement].) Instead, in his guilt-phase opening statement, he asked the jurors to listen to him as he stood in court and judge the case without their perceptions being clouded by the gang allegations. (See 35RT 4294 ["I would ask that you look at my demeanor in this court, let my behavior, let my way that I present my case be a symbol and not let these gang allegations be the sole substance of how you judge this case"].) The prosecutor's responsive argument trivialized Mr. Bankston's plea by focusing solely on his clothing and the "articulate" nature of his speech.

[21]The racialized dimension of referring to a Black person as "articulate" is well studied. During the 2008 presidential race, Joseph Biden described fellow Democratic presidential contender Barack Obama as "the first mainstream African-American who is articulate and bright and clean and a nice-looking guy." (Alim and Smitherman, Articulate While Black: Barack Obama, Language and Race in the U.S. (2012) p. 34. (Articulate While Black) Writing for the New York Times on *The Racial Politics of Speaking Well*, Lynette Clemetson referred to the "articulate"

prosecutor argued that Mr. Bankston's presentation in court was a fraud and that the real Anthony Bankston was nothing more than a vicious wild animal. (52RT 6522.) To illustrate her point, she told the jury:

> [A] little story called The Bengal Tiger. We have a journalist going to the zoo. He goes to the zoo and he sees a plaque. And the plaque says, oh, Bengal tiger. So he's looking at it and he sees this tiger. This tiger is just kind of laid out, real lethargic, kind of licking his paw. Behind him he hears a voice who says, "that's not a Bengal tiger." And the guy kinds of turns around and says, "what are you talking about? The sign says that." He says, "no, that's not a Bengal

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comment as a pervasive description of Black public figures by White people, (Clemetson, *The Racial Politics of Speaking Well*, N.Y. Times (Feb. 4, 2007) p. WK1), a point reinforced when both George Bush and Harry Reid referred to Barack Obama as "articulate." (Articulate While Black, *supra*, at pp. 35-36.) "When whites use the word in reference to blacks, it often carries a subtext of amazement, even bewilderment . . . . Such a subtext is inherently offensive because it suggests that the recipient . . . is notably different from other black people." (*The Racial Politics of Speaking Well*, *supra*, at p. WK1.) Professor Michael Eric Dyson agrees, "Historically, it was meant to signal the exceptional Negro . . . . The implication is that most black people do not have the capacity to engage in articulate speech, when white people are automatically assumed to be articulate." *Ibid.*

"When White people . . . give Black people the "compliment" of being 'articulate' they often juxtapose it with other adjectives like 'good,' 'clean,' 'bright,' 'nice-looking,' 'handsome,' 'calm,' and 'crisp[]' which suggest that "private opinions about Blacks, in general, hold that they are usually the opposite— 'bad,' 'dirty,' 'dumb,' 'mean looking,' 'ugly,' 'angry,' and 'rough.'" (Articulate While Black, *supra*, at p. 39.) This prosecutor followed the familiar pattern here, referring to Mr. Bankston as "articulate" and wearing "a nice little suit and tie." (52RT 6522.)

> tiger." This individual who had said that was kind of dressed in a safari outfit.
>
> So the two of them make a wager, and they go off to India in search of a Bengal tiger. As they go into the jungles deeper and deeper, the journalist is walking and he comes along a clearing and he sees this enormous tiger. He sees the muscles all flexed out, he sees the claws out, he sees the fangs, he sees the teeth, he hears the growl. And he runs back to the hunter and the hunter says, "now you see a Bengal tiger."

(52RT 6522-6523.)

The message was unmistakable: the real Anthony Bankston was a wild tiger in the jungle, muscles flexed, claws out, fangs bared, growling. The jurors who viewed Mr. Bankston in court could not appreciate how vicious he was in the jungle of Los Angeles.

The prosecution's reminders to the jury that they represented *civilized society* underscored the construction of Mr. Bankston as an "other," from outside society. (See Stabile, *Othering and the Law* (2016) 12 U. St. Thomas L.J. 381.) She reminded the jury several times that they represented civilized society as she called for them to act out vengeance on society's behalf:

> In a short time all of you are going to be representing the community here. We, as a civilized society, have said that we don't want people taking vengeance into their own hand, we're going to let the jury system do that. I'm going to have enough confidence that the jury system will do the right thing, so I'll give up my right for vengeance. Ladies and gentlemen, that's falling into your lap now. You are the voice of society in this case.

(52RT 6523.)

The prosecutor implored the jury "as members of society . . . to stop this killing machine" and warned the jury against imposing anything less than a death verdict, or "basically there's no stopping him." (52RT 6524.) Mr. Bankston, the prosecutor argued, was nothing more than a "cold-hearted . . . . thug" who "has evil in his soul." (52RT 6520, 6524.) Any verdict other than a death sentence would make the jurors complicit in whatever future crimes Mr. Bankston would commit. "If you give him life without possibility of parole, you're essentially giving him a gold card to go ahead and commit assaults[.]" (52RT 6517.)

### 3. These tropes violated the RJA and entitle Mr. Bankston to relief

Violations of Penal Code section 745, subdivision (a)(2) occur when "[d]uring the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745, subd. (a)(2).) Language is racially discriminatory if it, "to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin." (§ 745, subd. (h)(4).)

Comparing Mr. Bankston to a wild Bengal tiger with fangs, claws, and muscles flexed, violated the RJA. The RJA explicitly prohibits "language that compares the defendant to an animal." (Pen. Code, § 745, subd. (h)(4).) Indeed, the Legislature contemplated *this very Bengal tiger analogy* when it enacted Assembly Bill 2542, specifically citing "cases where prosecutors have compared defendants who are people of color to Bengal tigers." (AB 2542, Stats. 2020, ch. 317, § 2, subd. (e); *cf. Bennett v. Stirling* (4th Cir. 2016) 842 F.3d 319, 324-325 [prosecutor's descriptions of the accused as a "big old tiger," among other dehumanizing comments, "were poorly disguised appeals to racial prejudice"].)

A.B. 2542 cites two such capital cases: *Duncan v. Ornoski* (9th Cir. 2008) 286 Fed.Appx. 361; and *People v. Powell* (2018) 6 Cal.5th 136. (AB 2542, Stats. 2020, ch. 317, § 2, subd. (e).) During the penalty phase of Duncan's trial, just as in the penalty phase of Mr. Bankston's trial, "the prosecutor compared Duncan to Bengal tigers that look 'like kittens' at the zoo, but are scary in 'their natural habitat.'" (*Duncan v. Ornoski, supra,* 286 Fed.Appx. at p. 363.) And in *Powell*, the Court rejected a prosecutorial misconduct claim for comparing the defendant to a Bengal tiger. (*People v. Powell, supra,* 6 Cal.5th at pp. 182–183.) In response to these cases, the Legislature declared the "use of animal imagery is historically associated with racism" and the "use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (e).)

Professor N. Jeremi Duru refers to this phenomenon as the "myth of the Bestial Black Man" and notes that since the "early days of substantive interaction between Africans and Europeans, blacks have been perceived as only narrowly removed from the animal kingdom." (Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man* (2004) 25 Cardozo L.Rev. 1315, 1321; Jordan, White Over Black: American Attitudes Toward the Negro 1550-1812 (1968) at pp. 28-29.) In the context of a criminal trial, these images prime the jury with stereotypes of the accused and activate their implicit biases. (Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Res. L.Rev. 39, 61-62.) And they define the accused as the "'other' . . . . someone outside of the moral community [which] can also induce a negative emotional response towards the defendant." (Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J.Race & L. 325, 335.)

Referring to Mr. Bankston as a "thug" was similarly racially coded. (See The Conversation, *'Thugs' Is a Race-Code Word that Fuels Anti-Black Racism* (October 16, 2018) https://theconversation.com/thugs-is-a-race-code-word-that-fuels-anti-black-racism-100312 [as of Apr. 25, 2023]; *The Racially Charged Meaning Behind The Word "Thug"*, NPR Interview with John McWhorter (April 30, 2015); https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug [as of Apr. 25, 2023].)

Historically, the term "thug" has been used to dismiss "Black life as less valuable and perpetuates a negative and criminal connotation in forms of micro-insults and micro-invalidations."

(Smiley & Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America* (2016), vol. 26, No. 3-4, J. Hum. Behav. Soc. Environ. at pp. 350-366.) "Thug" has become a common insult toward African Americans. For example, professional football player Richard Sherman was called a "thug" for a post-game interview, even though he did not use vulgar language or express any feelings of violence or criminal action; his physical presence and loud voice was used to evoke the idea of "thuggery." Even President Obama was called a "political thug" by several political adversaries. (*Ibid.*)

And labeling Mr. Bankston a "killing machine" who would go on to kill nurses, doctors, staff, other inmates, deputies, visitors, and attorneys in prison, if not put to death, played to the caricature of "Black men as innately savage, animalistic, destructive and criminal—deserving of punishment . . . [and in this case] death." (Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J.Race & L. 325, 345.)

While much of the racially discriminatory language and themes were implicit (Bengal tiger, thug, and killing machine), the gang expert explicitly linked Mr. Bankston's race to his potential for future danger when he testified Black gang members were especially likely to commit outwardly violent criminal acts. (43RT 5552; Pen. Code, § 745, subd. (a)(2); cf. *Buck v. Davis* (2017) 580 U.S. 100, 104 [Defendant denied Sixth Amendment right to counsel where defense expert testified that he "was statistically more likely to act violently because he is black."].)

The Racial Justice Act provides mandatory remedies. If a conviction was sought or obtained in violation of the RJA, the court must vacate the conviction and sentence. (Pen. Code, § 745, subd. (e)(2)(A).) If the court finds a violation of the RJA during sentencing, the court must vacate the sentence as legally invalid. (§ 745, subd. (e)(2)(B).) A violation of the RJA makes the defendant ineligible for the death penalty. (§ 745, subd. (e)(3).) Pursuant to these provisions, Mr. Bankston asks the Court to vacate his conviction and sentence and declare him ineligible for the death penalty.

### C. Mr. Bankston may raise his RJA claim on direct appeal.

The Legislature enacted A.B. 256 for a specific purpose: "to apply the California Racial Justice Act of 2020 retroactively, to ensure equal access to justice for all." (A.B. 256, Stats. 2022, ch. 739, § 1, italics added.) Removing the stain of racial discrimination from every facet of the criminal justice system is central to the Legislature's twin goals "to remedy the harm to the defendant's case *and* to the integrity of the judicial system." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (i), italics added.) The RJA explicitly declared "the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, [and] inimical to a fair criminal justice system." (*Id. at* subd. (i).) Broad retroactivity was integral to the RJA's legislative intent.

The Legislature thus made the RJA immediately applicable "[t]o all cases in which judgment is not final." (Pen. Code, §745, subds. (j)–(j)(1).) The phrase, "applies . . . [to] all cases in which

judgment is not final," is a term of art. (*People v. McKenzie* (2020) 9 Cal.5th 40, 45 [a case is not final until direct appeal is exhausted and the time to file a petition for writ of certiorari has expired].) It refers to the application of a new statute directly to cases still on appeal. (*Ibid.*) Therefore Mr. Bankston may raise an RJA violation on direct appeal. (See *People v. Frahs* (2020) 9 Cal.5th 618, 638, fn. 5 (*Frahs*) [where a statute is deemed to apply to all nonfinal cases, defendant may seek relief on direct appeal].)

In *People v. Garcia* (2022) 85 Cal.App.5th 290, 298 (*Garcia*), the First District Court of Appeal reversed the trial court's refusal to grant a continuance to prepare an RJA claim. (*Ibid.*) In so doing, the court flatly "reject[ed] the People's contention that defendant can seek only postjudgment relief . . . through a habeas petition." (*Id.* at p. 298, fn. 4.) *Garcia* was correct to reject respondent's argument[22]

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[22]In finding a right to appeal, *Garcia* implicitly rejected the argument that subdivision (b) prohibits a defendant whose judgment is still pending on appeal from raising an RJA claim in that proceeding. Subdivision (b)'s second clause, permitting a petition, has an express limitation: "if judgment has been imposed." (Pen. Code, §745, subd. (b).) This limitation provides that the right to file a habeas petition alleging RJA claims begins only once judgment has been imposed. Subdivision (b) does not state that a petition is *required* if judgment has been imposed, nor does it limit the broader unqualified right to seek relief in the trial court. This language shows the Legislature did not intend to force all post-judgment claims into the habeas process because when the Legislature has intended to restrict certain claims to writ review it has stated so directly and clearly. For example, in Code of Civil Procedure 170.3, subdivision (d), the Legislature expressly barred appellate review of the denial of a motion to disqualify a judge. (*Ibid.*) The RJA, by contrast, contains no express limitation on the right to raise a claim on appeal.

because even "'in doubtful cases the doubt [about the right to raise claims on appeal] should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment. [Citation.]'" (*Koehn v. State Bd. Of Equalization* (1958) 50 Cal.2d 432, 435.) Put differently: "It is a well established policy that, since the right of appeal is remedial in character, our law favors hearings on the merits when such can be accomplished without doing violence to applicable rules." (*Slawinski v. Mocettini* (1965) 63 Cal.2d 70, 72.) "Accordingly [even] in doubtful cases the right of appeal should be granted. [Citations.]" (*Ibid.*)

### D. Denying the right to appeal an RJA violation violates the RJA's legislative intent

Requiring Mr. Bankston to pursue this patent RJA violation through habeas corpus may very well deny him the ability to ever raise the claim. Mr. Bankston has been waiting *nearly 30 years* for appointment of postconviction counsel.[23] As of December 2022, no state court had appointed new habeas counsel in *any* pre-petition capital case since the 2016 effective date of Proposition 66. (Habeas Corpus Resource Center, Annual Report (2022) p. 14, fn. 6.) Even if very old cases like Mr. Bankston's are prioritized for the

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[23]Although indigent people sentenced to death in California have a statutory right to the appointment of habeas counsel, (see *In re Morgan* (2010) 50 Cal.4th 932, 937 (*Morgan*); Pen. Code, § 1509, subd. (b); Gov. Code, § 68662), there is "a critical shortage of qualified attorneys willing to represent capital prisoners in state habeas corpus proceedings." (*Morgan*, *supra,* 50 Cal.4th. at p. 934.) That shortage has only grown more acute since *Morgan* was decided over a decade ago. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 868 (conc. opn. of Liu, J.) (*Briggs*).)

appointment of habeas counsel,[24] at the current rate of appointments, it could still be years, if not a decade or more, before counsel is appointed to his case.[25] And it will take many additional years before his habeas petition could be adjudicated.[26] Denying Mr.

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[24]Mr. Bankston is second among those with the 25 oldest death judgments for whom capital habeas counsel has not been appointed, a group prioritized for appointment, though not necessarily in the order in which they appear on that list. Cal. Rules of Court, rule 4.561(b) & (d). Regardless, the lack of funding has prevented the appointment of any private counsel. (Habeas Corpus Resource Center, Annual Report (2022) p. 14.)

[25]As of December 2022, there were 655 people under sentence of death. (Habeas Corpus Resource Center, Annual Report (2022) p. 11.) Of these 655 people, 370 were awaiting appointment of counsel for initial state habeas proceedings; 148 of those 370 had already had their death sentences affirmed on direct appeal; and 116 had been waiting for appointment of counsel for more than 20 years. (*Id.* at p. 13; see also *Briggs*, *supra*, 3 Cal.5th at p. 864 (conc. opn. of Liu, J.) [discussing delay in appointment of capital habeas counsel]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 728 [noting "inordinate delay" of "more than 20 years" between sentencing and appointment of habeas counsel].)

[26]For example, excluding *Morgan* petitions, the average capital state habeas corpus petition has been pending for 7.5 years. (Habeas Corpus Resource Center, Annual Report (2022) pp. 15-16.) And because Prop. 66 purports to bar capital defendants from filing more than one habeas petition, Mr. Bankston would need to include all his other possible habeas claims in his petition or risk forfeiting them. (See *Briggs*, *supra*, 3 Cal.5th at p. 843 [upholding restrictions on capital defendants' ability to file more than one habeas petition]; Pen. Code, § 1509, subd. (d).) Mr. Bankston should not be forced to choose between exercising his right to habeas corpus and his right to a trial unmarred by racial discrimination. (Cf. *Simmons v. United States* (1968) 390 U.S. 377, 394. ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"].)

Bankston an opportunity to assert his rights under the RJA on direct appeal would mean Mr. Bankston may never have the opportunity to present his claims.

If this Court determines Mr. Bankston's RJA claim is not cognizable on direct appeal, the extreme dysfunction of the state habeas system leaves him without a realistic remedy for the RJA violations in this case which would flout the fundamental "principle that [the state's] inability to timely appoint habeas corpus counsel in capital cases should not operate to deprive condemned inmates of a right otherwise available to them." (*People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523, 532–533; accord, *In re Zamudio Jimenez* (2010) 50 Cal.4th 951, 955-958; *Morgan*, *supra*, 50 Cal.4th at pp. 938–939.)

### E. This Court may craft a remedy for Mr. Bankston consistent with the RJA

As explained *supra*, the RJA's plain language and legislative purpose mean the Legislature intended that record-based claims be raised on direct appeal. Even if the Court were to conclude that Mr. Bankston needs to proceed through Section 745, subdivision (b), it may still craft a remedy that does not deprive Mr. Bankston of access to the RJA.

Clearly, the Legislature intended for there to be a remedy for the RJA violation. Remedial statutes are liberally construed to promote the general object sought to be accomplished. (*Viles v. State of California* (1967) 66 Cal.2d 24, 31; *People v. Martinsen* (1987) 193 Cal.App.3d 843, 847; *People v. Fulk* (1974) 39 Cal.App.3d 851, 855.) Wherever the meaning of a remedial statute is doubtful, "it must be

so construed as to extend the remedy." (*Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 Cal.2d 423, 434-435, quoting *White v. Steam-Tug Mary Ann* (1856) 6 Cal. 462, 470; *People v. White* (1978) 77 Cal.App.3d Supp. 17, 21.) Put another way, when the Legislature has attempted to "remove [the] snares" of problematic laws with a remedial statute, "[c]ourts should not rebuild them by a too narrow interpretation of the new enactments." (*Hobbs v. Northeast Sacramento County Sanitation Dist.* (1966) 240 Cal.App.2d 552, 556.)

California has expressly rejected a rule of strict statutory construction as applied to the Penal Code. (*Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113*; Aetna Cas. & Sur. Co. v. Industrial Acc. Com.* (1947) 30 Cal.2d 388, 401.) Penal Code section 4 specifically provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

This Court has endorsed a variety of remedies to ensure that eligible defendants enjoy the full protection and benefit of extant laws. For example, in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 309-310, this Court endorsed a limited remand procedure to permit the juvenile court to conduct a transfer hearing under Proposition 57. In *Frahs*, this Court ordered a conditional limited remand for a mental health diversion eligibility hearing. (*Frahs, supra,* 9 Cal.5th at p. 857.) And in *Gentile*, this Court held that a defendant may request "a stay of the appeal and a limited

remand for the purpose of pursuing . . . relief" under an ameliorative statute. (*People v. Gentile* (2020)10 Cal.5th 830, 858 (*Gentile*).)

The *Gentile* stay is particularly relevant here. This Court held in *Gentile* that Penal Code section 1170.95 (now section 1172.6) was the exclusive mechanism for retroactive relief and the ameliorative provisions of Senate Bill 1437 did not apply on direct appeal. (*Gentile, supra,* 10 Cal.5th. at p. 839.) But that did not end the matter. Recognizing that its reading could result in "unnecessary delay" for those sentenced to death, the Court proposed a stay and limited remand to protect the defendant's rights. If the litigation on remand to the superior court "'is successful, the direct appeal may either be fully or partially moot. If the [litigation] is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision.'" (*Id.* at pp. 858–859, quoting *People v. Martinez* (2019) 31 Cal.App.5th 719, 729; *People v. Awad* (2015) 238 Cal.App.4th 215, 220.)

Thus, even if this Court were to decline to consider the RJA claim on appeal, it could still permit Mr. Bankston to assert his rights under the statute by allowing him to return to the trial court to file a motion. Anything less is tantamount to a complete denial of the RJA in a case that presents a clear and patent RJA violation.

Mr. Bankston's conviction and death judgment should be reversed. In the alternative, the Court should stay this appeal and order a limited remand to permit Mr. Bankston to raise his RJA claim in superior court.

* * *

## III.
## THE CUMULATIVE EFFECT OF THESE ERRORS ALLOWED BIAS TO INFECT THE PROCEEDINGS AND UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

A cumulative error claim has already been raised in this appeal (see Claim XIV, Appellant's Opening Brief at pp. 397-399), but it is presented here to emphasize how implicit racial bias in the proceedings affects this analysis and to draw the Court's attention to how various trial errors permitted and even fostered this bias and resulted in a miscarriage of justice.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See Claim XIV, Appellant's Opening Brief at pp. 397-399, and cases cited therein.) Where a number of trial errors occur, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Thus, reversal is required unless it can be said that the combined effect of all the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* to totality of errors when federal constitutional errors combined with other errors].)

The prosecution's reliance on racial references in summation, likely to incite racial prejudice, "weighs heavily" on the prejudice

analysis for related trial errors. (*Cudjo v. Ayers* (2012) 698 F.3d 752, 769.) For example, when "an inflammatory racial comment" is used to undercut a defense case, it has the effect of "dramatically increasing the likelihood that" the exclusion of defense evidence, a separate due process violation, "had [a] substantial and injurious effect or influence in determining the jury's verdict. [Citation.]" (*Id.* at p. 770.) The same is true under state law, which recognizes that "racism in any form or amount" is "inimical to a fair criminal justice, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California." (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (i).)

As discussed above, this was a very close case. (See discussion, *supra*, at pp. 31-36.) The first jury could not reach a verdict on charges arising from each of the three separate alleged incidents. And the prosecution's case relied on unreliable eyewitness testimony. Many of the trial errors permitted racial bias to go undiscovered or enhanced the corrosive effect of bias in the proceedings. These include:

The trial court's refusal to root out bias in the jury pool with adequate voir dire, including its complete denial of a jury questionnaire, its refusal to permit anything but close-ended voir dire questions on attitudes about Los Angeles's gang problem, and its use of short-cut group voir dire—left Mr. Bankston with a jury with unexplored biases in violation of the Sixth Amendment. (See Claim IV, Appellant's Opening Brief, at pp. 123-149; *In re Hamilton* (1999) 20 Cal.4th 273, 295 ["Voir dire is the crucial means for discovery of actual or potential juror bias"].)

The trial court error in denying Mr. Bankston his full array of peremptory challenges and in dismissing prospective jurors who opposed the death penalty deprived him of a fair jury and of the tools required to reduce bias in the jury. (See Claims V-VII, Appellant's Opening Brief at pp. 150-164.)

The trial court error permitting the introduction of Mr. Bankston's entire rap sheet, including when he was detained as a minor and as an adult on mere suspicion of criminal activity, (see Claim VII, Appellant's Opening Brief at pp. 191-228), and the court's erroneous admission of evidence that Mr. Bankston might escape from prison, and the emphasis the prosecution placed on this excluded evidence, augmented the racialized threat the prosecution argued to the jury. (See Claim XII(C), Appellant's Opening Brief at pp. 356-378.)

The same is true with respect to the erroneous admission of hearsay evidence to prove Mr. Bankston's street-gang membership and bad character, which exposed the jury to unreliable and untested prejudicial evidence. (See Claim IX, Appellant's Opening Brief, at pp. 229-256; and Claim I Appellant's Supplemental Opening Brief, at pp. 1-22.) And the trial court error in failing to sever charges at the second guilt-innocence trial further prejudiced Mr. Bankston before the jury. (See Claim XI, Appellant's Opening Brief at pp. 278-292.)

Finally, the erroneous admission, under Penal Code section 190.3, factor (b), of a noncriminal act—graffiti on an out-of-order sign of a broken copy machine in the county jail's law library—but which gang expert MacArthur testified was evidence of Mr.

Bankston's risk of future dangerousness, and which the prosecution emphasized in penalty summation as evidence that Mr. Bankston expanded his list of enemies to include "anyone who stands in his way of being worst of the worst" (52RT 6510) denied Mr. Bankston a fair penalty hearing and furthered the racialized threat the prosecution represented Mr. Bankston posed to the jury. (See Claim XII(A), Appellant's Opening Brief at pp. 320-375.)

Alongside these trial errors, the inflammatory racial tenor of Mr. Bankston's trial—comparing him to a Bengal tiger, a thug, and killing machine, and connecting his Afrocentric poetry to a propensity for violence—likely had such a substantial and injurious effect on the jury's verdict that it constituted a miscarriage of justice and a due process violation. Mr. Bankston's conviction and death judgment should be reversed.

* * *

## CONCLUSION

For all the reasons argued above, and in appellant's opening and reply briefs, the sentence and judgment against Mr. Bankston should be reversed. In the alternative, the Court should issue an order of stay and abeyance to permit Mr. Bankston to raise his RJA claim in superior court.

DATED: April 26, 2023

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/
ERIK LEVIN
Senior Deputy State Public Defender

## CERTIFICATE OF COUNSEL
## (Cal. Rules of Court, rule 8.630(b)(2))

I, Erik Levin, am the Senior Deputy State Public Defender assigned to represent appellant ANTHONY G. BANKSTON in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 14,037 words in length excluding the tables and this certificate.

DATED: April 26, 2023

/s/
ERIK LEVIN
Senior Deputy State Public Defender

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Case Number: **Supreme Court Case No. S044739**
**Los Angeles Superior Ct. No. VA007955**

I, **Ana Boyea**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

**APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **April 26, 2023**, at Sacramento, California.

Ana Boyea Digitally signed by Ana Boyea
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ANA BOYEA

**STATE OF CALIFORNIA**
Supreme Court of California

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Supreme Court of California

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Last Name, First Name (PNum)

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Law Firm