

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTHONY G. BANKSTON,

Defendant and Appellant.

No. S044739

(Los Angeles County
Superior Court
Case No. VA007955)

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
REPLY BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	7
I. THE TRIAL COURT ADMITTED MR. BANKSTON'S CREATIVE WRITING IN VIOLATION OF EVIDENCE CODE SECTION 352.2	8
A. Section 352.2 applies retroactively to nonfinal cases	9
B. The red photo album should have been precluded under section 352.2	11
C. The error was prejudicial.....	13
II. MR. BANKSTON'S SENTENCE AND CONVICTION ARE LEGALLY INVALID UNDER THE RJA	15
A. The Attorney General does not dispute Mr. Bankston's record based RJA claim	16
B. Section 745, subdivision (b) does not preclude direct appeal with sufficient clarity to rebut the <i>Estrada</i> rule	17
C. Section 745, subdivision (j) declares the RJA fully retroactive to nonfinal convictions.....	19
D. Respondent's statutory intent argument violates well-established rules of statutory interpretation	24
E. This Court may craft a remedy for Mr. Bankston consistent with the RJA.....	27
III. THE CUMULATIVE EFFECT OF THESE ERRORS UNDERMINED THE FAIRNESS OF THE TRIAL AND RELIABILITY OF THE DEATH JUDGMENT	28
CONCLUSION	29
CERTIFICATE OF COUNSEL.....	30
DECLARATION OF SERVICE	31

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>Briggs v. Brown</i> (2017) 3 Cal.5th 808.....	27
<i>In re Dixon</i> (1953) 41 Cal.2d 756	19
<i>In re Estrada</i> (1965) 63 Cal.2d 740	8, 15
<i>In re George T.</i> (2004) 33 Cal.4th 620.....	12
<i>In re Harris</i> (1993) 5 Cal.4th 813.....	19
<i>In re Morgan</i> (2010) 50 Cal.4th 932.....	27
<i>In re Pedro T.</i> (1994) 8 Cal.4th 1041.....	24
<i>In re Reno</i> (2012) 55 Cal.4th 428.....	19
<i>In re Zamudio Jimenez</i> (2010) 50 Cal.4th 951.....	27, 28
<i>Lungren v. Deukmejian</i> (1988) 45 Cal.3d 727	21
<i>Marina Point, Ltd. v. Wolfson</i> (1982) 30 Cal.3d 721	26
<i>People v. Cervantes</i> (2020) 55 Cal.App.5th 927	9
<i>People v. Chhoun</i> (2021) 11 Cal.5th 1.....	14

<i>People v. Conley</i>	
(2016) 63 Cal.4th 646.....	21, 22, 23, 24
<i>People v. Cruz</i>	
(1996) 13 Cal.4th 764.....	21
<i>People v. DeHoyos</i>	
(2018) 4 Cal.5th 594.....	22, 23
<i>People v. Frahs</i>	
(2020) 9 Cal.5th 618.....	18, 19, 20
<i>People v. Garcia</i>	
(2022) 85 Cal.App.5th 290	25
<i>People v. Gentile</i>	
(2020) 10 Cal.5th 830.....	15, 22, 23
<i>People v. Murphy</i>	
(2001) 25 Cal.4th 136.....	24
<i>People v. Nasalga</i>	
(1996) 12 Cal.4th 784.....	24, 25
<i>People v. Olguin</i>	
(1994) 31 Cal.App.4th 1355.....	10
<i>People v. Perez</i>	
(2020) 9 Cal.5th 1.....	11
<i>People v. Scarbrough</i>	
(2015) 240 Cal.App.4th 916.....	18
<i>People v. Superior Court (Lara)</i>	
(2018) 4 Cal.5th 299.....	11
<i>People v. Superior Court (Morales)</i>	
(2017) 2 Cal.5th 523.....	28
<i>People v. Superior Court (Zamudio)</i>	
(2000) 23 Cal.4th 183.....	22
<i>People v. Venable</i>	
(2023) 88 Cal.App.5th 445.....	10, 11

<i>People v. Zepeda</i>	
(2008) 167 Cal.App.4th 25	10
<i>Town of Atherton v. California High Speed Rail Authority</i>	
(2104) 228 Cal.App.4th 314	24
<i>West Pico Furniture Co. v. Pacific Finance Loans</i>	
(1970) 2 Cal.3d 594	25

State Statutes

Evid. Code	
§ 352.2	passim

Pen. Code	
§ 3	9
§ 186.22(b)(1)	10
§ 745	15, 16, 17
§ 745(a)(2)	16, 19
§ 745(b)	17, 18, 19
§ 745(c)(2)	16
§ 745(e)(2)(A)	16, 21
§ 745(e)(2)(b)	21
§ 745(e)(3)	16, 21
§ 745(h)(4)	17
§ 745(j)	19
§ 745(j)(1)	20, 23
§ 745(j)(1)-(5)	19
§ 745(j)(2)	20
§ 745(j)(5)	20
§ 859.5	9
§ 1170.95	23

Court Rules

Cal. Rules of Court, Rule 8.630(b)(2)	30
---	----

Other Authorities

Assem. Bill 1118 (2023-2024 Reg. Sess.)	25, 26
Assem. Bill 2542, Stats. 2020, ch. 317	
§ 2(a)	8, 15, 21, 25
§ 2(b)	15, 16, 25
§ 2(d)	21
§ 2(e)	16, 17, 21
§ 2(f)	21, 25
§ 2(i)	8
§ 2(j)	18
§ 4.....	18
Assem. Bill 256, Stats. 2022, ch. 739	
§ 2	20
Assem. Bill 2799, Stats. 2022, ch. 973	
§ 1(a)	9, 10
§ 1(b)	10
Assem. Com. on Pub. Saf., Analysis of Assem. Bill No.	
1118 (2023-2024 Reg. Sess.)	26
Racial Justice Act.....	passim
Senate Bill	
No. 775.....	24
No. 1437.....	23, 24

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INTRODUCTION

Respondent opposes Mr. Bankston's Evidence Code section 352.2 claim on the grounds that the rule does not apply retroactively to nonfinal judgments. Alternatively, respondent argues section 352.2 does not require the exclusion of Mr. Bankston's creative writing and any error was harmless. Respondent's arguments ignore the statute's intent and how the prosecution used Mr. Bankston's creative writing to portray him as predisposed to violence to obscure weaknesses in its case against him.

Respondent takes a notably different approach in response to the Racial Justice Act (RJA) claim. It does not dispute that the trial record contains several RJA violations, which legally invalidate Mr. Bankston's convictions and make him ineligible to receive the death penalty, but argues this Court is powerless to adjudicate the claim

on direct appeal. To reach this conclusion, respondent relies on an overly restrictive interpretation of the RJA that is inconsistent with its plain language and the Legislature's express intent for the RJA to eliminate barriers to remedying racial bias in the criminal justice system. (Assem. Bill 2542, Stats. 2020, ch. 317, § 2.) Indeed, respondent's justice-deferred approach in the face of uncontested bias in the trial record exacerbates the damage to the integrity of the judicial system that the Legislature sought to redress with the RJA. (*Id.* at subd. (i).)

**I.
THE TRIAL COURT ADMITTED MR. BANKSTON'S
CREATIVE WRITING IN VIOLATION OF
EVIDENCE CODE SECTION 352.2**

Evidence Code section 352.2¹ applies retroactively to cases on direct appeal under *In re Estrada* (1965) 63 Cal.2d 740 because it was intended to reduce the possible punishment for defendants convicted after their criminal proceedings were infected with racial bias. (SSAOB, at pp. 19-21.) The prosecution violated section 352.2 when it relied on Mr. Bankston's creative writing to invoke racial stereotypes and portray him as violent and threatening. This error was not harmless. Without limiting instructions, the prosecution freely relied on Mr. Bankston's poetry to shore up the dubious identification evidence against him.

¹All statutory references in this argument are to the Evidence Code unless otherwise specified.

A. Section 352.2 applies retroactively to nonfinal cases

Respondent argues that section 352.2 is intended to apply prospectively only, relying principally on the analysis of *People v. Cervantes* (2020) 55 Cal.App.5th 927 (*Cervantes*).² In *Cervantes*, the Fifth District Court of Appeal declined to apply retroactively Penal Code section 859.5, which requires law enforcement to record custodial interrogations of murder suspects. (*Id.* at p. 931.) But section 352.2 is very different than the statute at issue in *Cervantes*. The defense in *Cervantes* conceded that the relevant legislative text showed no intent for it to apply retroactively. (*Id.* at p. 938.) The court found the law was intended to avoid factual disputes regarding interrogation and to prevent defendants from lying about statements made to law enforcement. (*Id.* at p. 940.) And the court concluded that the law did not “provide a clear and significant benefit to the defendants” because a properly recorded interrogation was as likely to undermine the defense as it was to bolster it. (*Ibid.*)

The Decriminalizing Artistic Expression Act presents a very different legislative record. (Assem. Bill 2799, Stats. 2022, ch. 973, § 1, subd. (a) (A.B. 2799).) There is ample evidence that

²Respondent also argues that under Penal Code section 3, no part of the Penal Code is retroactive, unless expressly so declared. (SSRB, at pp. 13-15). While this is correct, respondent does not explain the relevance of Penal Code section 3 to Evidence Code section 352.2, when the Evidence Code contains no analogous provision.

the Legislature intended it to reduce possible punishment for a class of persons: defendants whose creative expression presents a substantial danger of bias if admitted as evidence at trial. (*People v. Venable* (2023) 88 Cal.App.5th 445, 456-548 (*Venable*).) Prior to the enactment of Evidence Code section 352.2, courts regarded creative expression as a form of conduct proving culpability for a crime and imposition of a gang enhancement. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372 [creative expression admissible to prove culpability and gang enhancement]; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 28, 32-35 [defendant's lyrics admissible to prove assaults committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) because the lyrics “go beyond mere fiction to disclosing defendant's state of mind, his motives and intentions, and his fealty to furthering his criminal gang's activities”].)

The Legislature enacted Evidence Code section 352.2 because it concluded that existing precedent permitted bias and prejudice to infect criminal proceedings through the admission of creative expression evidence. (Assem. Bill 2799, § 1, subd. (a)).) The Legislature explicitly declared its intent to reduce punishments obtained through proceedings poisoned with bias by creating a “framework” to ensure “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[.]” (*Id.* subd. (b).) This framework set limitations designed to increase the likelihood of acquittals and “reduce[] the possible punishment for a class of persons” which demonstrates

an intent for it to apply retroactively to nonfinal judgments. (*Venable, supra*, 88 Cal.App.5th at pp. 456-457, quoting *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303.)

B. The red photo album should have been precluded under section 352.2

Contrary to respondent's suggestion, Mr. Bankston did object to the introduction of the writings in the red photo album. (SSRB, at p. 12; SSAOB, at pp. 23-25.) Regardless, this Court does not require an objection when it would have been "futile or wholly unsupported by substantive law then in existence." (*People v. Perez* (2020) 9 Cal.5th 1, 7–8.)

Respondent argues that the prosecution was not bound by section 352.2's proscription because it did not rely on Mr. Bankston's creative writing as literal proof, but only to prove motive and intent. (SSRB, at pp. 21-22 citing (RB, 226-227, 230-233; see 17RT 2047-2048, 2053-2055; 40RT 5157-5159.) It is true the trial court admitted the writings to prove motive and intent, but the prosecution relied on the writing to prove Mr. Bankston's character and propensity for violence generally. (SSAOB, at pp. 26-28.) The prosecution's expert witnesses testified that Mr. Bankston's figurative poetry meant he was a "hardcore gang member[] . . . often used to do shootings or driveby shootings of rival gangs." (40RT 5171.) And the prosecution went far beyond motive and intent when it argued that "based upon his words" Mr. Bankston was "a very dangerous individual." (43RT 5673.) By relying on Mr. Bankston's creative expression to prove his

propensity for violence and criminal disposition, the prosecution did the very thing section 352.2 seeks to prevent.

Respondent argues the evidence could not have injected racial bias and prejudice into the proceedings because the poetry reflected how Mr. Bankston saw himself. (SSRB, at p. 22.) But what did the poetry mean? This Court has recognized “a poem is inherently ambiguous” and “may mean different things to different readers.” (*In re George T.* (2004) 33 Cal.4th 620, 636.) Here, the prosecution chose one interpretation, a literal one, in which Mr. Bankston was literally a killer. And the prosecution supported its interpretation with racialized images of gang members and expert testimony warning the jury of the heightened danger posed by Black gang members. (SSAOB, at pp. 27-31 [e.g., Mr. Bankston had “violent tendencies” and his mission in life was to be a “hardcore gang member[],” the type “often used to do shootings or driveby shootings,” “especially with Black gangs because . . . it’s all about showing how . . . down[] . . . you get.”]) This was not how Mr. Bankston saw himself. It was how the prosecution presented him to the jury.

Respondent claims that Mr. Bankston “repeatedly alluded to killing members of the rival Crips gang” in the writings at issue, but this is completely false and nothing in the record supports it. (SSRB, at p. 12 citing 3CT 697-739.)³ During the

³Respondent cites 3CT 697-739, but nothing there is relevant to its claim. Instead, it includes various motions, proposed questions for prospective jurors, court minutes and minute orders, and proposed witness lists.

second guilt-innocence trial, Deputy MacArthur initially testified that the red photo album included threats against Crips, but on cross examination he was forced to admit he was mistaken. (49RT 6110, 6116-6117.) And the prosecution made a similar misrepresentation in its penalty phase summation when it argued that “[b]ased upon the writings” Mr. Bankston would kill Crips members, “[h]e would kill them in a second.” (43RT 5673.) But that argument did not rely on any allusions to killing Crips in Mr. Bankston’s creative writing. The prosecution instead interpreted his poetry to mean he was a hardcore gang member, the type of person predisposed to being a Crip killer. (SSAOB, at pp. 27-30.) The red photo album contained no threats to kill Crips or any other gang members. (SSAOB, at pp. 23-25.)

C. The error was prejudicial

Respondent argues that any error was harmless because of evidence that Mr. Bankston was a Bloods gang member. (SSRB, at p. 23 citing RB 240.) This misses the point. The prosecution used Mr. Bankston’s creative writing to prove more than gang affiliation. It relied on the writings to portray Mr. Bankston as a “hardcore” gang member who commits “shootings or drive by shootings” and “a very dangerous individual.” And the prosecution argued the writings revealed a dark truth about Mr. Bankston, something “ingrained into his soul[:]” he was a “killing machine” and the “worst of the worst[.]” (SSAOB, at pp. 28-30, 41.)

Respondent is also wrong when it argues the jury was immunized against the prejudicial effect of this evidence with jury instructions warning them not to be influenced by bias and

prejudice. (SSRB, at p. 22.) The jurors did not have to be biased. The prosecution team did that work for them with a literal, violent, and biased interpretation of Mr. Bankston’s figurative poetry, offered by law enforcement “expert” witnesses who testified that his poetry meant he was a killer and that because he was Black, an especially outwardly violent killer. The jury only had to accept the prosecution’s theory, as the lack of limiting instructions permitted it to do.

This is a not a case where prejudice was mitigated with “extensive limiting instructions the court read during testimony and before argument direct[ing] the jury not to use the . . . evidence for an improper purpose, including bad character.” (*People v. Chhoun* (2021) 11 Cal.5th 1, 30.) Here, the court gave no limiting instructions on the jury’s consideration of Mr. Bankston’s creative writing. During Mr. Bankston’s first guilt-innocence trial, the court instructed the jury that gang membership evidence was not to be considered as evidence of propensity to commit crimes, but only to establish motive, intent, or bias. (3CT 572.) During the second trial, however, the trial court omitted that portion of the instruction. (Compare 3CT 572 with 3CT 792.) And while the remaining instruction admonished the jury to recall prior limiting instructions, the court had given no limiting instructions regarding their consideration of his creative writing. (3CT 792; 40RT 5163-5164.) The jury was free to consider it evidence of Mr. Bankston’s character, as the prosecution urged them to do in summation. (SSAOB, at pp. 28-30.) And the prosecution relied on this evidence

to obscure the weaknesses of its shaky identification evidence.
(SSAOB, at pp. 31-38.)

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

II. MR. BANKSTON'S SENTENCE AND CONVICTION ARE LEGALLY INVALID UNDER THE RJA

The Legislature explicitly declared the RJA fully retroactive to nonfinal convictions without any procedural limitations and distinguished nonfinal convictions from final convictions with respect to their remedial schemes, a "significant indication" the law is intended to retroactively apply fully to cases on direct appeal. (*People v. Gentile* (2020) 10 Cal.5th 830, 853 (*Gentile*).) The RJA reflects the Legislature's conclusion that invalidating verdicts and sentences poisoned with racial bias is the only way to protect against the "pernicious" and "deleterious" threat it poses to our justice system. (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subds. (a), (b).) Applying the *Estrada*⁴ presumption that ameliorative changes are intended to apply as broadly as possible to nonfinal convictions, leaves no doubt that the RJA permits record-based claims on direct appeal.

Nonetheless, the Attorney General argues this Court cannot consider an RJA claim on direct appeal. To reach this conclusion, he relies on a selective reading of Penal Code section 745⁵ that

⁴*In re Estrada* (1965) 63 Cal.2d 740.

⁵All statutory references in this argument are to the Penal Code unless otherwise specified.

abandons long-standing principles of statutory interpretation and retroactivity.

A. The Attorney General does not dispute Mr. Bankston's record based RJA claim

The Attorney General does not dispute the merits of the RJA claim but suggests that the reference in the Second Supplemental Opening Brief to contemporaneous examples of racist tropes involving animal imagery was an attempt to submit evidence outside the appellate record more properly considered in a habeas corpus proceeding. (SSRB, at pp. 24, 27, 30 citing SSAOB, at pp. 42-43.) The argument is misplaced.

The historical examples in the opening brief were offered as context for the prosecution's decision to employ similar tactics against Mr. Bankston and in the spirit of the RJA, which declares that the "use of animal imagery is historically associated with racism," recognizes that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race," and exhorts us to create a fair legal system by acknowledging "the stark reality that race pervades our system of justice." (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subds. (b), (e).)

The examples were not offered to prove Mr. Bankston's claim because the RJA does not require proof of discriminatory intent or prejudice. (Section 745, subds. (c)(2), (e)(2)(A), (e)(3).) It only requires proof that an attorney or witness "used racially discriminatory language" during trial. (Section 745, subds. (a)(2).) Here, the prosecution violated section 745 when it compared Mr. Bankston to a "Bengal tiger," "thug," "killing machine," and "hardcore gang

member” and offered expert witness testimony that as a Black gang member, he was more likely to commit outwardly violent criminal acts. (SSAOB, at pp. 44-49.)

Respondent does not contest any of these facts or that the RJA prohibits them, and for good reason. The RJA explicitly prohibits “language that compares the defendant to an animal.” (Section 745, subd. (h)(4).) And 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.” (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subd. (e) (citations omitted).)

B. Section 745, subdivision (b) does not preclude direct appeal with sufficient clarity to rebut the *Estrada* rule

Respondent argues this Court cannot consider Mr. Bankston’s RJA claim, relying principally on subdivision (b) of section 745, which it cites as proof the Legislature intended habeas corpus to be the exclusive remedy for post judgment relief. (SSRB, at pp. 24-35.) Respondent reads too much into subdivision (b).⁶

Contrary to respondent’s interpretation, the plain language of subdivision (b) does not require post-judgment RJA claims to be raised in a habeas petition; it merely clarifies when a defendant first becomes eligible to file a habeas petition. The second clause of

⁶“A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction, alleging a violation of subdivision (a).” Section 745, subdivision (b).

subdivision (b) permits a petition only “if judgment has been imposed.” (Section 745, subd. (b).) This limitation provides that the right to file a habeas petition alleging RJA claims begins after judgment.⁷ Subdivision (b) does not state that a petition is required if judgment has been imposed, nor does it limit the right to seek relief in the trial court. Rather it explains “how the statute normally will apply going forward” (*People v. Frahs* (2020) 9 Cal.5th 618, 633 (*Frahs*).) And this makes sense in the context of the RJA because it was originally enacted with prospective implementation in mind. (See Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subd. (j) (A.B. 2542) [“This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.”].)

The RJA did not break any new ground by listing a habeas corpus petition as a mechanism available for people who did not file a motion during trial. In cases where an appeal is not taken, habeas is the only mechanism available to raise RJA violations after the trial court enters judgment. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923 [“Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun”].) And habeas

⁷This is consistent with the legislative history clarifying that the right to file a habeas petition raising RJA claims under section 1473, subdivision (f) arises only after judgment has been entered. (Compare Sen. Amend. to Assem. Bill 2542, § 4 [amending § 1473, subd. (f)] July 1, 2020, with Sen. Amend. to Assem. Bill 2542, August 25, 2020 [adopting language similar to subd. (b)’s restriction after judgment]; see also Sen. Pub. Safety Com., analysis of Assem. Bill 2542, Aug. 20, 2020, p. 2 [“Clarify that the ability to petition for a writ of habeas corpus is available only following a conviction.”].)

may be the only available mechanism to raise RJA claims based on evidence not contained in the trial record. However, there are also cases pending on appeal with RJA violations that do not require further evidentiary development because, like Mr. Bankston’s RJA claims, they can be proven based on the trial record. (See, e.g., section 745, subd. (a)(2) [making the use of racially discriminatory language during trial – and hence apparent on the trial record – a violation of the RJA].)

This Court has consistently held that habeas should be used only when “the normal method of relief – i.e., direct appeal – is inadequate.” (*In re Harris* (1993) 5 Cal.4th 813, 828; *In re Reno* (2012) 55 Cal.4th 428, 490.) For that reason, this Court bars habeas petitioners from bringing claims they could have raised on appeal but did not. (*Ibid.*, discussing *In re Dixon* (1953) 41 Cal.2d 756.) Nothing in section 745, subdivision (b) reflects an intent to disturb these settled rules.

In light of the above, the Attorney General’s proposed interpretation of subdivision (b) does not “demonstrate contrary indications of legislative intent with sufficient clarity in order to rebut the *Estrada* rule.” (*Frahs, supra*, 9 Cal.5th at p. 628 (internal citations and quotation marks omitted).)

C. Section 745, subdivision (j) declares the RJA fully retroactive to nonfinal convictions

The Attorney General’s proposed interpretation also ignores the significance of the Legislature’s decision to replace subdivision (j) with subdivisions (j)(1) through (5) when it made the RJA fully retroactive to all nonfinal convictions. (Section 745, subd.

(j)(1)-(5), as amended by Assem. Bill 256, Stats. 2022, ch. 739, § 2.) Effective January 1, 2023, subdivision (j)(1) made the RJA immediately applicable “To all cases in which judgment is not final.” (Section 745, subd. (j)(1).) This means the RJA applies directly to all cases still on appeal. (See *Frahs, supra*, 9 Cal.5th at p. 638, fn. 5 ([where a statute is deemed to apply to all nonfinal cases, defendant may seek relief on direct appeal].))

The Legislature also distinguished between final and nonfinal judgments when it made the RJA retroactive. With respect to nonfinal judgments, subdivision (j)(1) makes no reference to a petition or any other procedural mechanism for enforcement of one’s rights under the RJA. By contrast, subdivisions (j)(2) through (j)(5), which lay out four categories of defendants with final judgments and their corresponding effective date for retroactive application, specify when defendants with final judgments may file petitions seeking relief. (Section 745, subds. (j)(2)–(j)(5).) Thus, in nonfinal cases, defendants are not required to employ a collateral attack on the judgment; they may seek relief immediately on direct appeal, as in any case involving the retroactive application of an ameliorative statute. If the Legislature intended anything different, it would have included nonfinal cases in subdivision (j)(2), which immediately permits defendants in some final cases to file a petition. It did not do so; instead, defendants with nonfinal cases on appeal may immediately raise claims under the RJA. (Section 745, subd. (j)(1).)

Respondent does not argue that subdivision (b) overrides subdivision (j)’s plain language. It ignores the significance of the

new subdivisions altogether in violation of established principles of statutory interpretation that “each sentence must be read not in isolation but in the light of the statutory scheme [citation][.]” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Respondent’s proposed interpretation of subdivision (b) instead renders subdivision (j)(1) “nugatory” as it applies to nonfinal death penalty convictions, something this Court has directed “must be avoided[.]” (*Ibid.*; see *People v. Conley* (2016) 63 Cal.4th 646, 663 [“. . . important rule that we do not interpret legislation in a manner that would render it ‘an idle act’ by the Legislature or ‘a nullity.’ [Citation.]”])

Respondent’s argument that nonfinal death penalty judgments under subdivision (j)(1) be treated the same as final death judgments under subdivision (j)(2) also conflicts with the RJA’s express purpose: to declare “legally invalid” capital convictions infected with racial bias and to make defendants in those cases ineligible for the death penalty. (Section 745, subds. (e)(2)(a), (e)(2)(b), (e)(3).) The RJA was motivated in significant part by the racial injustices of the death penalty. It would be absurd for this Legislature to have intended capital appellants with nonfinal judgments to sit idly for years under legally invalid capital convictions procured through racial bias due to lack of habeas counsel. At the very least, this interpretation is contrary to the statute’s intent. (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subds. (a), (d), (e), (f); *People v. Cruz* (1996) 13 Cal.4th 764, 783 [“ambiguities are not interpreted . . . if such an interpretation would

provide an absurd result, or a result inconsistent with apparent legislative intent. [Citation.]”))

Respondent cites this Court’s opinions in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), *People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*), and *People v. Gentile* (2020) 10 Cal.5th 830 (*Gentile*) but elides their significance to retroactivity. (SSRB, at pp. 27, 31-32.) The Legislature made the RJA fully retroactive to nonfinal convictions following this Court’s decisions in these cases and the resulting law expresses legislative intent to make the RJA fully retroactive to cases on direct appeal in the way that *Conley*, *DeHoyos*, and *Gentile* prescribe. (Cf. *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 184 [“It had to be assumed that [in new laws] . . . the Legislature was aware of existing laws and intended to maintain a consistent body of rules.”]) The RJA explicitly distinguishes between nonfinal and final convictions, applies categorically to all nonfinal convictions, and relies on existing legal process because this Court identified these features in *Conley*, *DeHoyos*, and *Gentile* as how to express an intent to make ameliorative legislation fully retroactive to cases on direct appeal.

In *Conley*, *supra*, 63 Cal.4th at pp. 657-661, this Court concluded that Proposition 36, the Three Strikes Reform Act of 2012, did not apply retroactively to cases on direct appeal because it failed to distinguish between nonfinal and final convictions and because of the nature and complexity of its recall and resentencing procedure, which required additional fact development based on extra-record evidence and a public safety assessment. This Court found that these features called into question the *Estrada*

presumption: whether the voters intended to extend the amendment to all cases. (*Id.* at pp. 657-659.)

In *DeHoyos*, *supra*, 4 Cal.5th at p. 603, this Court reached a similar conclusion with respect to Proposition 47, the Safe Neighborhoods and Schools Act, and found it was not retroactive because it also failed to distinguish between final and nonfinal sentences and conditioned resentencing on a public safety assessment, which undermined the *Estrada* presumption that the amendment was intended to apply to all cases. (*Ibid.*, citing *Conley*, *supra*, 63 Cal.4th at p. 658.)

Gentile held that Senate Bill 1437 did not apply retroactively on direct appeal for similar reasons. (*Gentile*, *supra*, 10 Cal.5th at p. 854.) The ameliorative statute there, section 1170.95, just like Propositions 36 and 47, failed to distinguish between nonfinal and final convictions and contemplated “new or additional evidence” to determine eligibility. (*Id.* at pp. 853-854, original italics.)

The Legislature responded to this Court’s direction in *Conley*, *DeHoyos*, and *Gentile*, when it crafted the RJA to be fully retroactive to nonfinal judgments by distinguishing between nonfinal judgments, which entail no procedural limit, and final judgments, which specify petitions as the procedural vehicle. (Compare Section 745, subd. (j)(1) with subds. (j)(2)-(5).) And instead of creating a novel and complex procedure, the Legislature relied on existing procedural mechanisms, just like this Court indicated it should when it intends a statute to be fully retroactive. The Court should deny the Attorney General’s request to change the rules.

**D. Respondent’s statutory intent argument
violates well-established rules of statutory
interpretation**

Respondent’s argument that subdivision (b) proves the Legislature intended to preclude raising RJA claims on direct appeal assumes there is only one form in which the Legislature can express its intent and violates a longstanding rule of statutory interpretation.⁸ This Court has repeatedly “rejected the notion that *Estrada* ‘dictate[s] to legislative drafters the forms in which laws must be written to express the legislative intent.’ (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1048–1049.)” (*Conley, supra*, 63 Cal.4th at p. 661.) “Rather, what *is* required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.” (*In re Pedro T., supra*, 8 Cal.4th at p. 1049; accord *People v. Nasalga* (1996) 12 Cal.4th 784, 793 (*Nasalga*)). The “fundamental task” of any case involving statutory interpretation “is to determine the Legislature’s intent so as to effectuate the law’s purpose. [Citation.]” (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) And this requires an examination of “the entire substance of the statute . . . to determine

⁸Following *Gentile*, the Legislature enacted Senate Bill 775, which made it explicit that certain homicide convictions could be challenged under Senate Bill 1437 on direct appeal. (SB 775, § 2.) Respondent argues the reference to direct appeal in SB 775 means that the Legislature did not intend for record-based RJA claims to be raised on direct appeal because “the same language in analogous statutes should be construed the same way.” (SSRB, at pp. 27-28 quoting *Town of Atherton v. California High Speed Rail Authority* (2104) 228 Cal.App.4th 314, 339.) But these statutes do not use the same language nor are they analogous.

the scope and purpose of the provision [Citation.]” (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608; *Nasalga, supra*, 12 Cal.4th at p. 792 [“legislative intent is the ‘paramount’ consideration”].)

Here, the Legislature stated its purpose explicitly in the RJA when it described racial bias as “especially pernicious in the administration of justice” and as having a “deleterious effect . . . on our system of justice as a whole.” (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subd. (a) (internal citations omitted).) While the Attorney General appears prepared to allow a legally invalid death sentence infected with racial bias to remain in place for years to come, the Legislature refused to accept “the stark reality that race pervades our system of justice” and sought to “remedy that reality” by removing discrimination in the criminal justice system root and stem to create “a fair system of justice that upholds our democratic ideals.” (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subd. (b).) This Legislature would have dismissed the Attorney General’s justice-delayed approach to the RJA as “a fear of too much justice.” (Assem. Bill 2542, Stats. 2020, ch. 317, § 2, subd. (f) (internal citations omitted).)

Indeed, after the Attorney General sought to prevent appellate review of biased convictions and sentences, (see, e.g., *People v. Garcia* (2022) 85 Cal.App.5th 290), Assembly Member Kalra introduced a bill to clarify that a defendant can raise record based RJA violations on direct appeal. (Assem. Bill 1118 (2023-2024 Reg. Sess.) (A.B. 1118).) Assembly Bill 1118 adds the following language to the law: “For claims based on the trial record, a

defendant may raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence.” (Assem. Bill 1118, § 1(b).) The Bill does not make substantive changes to the law; it “clarifies” the existing law to ensure that “the intent of the law is followed.” (Assem. Com. on Public Safety, March 28, 2023, Rep. on Assembly Bill 1118 at pp. 1, 5.)

In light of this legislative history, the Attorney General’s argument that Assembly Bill 1118 demonstrates the Legislature intended the 2021 RJA for All bill to preclude claims on direct appeal is remarkable. (SSRB, at p. 29, fn.7.) It is also wrong as a matter of law. This Court has disapproved of citing proposed amendments to an existing statutory scheme to infer intent behind the existing statutory scheme. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7.) This Court has explained that:

The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. A third group of legislators might oppose them to preserve an existing prohibition, and a fourth because there was no need to clarify an existing permission. The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidence of legislative intent they have little value.
[Citations.]

(*Ibid.*)⁹

⁹In the event Assembly Bill 1118 is signed into law, however, Mr. Bankston requests the opportunity to brief its significance for the issues raised in this appeal.

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

If there is any doubt about the availability of a remedy on direct appeal under the RJA as presently written, this Court should resolve it in Mr. Bankston's favor, for the same reason it has previously crafted remedies for people who would otherwise be forced to sacrifice important protections because of the dysfunction in California's capital postconviction system. The delayed appointment of state habeas counsel could cause a defendant to lose his ability to file a federal habeas petition due to expiration of the one-year federal limitations period. This Court crafted a remedy – a placeholder petition – in *In re Morgan* (2010) 50 Cal.4th 932, 938-939. When the Attorney General asked the court to decide a placeholder petition prematurely, this Court crafted another remedy to protect capital defendants from losing their right to meaningfully present all their claims in a state habeas petition. (*In re Zamudio Jimenez* (2010) 50 Cal.4th 951, 955-958.)

Mr. Bankston is in a similar position. If respondent's argument is accepted, Mr. Bankston can only obtain RJA relief by filing a habeas petition. But if he files a habeas petition now seeking relief for the RJA violations, it could bar him from filing another petition once habeas counsel is appointed. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 843.) But if he waits for habeas counsel to file an all-inclusive petition, he could be waiting forever.

Respondent insists there is "nothing preventing" Mr. Bankston from filing a habeas petition which he "remains free to

pursue.” (SSRB, at pp. 29, 33.) This Court, however, has referred to similar dilemmas as “extraordinary circumstances [that] justify an exception” (*In re Zamudio Jimenez, supra*, 50 Cal.4th at p. 958) because they 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).

Even if this Court were to conclude that the RJA as presently drafted does not permit retroactive relief from RJA violations on appeal, it should still craft a remedy that eliminates the dilemma Mr. Bankston and others in his position face due to the unavailability of habeas counsel. The only apparent solution, and the one the Legislature is poised to enact, would allow Mr. Bankston’s record-based RJA claim to be addressed on direct appeal or allow him to return to the trial court to present his RJA claim by way of motion.

III. THE CUMULATIVE EFFECT OF THESE ERRORS UNDERMINED THE FAIRNESS OF THE TRIAL AND RELIABILITY OF THE DEATH JUDGMENT

Respondent argues there is no cumulative error claim because Mr. Bankston’s RJA and Evidence Code section 352.2 claims are not cognizable on appeal. Respondent does not contest that the prosecution compared Mr. Bankston to a Bengal tiger, a thug, and killing machine, associated his race with a heightened danger to the public, and connected his Afrocentric poetry to a propensity for violence. The trial court also allowed admission of other improper

and highly prejudicial evidence and failed to take appropriate steps to root out bias in jury selection. Respondent does not contest that the convictions and death sentence in this case are tainted with racial bias or that racism in any form is inimical to a fair criminal legal system and a miscarriage of justice under our constitution. This resulted in a miscarriage of justice and Mr. Bankston's conviction and death judgment must be reversed.

CONCLUSION

For the foregoing reasons, and those set forth in appellant's other briefing, the convictions and death judgment must be reversed. In the alternative, the Court should remand this case to permit Mr. Bankston to raise his RJA claim in the superior court.

DATED: June 23, 2023

Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/ _____
ERIK LEVIN
Supervising Deputy State Public
Defender

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

I, Erik Levin, am the Supervising 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 5,647 words in length excluding the tables and this certificate.

DATED: June 23, 2023

/s/

ERIK LEVIN
Supervising Deputy State Public
Defender

DECLARATION OF SERVICE

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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 REPLY BRIEF

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Anthony George Bankston CDCR #D02392 CSP-SQ 3-EB-8 San Quentin, CA 94974	Maria Arvizo-Knight Death Penalty Coordinator Los Angeles County Superior Court 210 W. Temple Street, Room M-3 Los Angeles, CA 90012
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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 **June
23, 2023**, at Sacramento, California.

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Boyea
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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S044739**

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Last Name, First Name (PNum)

