DEATH PENALTY

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF PROSECUTION SUPPORT OPERATIONS
WRITS & APPEALS DIVISION • HABEAS CORPUS LITIGATION TEAM

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April 24, 2025

Mr. Jorge E. Navarrete
Clerk of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter Brief in *People v. Anthony Bankston*, Case No. S044739 (Capital Case); LASC Case No. VA007955

Dear Chief Justice Guerrero and Associate Justices,

Amicus Nathan J. Hochman, District Attorney of the County of Los Angeles, submits this amicus letter brief regarding the issue of whether the prosecutor's use of a Bengal tiger analogy during the penalty phase was "[r]acially discriminatory language" that "appeals to racial bias" (Pen. Code, § 745, subd. (h))[1] and thus constitutes a violation of the Racial Justice Act of 2020 ("RJA"). Applying familiar canons of statutory interpretation and examining the language in its proper context, it is clear there was no violation of the RJA.

Every time this Court has considered the prosecution's use of the same Bengal tiger analogy, the Court has held that—viewed in context—the argument was proper, and did not evoke racial overtones or bias, or attempt to dehumanize the defendant. (*People v. Powell* (2018) 6 Cal.5th 136, 182-183 (*Powell*); *People v. Spencer* (2018) 5 Cal.5th 642, 688 (*Spencer*); *People v. Brady* (2010) 50 Cal.4th 547 (*Brady*); *People v. Duncan* (1991) 53 Cal.3d 955, 977 (*Duncan*).) It is difficult to comprehend how an analogy that this Court has repeatedly and expressly recognized "does not invoke racial overtones" (*Duncan*, *supra*, 53 Cal.3d at p. 977) could be deemed "racially discriminatory language" that "appeals to racial bias" under the RJA.

[1] All further statutory references are to the Penal Code unless otherwise stated.

We recognize that the Attorney General has conceded that the use of the Bengal tiger analogy was an RJA violation. (Third Supplemental Respondent's Brief (hereafter "TSRB"), p. 19.) However, the Attorney General's concession was not well taken, and this Court should reject it. (See *People v. Thompson* (1990) 221 Cal.App.3d 923, 934 [recognizing that "the Attorney General is not always right" and that a reviewing court may deem the Attorney General's position to constitute an "improvident concession" that does not bind the court]; see also *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021 [Court of Appeal held that "we are not bound by the concession" of the Attorney General].)

Respondent Attorney General stated the RJA "explicitly prohibits 'language that compares the defendant to an animal.' (§ 745, subd. (h)(4).)" (TSRB, p. 20.) Respondent's cursory concession was overbroad, as it engaged in no contextual statutory analysis, but rather asserted without qualification that *any* comparison of a defendant to an animal would constitute an RJA violation. Respondent's position eschewed hallowed tools of statutory interpretation and ignored the purpose of the RJA.

This Court has often observed that "we do not read the text in a vacuum; our task is to construe the statutory language in a manner that 'comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*Lopez v. Ledesma* (2022) 12 Cal.5th 848, 858-859, quoting *People v. Jenkins* (1995) 10 Cal.4th 234, 246.) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

The Court should reject Respondent's concession because it effectively suggests that the RJA prohibits *any* language that compares a defendant to an animal, regardless of context. Rather, the relevant operative text of the RJA prohibits only the use of **"[r]acially discriminatory language,**" which the RJA defines as "**language that, 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), bold added.)

This passage cannot be fairly read as prohibiting *any* language that "compares the defendant to an animal" regardless of whether the language "explicitly or implicitly appeals to racial bias" when viewed by "an objective observer." (§ 745, subd. (h).) Rather than separating out each clause of section 745, subdivision (h), and examining it in isolation, this Court should instead read each clause in light of the operative text that introduces it: "language that, to an objective observer, explicitly or implicitly appeals to racial bias . . . ." (§ 745, subd. (h).) This method of interpretation is consistent with well-established rules of statutory interpretation and requires the language to be evaluated in context, on a case-by-case basis.

If Respondent were correct that literally *any* comparison of a defendant to an animal automatically constitutes an RJA violation, regardless of context, that would mean the RJA prohibits comparisons that are neutral or even *favorable* to a defendant. Applying Respondent's logic, it would be an RJA violation for a defendant's own attorney to describe his or her client as "happy as a clam" or even to praise the client as being as "noble as a lion." This Court's precedents do not remotely support, much less compel, such an absurd interpretation of statutory language. Rather, this Court should reject Respondent's view as "an interpretation that would lead to absurd consequences." (*Lopez v. Ledesma*, *supra*, 12 Cal.5th at pp. 858-859.)

Instead of *removing* context, the proper approach in this case is to look at the language *in* context, to determine whether it is indeed "language that, to an objective observer, explicitly or implicitly appeals to racial bias . . . ." (§ 745, subd. (h).) Here, as in prior cases before the Court, nothing suggests the Bengal tiger analogy was used in argument to appeal to racial bias. During the penalty phase, the prosecutor stated, "The person that we see here in court is not the person that was out on the streets, it's not the person that conducts himself in the manner in which we heard about in custody." (52RT 6522.) The prosecutor then argued as follows:

> There's 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 [*sic*] of turns around and says, "What are you talking about? The sign says that." He says, "No, that's not

> a Bengal 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."
>
> Ladies and gentlemen, you sit in judgment in this case on the real Anthony Bankston, the man who kills without remorse, the man who cares nothing about human life.

(52RT 6522-6523.)

Respondent's concession asserted, "the Legislature contemplated this very 'Bengal tiger' analogy as an example of discriminatory language 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).)" (TSRB, p. 21.) But this assertion ignored the operative language of the RJA's definition of "racially discriminatory language" and mischaracterized the past pronouncements of this Court regarding the use of this exact analogy.

Although this Court will always try to harmonize statutory language with legislative intent, it is the operative text that controls. "[I]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*People v. Valencia* (2017) 3 Cal.5th 347, 357 [interpreting Penal Code provisions enacted by Prop. 47].)

RJA's legislative history stated, in pertinent part:

> Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials. For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such

> statements are "highly offensive and inappropriate" (*Duncan v. Ornoski*, 286 Fed. Appx. 361, 363 (9th Cir. 2008); see also *People v. Powell*, 6 Cal.5th 136, 182-83 (2018)). Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system . . .

(AB 2542, Stats. 2020, ch. 317, § 2, subd. (e).)

To the extent the Legislature accused this Court of having "tolerate[d] the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials," the Legislature misinterpreted this Court's precedents. In the *Powell* case cited by the Legislature, this Court *explicitly distinguished* improper comparisons of a defendant "to a beast for the purpose of dehumanizing him before the jury or in an effort to evoke the jury's racial biases," on one hand, from a legally appropriate penalty phase analogy in which the prosecutor "properly remind[s] a penalty phase jury of the circumstances of the offense, including the brutality of the murder, and caution[s] the jury against judging defendant solely based upon his calm demeanor in the courtroom," on the other hand. (*Powell*, *supra*, 6 Cal.5th at p. 183.)

As Justice Corrigan wrote in her majority opinion in *Powell*, *supra*:

> Defendant contends the prosecutor's comments comparing him to a Bengal tiger constituted a "thinly-veiled racist allusion" that dehumanized him and thus constituted an improper argument regarding his future dangerousness. We have previously rejected claims based on similar comments and find no ground to reach a different result here. (See *People v. Brady* (2010) 50 Cal.4th 547, 585, 113 Cal.Rptr.3d 458, 236 P.3d 312; *People v. Duncan* (1991) 53 Cal.3d 955, 976-977, 281 Cal.Rptr. 273, 810 P.2d 131.) **It goes without saying that a prosecutor may not compare a defendant to a beast for the purpose of dehumanizing him before the jury or in an effort to evoke the jury's racial biases. The prosecutor may, however, properly remind a penalty phase jury of the circumstances of the offense, including the brutality of the murder, and caution the jury against judging defendant solely based upon his calm demeanor in the courtroom. Here, as in our prior cases, the record makes clear that the prosecutor**

> **was using the Bengal tiger analogy only to make the latter point.** Under the circumstances of the case, we find no prejudicial misconduct.

(*Powell*, *supra*, 6 Cal.5th at pp. 182-183, bold added.)

Nothing about this passage suggests that this Court ever found racial stereotypes to be proper. On the contrary, this Court *denounced* the very practice flagged by the Legislature: the use of animal imagery to dehumanize a defendant or to evoke racial bias from the jury. *But*, the Court held the analogy used in the *Powell* case—an analogy substantially identical to the one used at Appellant's trial—did *not* attempt to dehumanize the defendant or appeal to the jury's racial bias. Thus, the Court in *Powell* in no way "tolerate[d] the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials" (AB 2542, Stats. 2020, ch. 317, § 2, subd. (e)), as suggested by the legislative history.

The same is true of this Court's holding in *Duncan*, *supra*, which held that a substantially identical analogy "does not invoke racial overtones" and thus rejected the claim that the analogy was a "thinly veiled racist allusion":

> We find no impropriety in the argument. The prosecutor was attempting to focus the jury's attention on the vicious nature of the crime. He clearly wanted the jury not to be misled by defendant's benign and docile appearance at trial, but to remember him as the murderer. The prosecutor was entitled to point out that modest behavior in the courtroom was not inconsistent with violent conduct under other less structured and controlled circumstances. (*People v. Hovey* (1988) 44 Cal.3d 543, 579–580, 244 Cal.Rptr. 121, 749 P.2d 776; *People v. Thornton* (1974) 11 Cal.3d 738, 762–763, 114 Cal.Rptr. 467, 523 P.2d 267.) We find no error in this argument.
>
> **Defendant's complaint that the Bengal tiger argument was a thinly veiled racist allusion does not withstand scrutiny. Likening a vicious murderer to a wild animal does not invoke racial overtones.** Indeed, the circumstances of the murder might have justified even more opprobrious epithets.

(*Duncan*, *supra*, 53 Cal.3d at p. 977, bold added.)

Similarly, in *Brady*, *supra*, 50 Cal.4th 547, an opinion authored by Justice Werdegar, the Court rejected the argument that a substantially identical Bengal tiger analogy was a "thinly veiled racist allusion to his Vietnamese heritage." (*Id.* at p. 585.) The Court held that "likening a murderer to a wild animal does not necessarily invoke racial overtones" and that the argument was not improper when "the prosecutor's argument was intended merely to note that defendant's docile behavior in the courtroom was not irreconcilable with his violent conduct in less controlled circumstances." (*Ibid.*) That is exactly what the prosecutor argued here—using the same analogy.

Thus, this Court has previously approved an analogy substantially identical to the one used in the instant case, and has repeatedly held that, *in the context of a warning to the jury not to be misled by the defendant's benign appearance in court*, such an analogy "does not invoke racial overtones" and cannot be considered a "thinly veiled racist allusion." (*Duncan*, *supra*, 53 Cal.3d at p. 977.) Such an analogy cannot be considered "[r]acially discriminatory language" that "appeals to racial bias" as required by the RJA. (§ 745, subd. (h).)

Moreover, the RJA states: "Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory." (§ 745, subd. (h).) Appellant has not shown this to be the case, and the history of the analogy shows that it has been used in all manner of cases with defendants of various races and ethnicities.

Indeed, in a recent case decided by the Court, the analogy was used against a white defendant. *Spencer*, *supra*, involved defendant Christopher Spencer's challenge to the use of the Bengal tiger analogy by prosecutors. (*Spencer*, *supra*, 5 Cal.5th at pp. 687-688.) Spencer is white. (See Death Row U.S.A, The Legal Defense Fund, p. 45 (Spring 2024) [providing capital punishment statistics, including state by state lists of individuals with death judgments and their race].)

Notably, no attempt has been made to distinguish the Bengal tiger analogy used in *Spencer* from the substantially identical analogy used in the *Duncan, Brady,* and *Powell* cases. These four cases—all capital cases—are the only published decisions we have found in California discussing the use of the Bengal tiger analogy. The Legislature, Appellant, and Respondent all neglect even to mention *Spencer*. The absence of citations to *Spencer* exposes the fallacy of the claim that the Bengal tiger analogy is a racially biased analogy. The *Spencer* case is

evidence that the Bengal tiger analogy is one used in capital cases as to defendants of all races, and not one "used exclusively or disproportionately in cases where the defendant is of a specific race . . . ." (§ 745, subd. (h).)

Viewed in context, the Bengal tiger analogy in this case did not appeal to racial bias. Nothing suggests that the prosecutor's argument here was any different from the arguments previously considered by the Court and held to be not only proper, but devoid of racial overtones. Accordingly, this Court should reject the Attorney General's concession as to the RJA as improvident, and find that no RJA violation occurred.

Very truly yours,

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By: Patrick Frey

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