

No. S044739 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ANTHONY BANKSTON,
Defendant and Appellant.

Los Angeles County Superior Court, Case No. VA007955
The Honorable Nancy Brown, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

Bankston was sentenced to death in 1994 and briefing on automatic appeal was completed in 2017. After this Court recently notified counsel that oral argument may take place in the next few months, Bankston sought and received permission to file an oversized second supplemental opening brief. Bankston's new brief alleges that: 1) evidence of his "creative expression" was improperly admitted at trial in violation of newly-enacted Evidence Code section 352.2; 2) discriminatory language was used at trial in violation of the Racial Justice Act (RJA); and 3) the judgment should be reversed due to cumulative error. None of these claims warrants reversal.

Bankston's claim under Evidence Code section 352.2 is not cognizable. The new statute presumptively operates prospectively, and nothing in the statute or the bill's legislative history dictates a different conclusion. Nor does the *Estrada*¹ exception apply, because the new evidentiary rule does not create an ameliorative provision that reduces possible punishment or increases the threshold for conviction. Evidence Code 352.2 therefore has no effect on Bankston's judgment. But even assuming the new statute *does* apply retrospectively, it is not reasonably probable that the trial court would have excluded the evidence under its factors, and any error in admitting the evidence without considering the new factors was harmless.

Bankston's RJA claim is also not cognizable. As set forth in detail below, the Legislature has specifically provided that where,

¹ *In re Estrada* (1965) 63 Cal.2d 740.

as here, judgment has already been imposed in the trial court, the proper means for an incarcerated defendant to raise claims under the RJA is to “file a petition for writ of habeas corpus . . . in a court of competent jurisdiction” (Pen. Code, § 745, subd. (b).) This path for pursuing an RJA claim permits Bankston to fully present an RJA claim even though it was not developed during his trial. Contrary to Bankston’s contention, habeas corpus is not illusory for condemned inmates, and in recently amending the RJA to include post-judgment claims for condemned inmates, the Legislature found no reason to expand upon the procedural mechanisms expressly provided for in the RJA.

Finally, Bankston’s cumulative error claim, which he has now reframed to include his two new substantive claims, fails for the same reasons set forth in the respondent’s brief.

ARGUMENT

I. EVIDENCE CODE SECTION 352.2 OPERATES PROSPECTIVELY AND HAS NO EFFECT ON BANKSTON’S ALREADY CONCLUDED TRIAL

On September 30, 2022, the Legislature enacted Assembly Bill No. 2799 (AB 2799), codified as Evidence Code section 352.2.² AB 2799 created new factors for courts to consider when admitting evidence of a defendant’s “creative expression” at trial. In his second supplemental opening brief, Bankston asserts that section 352.2 applies retroactively to his case. He argues that three written passages found in his residence that the trial court

² Undesignated statutory references in Argument I are to the Evidence Code.

admitted at trial, and which the gang experts testified showed his dedication to the Bloods gang, constituted creative expression. Bankston contends that the admission of the written passages without considering the factors specified in section 352.2 violated state law and his constitutional rights. (Appellant's Second Supplemental Opening Brief [SSAOB] 14-38.)³ Bankston's assertion that section 352.2 applies retroactively is incorrect. Even assuming the new Evidence Code section applies retroactively, it is not reasonably probable that the trial court would have excluded Bankston's writings, and any error in admitting the evidence was harmless in any event.

A. Evidence Code section 352.2 creates new factors to consider when admitting evidence of creative expression

Effective January 1, 2023, AB 2799, codified as Evidence Code section 352.2, provides that:

(a) In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice under Section 352, shall consider, in addition to the factors listed in Section 352, that: (1) the probative value of such expression for its literal truth or

³ As discussed at length in the respondent's brief, police found an album of gang-related pictures and writings, including three poems, in his residence, and the gang experts testified that the album's contents supported their opinions that he was an active Bloods gang member. (See RB 12-14, 36-39, 225-235) The album and its contents were marked as exhibits and entered into evidence. (See People's Exhs. 5, 21 & 23; 17RT 2044-2045.) The writings at issue are quoted in full in the respondent's brief (RB 12-14, 36-39, 225-235), and in appellant's second supplemental opening brief (SSAOB 16-17).

as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and (2) undue prejudice 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 as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

(b) If proffered and relevant to the issues in the case, the court shall consider the following as well as any additional relevant evidence offered by either party:

(1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression.

(2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.

(3) Evidence to rebut such research or testimony.

(c) For purposes of this section, "creative expression" means 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.

(d) The question of the admissibility of a form of creative expression shall be heard in limine and determined by the court, outside the presence and hearing of the jury, pursuant to Section 402. The court shall state on the record its ruling and its reasons therefor.

(§ 352.2, as added by Stats. 2022, ch. 973, § 2, eff. Jan. 1, 2023.)

As discussed in the respondent’s brief, the prosecutor introduced the contents of Bankston’s album, including the poems therein, because the evidence was probative of identity, motive, and intent in the gang-related shootings. (RB 226-227, 230-233; 17RT 2047-2048, 2053-2055, 40RT 5157-5159.) In the writings at issue, which Bankston signed using his gang moniker “Ant Dog,” he identified himself as a “true gangster” and a “young brave Blood,” professed his loyalty to the Bloods and the United Blood Nation (“U.B.N.”) prison gang, and repeatedly alluded to killing members of the rival Crips gang. (3CT 697-739.) When the poems were discussed at the first trial, Bankston offered to stipulate that he was a member or associate of the U.B.N. prison gang referred to in one of the poems, and that any gang writing in the album was “an accurate statement of the defendant.” (17RT 2049, 2053.) At the end of the second trial, Bankston expressly stated he had “no objection” to the admission of the photo album, and “no objection” to the admission of the “U.B.N. Warrior” poem contained therein. (42RT 5519-5520.)

B. New statutes are presumed to operate prospectively and nothing in the language of the statute or any extrinsic source indicates a legislative intent that AB 2799 be applied retroactively

Contrary to Bankston’s assertion, AB 2799 does not apply retroactively. Bankston relies on *People v. Venable* (2023) 88 Cal.App.5th 445, which did hold that AB 2799 applies retroactively. However, the Court of Appeal in *People v. Ramos* (2023) 90 Cal.App.5th 578, ___ [307 Cal.Rptr.3d 258, 267-272], correctly held that AB 2799 does not lessen criminal punishment

or reduce criminal liability and, therefore, the *Venable* opinion was incorrect to apply the new statute retroactively.⁴

“Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent” (*People v. Brown* (2012) 54 Cal.4th 314, 319), and “[n]o part of the Penal Code is retroactive, unless expressly so declared” (Pen. Code, § 3). Where the Legislature’s intent is unclear, Penal Code section 3 (and its counterparts in other codes, e.g., Civil Code section 3; Code of Civil Procedure section 3), create a strong presumption that the statute operates prospectively only. (*Brown, supra*, 54 Cal.4th at p. 319.) “It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.” (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287; see also *People v. Frahs* (2020) 9 Cal.5th 618, 627 [“Generally, statutes are presumed to apply only prospectively”].) However, this presumption of prospective application is a “canon of statutory interpretation rather than a constitutional mandate,” and courts can “look to the Legislature’s intent in order to determine if a law is meant to apply retroactively.” (*Frahs, supra*, at p. 627.)

⁴ The *Venable* and *Ramos* cases constitute a published split between two divisions of the court of appeal on whether AB 2799 applies retroactively. This Court granted the People’s petition for review in *Venable* on May 17, 2023, and deferred further action pending consideration and disposition of related issues in this case and in *People v. Hin*, Case No. S141519, or pending further order of this Court.

Nothing in the language of AB 2799 or section 352.2 indicates an express intent that the new Evidence Code section be applied retroactively. Moreover, Bankston does not cite to, and respondent is unaware of, any extrinsic source that indicates the Legislature intended for the law to apply retroactively. Therefore, there is no justification to dispense with “the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citation.]” (*People v. Brown, supra*, 54 Cal.4th at p. 319; see also *Tapia, supra*, 53 Cal.3d at p. 287 [where both the text of the proposition and related ballot arguments “are entirely silent on the question of retrospectivity . . . we see no reason to depart from the ordinary rule of construction that new statutes are intended to operate prospectively”].)

C. Evidence Code section 352.2 does not operate in an ameliorative way and, thus, does not fall under the retroactivity rule of *Estrada*

As the Court of Appeal explained in *People v. Ramos, supra*, 307 Cal.Rptr.3d 258 at pages 267-272, section 352.2 also does not operate retroactively under *Estrada, supra*, 63 Cal.2d 740. *Estrada* held that as an exception to Penal Code section 3’s general rule of prospectivity, courts should presume that the Legislature intends a new law to apply to all nonfinal judgments where the law amends a penal statute to reduce the punishment for a crime. (*Estrada*, at p. 745.)

Section 352.2 does not operate in any of the ameliorative ways recognized by *Estrada*, or by courts that have extended the *Estrada* rule. It does not change the elements of a substantive offense or defense; it does not reduce any penalty or affect any statute concerning penalty enhancement; it does not grant courts discretion to reduce punishment; and it does not mitigate the possible punishment for a class of persons. Instead, section 352.2 establishes a specific process for admitting evidence of “creative expression” into criminal proceedings. Or, as the Legislature stated in AB 2799 itself, the new law “provide[s] 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.) Such a procedural change does not, by its nature, give rise to the same “clear and unavoidable” inference of retroactivity that *Estrada* explained would arise from a Legislative decision to reduce punishment. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) Absent such an inference, there is nothing to overcome Penal Code section 3’s clear directive regarding prospective application of a statute. (*People v. Brown, supra*, 54 Cal.4th at pp. 319, 324.) It is also worth noting that *no other case* has applied the *Estrada* rule to an amendment to the Evidence Code, which does not alter an offense or the possible punishment for an offense.

Section 352.2 governs the conduct of trials or trial procedure and therefore, operates prospectively only. For example, in

People v. Cervantes (2020) 55 Cal.App.5th 927, the defendant confessed to multiple murders, and his confession was introduced at trial where he was convicted. While his appeal was pending, statutory amendments that imposed new requirements for custodial interrogations were passed. (*Id.* at p. 931.) The defendant argued the amendments applied retroactively to his case to render his confession inadmissible. (*Id.* at p. 936.) Yet the *Cervantes* court held there was nothing in the language of the statutes or the legislative history clearly indicating the Legislature intended for the amendments to have retroactive application. (*Id.* at p. 938.)

Further, *Cervantes* reasoned that the amendments were not analogous to the statute at issue in *Estrada*, because they did not “alter the substantive requirements for conviction, nor affect the available punishments in the event of conviction. They [did] not alter or reduce criminal punishment or treatment.” (*People v. Cervantes, supra*, 55 Cal.App.5th. at p. 940.) Instead, the amendments “imposed requirements on certain interrogations,” and “circumscribe[d] the admissibility of those statements if those requirements [were] not met or excused.” (*Ibid.*) Finally, *Cervantes* explained, “[n]or does the logic of *Estrada* apply here” because “while in certain instances, the amendments may result in the suppression of statements that are damaging to the defense,” they were “not designed to provide a clear and significant benefit to defendants; they were designed to reduce biased interpretation of, and ensure the accuracy of the evidence

of, the communication that occurs in an interrogation.” (*Id.* at pp. 940-941.)

Section 352.2 is analogous to the prospective custodial interrogation amendments in *Cervantes*. As explained, section 352.2 does not alter the substantive requirements for conviction, and does not alter or reduce criminal punishment or treatment. Instead, it imposes requirements for the admission of a certain type of evidence, namely “creative expression.” Further, although in certain instances, some evidence of “creative expression” that is damaging to the defense will be ruled inadmissible, the legislative intent behind AB 2799 was not to provide a clear and significant benefit to defendants. Rather, the intent was to prevent the introduction of stereotypes or bias as a result of a person’s “creative expression.” (Stats. 2022, ch. 973, § 1.)

The issue of retroactivity as to Penal Code section 1109, the recent statute governing bifurcation of gang enhancements, is similarly analogous. California courts of appeal are split on whether Penal Code section 1109 operates retroactively or prospectively, and the matter is pending before this Court in *People v. Burgos* (2022) 77 Cal.App.5th 550, review granted July 13, 2022, S274743. However, several courts have reasoned that because Penal Code section 1109 governs trial procedure, and does not alter the substantive requirements of the gang enhancement or affect punishment, the statute applies prospectively only. (*People v. Boukes* (2022) 83 Cal.App.5th 937, 948; *People v. Ramirez* (2022) 79 Cal.App.5th 48, 65; *People v. Perez* (2022) 78 Cal.App.5th 192, 207.)

In *Perez*, the court held *Estrada* is limited to “newly enacted criminal statutes that are intended to ameliorate criminal punishment,” and “[a]lthough [Penal Code] section 1109 is designed to minimize the prejudicial impact of gang evidence, it does not reduce the punishment or narrow the scope of the application of the gang statute.” (*People v. Perez, supra*, 78 Cal.App.5th at p. 207.) The court also reasoned that, unlike the law in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, which was a “procedural law that had the effect of potentially reducing the punishment for a class of defendants,” Penal Code section 1109 “is a procedural statute that ensures a jury will not be prejudiced by the introduction of evidence to support gang enhancement allegations—it does not reduce the punishment imposed.” (*Ibid.*)

The reasoning in *Perez* is instructive when it comes to section 352.2, which is an evidentiary law designed to minimize the admission of evidence that might introduce stereotypes or bias, and does not reduce any punishment. Also inapplicable are *People v. Burgos, supra*, 77 Cal.App.5th 550, and *People v. Ramos* (2022) 77 Cal.App.5th 1116, which found Penal Code section 1109 conferred ameliorative benefit to “a distinct class of defendants—those charged with gang enhancements.” (*Burgos, supra*, 77 Cal.App.5th at p. 565; *Ramos, supra*, 77 Cal.App.5th at p. 1129.) *Burgos* and *Ramos* were wrongly decided on the issue of Penal Code section 1109’s retroactivity, for the reasons explained in the People’s briefing before this Court in *Burgos*, case number S274743.

Moreover, section 352.2 is even further removed from satisfying *Estrada*'s rationale for presuming retroactivity than is Penal Code section 1109. Although Penal Code section 1109 requires the automatic granting of bifurcation at the request of a defendant, severing the question of guilt of the underlying offense from the question of the truth of a gang enhancement, section 352.2 merely provides a set of additional factors for trial courts to consider when admitting a specific type of evidence. Even under the new procedures of section 352.2, a trial court may still properly admit relevant evidence of "creative expression" over a defendant's objection if it is determined that the probative value of the evidence outweighs the "substantial danger of undue prejudice." (§ 352.2, subd. (a).)

Finally, Bankston's reliance on *Frahs* and *Lara* (see SSAOB 20) is misplaced, because both cases are inapplicable. In *Lara*, Proposition 57 prevented prosecutors from charging juvenile defendants directly in adult court. (*Lara, supra*, 4 Cal.5th at p. 303.) This Court reasoned that where the goal of juvenile court is largely rehabilitation, and where the sentencing treatment differs drastically between juvenile court and adult court, Proposition 57 reduces the possible punishment for a class of persons—namely, juveniles—and is therefore retroactive under *Estrada*. (*Id.* at p. 303.)

In *Frahs*, this Court determined that new legislation creating a pretrial diversion program for certain defendants with mental health disorders applied retroactively to cases where judgment was not yet final. (*Frahs, supra*, 9 Cal.5th at pp. 631-

632.) This Court reasoned that the diversion statute provides a possible benefit to a class of criminal defendants, namely, those who suffer from a qualifying mental disorder and provided “the potential of substantial reductions in punishment.” (*Id.* at p. 631.) Further, the legislative intent was to promote increased diversion of individuals with mental disorders to mitigate the individuals’ entry and reentry into the criminal justice system. (*Ibid.*)

By contrast, section 352.2 neither “reduces the possible punishment for a class of persons” (*Lara, supra*, 4 Cal.5th at p. 303), nor carries “the potential of substantial reductions in punishment” for defendants at trial (*Frahs, supra*, 9 Cal.5th at p. 631). Indeed, while *Lara* identified juveniles, *Burgos* identified defendants charged with gang enhancements, and *Frahs* identified defendants with qualifying mental health disorders as the “class of persons” whose potential punishment was reduced by new legislation. Bankston does not identify any such class of persons whose potential punishment is reduced, let alone explain how their potential punishment is reduced by the provisions of section 352.2. In sum, no court has ever held that the *Estrada* exception requires retroactive application of an evidentiary rule that simply sets forth new considerations for the admission of evidence, and this Court should decline to do so.

D. Even assuming Evidence Code section 352.2 applies retroactively, and assuming the trial court wrongly admitted Bankston’s poems, the purported error was harmless

Even if section 352.2 applies retroactively, the statute does not warrant reversal of the judgment. Had section 352.2 been in

effect at the time of Bankston's trial, it is not reasonably probable that the trial court would have excluded the writings in the photo album, even considering the new factors. Respondent has already explained that the evidence was probative of motive, identity, and intent, and was not substantially outweighed by the danger of prejudice. (See, e.g., RB 236-240.) Under section 352.2, a trial court must also consider that the probative value of "creative expression" for its literal truth is minimal, unless that expression is created near in time to the charged crime, bears a sufficient level of similarity to the charged crime, or includes factual detail not otherwise publicly available. (§ 352.2, subd. (a)(1).) The court must also consider that undue prejudice includes the possibility that the trier of fact will treat the expression as the defendant's propensity for violence. (§ 352.2, subd. (a)(2).) It is not reasonably probable that these factors would have changed the trial court's admissibility determination in this case.

As explained in the respondent's brief, and contrary to Bankston's claim on appeal, the prosecution did not rely on the poems as evidence of their "literal truth." (RB 226-227, 230-233; see 17RT 2047-2048, 2053-2055, 40RT 5157-5159.) Instead, the gang-related photos and writings were used to help establish motive, intent, and the identity of the perpetrator, for crimes allegedly committed by a Bloods member against individuals suspected of being members of the rival Crips gang. Because Bankston's acts of "creative expression" were not relied upon for

their literal truth, the factors enumerated in section 352.2 carry little, if any, weight.

Bankston's primary argument is that his poems injected racial bias into the proceedings (SSAOB 26-31), but it is not reasonably probable that this factor would have caused the trial court to exclude the evidence. Bankston's writings, which he signed with his gang moniker, were mostly a reflection of his views as a self-envisioned "warrior" for the Bloods gang, and thus, as discussed in the respondent's brief (RB 239-224), were probative of motive and identity, and the probative value was not substantially outweighed by an undue risk of prejudice. Furthermore, the jury was instructed that it could not let bias or prejudice influence its decisions (3CT 783-784 [CALJIC No. 1.00]; 4CT 907 [CALJIC No. 8.84.1]). The jury was also instructed that it could not rely on Bankston's out-of-court statements to convict him; rather, the jury was instructed that the People must prove each element of the crime independently of any such statements. (3CT 592 [CALJIC No. 2.72].) Jurors are presumed to have followed the court's instructions (*People v. Jones* (2011) 51 Cal.4th 346, 371), and therefore these instructions would have helped mitigate any possible prejudice.

Even so, as respondent argued in the respondent's brief (RB 239-224), the evidence against Bankston was so strong that it was not reasonably probable that he would have received a more favorable outcome absent the three poems contained in his photo album. (See, e.g., *People v. Coneal* (2019) 41 Cal.App.5th 951, 972-973 [error in admitting five rap videos in violation of section

352 was harmless where evidence incriminating defendant was strong]; *People v. Jasmin* (2008) 167 Cal.App.4th 98, 114 [any error in admitting rap lyrics focused on guns and violence was harmless in light of “overwhelming evidence presented at trial”].) As discussed in the respondent’s brief, the poems were merely one item in a veritable mountain of virtually uncontested gang evidence that showed Bankston was an active and devoted Bloods member with a strong desire to kill his Crips rivals. (See RB 240.) Notably, Bankston, who represented himself, did not dispute the gang evidence against him at trial. In fact, he appeared to take pride in his identity as a Bloods gang member—he readily admitted to the jury he was a Bloods member (see, e.g., 21RT 2734; 24RT 2991; 52RT 6542-6543), and he personally offered to stipulate that: (1) his gang membership continued while he was in prison and (2) the writings, drawings, and beliefs documented in the photo album were an “accurate portrayal of” him. (17RT 2049, 2053.)

Thus, Bankston has not shown that it is reasonably probable he would have obtained a more favorable result if the trial court had excluded the photo album poems. (See *People v. Young* (2019) 7 Cal.5th 905, 931 [“When evidence is erroneously admitted, we do not reverse a conviction unless it is reasonably probable that a result more favorable to the defendant would have occurred absent the error”]; *People v. Powell* (2018) 5 Cal.5th 921, 951 [same].) In addition, Bankston cannot establish that the admission of his writings violated his due process rights and rendered his trial fundamentally unfair. (See *People v.*

Partida (2005) 37 Cal.4th 428, 439 [“the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair”].) For these reasons, and those articulated in the respondent’s brief, any error relating to the admission of the poems was harmless beyond a reasonable doubt.

II. POST-JUDGMENT RJA CLAIMS ARE NOT COGNIZABLE ON DIRECT APPEAL

Bankston’s newly-added RJA claim is also not cognizable in the instant appeal. The Legislature has provided the procedural path of habeas corpus for condemned inmates to raise post-judgment RJA claims. This available procedural path permits Bankston to fully present his RJA claim even though it was not developed during his trials, and permits him to properly present and rely upon the information outside the appellate record that he cites in support of his claim. (See, e.g., SSAOB 42-43 [citing race-related events from the 1980s and 1990s—and analyses thereof—to support his claim that “[a]ge-old racist tropes against Black men were a part of the culture of 1994 Los Angeles”].)⁵

⁵ In addition to this case, the Office of the State Public Defender has attempted to raise RJA claims in two other capital cases that are pending in this Court on automatic appeal: *People v. Marcos Esquivel Barrera*, Case No. S103358, and *People v. Javance Mickey Wilson*, Case No. S118775. In all three cases, briefing had already been completed, and the requests to raise RJA claims were not made until after this Court notified counsel that oral argument would be held in the next few months. In *Barrera*, appellant filed a supplemental brief on May 26, 2023. In *Wilson*, a Motion for Stay and Limited Remand so that the

A. The California Racial Justice Act of 2020

Effective January 1, 2021, the RJA codified in a scheme of interrelated statutes in the Penal Code (§§ 745, 1473, subd. (f), 1473.7, subd. (a)(3)) the fundamental principle that “[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” (Pen. Code, § 745, subd. (a).)⁶ “The Act sets forth four categories of conduct, any of which, if proved, is enough to ‘establish’ a violation of section 745, subdivision (a).” (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 147.) Bankston alleges on appeal that his case falls into one of those categories: “During 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); SSAOB 39-40.)

In its initial, previous form, the RJA only applied “prospectively in cases in which judgment ha[d] not been entered prior to January 1, 2021.” (Former § 745, subd. (j).) As part of Assembly Bill No. 256 (AB 256), which became effective

appellant may litigate his RJA claim in the superior court is currently pending.

⁶ Undesignated statutory references in Argument II are to the Penal Code.

January 1, 2023, the Legislature amended subdivision (j) to provide, in pertinent part: “This section applies as follows: (1) to all cases in which judgment is not final[; and] (2) . . . [T]o all cases in which . . . the petitioner is sentenced to death . . .” (§ 745, subd. (j); Stats. 2022, ch. 739 (Assem. Bill 256), §§ 2, 3, eff. Jan. 1, 2023 [amending § 745, subd. (j), § 1473, subd. (f)].)

Section 745, subdivision (b), currently provides, in pertinent part, “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).”

When construing a statute, the court’s goal is to ascertain legislative intent so as to effectuate the purpose of the law. (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) The words of a statute must be given their usual and ordinary meaning, viewed in the context of the statute as a whole. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184.) “If no ambiguity appears in the statutory language, [courts] presume that the Legislature meant what it said, and the plain meaning of the statute controls. [Citations.]” (*People v. Gray* (2014) 58 Cal.4th 901, 906.) 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. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.)

These principles compel the conclusion that, as discussed above, the RJA sets forth three separate procedural mechanisms

for raising claims under its provisions, each of which apply in different instances: (1) for persons who remain under the jurisdiction of the trial court, they may file a motion in the trial court; (2) for persons who are incarcerated or otherwise have their liberty restrained after judgment has been imposed, they may file a petition for writ of habeas corpus in any court of competent jurisdiction; or (3) for persons who are no longer incarcerated after judgment has been imposed, they may file a motion under section 1473.7. (See § 745, subd. (b).)

By amending the RJA to provide for retroactivity while maintaining the specific manner of presenting RJA claims, it is evident that the Legislature intended to make these remedies exclusive. (See, e.g., *People v. Conley* (2016) 63 Cal.4th 646, 655-661 [petition procedure under Three Strikes Reform Act of 2021 sole means for obtaining relief]; *People v. DeHoyos* (2018) 4 Cal.5th 594, 600-606 [given statutory petition procedure, Proposition 47 claims cannot be raised on direct appeal].)

For persons such as Bankston, who are no longer under the jurisdiction of the trial court, the RJA provides for those individuals to explore their claims on habeas, thereby enabling such individuals to present evidence that is outside of the appellate record, just as Bankston attempts to do here. (See, e.g., SSAOB 42-43.) Notably, the Legislature has provided direct appeal as a remedy when it has wished to do so. For instance, section 1172.6, subdivision (g), part of Senate Bill No. 775—which, like AB 256, was a product of the Legislature’s 2021-2022 Regular Session—amended the petitioning process for murder

defendants, providing, “A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437.” The fact that no similar language appears in section 745 indicates a Legislative intent that the same remedy is not available in cases alleging violations of the RJA. (See *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 339, internal quotation marks and citation omitted [“Unless there is evidence the Legislature had a contrary intent, logic and consistency suggest the same language in analogous statutes should be construed the same way”].)

Additionally informative is the Legislature’s failure to carve out a jurisdictional exception within the RJA for matters that are pending in an appellate court. As is well established, “where there is no statutory exception, “the filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur [citation] and deprives the trial court of jurisdiction to make any order affecting the judgment.” [Citation].” (*People v. Wagner* (2009) 45 Cal.4th 1039, 1061.) Had the Legislature intended to permit individuals the ability to stay a pending appeal in order to raise a claim under the RJA, it could have easily done so. Instead, it made clear that post-judgment claims under the RJA are to be raised in a petition for writ of habeas corpus.

The Legislature’s specification of these procedures is readily understandable. The failure to file a motion in the trial court

deprives the superior court of an opportunity to conduct a hearing and develop a factual record related to the allegations of racial bias. And unlike the superior court, “appellate courts are not equipped to accept new evidence and make factual findings.” (*People v. Cervantes* (2020) 46 Cal.App.5th 213, 224.) Because Bankston has no denial of a trial RJA motion to appeal, he cannot bring an RJA claim in this Court on direct appeal in the first instance.

Bankston, of course, is not without a remedy. There is nothing preventing him from developing and raising post-conviction RJA claims through a petition for writ of habeas corpus, as the Legislature contemplated in expanding the act to include retroactive application to condemned inmates.

Accordingly, this Court should reject Bankston’s request to expand the procedural path for pursuing those claims beyond the remedy of habeas corpus described in the statute. (See, § 745, subd. (b).)⁷

⁷ A proposed amendment to section 745 is currently pending in the Legislature that would allow defendants to raise record-based RJA claims for first time on direct appeal, and would permit a limited stay and remand for non-record-based RJA claims to be developed in trial court. Specifically, if enacted into law, the proposed statutory language would provide that: “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. The defendant may move to stay the appeal and request remand to the superior court to file a motion pursuant to this section.” (Assem. Bill No. 1118 (2023-2024 Reg. Sess.) as amended May 18, 2023.) The fact that the Legislature is contemplating whether to permit defendants to raise RJA

Bankston is seeking to create an extraordinary remedy by asking this Court to permit him to raise an RJA claim on direct appeal and to consider matters outside the appellate record. Notably, this appeal has been pending in this Court for nearly 30 years, has been fully briefed for six years, and is on the eve of oral argument. Bankston, however, argues that he should not be required to pursue the claim on habeas corpus because of the lack of appointment of habeas counsel since the electorate passed Proposition 66 (Death Penalty Reform and Savings Act of 2016). (SSAOB 55-57.) According to Bankston, the lack of appointed counsel means that it will be many more years before his RJA claim could be adjudicated on habeas corpus. But any concern over the appointment of state habeas counsel hardly justifies delaying the resolution of automatic appeals to give priority to adjudicating RJA claims over other habeas claims. The Legislature did not provide for *any process other than habeas* for post-judgment claims by condemned inmates, no doubt recognizing as a practical matter that the remedy for any violation of the RJA would be a new trial; and accordingly, the current process for obtaining relief by way of habeas is an equally appropriate mechanism for post-judgment relief for RJA claims.

Anticipating that his RJA claim is not cognizable on appeal, Bankston suggests that this Court should, as an alternative “stay this appeal and order a limited remand to permit Mr. Bankston

claims for the first time on direct appeal, or to move for a remand for further development in the trial court, strongly suggests that such procedural paths are *not* options for defendants under current law.

to raise his RJA claim in superior court.” (SSAOB 59.) In support of his alternative request for a limited remand, Bankston cites *People v. Gentile* (2020) 10 Cal.5th 830, 858, and *People v. Awad* (2015) 238 Cal.App.4th 215, 220. (SSAOB 58-59.) Both cases are readily distinguishable. In *Gentile*, this Court noted that the petition process then set forth in former section 1170.95 was the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments. (*Gentile, supra*, 10 Cal.5th at p. 859.) In so doing, this Court also noted that an appellate court could grant a stay and remand of the proceedings “where good cause supports the motion,” suggesting that persons who are left without any available means of raising a claim under SB 1437 could establish such “good cause.” (*Id.* at pp. 858-859.)

In 2021, the Legislature responded to *Gentile* and other decisions of the California courts by passing Senate Bill 775, which became effective on January 1, 2022. (See Assem. Com. on Public Safety, Analysis of Senate Bill 775 as amended July 6, 2021, p. 11; Stats. 2021, ch. 551, § 1; *People v. Glukhoy* (2022) 77 Cal.App.5th 576, 591.) An analysis by the Assembly Public Safety Committee explained:

In *Gentile*, the California Supreme Court found that the petition process set forth in Penal Code section 1170.95 is the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments. [Citation.] Generally, the rule is that a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citation.] [¶] This bill would provide that where a conviction is not final, it may be challenged on S[enate] B[ill] 1437 grounds on direct appeal from that conviction.

(*Glukhoy, supra*, at p. 591, fn. 34.) The legislation amended section 1170.95 to provide: “[a] person convicted of murder, attempted murder, or manslaughter *whose conviction is not final may challenge on direct appeal* the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).” (§ 1170.95, subd. (g), italics added.)

Here, unlike in *Gentile*, seeking relief in the trial court is not the sole procedural mechanism set forth by the Legislature for seeking relief under the RJA. Rather, in enacting the RJA, the Legislature was careful to ensure that relief was available to persons who were outside the jurisdiction of the trial court. Although filing a motion in the trial court is the means of exploring a claim under the RJA for those persons who remain under the jurisdiction of the trial court, for persons such as Bankston, whose judgments have already been entered, they are able to avail themselves of the RJA via a petition for writ of habeas corpus. This alternative procedural mechanism, specifically set forth by the Legislature, eliminates the “good cause” that was present in *Gentile*.

Awad is similarly unhelpful to Bankston’s position. There, the defendant was sentenced and filed a notice of appeal before Proposition 47 (§ 1170.18) became effective. Defendant Awad’s appeal challenged various counts and also claimed one of the counts should be reduced to a misdemeanor under Proposition 47. (*Id.* at pp. 218-219.) The trial court, however, had declined to hear the Proposition 47 petition on the ground that it lacked

jurisdiction to recall the sentence while the case was pending on appeal. (*Id.* at p. 218.) The appellate court referred to the defendant's position as a "Hobson's choice." (*Ibid.*)⁸ Awad could either pursue his appeal and, after the remittitur is returned, address the Proposition 47 issue in the trial court, or he could abandon his appeal to pursue his claim immediately. (*Ibid.*) The appellate court appropriately reasoned that, in such a circumstance, the passage of time during the appeal would have diminished the benefit of the reduction to the defendant. (*Id.* at p. 221.) Accordingly, the appellate court stayed the pending appeal and remanded the case to the trial court to allow the lower court to address the claim under Proposition 47. (*Awad, supra*, 238 Cal.App.4th at pp. 222, 225.)

Here, conversely, Bankston is not faced with a "Hobson's choice." Instead, he remains free to pursue his claims under the RJA via a petition for writ of habeas corpus. This is the opposite of the situation presented in *Awad*, where the defendant was required to either abandon his pending appellate claims, or wait until his appeal was resolved, at which point he may have already been released from custody, which was the precise remedy he would have sought under Proposition 47. Bankston, on the other hand, is a condemned inmate seeking to claim he is entitled to a new trial under the provisions of the RJA. To do so, he does not have to abandon his direct appeal, nor is his right to

⁸ A "Hobson's choice," as used here by the court in *Awad*, refers to the necessity of accepting one of two or more equally objectionable alternatives.

pursue his RJA claims dependent upon the resolution of his appeal. The Legislature, in expanding the RJA to cases like Bankston’s—where the judgment has already been entered—did so without providing for a different procedural path than habeas.

Bankston argues that hearing the claim on direct appeal—or, alternatively, delaying the appeal so he may pursue the claim in superior court—is justified because the lack of appointment of habeas counsel since the electorate passed Proposition 66 has rendered habeas corpus an illusory remedy. (SSAOB 58-59.) While the system needs marked improvement when it comes to the appointment of counsel for capital inmates, habeas corpus is not an illusory remedy for condemned inmates with respect to vindicating RJA claims, or any other claim that is cognizable on habeas. California provides ample protections for capital defendants in state appeals and habeas corpus proceedings. (See generally, *In re Reno* (2012) 55 Cal.4th 428, 456-457.) In addressing “whether a long postconviction delay leads to the infliction of a criminal sanction in a manner that is so arbitrary that its imposition can be characterized as cruel and unusual,” this Court observed that “[u]nquestionably, . . . delays occur when this court locates and appoints qualified counsel for habeas corpus, allows ample time for counsel to prepare a petition, and then evaluates the resulting petition and successive petitions. But such delays are the product of ‘a constitutional safeguard, not a constitutional defect [citations], because [they] assure[] careful review of the defendant’s conviction and sentence.’” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1372, 1374.)

Bankston's RJA claim is not cognizable on appeal and he must pursue his claim by way of a habeas petition, i.e., the procedural path specifically provided by the Act itself. As to Bankston's alternative request for a limited remand, he has failed to establish good cause to justify this Court interjecting substantial delay into his automatic appeal in order to remand the case to the trial court for him to pursue post-conviction relief.

III. THERE WAS NO CUMULATIVE ERROR

Bankston's final contention is that there was cumulative error. (SSAOB 60-63.) He acknowledges that he raised a cumulative error claim in his original opening brief, but re-raises it in his latest brief "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." (SSAOB 60.) Bankston is not entitled to a reversal based on his re-framed cumulative error claim. As explained above and in the respondent's brief, Bankston's newly-raised claims are not cognizable, and he has failed to demonstrate that prejudicial error occurred in any event.

Moreover, whether considered individually or for their cumulative effect, it is not reasonably probable that the alleged errors affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000)

23 Cal.4th 1153, 1214.) The record shows that Bankston received a fair trial, and his claim of cumulative error should be rejected.

CONCLUSION

Based on the arguments and authorities set forth above, in the respondent's brief, and in the first supplemental respondent's brief, the judgment and sentence of death should be affirmed its entirety.

Respectfully submitted,

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June 9, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 7,450 words.

ROB BONTA
Attorney General of California

/S/ STEVEN E. MERCER

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June 9, 2023

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *People v. Anthony Bankston* No.: S044739 (CAPITAL CASE)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 9, 2023, I electronically served the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on June 9, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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Executive Officer/Clerk of Court
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Death Penalty Appeals Clerk
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
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On June 9, 2023, I served the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF by transmitting a true copy via electronic mail to:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 9, 2023, at Los Angeles, California.

Frances Conroy
Declarant

/s/ Frances Conroy
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BANKSTON (ANTHONY
GEORGE)**

Case Number: **S044739**

Lower Court Case Number:

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/s/Frances Conroy

Signature

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