IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARCOS ESQUIVEL BARRERA, Defendant and Appellant.	No. S103358 Los Angeles County Superior Court No. PA029724-01 Capital Case

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Ronald S. Coen

APPELLANT'S FOURTH SUPPLEMENTAL OPENING BRIEF

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I.
THIS TRIAL WAS RACIALIZED FROM BEGINNING TO END, RENDERING THE CONVICTIONS "LEGALLY INVALID" UNDER THE RACIAL JUSTICE ACT

Appellant, Marcos Barrera, is a Mexican national who immigrated to Los Angeles in the mid-1980's, without obtaining authorization from immigration authorities. This country has a long history of discrimination against Latinxs like Mr. Barrera. In 1786, Thomas Jefferson wrote about taking over Latin America "piece by piece" once our population "sufficiently advanced." (Letter from Thomas Jefferson to Archibald Stuart, Jan. 25, 1786, National Archives <https://founders.archives.gov/documents/ Jefferson/01-09-02-0192> [as of May 23, 2023].) Less than a hundred years later, we did just that under the banner of "Manifest Destiny." But moving the border wasn't enough; the United States wanted the Mexicans

to move with it. Ones who remained were targeted with violence, segregation, and subject to "repatriation," i.e., mass deportation. (*State v. Zamora* (Wash. 2022) 512 P.3d 512, 524.) "Latinx men, women, and children alike were brutalized, tortured, and lynched by white mobs with impunity." (*Ibid.*) Anti-Latinx discrimination was a motivating factor in Congress's decision to pass the Undesirable Aliens Act of 1929 and the Nationality Act of 1952. (*United States v. Carillo-Lopez* (D. Nev. 2021) 555 F.Supp.3d 996, 1005-1009, revd. (9th Cir. 2023) __ F.4th __, 2023 WL 3587596 [agreeing that the 1929 Act was motivated by anti-Latinx animus but disagreeing that Carillo-Lopez had overcome the "strong presumption of good faith" with respect to the 1952 Act].) Legislators spoke of Mexicans as "poisoning the American citizen" because they are a "very undesirable" class. (*Id.* at p. 1009.) Discrimination was legitimized and rationalized through dehumanization and demonization. (Kevin Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons* (1997) 28 U. Miami Inter-Am. L.Rev. 263, 264-292 (hereafter *"Aliens"*).)

The largest mass deportation in American History occurred in 1953 and was code-named "Operation Wetback." (Kevin Johnson, *Trump's Latinx Repatriation* (2019) 66 UCLA L.Rev. 1444, 1460-1464.) Over a million Latinxs, including many U.S. citizens, were forcibly removed to Mexico before the operation ended. (*Id.* at p. 1446; see also Ballinger, *From the archives: How The Times covered mass deportations in the Eisenhower era*, L.A. Times (2023) <https://documents.latimes.com/eisenhower-era-deportations/> [as of May 23, 2023].)

In response to the civil rights movement, federal law replaced its overt race-based exclusions with provisions that were facially race-neutral but intended to have the same effect – exclude poor people of color from entering our country across its southern border. (*"Aliens*," *supra*, 28 U. Miami Inter-Am. L.Rev. 263.) "Illegal alien" became the new code for anti-Latinx bias. (*Ibid.*) Latinxs are frequently scapegoated for society's economic woes and rising crime and are often dehumanized and demonized by the media and politicians.

Take, for example, Donald Trump's speech announcing his candidacy for president: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." (Donald Trump, Remarks Announcing Candidacy for President in New York City (June 16, 2015) <https://www.presidency.ucsb.edu/documents/remarks-announcing-candidacy-for-president-new-york-city> [as of May 23, 2023].) Once president, Trump remarked that they "aren't people. These are animals." (Pres. Donald Trump, Remarks at a Roundtable Discussion on California's Immigration Enforcement Policies (May 16, 2018) <https://www.presidency.ucsb.edu/documents/remarks-roundtable-discussion-californias-immigration-enforcement-policies> [as of May 23, 2023].)

The same language historically used to appeal to anti-Latinx bias was expressed throughout Mr. Barrera's trial. It began during

voir dire, when the jury learned from defense counsel that Mr. Barrera was a Mexican national, or "illegal alien," and culminated in the penalty phase during closing argument when the prosecutor distinguished between "[w]e, the people . . . we, the citizens of the United States," and others, and implied that the others, like Mr. Barrera, might be more inclined to torture and murder their children. In between, Mr. Barrera was dehumanized, compared to an animal, and mocked for street vending with his children. His own expert testified that being "illegal" predisposed him to commit child abuse.

The final appeal to bias, the prosecutor's "we the citizens" argument, prompted the Mexican government to intervene. Following the jury's death verdict, the Consul General sent an unprecedented letter to the superior court asking it to grant the automatic motion to reduce the death penalty to life in prison without the possibility of parole. Mexico was troubled by the prosecutor's argument for appealing to jurors' biases against foreign nationals and for improperly urging them to consider Mr. Barrera's nationality in selecting the appropriate punishment. (23CT 6328-6329.)

The trial court denied the automatic motion and sentenced Mr. Barrera to death. Mexico's concerns with the prosecutor's argument were never addressed, or even acknowledged, and this appeal has been pending ever since.

A. The Racial Justice Act is a paradigm shift from precedent that tolerated many forms of bias as "inevitable"

Nearly two decades after the trial in this case, the California Legislature has acknowledged what Mexico objected to in 2001: that racial and ethnic bias[1] continues to infect the criminal legal system. Recognizing that such bias persists because "courts only address racial bias in its most extreme and blatant forms," the Legislature set out to address more "insidious" and subtle forms of bias that nevertheless corrode the integrity of the justice system. (The California Racial Justice Act of 2020 (RJA), Stats. 2020, ch. 317, § 2, subds. (c) & (h).) The Legislature "acknowledged that all persons possess implicit biases, that these biases impact the criminal justice system, and that negative implicit biases tend to disfavor people of color." (*Id.* § 2, subd. (g), citations omitted.) And those implicit biases, "although often unintentional and unconscious, may inject

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[1] This brief uses the terms "race" or "racial" when characterizing the nature of the anti-Latinx language used during this trial even though Latinx identifies a person's ethnicity and not their race. The United States Supreme Court and Washington Supreme Court have "used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons." (*Peña-Rodriguez v. Colorado* (2017) 580 U.S. 206, 214; *State v. Zamora*, *supra*, 512 P.3d at p. 516, fn. 6; see also *About the Hispanic Population and Its Origin* (Apr. 15, 2022) U.S. Census Bureau ["race and Hispanic origin (also known as ethnicity) are two separate and distinct concepts. These standards generally reflect a social definition of race and ethnicity recognized in this country, and they do not conform to any biological, anthropological, or genetic criteria"] <https://www.census.gov/topics/population/hispanic-origin/about.html> [as of May 23, 2023].)

racism and unfairness into proceedings similar to intentional bias." (*Id.* at subd. (i).)

Research has shown that the use of a racial code word or dog whistle, like the use of animal imagery to describe the defendant, is equally (or even more) likely to activate jurors' own subconscious biases against a defendant than an overt racial slur. (Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3101.) But courts generally failed to address such veiled animus, deeming it unintentional or failing to appreciate its impact. (*Id.* at p. 3115.) In other words, the legal mechanisms available to combat bias failed to evolve alongside our understanding of implicit bias, thus perpetuating disparate outcomes for people of color and undermining public confidence in the criminal justice system.

The Legislature enacted the RJA specifically to address the limitations of "[e]xisting precedent." (Stats. 2020, ch. 317, § 2, subds. (e) & (f).) It did so by creating a mechanism to evaluate bias through a 21st century lens. (*Id.* at subd. (e) [citing articles discussing the prevalence and power of dehumanizing rhetoric and how subtle references to race or racial stereotype can cause otherwise fair-minded actors in the criminal justice system to unknowingly perpetuate a racially inequitable society].)

To that end, Penal Code[2] section 745 describes four violations of the Act. Of relevance here is subdivision (a)(2), which makes it a violation for a specified actor (judge, attorneys in the case, a law

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[2] All statutory references are to the Penal Code unless otherwise specified.

enforcement officer involved in the case, an expert witness, or juror) to use "racially discriminatory language" or otherwise exhibit bias towards the defendant during trial, "whether or not purposeful." (§ 745, subd. (a)(2).)

The RJA solves the essentially insurmountable problems defendants previously encountered in trying to prove discriminatory language was used purposefully, was overt enough to be considered error, or that its use affected the outcome. Now, the use of discriminatory language is a violation, "whether purposeful or not." (§ 745, subd. (a)(2).) The focus, after all, is on remedying the harm to the defendant's case and the integrity of the judicial system, not on punishing the actor. (Stats. 2020, ch. 317, § 2, subd. (i).) The RJA also targets bias "in any form or amount" by defining racially discriminatory language expansively to include code words, animal metaphor, or other language that an objective observer would see as implicitly or explicitly appealing to racial bias, including bias based on ethnicity or national origin. (§ 745, subd. (h)(4); Stats. 2020, ch. 317, § 2, subd. (i).)

Even a code word or animal metaphor – though not explicitly racist – can activate subconscious bias in jurors, lead to disparate outcomes, and thereby violate the RJA. (§ 745, subds. (a)(2) & (h)(4); Stats. 2020, ch. 317, § 2, subd. (i), citing *Implicit Racial Biases in Prosecutorial Summations*, *supra*, 86 Fordham L. Rev. at p. 3101 ["Even the simplest of racial cues can automatically evoke racial stereotypes and affect the way jurors evaluate evidence"]; see also *State v. Zamora*, *supra*, 512 P.3d at p. 521 [observing that subtle references "are just as insidious and perhaps more effective . . . Like

a wolf in sheep's clothing, a careful word here and there can trigger racial bias"].) The RJA captures such language in recognition of the way bias works. (Stats. 2020, ch. 317, § 2, subd. (i).)

Finally, the RJA provides that "because racism in any form or amount, at any stage of a criminal trial, is intolerable, [and] inimical to a fair criminal justice system," violations of the Act are miscarriages of justice that belong on the list of other errors that defy traditional prejudice analysis. (Stats. 2020, ch. 317, § 2, subd. (i) ["racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California"]; see *People v. Flood* (1998) 18 Cal.4th 470, 493-594 [discussing characteristics that make an error structural].) This solution also eliminates the fiction that jurors were somehow capable, upon instruction, of putting aside biases that reside in their subconsciouses.

Now, when a court finds proof in the trial record that a speaker used racially discriminatory language or otherwise exhibited bias, the required remedy depends on the stage of the proceedings and not the speaker's purpose, the overtness of the appeal to bias, or the measurable effect it had on the outcome. (§ 745, subd. (e).) After a judgment has been entered, "the court shall vacate the conviction and sentence." (§ 745, subd. (e)(2).) A violation, regardless of when it is found, renders the defendant ineligible for the death penalty. (§ 745, subd. (e)(3).)

B. Anti-Latinx language was used throughout this trial

From the outset, Mr. Barrera's trial was racialized. It began during voir dire with prospective jurors and defense counsel. Everyone in court learned that Prospective Juror Carter wrote in his questionnaire that he "resent[ed] the flood of non-European immigrants" to this country, which he admitted was "badly put." His clarification wasn't much better: "What I really meant by that is, I feel sorry for all the people being let in with almost no education, and extremely poor circumstances and background; and I think they tend to become a burden on everyone else, and have no chance of succeeding here. I wish our policies were different." (4RT 741-743.) Before Carter, Prospective Juror Clausen admitted in open court that she was biased against people from Mexico with "immigration issues." (3RT 581-582.) Latinx jurors were singled out for questioning about whether they would be too "angered" or "embarrassed" as Latinxs about what the Latinx defendants were charged with doing. (3RT 506, 566-567, 4RT 738.) Defense counsel twice referred to immigrants from Mexico as "illegal aliens" (3RT 519, 521-522) and acknowledged that questions about being prejudiced against them were "unfair." (3RT 519.)

In her opening statement, the prosecutor mocked Mr. Barrera for having his kids help him sell corn on the street after school. She described him as "an enterprising man" and the "big boss." (8RT 1352-1353.) Codefendant's counsel elaborated on that point in his opening remarks, saying Mr. Barrera brought his family from Mexico to the United States because he unilaterally decided that he "needs a bigger labor force." (8RT 1376.)

Almost all the Barrera family witnesses were asked questions concerning the street vending business. (9RT 1568-1581, 10RT 1631-1640, 1676, 1706-1709.) The prosecutor asked questions that suggested it was abusive for Mr. Barrera to have his older children selling corn on the street while he drove around collecting money. (9RT 1568-1581.) Yet, the prosecutor did not even attempt, in closing, to connect street vending to any of the charges. (See 13RT 1884-1922, 1966-1972.)

In closing, the prosecutor used dehumanizing rhetoric and animal metaphor to refer to Mr. Barrera. She began by describing the abuse both the deceased children suffered. In transitioning to the real issue in the case – whether Mr. Barrera intended to kill his children – the prosecutor prefaced her discussion with the following description:

> I don't even know what to call this man. I would like to say that he's an animal, but I would not insult animals. And for sure he's not a human because I don't want to belong to the same species he does. What is he? He's evil. Evil in the shape of a man. I don't know what else you could call him.

(13RT 1903.) The jury's verdict reflects that it drew the most culpable inferences from the circumstantial, and legally insufficient, evidence. (See AOB, Argument I, pp. 28-94 [explaining why the evidence was legally insufficient].)

The racialization continued during the penalty phase, beginning with the defense's cultural expert, Felipe Peralta. When asked whether there were factors that predisposed Mr. Barrera to child abuse, Peralta listed several, including Mr. Barrera's status as an "illegal." (16RT 2147-2148.) On cross-examination, the prosecutor

repeatedly emphasized the "illegal" factor, asking questions about how many "illegal immigrants" beat and starve their children, whether "It's because they are illegal immigrants?" and "Would you want to say that he being an illegal immigrant makes it more likely to beat your children?" to which Peralta answered, "Yes." (16RT 2163-2164.)

The prosecutor's penalty phase closing argument involved a similar stereotype of foreigners:

> We, the people of the State of California, we the citizens, we don't torture and murder our children. And we, the citizens of the United States, don't do that. Do citizens of the world? No human being tortures or murders their children and no animal of nature does it.

(17RT 2182-2183.) These were the remarks that prompted Mexico to intervene for appealing to jurors' biases against foreign nationals and improperly urging jurors to consider Mr. Barrera's nationality in selecting the appropriate punishment. (23CT 6328-6329.)

C. Individually and cumulatively, the use of language throughout this trial that appealed to anti-Latinx bias violates the RJA and requires reversal of the convictions and sentence

The language the trial actors used throughout this trial – "illegal alien," "burden on society," "not a human," beneath an "animal" – violates the RJA because it is racially discriminatory. Any objective observer would see it that way. It is essentially the same language that people have used throughout history when referring to Latinx immigrants, like Mr. Barrera, to justify discrimination and activate anti-Latinx biases. An objective observer would also see appeals to bias in codefendant's counsel's

disparate questioning of Latinx jurors, the prosecutor's weaponization of street vending, Peralta's testimony that being "illegal" predisposed Mr. Barrera to commit child abuse, and the prosecutor's "we the citizens" argument.

An RJA violation occurs when an in-court actor uses racially discriminatory language or otherwise exhibits bias. (§ 745, subd. (a)(2).) Remedies are required if the reviewing court finds, by a preponderance of the evidence, that a violation occurred. (§ 745, subd. (e).) Section 745, subdivision (h)(4) defines "racially discriminatory language" 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. 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.

In the context of a statute or rule designed to eliminate bias, an objective observer is described as a "person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways." (*State v. Zamora*, *supra*, 512 P.2d at p. 523.) Without such an awareness, an objective observer would be unable to identify the exact bias the law was intended to target, remedy, and eliminate. Applied here, an objective observer would be aware of historical discrimination against Latinx people and would recognize that this trial occurred in the aftermath of a highly racialized 1994

ballot initiative where similar language had been used, successively, to activate voters' anti-Latinx biases.

Proposition 187, a ballot measure the voters approved in 1994, was known as the "Save Our State" or "S.O.S." initiative. It blamed "illegal aliens" for California's failing economy and rising crime and proposed withholding the availability of public benefits, including elementary school education and medical care, in order to get them to leave and dissuade them from coming back. (Ballot Pamp., Gen. Elec. (Nov. 8, 1994), argument in favor of Prop. 187, p. 54.) These were its opening lines:

> The People of California find and declare as follows:
> That they have suffered and are suffering economic hardship by the presence of illegal aliens in this state.
> That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state . . . .

(Prop. 187, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994).) The animus behind the initiative was overtly directed toward poor people of color entering from our southern border. (Daniel Martinez HoSang, Racial Propositions: Ballot Initiatives and the Making of Postwar California (2010), pp. 160-200 [chronicling the initiative's racialization in the media and at every level of society and government]; Ruben Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law* (1995) 17 Chicano-Latino L.Rev. 118, 122; *"Aliens," supra*, 28 U. Miami Inter-Am. L.Rev. at pp. 264-292.)

Governor Pete Wilson's 1994 "They Keep Coming" reelection campaign ad gave California voters a vivid picture of the problem: "Over grainy footage of a group of figures running past cars

identified by an onscreen graphic as a 'Border Crossing . . . San Diego County' an ominous voice warned, 'They keep coming. Two-million illegal immigrants in California. The federal government won't stop them at the border yet requires us to pay billions to take care of them' . . . Wilson's concluding line, 'Enough is enough.'" (Racial Propositions, *supra*, at p. 177.)

Wilson was reelected and Proposition 187 passed with overwhelming voter support. Afterwards, there was an increase in hate crimes and other harassment of Latinx people. (Kevin Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics after Trump* (2020) 53 U.C. Davis. L.Rev. 1859, 1872-1874.) For years following its passage, the highest levels of California's government vigorously defended it in court.

In 1997, a year before the case against Mr. Barrera commenced, a federal district court barred California from enforcing Proposition 187, reasoning that it was preempted by intervening federal legislation that also denied public benefits to Latinx immigrants who were subject to deportation under federal law. (*League of United Latin American Citizens v. Wilson* (C.D. Cal. 1997) 997 F.Supp. 1244.) California did not abandon its appeals until 1999. The prevailing attitude was that pursuing the case was "too expensive and too controversial – and also unnecessary because key parts of Proposition 187 are written into federal law." (Sanchez, *Divisive Prop. 187 Is Voided*, Washington Post, (July 30, 1999) <https://www.washingtonpost.com/archive/politics/1999/07/30/divisidi-prop-187-is-voided/e4ef8082-e94b-4b87-83aa-16335004db4f/> [as of May 23, 2023].)

At the outset of Mr. Barrera's trial, Prospective Juror Carter essentially quoted the charter for Proposition 187 when he said he resented the flood of "non-European" immigrants into this country and their burden on society. (4RT 741-743.) His language explicitly appealed to bias against non-white races. Viewed in historical context, an objective observer would also see the "burden on society" language as implicitly appealing to bias because nearly identical language had been used to activate voters' anti-Latinx biases to pass Proposition 187. (Prop. 187, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994) ["The People of California find and declare . . . That they have suffered and are suffering economic hardship by the presence of illegal aliens in this state"].) Carter's statements explicitly and implicitly appealed to anti-Latinx bias and violate the RJA.

Defense counsel's use of the term "illegal alien" is problematic for similar reasons. An objective observer aware of the term's history and modern usage would perceive it as language that explicitly or implicitly appeals to anti-Latinx bias in violation of the RJA. "Illegal alien" as a code word for anti-Mexican animus has been burned into our subconscious and it is "embedded" in immigration law. (*"Aliens*," *supra*, 28 U. Miami Inter-Am. L.Rev. at p. 283.)

"Illegal alien" is the same term Proposition 187 used for the object of its animus. Its use as a proxy for Mexican immigrants is apparent from Governor Pete Wilson's now infamous "They Keep Coming" campaign ad, which displayed footage of the *southern border.* Other rhetoric in public discourse made it "relatively easy to discern which noncitizens are the ones that provoke concern."

("*Aliens*," *supra*, 28 U. Miami Inter-Am. L.Rev. at p. 282 ["The dominant image of the alien often is an undocumented Mexican or some other person of color"].) When people talk about "illegal aliens," they're not referring to Europeans or Canadians, though these groups are just as likely to overstay visas. (Lenni Benson, *Seeing Immigration and Structural Racism: It's Where You Put Your Eyes* (2021) 66 N.Y. Sch. L.Rev. 277, 279-281; Kevin Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement* (2009) Duke University School of Law: Law and Contemporary Problems, vol. 72, no. 4, p. 18 ["the increasingly rigorous enforcement of the nation's southern border with Mexico, in comparison to the relatively low enforcement of the northern border with Canada is often pointed to as nothing less than evidence of racism at work"].)

An objective observer would identify "illegal alien" as the code language used to dehumanize poor people of color who immigrate to the United States in search of a better life. The term "aliens" evokes space invaders who "may be killed with impunity and, if not, *'they'* will destroy the world as we know it." ("*Aliens*," *supra*, 28 U. Miami Inter-Am. L.Rev. at p. 272.) As a matter of cognitive dissonance theory, the term "serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering." (*Id.* at p. 273.) For all these reasons, its use during trial appealed to anti-Latinx bias.

Codefendant's counsel also exhibited bias during voir dire when he disparately questioned Latinx jurors about whether they would be too "angered" or "embarrassed" to fairly judge the case

because they shared an ethnic heritage with Mr. Barrera. An objective observer would see this questioning as appealing to anti-Latinx bias. It echoes the prohibited stereotype that prompted *Batson v. Kentucky* (1986) 476 U.S. 79, and its progeny: the presumption that jurors who are not White are incapable of fairly judging defendants of the same race. "A person's race simply is unrelated to his fitness as a juror." (*Batson*, at p. 87.) To an objective observer, suggesting otherwise exhibits bias.

By the end of voir dire, numerous actors had used anti-Latinx language that was demeaning and dehumanizing. Voir dire is a time when jurors are particularly susceptible to such language. (*State v. Zamora*, *supra*, 512 P.3d at p. 520 ["there is an increased danger of infecting the jury with bias and prejudice when the improper conduct occurs at the jury's introduction to the case . . . the courtroom, the proceedings, and their responsibility as a member of the jury. The jury is, in the voir dire phase, primed to view the prosecution through a particular prism."].) While the Constitution demands that defendants be permitted to ask questions "designed to explore potential racial bias," they can also "exacerbate whatever prejudice might exist without substantially aiding in exposing it." (*Ibid.*, quoting *Peña-Rodriguez v. Colorado*, *supra*, 580 U.S. at pp. 224-225.) It is for this reason that courts remain wary of how questioning may compromise a defendant's right to an impartial jury. (*Zamora*, at p. 520.)

The prosecutor's opening statement contained another appeal to bias. She mocked Mr. Barrera as "enterprising" and the "big boss" for having his children help him sell corn on the street. These

remarks essentially demonized a common and highly visible occupation for poor Latinxs who migrate to this country and cannot find other work due to their immigration status. (Khushpreet Choumwer, *Racialization of Street Vendors: The Criminalization of Ethnic Minority Workers in California* (2023) 34 Hastings J. Gender & L. 13, 21.)

In Los Angeles, street vending is heavily associated with Latinx migrants. (Stephen Lee, *Racial Justice for Street Vendors* (2021) 12 Calif. L.Rev. Online 1.) Children are frequently involved in the street vending business, often after school, to help support the family. (Emir Estrada, Kids at Work: Latinx Families Selling Food on the Streets of Los Angeles (2019), pp. 26-50.)

At the time of Mr. Barrera's trial, Los Angeles had just criminalized street vending to coincide with the passage of Proposition 187. (Joseph Pileri, *Who Gets to Make a Living? Street Vending in America* (2021) 36 Geo. Immigr. L.J. 215, 244.) Criminalization of street vending, like Proposition 187, was voters' response to the unwelcome presence of immigrants in their city and was part of a "broad repertoire of urban governance tactics to disappear the urban poor, especially people of color, from the city's public spaces." (*Id.* at p. 242.)

Viewed in context, an objective observer would see the prosecutor's statements as implicitly appealing to the same anti-Latinx biases underlying the recent decision to criminalize street vending. An objective observer would also question the relevance of street vending to any issue in this case aside from its tendency to

prime biases.[3] Street vending received a relatively large amount of airtime during trial (9RT 1568-1581, 10RT 1631-1640, 1676, 1706-1709), yet the prosecutor did not even attempt, in closing, to connect it to any of the charges (13RT 1884-1922, 1966-1972).[4] Guadalupe and Ernesto's deaths had nothing to do with the street vending business; they were too young to meaningfully participate. (10RT 1706.) Given its irrelevance to any legitimate issue in the case, its only possible purpose was the illegitimate one of activating and inflaming anti-Latinx bias against Mr. Barrera. (See David Weber, *(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society* (2010) 94 Marq. L.Rev. 613, 649-650 ["when immigration status is irrelevant to the underlying action . . . it is difficult to conclude that there was a substantial, legitimate purpose other than to embarrass and inflame hostile anti-immigrant sentiment"].)

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[3] Implicit bias exists in everyone, including in people who believe they have no racial biases. (Stats. 2020, ch. 317, § 2, subd. (g).) That bias can be "triggered" or "primed" by a stimulus, like hearing racially discriminatory language, and manifest itself in decision-making at a subconscious level. (*Implicit Racial Biases in Prosecutorial Summations*, *supra*, 86 Fordham L. Rev. at p. 3101.)

[4] Mr. Barrera's status as a street vendor was frequently included in media coverage. (Jesse Hiestand, *Boy Beaten to Death, Police Say; Pacoima Father Facing First-Degree Murder Charge*, Daily News, Los Angeles (Mar. 4, 1998); Miles Corwin, *Girl, 2, Found Buried In Forest; Believed to Be Dead Boy's Sister*, L.A. Times (May 22, 1998); Scott Glover & Evelyn Larrubia, *Dead Boy's Siblings Revealed Girl's Grave Crime: The 2-Year Old Is Believed To Have Been Killed Several Months Before 5-Year Old. Mother Is Arrested*, L.A. Times (May 23, 1998).

One of the court interpreters in this case published a book shortly after the trial reflecting on his experience. (Dwight Neumann, The Destroyer of Innocents (2003).) The prosecutor's statements concerning street vending clearly struck a chord with the interpreter, priming his anti-Latinx biases:

> Talk about a violation of the child labor laws. Not only are these under-aged children working, but they're putting in overtime, never having a day off, and violating the curfew laws. Yet, you have to remember that they're in the Los Angeles area, and even more importantly, in Pacoima. Richie Valens lived in Pacoima. It's always been a poverty stricken little Tijuana and a main artery of the San Fernando Valley crime scene. It's the Valley's worst part, equivalent to East and South Central L.A. You can live in Pacoima without ever having to learn English. You can also do whatever you do in Mexico and get away with it. It's a third world country for God's sake!

(*Id.* at pp. 20-21.) Whether or not the prosecutor's comments were intended to elicit a reaction like Neumann's, they did. That an objective observer would see an appeal to bias is aptly demonstrated by the theme's effect on the trial translator.

In her closing argument, the prosecutor used metaphors to describe Mr. Barrera that also resonated with Neumann: "not a human," "insult to animals," and "evil" were three he mentioned in his book. (See 13RT 1903; Destroyer of Innocents, *supra*, p. 83, 90, 92.) Those metaphors have been used throughout American history to appeal to anti-Latinx bias. Indeed, the Legislature identified "language that compares the defendant to an animal" when the defendant is a person of color as an example of language an objective observer would view as an appeal to racial bias. (§ 745, subd. (h)(4).)

Comparing a person of color to an animal is an evolution of the racial slur. (Otto Santa Ana, *'Like an Animal I was Treated': Anti-immigrant Metaphor in U.S. Public Discourse* (1999) 10 Discourse & Society 191, 218; *Implicit Racial Biases in Prosecutorial Summations*, *supra*, 86 Fordham L.Rev. at p. 3099.)

> Racist language is commonly understood to be the blatant invectives and slurs that were common in the US over most of its history, when it was an openly racist society. These expletives are no longer tolerated in most polite settings. They are no longer common currency in political discourse. However, the conceptual foundation of racism continues to be expressed via the metaphors most commonly utilized in the public discourse on immigrants . . . .

(*'Like an Animal I was Treated*,' at p. 218.)

When this trial occurred, in the aftermath of Proposition 187, voter biases had just been successfully activated against Latinx immigrants. Scholars have extensively commented on the dehumanizing rhetoric used to influence public opinion into overwhelming support for the initiative. (*'Like an Animal I was Treated,' supra*, 10 Discourse & Society at p. 216; *"Aliens," supra*, 28 U. Miami Inter-Am. L.Rev. 263; Racial Propositions, *supra*, pp. 160-200.) Public discourse analysis of articles published in the Los Angeles Times about Proposition 187, reveals that "[i]mmigrants are animals" was the "dominant metaphor." (*'Like an Animal I was Treated,' supra*, at p. 211.) Scholars have also identified other prevalent metaphors, such as dehumanizing (*"Aliens," supra*, at p. 273; *'Like an Animal I was Treated,'* at p. 211), and demonizing (Sophia Porotsky, *Rotten to the Core: Racism, Xenophobia, and the Border and Immigration Agencies* (2021) 36 Geo. Immigr. L.J. 349,

381; *Critical Race Theory and Proposition 187, supra,* 17 Chicano-Latino L.Rev. at p. 118, fn. 1; Kevin Johnson*, Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate Over Immigration Reform* (2013) 91 N.C. L.Rev. 1613, 1622).

The prosecutor combined all those metaphors when she described Mr. Barrera as "not a human," something beneath an "animal," and "[e]vil in the shape of a man." (13RT 1903.) Whether the prosecutor did so purposefully or not, an objective observer would see her remarks in this regard as appealing to anti-Latinx bias for all the reasons set forth above.

The use of racially discriminatory language continued into the penalty phase, beginning with the defense's cultural expert, Felipe Peralta, who opined that being "illegal" was a "risk factor" that predisposed Mr. Barrera to commit child abuse. (16RT 2148, 2152-2154.) The prosecutor repeatedly emphasized that racially charged testimony during cross-examination by asking Peralta question after question about the prevalence of "illegal immigrants" beating and starving their children and only stopping after he unequivocally agreed that "being an illegal immigrant makes it more likely to beat your children." (16RT 2163-2164.)

The Legislature was particularly sensitive to expert testimony like Peralta's and used a similar example to demonstrate how existing mechanisms were inadequate to eliminate bias from the criminal justice system:

> Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony,

> including expert testimony, and arguments in criminal trials. A court upheld a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery. (*United States v. Shah* (9th Cir. 2019) 768 Fed.Appx. 637, 640.)

(Stats. 2020, ch. 317, § 2, subd. (d).)

The high court criticized similarly problematic defense expert testimony in *Buck v. Davis* (2017) 580 U.S. 100. In Texas, a jury can only impose a death sentence if it finds the defendant is likely to commit acts of violence in the future. (*Buck*, at p. 104.) A defense expert testified that Buck probably would not be violent in prison. In reaching that opinion, the expert considered several factors, including race and the "fact" that Buck was more likely to act violently because he is Black. (*Id.* at p. 107.) The jury sentenced Buck to death. After Buck's trial, Texas admitted that the expert's testimony was racist, inappropriate, and required reversal in five other cases where it had been used, but not Buck's.

Buck turned to the federal courts, arguing that his trial attorney had rendered ineffective assistance by calling the expert. However, the district court denied habeas relief, reasoning that the expert's mention of race was ill advised and repugnant but "de minimus" and did not affect the outcome. (*Buck v. Davis*, *supra*, 580 U.S. at p. 113.) After the Fifth Circuit denied a certificate of appealability, the United States Supreme Court granted certiorari and reversed. It found both prongs of *Strickland v. Washington* (1984) 466 U.S. 668, had been satisfied. "No competent defense attorney," the Court reasoned, "would introduce such evidence about his own client." (*Buck*, at p. 119.) Further, the court found the use of

that "powerful racial stereotype" affected the outcome because it could have influenced one or more jurors:

> [W]hen a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.

(*Id.* at pp. 121-122.)

Peralta used the same stereotype here as the expert in *Buck* and it had the same result. Under the RJA, the test is whether an objective observer would see language that appealed to anti-Latinx bias. The United States Supreme Court certainly qualifies as an objective observer and it saw the same stereotype as an explicit appeal to bias that was "deadly in small doses."

The bias exhibited during this trial reached its climax shortly after Peralta's testimony when the prosecutor delivered her closing argument. The prosecutor erected a distinction between "We, the people . . . the citizens" and others, which obviously included Mr. Barrera, and implied that the others might be more inclined to torture and murder their children.

> We, the people of the State of California, we the citizens, we don't torture and murder our children. And we, the citizens of the United States, don't do that. Do citizens of the world? No human being tortures or murders their children and no animal of nature does it.

(17RT 2182-2183.)

Objective observers would see this portion of the prosecutor's closing argument in the context in which it arose – pervasive anti-Latinx bias both inside and outside this courtroom. They would see the prosecutor's "us-them" distinction in the final moments of this

trial as particularly pernicious because it is a historical device used to appeal to and activate bias based on race or national origin. (See *Implicit Racial Biases in Prosecutorial Summations*, *supra*, 86 Fordham L. Rev. at p. 3107 ["By using euphemisms such as 'us' and 'them,' prosecutors can emphasize racial separation while believing that they are not making racial statements"]; Ryan Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J. Race & L. 325, 335 [discussing how prosecutors from the time of Cicero until the present have long used the technique of "othering" defendants as someone outside of the moral community to induce a negative emotional response towards the defendant].)

The prosecutor answers her rhetorical question – "we don't torture and murder our children. Do citizens of the world?" – with "No human being" or "animal of nature does it," which is the same dehumanizing language and animal metaphor she used during her guilt phase closing. Using that language during the penalty phase, as during the guilt phase, appealed to anti-Latinx bias for all the same reasons.

This Court already knows how an objective observer would perceive the prosecutor's "us-them" rhetoric. Mexico intervened because it saw the prosecutor's language as "appealing to the jurors' biases against foreign nationals" and improperly urging jurors "to consider Mr. Barrera's nationality in considering the appropriate punishment." (23CT 6328-6329.)

However, the objective observer test is not confined to evaluating each statement in isolation from others. Rather, an

inherent feature of any objective test is its ability to consider all the circumstances. (*People v. Sanchez* (2016) 63 Cal.4th 665, 668; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083; *People v. Caro* (2019) 7 Cal.5th 463, 491-492.) The appeal to bias in the prosecutor's "we the citizens" rhetoric is apparent to any objective observer even when considered in isolation. But its appeal to bias becomes *more* apparent when viewed in context. The prosecutor's argument did not sit in a vacuum, but at the end of a trial filled with language that has been historically shown to appeal to anti-Latinx bias. Immigrants from Mexico, like Mr. Barrera, were "illegal aliens" and "burdens on society." Mr. Barrera was the "big boss" street vendor who brought his family here because he "needed a bigger labor force." It would be an "insult" to animals to call him one. He was "not a human." When the prosecutor argued "we the citizens" she had read the room.

The trial record in this case proves that the prosecutor and other trial actors used racially discriminatory language, whether purposeful or not, in violation of the RJA. The remedy, at this point, is to "vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with [the RJA]." (§ 745, subd. (e)(2).) Mr. Barrera "shall not be eligible for the death penalty." (§745, subd. (e)(3).)

D. RJA claims may be raised on appeal

As originally enacted, the RJA did not apply retroactively. (§ 745, subd. (j), as added by Stats. 2020, ch. 317, § 3.5.) The Legislature made the RJA retroactive two years later via Assembly Bill No. 256 (2022-2023 Reg. Sess.). Before Assembly Bill No. 256,

the RJA contemplated that people with pending trials would raise violations in motions at any point before judgment was pronounced. (§ 745, subd. (b).) This non-retroactive version of the RJA also contemplated that there will be people who could have filed motions during trial but did not, either through inadvertence or an inability to discover the basis for it before judgment was pronounced. The statute provides that such violations "may" be raised after judgment by way of a petition for writ of habeas corpus or a section 1473.7 petition. (§ 745, subd. (b).)

The RJA did not break any new ground by listing a habeas corpus petition as a mechanism available for people who did not file a motion during trial. In cases where an appeal is not taken, habeas is the only mechanism available to raise RJA violations after the trial court enters judgment. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923 ["Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun"].) Habeas may also be the only available mechanism to raise RJA claims based on evidence not contained in the trial record. However, there are also cases pending on appeal with RJA violations that do not require further evidentiary development because they can be proven based on the trial record. (E.g., § 745, subd. (a)(2) [making the use of racially discriminatory language during trial – and hence apparent on the trial record – a violation of the RJA].)

This Court has consistently held that habeas should only be used when "the normal method of relief – i.e., direct appeal – is inadequate." (*In re Harris* (1993) 5 Cal.4th 813, 828; *In re Reno*

(2012) 55 Cal.4th 428, 490.) For that reason, this Court bars habeas petitioners from bringing claims they could have raised on appeal but did not. (*In re Reno*, at p. 490, discussing *In re Dixon* (1953) 41 Cal.2d 756.) There is nothing in section 745, subdivision (b) reflecting an intent to disturb these settled rules.

When the Legislature made the RJA retroactive, it distinguished between final and nonfinal cases. In cases that are "final," the Legislature contemplates that habeas petitions will be the mechanism used to seek relief. (§ 745, subds. (j)(2)-(j)(5).) But in cases that are "not final," such as those pending on appeal, there is no listed mechanism. (§ 745, subd. (j)(1).) This Court often distinguishes between cases that are final and not final for purposes of retroactivity. (*In re Estrada* (1965) 63 Cal.2d 740, 745.) In nonfinal cases, the Court has permitted defendants to assert the benefit of the new law in a habeas petition (*Estrada*) or on direct appeal (*People v. Frahs* (2020) 9 Cal.5th 618, 627-637; *People v. Nasalga* (1996) 12 Cal.4th 784). Defendants remain free to select the mechanism – habeas petition or direct appeal – based on their need to develop the factual record. The trial record in this case does not require development. It proves various actors used racially discriminatory language throughout trial in violation of section 745, subdivision (a)(2).

Almost as soon as the RJA went into effect, the Attorney General began arguing that habeas corpus was the exclusive mechanism to obtain relief under the RJA. (See, e.g., Respondent's Brief, *People v. Garcia*, 1DCA, Div. 3, Case No. A163046 (Feb. 4, 2022), pp. 19-20.) The Attorney General interprets the Legislature's

reference to the availability of a habeas corpus petition in section 745, subdivision (b) as the exclusive means by which to raise RJA violations post-judgment and an express signal that the Legislature did not intend for issues to be raised in a pending appeal. That reading puts the RJA in tension with existing precedent as described above. Further, as a general matter, reading the availability of habeas corpus as a bar to relief via appeal would swallow the right to appeal whole. Habeas corpus is always available, whether the Legislature says so in a particular statute or not. (Cal. Const., art. I, § 11 ["Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion"].) The availability of habeas corpus as a mechanism to raise RJA violations, like its availability in other contexts, does not eliminate the direct appeal as the preferred mechanism to obtain relief.[5]

E. Denying the right to appeal an RJA violation violates the RJA's legislative intent

Requiring Mr. Barrera to pursue this RJA violation through habeas corpus may very well deny him the ability to ever raise the claim. Mr. Barrera has been waiting *over 20 years* for appointment of habeas corpus counsel.[6] Since the 2016 effective date of

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[5] In apparent response to the Attorney General's argument, Assembly Member Kalra introduced a bill to clarify that a defendant can raise record based RJA violations in the direct appeal. (Assembly Bill No. 1118 (2023-2024 Reg. Sess.).)

[6]Although indigent people sentenced to death in California have a statutory right to the appointment of habeas counsel (see *In re Morgan* (2010) 50 Cal.4th 932, 937 (*Morgan*); § 1509, subd. (b); Gov. Code, § 68662), there is "a critical shortage of qualified attorneys willing to represent capital prisoners in state habeas

Proposition 66, new appointments of habeas counsel have virtually ground to a halt. (See Habeas Corpus Resource Center (HCRC), Annual Report (2022) p. 14, fn. 6 <http://www.hcrc.ca.gov/documents/HCRC%20Annual%20Report%202022.pdf> [as of May 23, 2023].) Even if old cases like Mr. Barrera's are prioritized for the appointment of habeas counsel, at the current rate of appointments, it could still be years, if not a decade or more, before counsel is appointed to his case.[7] And it will take many additional years before his habeas petition could be adjudicated.[8] Denying Mr. Barrera an

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corpus proceedings." (*Morgan*, *supra,* 50 Cal.4th. at p. 934.) That shortage has only grown more acute since *Morgan* was decided over a decade ago. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 868 (conc. opn. of Liu, J.) (*Briggs*).)

[7]As of December 2022, there were 655 people under sentence of death in California. (HCRC, Annual Report, *supra*, at p. 11.) Of these 655 people, 370 were awaiting appointment of counsel for initial state habeas proceedings; 148 of those 370 had already had their death sentences affirmed on direct appeal; and 116 had been waiting for appointment of counsel for more than 20 years. (*Id.* at p. 13; see also *Briggs*, *supra*, 3 Cal.5th at p. 864 (conc. opn. of Liu, J.) [discussing delay in appointment of capital habeas counsel]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 728 [noting "inordinate delay" of "more than 20 years" between sentencing and appointment of habeas counsel].)

[8]For example, excluding *Morgan* petitions, the average capital state habeas corpus petition has been pending for 7.5 years. (HCRC, Annual Report, *supra,* at pp. 15-16.) And because Proposition 66 bars capital defendants from filing more than one habeas petition, Mr. Barrera would need to include all his other possible habeas claims in his petition or risk forfeiting them. (See *Briggs*, *supra*, 3 Cal.5th at p. 843 [upholding restrictions on capital defendants' ability to file more than one habeas petition]; § 1509, subd. (d).) Mr. Barrera should not be forced to choose between exercising his right to habeas corpus and his right to a trial unmarred by racial discrimination. (Cf. *Simmons v. United States* (1968) 390 U.S. 377,

opportunity to assert his rights under the RJA on direct appeal could mean he may never have the opportunity to present his claims, which would flout the fundamental "principle that [the state's] inability to timely appoint habeas corpus counsel in capital cases should not operate to deprive condemned inmates of a right otherwise available to them." (*People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523, 532–533; accord, *In re Zamudio Jimenez* (2010) 50 Cal.4th 951, 955-958; *Morgan*, *supra*, 50 Cal.4th at pp. 938–939.)

F. This Court may craft a remedy for Mr. Barrera consistent with the RJA

As explained above, the RJA allows individuals in Mr. Barrera's position to raise RJA violations in a pending appeal if they are based on the trial record. Nothing in section 745 reflects an intent to change the rule that claims in nonfinal cases ordinarily be brought in a pending appeal. But even if the Court were to conclude that habeas is the exclusive remedy for people in Mr. Barrera's position, it may still craft a remedy that does not deprive him of access to the RJA.

Clearly, the Legislature intended for there to be a remedy for RJA violations. Remedial statutes are liberally construed to promote the general object sought to be accomplished. (*Viles v. California* (1967) 66 Cal.2d 24, 31; *People v. Martinsen* (1987) 193 Cal.App.3d 843, 847; *People v. Fulk* (1974) 39 Cal.App.3d 851, 855.) Wherever

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394 ["we find it intolerable that one constitutional right should have to be surrendered in order to assert another"].)

the meaning of a remedial statute is doubtful, "it must be so construed as to extend the remedy." (*Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 Cal.2d 423, 434-435, quoting *White v. Steam-Tug Mary Ann* (1856) 6 Cal. 462, 470; *People v. White* (1978) 77 Cal.App.3d Supp. 17, 21.) Put another way, when the Legislature has attempted to "remove [the] snares" of problematic laws with a remedial statute, "[c]ourts should not rebuild them by a too narrow interpretation of the new enactments." (*Hobbs v. Northeast Sacramento County Sanitation Dist.* (1966) 240 Cal.App.2d 552, 556.)

This Court has endorsed a variety of remedies to ensure that eligible defendants enjoy the full protection and benefit of extant laws. For example, in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 309-310, this Court endorsed a limited remand procedure to permit the juvenile court to conduct a transfer hearing under Proposition 57. In *Frahs*, this Court ordered a conditional limited remand for a mental health diversion eligibility hearing. (*People v. Frahs, supra,* 9 Cal.5th at p. 640.) And in *Gentile*, this Court held that a defendant may request "a stay of the appeal and a limited remand for the purpose of pursuing . . . relief" under an ameliorative statute. (*People v. Gentile* (2020)10 Cal.5th 830, 858 (*Gentile*).)

The *Gentile* stay is particularly relevant here. This Court held in *Gentile* that section 1170.95 (now section 1172.6) was the exclusive mechanism for retroactive relief under the ameliorative provisions of Senate Bill 1437 and therefore the new law did not apply on direct appeal. (*Gentile, supra,* 10 Cal.5th. at p. 839.) But

that did not end the matter. Recognizing that its reading could result in "unnecessary delay" for those sentenced to death, the Court proposed a stay and limited remand to protect the defendant's rights. If the litigation on remand to the superior court "'is successful, the direct appeal may either be fully or partially moot. If the [litigation] is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision.'" (*Id.* at pp. 858–859, quoting *People v. Martinez* (2019) 31 Cal.App.5th 719, 729; see also *People v. Awad* (2015) 238 Cal.App.4th 215, 220.)

Thus, even if this Court were to decline to consider the RJA claim on appeal, it could and should nevertheless permit Mr. Barrera to assert his rights under the statute by allowing him to return to the trial court to present his RJA claim by way of motion. This trial was infected with bias. Forcing Mr. Barrera and others in his position to wait for years, decades or more perpetuates the injustice that the RJA was intended to remedy.

CONCLUSION

Mr. Barrera's convictions and death judgment must be reversed. In the alternative, the Court should stay this appeal and order a limited remand to permit Mr. Barrera to raise his RJA claim in the superior court.

DATED: May 26, 2023

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/
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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I am the Supervising Deputy State Public Defender assigned to represent appellant, MARCOS ESQUIVEL BARRERA, 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 8,676 words in length.

DATED: May 26, 2023

/s/
WILLIAM C. WHALEY
Supervising Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: *People v. Marco Esquivel Barrera*
Case Number: **Supreme Court Case No. S103358**
Los Angeles County Superior Court
Case No. PA029724-01

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 where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S FOURTH SUPPLEMENTAL OPENING BRIEF

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Los Angeles County District Attorney's Office 211 W. Temple St., Ste. 1200 Los Angeles, CA 90012	Los Angeles Public Defender's Office 900 Third Street San Fernando, CA 91340

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **May 26, 2023**, at Sacramento County, CA.

Ann-Marie Doersch

Digitally signed by Ann-Marie Doersch
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ANN-MARIE DOERSCH

STATE OF CALIFORNIA
Supreme Court of California

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