

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 THIRD SUPPLEMENTAL
REPLY BRIEF**

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**APPELLANT'S THIRD SUPPLEMENTAL
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INTRODUCTION

Respondent takes a significant step toward fulfilling the promise of the Racial Justice Act (RJA) in agreeing that the Bengal tiger comparison during penalty summation invalidates Mr. Bankston's death sentence.¹ The Legislature enacted the RJA to eliminate racial bias from the criminal justice system because "discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law." (Stats. 2020, ch. 317, § 2, subds. (a) & (i).) The RJA specifically prohibits animal comparisons because it is a pervasive appeal to racial stereotypes of Black men as violent and threatening. (*Id.* at § 2, subd. (e).) The prosecution's Bengal tiger comparison,

¹Although its interpretation of Penal Code section 745 is flawed. See discussion, section C, *post*.

however, was not the entire RJA violation. It was the capstone to a trial contaminated with bias.

Appeals to racial bias began during the guilt-innocence trials with law enforcement gang expert testimony citing Afrocentric poetry and prose as proof Mr. Bankston was a violent “hardcore gang member” predisposed to commit shootings, including drive-by shootings. The same allegations he faced at trial. One expert explicitly linked Mr. Bankston’s race with an increased risk of violence. Black gangs, the expert opined, were especially violent because of their heightened need for respect and because for them “it’s all about showing how – for a term they use – down, . . . you . . . get[.]” (43RT 5552.) The appeals to racial bias during the penalty trial summation, when the prosecution called Mr. Bankston a thug, a killing machine, and a wild Bengal tiger that “civilized society” needed to stop, were the culmination of appeals to racial bias during the guilt-innocence trials. These RJA violations require that Mr. Bankston’s convictions and sentence be vacated.

ARGUMENT

APPELLANT’S SENTENCE AND CONVICTIONS MUST BE VACATED BECAUSE THE PROSECUTION TEAM APPEALED TO RACIAL BIAS IN VIOLATION OF THE RACIAL JUSTICE ACT

The “hardcore gang member” label appealed to the same racist stereotypes as the Bengal tiger comparison. And Lieutenant Wright’s expert witness testimony that Black hardcore gang members were especially violent was an explicit appeal to these same biases. The RJA prohibits all of them and entitles Mr. Bankston to a new trial.

A. Gang expert testimony associating race with violence explicitly appealed to racial bias.

Respondent understandably tries to reframe Wright’s testimony as merely concerning “the importance of gaining stature” in Black gangs. (3SRB, p. 14.) But Wright testified to more than that. He testified that Black gangs were especially violent and criminal and that Black hardcore gang members were more likely to commit outward violent criminal acts. (43RT 5552-5553.) In Wright’s opinion, 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[.]” (43RT 5552, 5570.)² The message was that Mr. Bankston’s race elevated the threat he posed, an “appeal[] to a powerful racial stereotype—that of black men as ‘violence prone.’” (*Buck v. Davis* (2017) 580 U.S. 100, 121, quoting *Turner v. Murray* (1986) 476 U.S. 28, 35 (plurality opinion); See also *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 596 [law enforcement witness testimony referring to “Cuban drug dealers” had the “effect of putting the city of Las Vegas’s Cuban community on trial”].)

²Wright’s testimony that for Black gang members it’s all about showing “how . . . down . . . you get” was a gratuitous reference to the African American Vernacular English term “down” which means to be “loyally participating” in the gang’s activities. (<<https://en.wiktionary.org/wiki/down#Adjective>> [last visited 2/14/23]; see also Ivey (1994) “Gangsta’s Paradise” [“I’m a loc’d out gangsta, set-trippin’ banger/ And my homies is down so don’t arouse my anger”].) Incorporating “a term they use” into his testimony bolstered his conclusion that it was the *Black* gangs that were especially violent. (43RT 5552.)

Respondent argues that Mr. Bankston cannot prevail because he cross examined Wright regarding Black gangs after Wright had testified to his race-based opinions. (3SRB, pp. 13-14.) Respondent misses the point entirely. Mr. Bankston examined Lieutenant Wright to rebut the racial stereotypes Wright was perpetuating. Mr. Bankston questioned whether gang members could obtain status through nonviolent activities like hosting social events. (43RT 5565.) His point was that “it’s not just the violent nature of the gang life that would give you stature within that particular gang[.]” (43RT 5566.) He was not suggesting that Black gangs were especially violent, as Wright had testified; he was arguing that Black gangs are made of Black people who can be “aware of . . . African heritage.” (43RT 5566.)³ His point was that the Afrocentric writings did not reflect someone committed to violence, but someone “aware of his culture, his heritage . . . Afro-American culture[.]” (43RT 5569-5570.)

Respondent tries to minimize Wright’s testimony correlating race with violence because it was “based on Wright’s experience as a gang expert” and was no more than a “single reference to ‘Black gangs[.]’” (3SRB, pp. 12, 14.) In *Buck v. Davis*, *supra*, 580 U.S. 100, the High Court found that neither witness expertise nor brevity excuse the use of race-based evidence. At issue in *Buck*, was an expert witness who, just like Lieutenant Wright, relied on his expertise and training to associate race and violence. That expert, a psychologist, testified that being Black increased the probability of

³Respondent miscites this testimony as occurring at 43RT 5556. (3SRB, pp. 14, 16.)

future violence based on “an over-representation of Blacks among the violent offenders.” (*Id.* at p. 107.) This was tantamount to evidence “that Buck was statistically more likely to act violently because he is black.” (*Id.* at p. 104.) The same is true here. Expert testimony that Black hardcore gang members were especially violent meant that Mr. Bankston, whom the prosecution alleged was one, was also “more likely to act violently because he is black.” (*Id.* at p. 104.) In *Buck*, the Court found that the introduction of race could not be disregarded as *de minimis* merely because it was brief. The Court held that impact “cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.” (*Id.* at p. 122.) The same is true here.

Respondent is also mistaken in describing Wright’s testimony as the only reference to Black gangs and violence during the trial. As respondent acknowledges elsewhere, this case was largely about Black gangs. (See 3SRB, p. 14. [“Bloods and the Crips were comprised of Black gang members”].) Wright’s testimony was the most explicitly race based, but it was not the only testimony correlating race and violence. It was part of a pervasive theme throughout the guilt-innocence and penalty trials that associated Mr. Bankston’s identity as a Black man with violence and criminality. Much of this was done with the “hardcore gang member” label.

B. The prosecution’s construction of the “hardcore gang member” appealed to racial bias.

Respondent argues that “hardcore gang members” cannot appeal to racial bias because it is “race-neutral” and similar to descriptors law enforcement officials have commonly used. (3SRB, pp. 9, 10-12.) Respondent does not explain how the label could be race neutral in light of Wright’s testimony about Black hardcore gang members and the heightened danger they present. (43RT 5552-5553.) Regardless, the Bengal tiger has no race at all (it’s a tiger) and it also has been used to secure criminal convictions of African American men. (See 2SAOB, pp. 50-51.) Both appeal to the same racist caricature of “Black men as innately savage, animalistic, destructive and criminal[.]” (Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J.Race & L. 325, 345.) Historical use is not a defense. It is the reason the RJA was enacted—to change the legal status quo and remedy the “stark reality that race pervades our system of justice.” (Stats. 2020, ch. 317, § 2, subd. (b).)

Nor is “gang member” a race-neutral term. There has long been a concern that gang expert witness testimony may appeal to stereotypes of “gang members as violent criminals who look a certain way or a bias that people of color are more likely to commit crimes[.]” (Hildebrand, *Racialized Implications of Officer Gang Expert Testimony* (2022) 92 Miss. L.J. 155, 182.) The disproportionate use of gang sentencing enhancements in cases against people of color reinforces these stereotypes. A 2020 report found that 95 percent of people sentenced to prison for a gang

enhancement from Los Angeles were Black or Latino. (Com. on Revision of the Pen. Code 2020 Annual Report (Feb. 2021), p. 38.)

Gang membership and status often are proxies for race. (2SAOB, p. 27, fn. 12.) “The gang label has been so highly racialized that white people who self-identify as gang members are almost *never* categorized as ‘gang members’ by law enforcement, while Black and Latino people who are *not* gang members are routinely labeled and targeted as if they were.” (Caldwell, *Reifying Injustice: Using Culturally Specific Tattoos As A Marker of Gang Membership* (2023) 98 Wash. L. Rev. 787, 791.) These realities help make words like “gang” and “gang member” “so imbued with racial meaning that they can and do convey racist ideas and attitudes beneath a veneer of neutrality or objectivity.” (*Id.* at p. 790.)

Respondent complains there is no legal authority that the “hardcore gang member” label is racially biased. (3SRB, pp. 11-12.) Recent legislation has recognized that being labeled a “gang member” is both racially discriminatory and highly prejudicial. The Legislature recently reformed the gang sentencing enhancement concluding that punishing gang membership “criminalize[s] entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.” (A.B. 333, Stats. 2021, ch. 699, § 2, subd. (a) [findings and declarations].) The Legislature cited reports concluding that the gang enhancements were applied “inconsistently against people of color, creating a racial disparity.” (*Id.* at § 2, subd. (d)(1).)

But here the prosecution not only invoked the image of the “gang member,” it claimed Mr. Bankston was a “hardcore gang member” a more lethal and violent kind of “gang member.” The prosecution’s expert witnesses emphasized the connection to Mr. Bankston’s race by citing figurative poetry and prose exploring Afrocentric themes as evidence he was a “hardcore gang member” with a propensity for extreme violence. (2SAOB, pp. 27-30, 44.) One gang expert interpreted a quote “a warrior does what he has to do. A soldier does what he’s told” to be from the type of person “often used to do shootings or driveby shootings of rival gangs” even though the writing did not reference shootings or driveby shootings, but instead referred to African political prisoners and the Swahili language. (40RT 5171; Exhibit 43.) In summation, the prosecution argued one poem lamenting the loss of language, identity, and life and pledging to seize it back from the oppressors was evidence of a motive to kill rival gang members. (23RT 2935 [first guilt innocence summation], 43RT 5631 [second guilt innocence summation].) The creative writing, the prosecution argued in guilt-innocence summation, identified Mr. Bankston as a “hardcore gang member” and “a very dangerous individual.” (43RT 5673.)

Respondent argues that the image of the “hardcore gang member” cannot be discriminatory because Mr. Bankston referred to it during his guilt-innocence summation at the conclusion of the first trial. (3SRB, p. 11.) Mr. Bankston argued he was not a “hardcore gang member” but that the prosecution’s gang-member witnesses might be biased against him because of the allegation that he was one. (24RT 2292, 3011, 3013.) He never legitimized the label,

endorsed the prosecution's construction of it, or agreed that poetry and prose identified him as one.

Taken together, the language used by the prosecution team throughout the guilt-innocence and penalty trials appealed to racial biases against Black men and "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.)) The racially discriminatory language violated the Racial Justice Act and entitles Mr. Bankston to relief.

C. Direct appeal Racial Justice Act claims are not subject to harmless error analysis.

Respondent argues in the alternative that Mr. Bankston is not entitled to have his convictions vacated because the RJA violations were harmless beyond a reasonable doubt. (3SRB, p. 15-19.)⁴ And while respondent concedes that Mr. Bankston is entitled to penalty trial relief, it does so under the harmless error standard, and without acknowledging that the RJA violations make Mr. Bankston ineligible for the death penalty. (3SRB, pp. 19-22.) Respondent comes to the right conclusion on the penalty trial, but its reading of the statute is flawed.⁵ The RJA does not require proof

⁴In a footnote, respondent suggests that appellant does not challenge the convictions following his first guilt-innocence trial. (3SRB, p. 15, fn. 2.) Respondent is incorrect. Appellant's RJA claim challenges both guilt-innocence convictions. (2SAOB, p. 44-45, 63.)

⁵Respondent also mistakenly reports that Mr. Bankston was convicted of two special circumstance murders. (3SRB, p. 22.) He was convicted of one special circumstance murder. (3CT 870.)

of prejudice for claims raised on direct appeal. (See *People v. Simmons* (2023) 96 Cal.App.5th 323, 334–35.)

Once a violation of the RJA has been established by a preponderance of the evidence, the court is required to impose one of the enumerated remedies. (§ 745, subd. (e).) If a conviction was sought or obtained in violation of the RJA, the court must vacate the conviction and sentence. (§ 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).)

Respondent cites section 745, subdivision (k) to support its claim that the harmless error standard applies. (3SRB, p. 15.) The plain language of that subdivision is clear that the harmless error standard applies *only* to habeas corpus petitions and not direct appeal claims like this one. (§ 745, subd. (k).) Subdivision (k) is explicit on this point:

For petitions that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.

“[P]etitions” in subdivision (k) is a reference to petitions for a writ of habeas corpus, one of the procedural vehicles available for asserting an RJA claim. (See § 745, subd. (b) [“A defendant may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7 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.”].)

Respondent is aware this is not a habeas corpus petition. (3SRB, p. 8.) Respondent is also aware of the different ways to raise an RJA claim. In fact, respondent’s initial opposition to the RJA claim asserted that Mr. Bankston could only raise his RJA claim in a petition for a writ of habeas corpus, an argument it has now abandoned. (2SRB, pp. 24-35; 3SRB, p. 8.) In that briefing, respondent cautioned this Court that the canons of statutory construction disfavor omitting or adding words to an unambiguous statute. “Courts may neither insert words nor delete words in an unambiguous statute, or rewrite a statute to conform to an assumed intention that is not within its language.” (2SRB, p. 26, quoting *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.) Respondent’s current interpretation of subdivision (k) relies on deleting language from that subdivision, an approach which is invalid and this Court should reject.

Moreover, even if a harmless error standard applied, respondent has not met it. Respondent points to evidence it characterizes as overwhelming and substantial and in doing so resolves all factual issues in favor of the judgment and glosses over glaring weaknesses in the prosecution case against Mr. Bankston. (3SRB, pp. 16-19; See 2SAOB, pp. 32-36.) But that is not the nature of the inquiry.

Under the harmless-beyond-a-reasonable-doubt standard, respondent must point to some evidence that the prosecutor’s comments and expert witness testimony—depicting Mr. Bankston

as a violent ‘hardcore gang member,’ based in part on the fact that he is Black and his Afrocentric writing —did not activate the subconscious bias of a single juror. (*See Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [The inquiry “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error”]; accord *People v. Schuller* (2023) 15 Cal.5th 237, 261-263.) Respondent has not attempted to carry that burden. As a result, Mr. Bankston would prevail on this matter even if he had raised it in a habeas corpus petition and the harmless error standard did apply.

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CONCLUSION

For all the reasons argued above and in prior briefing, the sentence and judgment against Mr. Bankston should be reversed.

DATED: February 20, 2024 Respectfully submitted,

GALIT LIPA
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 2,912 words in length excluding the tables and this certificate.

DATED: February 20, 2024

/s/

ERIK LEVIN
Supervising Deputy State Public
Defender

DECLARATION OF SERVICE

Case Name: *People v. Anthony George Bankston*
Case Number: Supreme Court Case No. S044739
Los Angeles Superior Ct. No. VA007955

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APPELLANT'S THIRD SUPPLEMENTAL REPLY 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 **February 20, 2024**, at San Joaquin County, California.

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Supreme Court of California

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