IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAVANCE WILSON, Defendant and Appellant.	No. S118775 San Bernardino County Superior Court No. FVA 12968 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

The Honorable James A. Edwards

APPELLANT'S THIRD SUPPLEMENTAL OPENING BRIEF

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INTRODUCTION

Javance Wilson submits this Third Supplemental Opening Brief in response to this Court's order of December 6, 2023, directing him to address the impact of the recent amendments to Penal Code[1] section 745, subdivision (b) (§ 745(b)) on his case. Below, he contends that this Court should grant his Motion for a Stay of Appeal and Limited Remand, a procedure now explicitly authorized by amended section 745(b). In the alternative, should this Court determine that a stay is unwarranted, Mr. Wilson asks this Court to resolve the issues presented on direct appeal and then remand to the superior court so that he may seek to vindicate his rights under the

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

California Racial Justice Act (RJA) and establish his ineligibility for the death penalty there.

I
THIS COURT SHOULD GRANT MR. WILSON'S MOTION FOR A STAY OF APPEAL AND LIMITED REMAND

A. Introduction

In the weeks following the retrial at which the jury returned a death verdict, Mr. Wilson's defense team learned that, during penalty phase deliberations, one juror told another juror that the serious abuse and unconscionable neglect that marred Mr. Wilson's childhood was "cultural" and typical in African-American families. (11 CT 3131–3132.) This pernicious racial stereotype had the potential to undermine — on the basis of his race — Mr. Wilson's powerful mitigating evidence.

On February 27, 2023, less than two months after the RJA was given retroactive application to this case, Mr. Wilson filed with this Court a Motion for Stay of Appeal and Limited Remand ("Motion"). In that motion, Mr. Wilson maintained that, due to the standstill in the appointment of habeas counsel in capital cases, a writ of habeas corpus provided an illusory remedy for the RJA violations that were committed in his case. (Motion, pp. 18–21.) Accordingly, Mr. Wilson argued that he had presented good cause for a stay of appeal and limited remand to file a motion at the superior court to raise RJA claims that are based on evidence outside the appellate record, including a claim related to the juror's remark described above, and claims related to statistical disparities

in capital charging and sentencing in San Bernardino County. (Motion, pp. 10–13, 23–25.)

In its March 17, 2023, response to the motion ("Response"), the Attorney General asserted that a stay of appeal and limited remand was not an available vehicle for Mr. Wilson to vindicate his RJA claims. The Attorney General contended that a habeas petition provided the only permissible procedure for raising RJA claims in cases for which judgment has already been entered. (Response, pp. 8–15.)

Later this year the Legislature resolved the parties' disagreement regarding whether people may have their capital appeals stayed and remanded to the superior court to litigate motions under the RJA. On October 8, 2023, Governor Newsom signed Assembly Bill No. 1118, which amended section 745 to expressly authorize a defendant to "move to stay the appeal and request remand to the superior court to file a motion" under the RJA. (Assem. Bill No. 1118 (2023–2024 Reg. Sess.) ("A.B. 1118") § 1; § 745(b) [eff. 1/1/24].) Accordingly, effective January 1, 2024, this Court indubitably has the authority to stay Mr. Wilson's pending appeal and issue a limited remand to litigate an RJA motion. That is the short answer to the question posed by this Court in its December 6, 2023, order directing Mr. Wilson to submit a supplemental brief to answer the following question: "What is the effect, if any, of the recent amendment to Penal Code section 745, subdivision (b) on the issues in this case?"

Furthermore, for the reasons articulated in the motion pleadings and in this supplemental brief, Mr. Wilson has shown

good cause for this Court to stay his appeal and remand the case to the superior court. Mr. Wilson has presented specific facts demonstrating that the RJA might have been violated at his trial. The interminable delays in the appointment of habeas counsel in capital cases deprive Mr. Wilson of a viable path for raising RJA claims in a habeas petition. Consequently, this Court should grant Mr. Wilson's motion for a stay and limited remand so he could pursue his RJA claims in a motion filed at the superior court.

B. Effective January 1, 2024, section 745(b) expressly permits Mr. Wilson to seek a stay and remand to litigate his RJA claims in the superior court

As noted above, the Attorney General has opposed Mr. Wilson's motion for a stay and limited remand because the Attorney General contended that a writ of habeas corpus was the only possible procedure for raising RJA claims after the entry of judgment. (Response, pp. 8–15.) That premise no longer holds.

By amending section 745(b) to clarify that a defendant whose case is currently pending on direct appeal may "move to stay the appeal and request remand to the superior court to file a motion pursuant to this section," A.B. 1118 has resolved any doubt as to the ability of a defendant, on or after the effective date of January 1, 2024, to seek a stay and remand to litigate an RJA claim in the trial court.

Moreover, in enacting the RJA, the Legislature sought to eliminate racial bias in sentencing: "It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing." (Assem. Bill No. 2542 (2019–

2020 Reg. Sess.) ("A.B. 2542") § 2, subd. (i).) The Legislature intended "to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination." (*Id.* at subd. (j).)

It is therefore important to note that although the Legislature initially limited the reach of the RJA to cases in which judgment was entered after January 1, 2021, A.B. 256 expanded the statute's reach by making the RJA retroactive through staggered effective dates for non-final cases depending on the type and posture of the case. (§ 745, subds. (j)(2)–(5) [providing that the RJA applied to all capital cases starting on 1/1/23, non-capital cases for which the defendant was currently serving sentence on 1/1/24, cases filed pursuant to section 1473.7, subd. (f) and section 1473 on 1/1/25, and to cases for which the defendant was no longer in custody on 1/1/26.].) By placing people sentenced to death at the front of the line for RJA retroactivity, the Legislature indicated that people on death row should not have to wait to seek relief under the act. Requiring Mr. Wilson to wait for the appointment of habeas counsel — an appointment that appears unlikely to ever occur (see Motion, pp. 15, 18–21) — would defeat Legislative intent and deprive Mr. Wilson of an opportunity to seek relief under the RJA for claims that have not been developed on the appellate record.

Mr. Wilson, therefore, asks this Court, upon the effective date of A.B. 1118, to stay the appeal and order a limited remand to the superior court so that he may file such a motion.

C. This Court should stay the appeal and order a limited remand to permit Mr. Wilson to file a motion seeking relief under the California Racial Justice Act

A.B. 1118 does not expressly set forth a standard under which this Court should assess whether to grant a stay and limited remand to litigate Mr. Wilson's RJA claims. This Court, however, has broad discretion to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260; see *People v. Awad* (2015) 238 Cal.App.4th 215, 222 [construing section 1260 to permit a limited remand during the pendency of an appeal so that the trial court could apply ameliorative legislation]; accord, *People v. Gentile* (2020) 10 Cal.5th 830, 858 [appellate court may grant a "stay and limited remand" to pursue relief under former section 1170.95, "where good cause supports the motion"].) As demonstrated below, it would be "just under the circumstances" of this case to stay the appeal and remand to the superior court to allow Mr. Wilson a meaningful opportunity to litigate his RJA claim based on a juror's minimization of Mr. Wilson's mitigating evidence due to Mr. Wilson's race and his claims based on statistical disparities in death penalty charging and sentencing in San Bernardino County. (See § 745, subd. (a)(2) (§ 745(a)(2)).)

1. The standard to grant a stay should not be difficult to meet

In order "to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them," (A.B. 2542, § 2, subd. (i)), the Legislature created a multi-stage procedure to investigate and litigate RJA claims. (*Young v.*

Superior Court of Solano County (2022) 79 Cal.App.5th 138, 160 (*Young*).) Under this scheme, the burden gradually increases from requiring good cause to seek discovery, a prima facie showing to obtain an evidentiary hearing, and a preponderance of the evidence standard to establish an RJA violation and obtain relief. (*Ibid.*) "It stands to reason that the plausible justification standard [for discovery], the least onerous of all three, should not be difficult to meet." (*Id.* at p. 161; see also *Finley v. Superior Court* (2023) 95 Cal.App.5th 12, 22 ["imposing a 'heavy burden' at the prima facie stage in a Racial Justice Act case would be contrary to the Act's structure and purpose."].)

Importantly, the RJA's good-cause discovery standard was a repudiation of *United States v. Armstrong* (1996) 517 U.S. 456, "which has long been criticized for requiring defendants to prove up their claims on the merits just to be entitled to discovery—present[ing] a quandary for defendants seeking to pursue allegations of race-based selective prosecution" that "is inconsistent with the legislative intent behind the [RJA]." (*Young*, *supra*, 79 Cal.App.5th 138, 162.) As the court in *Young* aptly observed, "[p]reventing a defendant from obtaining information [to support an RJA claim] without first presenting that same evidence in a discovery motion is the type of a Catch-22 the Act was designed to eliminate." (*Ibid.*) Thus, "to establish good cause for discovery under the Racial Justice Act, a defendant is required only to advance a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case."

(*Id.* at p. 159, quoting *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).)

Young's reasoning applies with equal if not greater force where a defendant seeks a stay, as a stay motion is likely to be made at an even earlier stage and in anticipation of requesting discovery under the RJA. The standard to obtain a stay under A.B. 1118, therefore, should be at least as easy to satisfy as the good cause standard for discovery; it cannot be more onerous.

2. Mr. Wilson has demonstrated good cause for a stay and limited remand

Mr. Wilson has "advance[d] a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case." (*Young*, *supra*, 79 Cal.App.5th at p. 159, quoting *Warrick*, *supra*, 35 Cal.4th at p. 1016.) The declaration by Ronald Forbush, which was attached to Mr. Wilson's motion for a new trial that was filed on July 8, 2003, laid that factual foundation. In that declaration, Forbush stated that Juror Number 1 reported that, in the presence of other jurors, Juror Number 9 said to Juror Number 11 that the abuse and neglect that pervaded Mr. Wilson's upbringing was "cultural," that a lot of children in Black families were raised like Mr. Wilson had been,[2] and that she herself had been reared similarly and had not killed anybody. (11 CT 3131–3132.)

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[2] In the motion for a stay and limited remand, Mr. Wilson catalogued the extensive abuse and unimaginable neglect he had faced during his childhood. (Motion, pp. 6–7, fn. 2.)

Section 745(a)(2) provides that an RJA violation occurs when "[d]uring the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745(a)(2).) A capital defendant who establishes an RJA violation is no longer "eligible for the death penalty." (§ 745, subd. (e)(3).) Subdivision (d) allows a defendant to file a motion for disclosure of all evidence related to potential violations of subdivision (a). (See *Young*, *supra*, 79 Cal.App.5th at p. 144.)

Among the ways in which the Legislature sought to eradicate racial bias in criminal cases, the Legislature barred the use of racial stereotypes in criminal trials. (A.B. 2542, § 2, subd. (e) ["Existing precedent tolerates the use of . . . racial stereotypes in criminal trials"]; see also *Peña-Rodriguez v. Colorado* (2017) 580 U.S. 206, 225 [a juror's reliance on racial stereotypes in a criminal trial may violate the Sixth Amendment].) In this case, Juror Number 9's comments that child abuse and neglect were cultural and commonplace in African-American families evoked disturbing racial stereotypes that lack factual support. As discussed in Mr. Wilson's motion for a stay and limited remand, there is little difference in the incidence of child abuse in Black and White families. (Motion, p. 9.)

The fact that Juror Number 9 was, like Mr. Wilson, Black does not render her remarks permissible under the RJA. It is well-established that members of racial and ethnic groups are susceptible

to implicit bias against their own groups. (Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society* (2013) 91 N.C. L.Rev. 1555, 1584; see also Livingston, *The Role of Perceived Negativity in the Moderation of African Americans' Implicit and Explicit Racial Attitudes* (2002) 38[4] J. of Experimental Social Psychology 405, 411–412; cf. *People v. Bain* (1971) 5 Cal.3d 839, 848–850 [prosecutor engaged in prejudicial misconduct when he asked the jury to credit his belief in the defendant's guilt "because he, as a black man, 'understood' black defendants"].) Moreover, precluding relief on the basis of the speaker's race would run contrary to the legislative intent of the RJA to eradicate racial disparities in the administration of the Penal Code. The identity of the actor, just like the intent of the actor, is wholly irrelevant.

This Court has held that in the penalty phase, jurors may use their life experiences to assist in interpreting the evidence presented at trial. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 830.) On the other hand, a juror's expression of stereotypes regarding the defendant's race violates the RJA, regardless of whether the juror had intended to express bias toward the defendant. (§ 745(a)(2) [violation when juror uses racially discriminatory language about defendant's race, whether or not purposeful].) On remand, Mr. Wilson anticipates presenting evidence to demonstrate that Juror Number 9's expression of racial stereotypes during deliberations constituted racially discriminatory language about Black people, such as Mr. Wilson, or otherwise exhibited bias toward him because of his race.

Juror Number 9's remarks exhibited racial bias or animus toward Mr. Wilson in another respect. The logical implication of her commenting that the abuse and neglect in Mr. Wilson's upbringing was cultural and commonplace in Black families was that jurors should discount the weight of Mr. Wilson's mitigating evidence of abuse and neglect on the basis of his race. "Stereotypes about black families negate individualized consideration; indeed, they most probably serve as a rationale for executing the black capital defendant." (Lane, *"Hang Them If They Have to Be Hung": Mitigation Discourse, Black Families, and Racial Stereotypes* (2009) 12 New Crim. L.Rev. 171, 204; see also Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America* (2022) 107 Cornell L.Rev. 1513, 1550.)

The facts regarding Juror Number 9's remarks that Ronald Forbush alleged in his declaration submitted with the motion for a new trial suffice to constitute "a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case." (*Young*, *supra*, 79 Cal.App.5th at p. 159, quoting *Warrick*, *supra*, 35 Cal.4th at p. 1016.)

Furthermore, because subparts (1) through (4) within subdivision (a) are "not isolated pathways to proving a violation" but "may work in tandem," on remand, Mr. Wilson would pursue potential (a)(3) and (a)(4) claims under the RJA based on racial disparities in charging and sentencing. (See *Young*, *supra*, 79 Cal.App.5th at p. 164.) As detailed in Mr. Wilson's motion (Motion, pp. 10–13), the Committee on Revision of the Penal Code has noted "that the studies about racial bias in the administration of the death

penalty are remarkably consistent across time periods and research designs and show a consistent theme: race often determines when the death penalty is sought and when it is imposed." (Com. on Revision of the Pen. Code, Death Penalty Report (Nov. 2021) ("Death Penalty Report"), p. 19 [quoting UCLA School of Law Professor Sherod Thaxton], pp. 19–24 [reviewing studies conducted statewide and in individual counties].)

More specifically, death-sentencing statistics from San Bernardino County, during the decade in which Mr. Wilson was sentenced to death, reveal a striking and alarming disparity. From 2000 through 2010, 18 people were sentenced to death in San Bernardino County. Seven of them (38.9 percent) were Black: Joe Henry Abbott, Thomas Battle, Louis Mitchell Jr., Johnny Duane Miles, John Myles, Gregory C. Whiteside, and Mr. Wilson. (See Amicus Brief of Governor Gavin Newson, filed in *People v. McDaniel* (S171393), Attachment A, pp. 104–161 [death-sentencing data provided by the Habeas Corpus Resource Center pursuant to its legislative mandate].) At the same time, the Black population of San Bernardino County increased slightly from 10.0% to 10.3%.[3] (U.S. Census Bureau, 2010 Census of Population and Housing, Summary Population and Housing Characteristics: California (2012) pp. 164, 236; U.S. Census Bureau, 2000 Census of Population and Housing, Summary Population and Housing Characteristics: California

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[3] These figures include all people who identified as Black, irrespective of whether they had selected multiple races on their census forms.

(2002) pp. 94, 152.) Thus, the proportion of the people sentenced to death between 2000 and 2010 who were Black was nearly four times greater than the proportion of the general population who was Black.

These data comport with other currently available statistics. In San Bernardino County, from 2010 to 2020, "50% of people sentenced to death were people of color. Black people made up 9% of the county population during this time but accounted for 38% of the 8 new death sentences." (Death Penalty Report, *supra*, p. 21.) Similarly, of the 14 death sentences San Bernardino County imposed between 2006 and 2015, 43% of the defendants were Black, while less than 10% of the county's population was Black. (Fair Punishment Project, Too Broken to Fix Part II: An In-Depth Look at America's Outlier Death Penalty Counties (2016), pp. 18–19.)[4] These statistics establish "a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred'" (*Young*, *supra*, 79 Cal.App.5th at p. 159, quoting *Warrick*, *supra*, 35 Cal.4th at p. 1016) in Mr. Wilson's case.

For the reasons shown above, a stay and remand would be "just under the circumstances." (§ 1260.) Accordingly, Mr. Wilson has shown good cause to receive the stay and limited remand that he requested in his February 27, 2023, motion.

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[4] Altogether, of the 39 people currently on death row who were sentenced in San Bernardino County, 62% are people of color. (Death Penalty Report, *supra*, p. 21.)

II

IN THE ALTERNATIVE, AFTER ADDRESSING THE ISSUES RAISED IN MR. WILSON'S APPEAL, THIS COURT SHOULD REMAND THE CASE TO THE TRIAL COURT TO ALLOW HIM TO PURSUE RELIEF UNDER THE RJA AND ESTABLISH HIS INELIGIBILITY FOR A DEATH SENTENCE

In his response to Mr. Wilson's motion for a stay and limited remand, the Attorney General noted that Mr. Wilson's direct appeal has been fully briefed and pending for some time, and objected to a stay and remand on these grounds. (Response, pp. 6–7.) The Attorney General contended that a stay and remand would "disrupt[] the orderly administration of justice"; therefore, he objected to the procedure and contended that a petition for writ of habeas corpus was the only available means for Mr. Wilson to vindicate his rights under the RJA. (Response, pp. 6, 13–14.)

As set forth above in Argument I, amended section 745(b) now explicitly contemplates stay and remand to allow appellants with cases on direct appeal to raise claims under the RJA, whether or not those claims are apparent on or developed in the record on appeal. (See § 745(b); A.B. 1118, Sen. Com. on Pub. Safety Bill Analysis, June 6, 2023, pp. 5–6.) In the alternative, should the Court determine that a stay at this stage of the appeal is unwarranted, Mr. Wilson asks that this Court resolve the issues presented on appeal and remand to the superior court to determine whether RJA violations render Mr. Wilson ineligible for the death penalty.

Section 1260 permits this Court to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." Such a remand would be "just under the

circumstances" for the same reasons articulated above in Argument I. Moreover, as set forth in Mr. Wilson's Motion for a Stay of Appeal and Limited Remand, and as the Legislature recognized in enacting A.B. 1118, habeas corpus is not a viable means of vindicating rights under the RJA for people sentenced to death. (Motion, pp. 15, 18–21; see also A.B. 1118, Sen. Com. on Pub. Safety Bill Analysis, June 6, 2023, pp. 5–6.) The Legislature has now made clear its intent to permit people whose cases are pending on direct appeal to raise RJA claims, whether or not those claims are developed on the record. (See § 745(b); A.B. 1118, Sen. Com. on Pub. Safety Bill Analysis, June 6, 2023, pp. 5–6.) Thus, whatever the disposition of his appeal, Mr. Wilson asks the Court to remand the case to the trial court to permit him to pursue relief and establish his ineligibility for the death penalty under the RJA.

CONCLUSION

For the reasons stated above and in Mr. Wilson's Motion and his Reply in support of the Motion, this Court should grant the motion for a stay and limited remand so Mr. Wilson could file a motion for relief under the RJA at the superior court. If this Court denies the request for a stay, this Court should nevertheless remand this case to the superior court.

Dated: December 27, 2023

Respectfully submitted,

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/s/
CRAIG BUCKSER
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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, JAVANCE MICKEY WILSON, in this automatic appeal. I 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, excluding tables and certificates is 3,790 words in length.

DATED: December 27, 2023

/s/

CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: *People v. Javance Mickey Wilson*
Case Number: Supreme Court No. S118775
San Bernardino County Superior Court
Case No. FVA12968

I, **Ann-Marie Doersch,** declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a true copy of the following document:

APPELLANT'S THIRD SUPPLEMENTAL OPENING BRIEF

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Ann-Marie Doersch

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STATE OF CALIFORNIA
Supreme Court of California

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Signature

Buckser, Craig (194613)

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Office of the State Public Defender

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