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 REPLY BRIEF

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I.
RESPONDENT DOES NOT DISPUTE THAT THIS TRIAL WAS RACIALIZED FROM BEGINNING TO END

The Attorney General does not dispute that the trial record in this case contains proof of several violations of the Racial Justice Act (RJA). Nevertheless, he asks this Court to ignore them, insisting that a petition for writ of habeas corpus is Mr. Barrera's exclusive remedy. The Attorney General infers this restriction from language in the RJA that lists a petition for writ of habeas corpus as an available mechanism for obtaining relief in cases where a judgment has already been imposed. This restrictive interpretation of the remedies available under the RJA is inconsistent with both the language of the statute as a whole and the Legislature's intent to eliminate barriers to remedying racial bias. (Stats. 2020, ch. 317, §

2.) Moreover, ignoring the bias apparent on the face of the trial record, as the Attorney General urges this Court to do, would exacerbate the damage to the integrity of the judicial system that the Legislature sought to redress. (*Id.* at subd. (i).)

A. The trial record in this case proves several RJA violations

Respondent does not dispute the merits of this case, namely that the trial record itself proves several RJA violations. (4SRB, at pp. 5-18.) Instead, respondent claims that Mr. Barrera cannot obtain relief on appeal because habeas is the exclusive mechanism available. (4SRB, at pp. 5, 8-12.) In making that argument respondent contends that some of the information presented in the opening brief falls outside the appellate record and is therefore properly presented in a habeas petition but not a claim on appeal. (RB, at pp. 5, 9.) Respondent points to Mr. Barrera's citation to a 1786 letter from Thomas Jefferson wherein Jefferson spoke of taking over Latin America piece-by-piece, a news article discussing the mass deportation of Latinxs in 1953, codenamed "Operation Wetback," references to Proposition 187, which was a ballot measure approved by California in 1994 that withheld public benefits including school and medical care from "illegal aliens," references to Governor Pete Wilson's "They Keep Coming" 1994 reelection campaign ad, Donald Trump's racist comments about Mexican immigrants in formal speeches, media coverage of the case commenting on Mr. Barrera's status as a street vendor, and quotes from a book written by one of the trial interpreters. (4SRB, at p. 9.)

Mr. Barrera did not cite the information as "evidence," but as historical context that would be known to any objective observer. Objective observers are not oblivious to historical discrimination but are presumed to be aware of it. (Stats. 2020, ch. 317, § 2 [defining an objective observer (in the context of jury selection) as a person "aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors"]; *State v. Zamora* (Wash. 2022) 512 P.3d 512, 524 [defining an objective observer 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"].) Knowledge of historical context is an essential feature of the objective observer standard. Respondent may prefer an "absentminded objective observer" (*McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005) 545 U.S. 844, 866) to one already aware of historical discrimination and its continued effects, but that is not what the RJA envisions.

In any event, respondent does not dispute that the trial record, standing alone, contains sufficient evidence to prove several RJA violations. It does not contest that an objective observer would see appeals to bias where Mexican immigrants, like Mr. Barrera, were referred to as "illegal aliens" who are a "burden" on society (3RT 519, 521-522, 4RT 741-743), where 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), where Mr. Barrera was mocked as "enterprising" and the "big boss" who brought his

children to the United States because he needed a "bigger labor force" (8RT 1352-1353, 1376), where the prosecutor told the jury Mr. Barrera was not a human and that it would be an "insult" to animals to call him one (13RT 1903), where his own expert testified that being "illegal" predisposed him to commit child abuse (16RT 2147-2148, 2163-2164), and where the prosecutor distinguished between "we the citizens" and others, like Mr. Barrera, in her penalty phase closing argument (17RT 2182-2183, 23CT 6328-6329).

While respondent notes that Mr. Barrera could "properly present" Donald Trump's speeches, Thomas Jefferson's letter, and the other contextual information contained above in a petition for writ of habeas corpus, it would be unnecessary. The trial record speaks for itself.[1]

B. Nothing in the RJA reflects an intent to upset the existing rules that govern what issues get raised on appeal.

Respondent claims the Legislature intended a petition for writ of habeas corpus to be the exclusive mechanism to obtain retroactive relief for RJA violations. (4SRB, at pp. 8-12.) It reads such an intent

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[1] Respondent does not argue that Mr. Barrera has misrepresented the content of Thomas Jefferson's letter, Trump's speeches, Governor Wilson's campaign ad, the details of Operation Wetback, the interpreter's book, or any of the other information contained in the opening brief. The information presented is "not reasonably subject to dispute" and is "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

from language in Penal Code[2] section 745, subdivision (b), concerning the availability of habeas corpus as a vehicle to obtain RJA relief. (4SRB, at pp. 7-8.) Mr. Barrera anticipated the argument in the opening brief because the Attorney General has made it in several other cases. (4SAOB, at pp. 36-39.) The Legislature has also responded to his argument. About two weeks after the Attorney General began making the argument (see Respondent's Brief, *People v. Garcia,* 1DCA, Div. 3, Case No. A163046 (Feb. 4, 2022), pp. 19-20) Assembly Member Kalra introduced Assembly Bill No. 1118 (2023-2024 Reg. Sess.) to "clarif[y] that RJA claims can be raised on appeal, or if additional evidence is needed, permits individuals to request a stay of an appeal and remand to the trial court to file a motion." (Assem. Com. Pub. Saf., Analysis of Assem. Bill No. 1118 (2023-2024 Reg. Sess.).)[3]

Though timely, the Legislature's clarification should be unnecessary. This is not a situation where the Legislature passed a law and created a single, special mechanism for everyone to use to obtain retroactive relief regardless of the finality of their judgment. (See, e.g., *People v. Conley* (2016) 63 Cal.4th 646, 655-661 [holding that defendants must use special mechanism created by the Three Strikes Reform Act to obtain retroactive relief]; *People v. DeHoyos* (2018) 4 Cal.5th 594, 600-606 [holding that defendants must use

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

[3] Nevertheless, respondent claims that Assembly Bill No. 1118 "strongly suggests" that the RJA was never intended to apply retroactively on appeal. (See 4SRB, at pp. 11-12, fn. 3.)

special mechanism created by Proposition 47 (Nov. 4, 2014) to obtain retroactive relief]; *People v. Gentile* (2020) 10 Cal.5th 830, 859 [holding that defendants must use special mechanism created by Senate Bill No. 1437 (2017-2018 Reg. Sess.) to obtain retroactive relief].)

Here, the Legislature passed a law that was *not* retroactive and envisioned relief via familiar, preexisting mechanisms. (§ 745, subd. (b), as added by Assem. Bill No. 2542 (2019-2020 Reg. Sess.).) Specifically, before it became retroactive, the RJA provided that people with pending trials could obtain relief for violations via motions and that people who failed to bring motions during trial could still obtain relief using other available mechanisms, including a petition for writ of habeas corpus or a motion pursuant to section 1473.7. (*Ibid.*) The reference to a habeas petition in subdivision (b) – the sole language respondent offers in support of its interpretation – pre-dated the RJA's retroactivity and functioned to *expand*, not contract, the mechanisms that may be used to obtain relief and the class of people able to obtain it.

When the Legislature made the RJA retroactive, it distinguished between final cases and nonfinal cases. (§ 745, subd. (j), as amended by Assem. Bill No. 256 (2022-2023 Reg. Sess.) In final cases, the Legislature contemplated that relief would be via a habeas petition or a motion under section 1473.7. (§ 745, subs. (j)(2)-(j)(5).) However, in nonfinal cases, such as those pending on appeal, the Legislature did not list an available mechanism. (§ 745, subd. (j)(1).) For over a half-century this Court has allowed individuals with nonfinal cases to obtain the benefit of a new law in a petition

for writ of habeas corpus or on direct appeal, depending on the defendant's need to develop the factual record. (*In re Estrada* (1965) 63 Cal.3d 740, 745; *People v. Frahs* (2020) 9 Cal.5th 618, 627-637; *People v. Nasalga* (1996) 12 Cal.4th 784.) Distinguishing between "final" and "nonfinal" convictions, as subdivision (j) does, is to speak in the language of *Estrada* and its progeny.

Respondent's construction of the RJA attributes no significance to subdivision (j)'s differential treatment of final and nonfinal convictions. It also places the RJA in tension with existing rules regarding the appeal as the preferred mechanism for violations that appear on the face of the record. The fact a defendant might be able to obtain habeas relief for a legal violation that occurred during trial has never been read as a barrier to relief on appeal. In fact, the opposite is true. (*In re Dixon* (1953) 41 Cal.2d 756.) This Court has consistently held that habeas should only be used when "the normal method of relief – i.e., the direct appeal – is inadequate." (*In re Harris* (1993) 5 Cal.4th 813, 828; *In re Reno* (2012) 55 Cal.4th 428, 490.)

Respondent does not argue that an appeal is somehow inadequate to resolve the RJA violations in this case. Respondent's position appears to be that habeas is the exclusive mechanism even when the trial record itself proves RJA violations. The idea that the Legislature intended for this Court to ignore RJA violations that appear on the face of the trial record is unsettling. The Legislature sought to eliminate barriers to addressing bias, not add to them.

Worse, by forcing even record-based claims into habeas corpus proceedings, the Attorney General would effectively deny Mr.

Barrera any remedy at all. Respondent disputes that the right to habeas counsel in capital cases in California is illusory, conceding only that "the system needs marked improvement." (4SRB, at p. 16.) Yet, respondent does not dispute that it could be a decade, or more, before Mr. Barrera is appointed habeas counsel, or that he may never be appointed habeas counsel. The Attorney General does not contest that there are already hundreds of people sentenced to death waiting for habeas counsel, including over 140 who have already completed their direct appeals (Habeas Corpus Resource Center (HCRC), Annual Report (2022), pp. 11, 13 <https://www.hcrc.ca.gov/documents/HCRC%20Annual%20Report%202022.pdf> [as of June 12, 2023]), or that new habeas appointments have virtually ground to a halt (*id.* at p. 14, fn. 6). More, the Attorney General argues that the trainwreck that is the state habeas process in California is all for the benefit of capital defendants. (4SRB at 16-17.)

The RJA affords Mr. Barrera a remedy now, on direct appeal, for the violations that are apparent on the face of his trial record. The Attorney General's crabbed interpretation of the RJA to deny Mr. Barrera a remedy is at odds with the Act's core objective to make it easier to remedy bias and its harmful effects on both individuals and the integrity of the criminal justice system. (Stats. 2020, ch. 317, § 2, subd. (i).)

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

If there are any doubts about the availability of a remedy on direct appeal under the RJA as presently written, this Court should resolve them in Mr. Barrera's favor, for the same reason it has

previously crafted remedies for people who would otherwise be forced to sacrifice important protections because of the dysfunction in California's capital postconviction system. The delayed appointment of state habeas counsel could cause a defendant to lose his ability to file a federal habeas petition due to expiration of the one-year federal limitations period. This Court crafted a remedy – a placeholder petition – in *In re Morgan* (2010) 50 Cal.4th 932, 938-939. When the Attorney General asked the court to decide a placeholder petition prematurely, this Court crafted another remedy to protect capital defendants from losing their right to meaningfully present all their claims in a state habeas petition. (*In re Zamudio Jimenez* (2010) 50 Cal.4th 951, 955-958.)

Mr. Barrera is in a similar position. If respondent's argument is accepted, Mr. Barrera can only obtain RJA relief by filing a habeas petition. But if he files a habeas petition now seeking relief for the RJA violations, it could bar him from filing another petition once habeas counsel is appointed. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 843.) But if he waits for habeas counsel to file an all-inclusive petition, he could be waiting forever.

Respondent fails to see a "Hobson's choice." (4SRB, at p. 15.) It insists there is "nothing preventing" Mr. Barrera from filing a habeas petition which he "remains free to pursue." (4SRB, at pp. 14-15.) This Court, however, has referred to similar dilemmas as "extraordinary circumstances [that] justify an exception" (*In re Zamudio Jimenez*, *supra*, 50 Cal.4th at p. 958) because they 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).

Even if this Court were to conclude that the RJA as presently drafted does not permit retroactive relief from RJA violations on appeal, it should still craft a remedy that eliminates the dilemma Mr. Barrera and others in his position face due to the unavailability of habeas counsel. The only apparent solution, and the one the Legislature is poised to enact, would allow Mr. Barrera's record-based RJA claim to be addressed on direct appeal or allow him to return to the trial court to present his RJA claim by way of motion.

CONCLUSION

For the foregoing reasons, and those set forth in appellant's other briefing, the convictions and death judgment must be reversed. In the alternative, the Court should remand this case to permit Mr. Barrera to raise his RJA claim in the superior court.

DATED: June 16, 2023

Respectfully submitted,

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/s/
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Supervising Deputy State Public Defender

Attorneys for Appellant

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 3,274 words in length.

DATED: June 16, 2023

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

DECLARATION OF SERVICE

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Case Number: **Supreme Court Case No. S103358**
Los Angeles County Superior Court
Case No. PA029724-01

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APPELLANT'S FOURTH SUPPLEMENTAL REPLY BRIEF

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