IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. RUN PETER CHHUON AND SAMRETH SAM PAN, DEFENDANTS AND APPELLANTS.	No. S105403 Los Angeles County Superior Court No. KA032767 **CAPITAL CASE**

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

Honorable Robert J. Perry, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Constitutional Provisions

Other Authorities

I. MR. CHHUON'S CONVICTION AND SENTENCE ARE RENDERED INVALID UNDER THE RACIAL JUSTICE ACT

Mr. Chhuon and respondent agree that the history of anti-Asian bias in this country has manifested in certain prevalent stereotypes, that those stereotypes are informed by and interact with anti-Black stereotypes, and that Cambodian Americans experience, and are perceived through, this cultural context in unique ways. (Supplemental Appellant's Opening Brief (SAOB) 42-52; Fourth Supplemental Respondent's Brief (4SRB) 17.) Mr. Chhuon and respondent disagree over whether reviewing courts must take that cultural context into consideration when reviewing alleged violations of the Racial Justice Act (RJA), or whether the inquiry is limited to divining the intent of the speaker and considering how a "reasonable juror" might interpret the language in question. (4SRB 13, 36, 41.) Mr. Chhuon explains below that respondent's narrow interpretation of the RJA is contrary to the plain language and intent of the act.

Mr. Chhuon addresses respondent's arguments where necessary to present the issue fully and fairly to the Court. He does not reply to those arguments that are fully addressed in his opening brief. By declining to reply to any specific argument or allegation, or to reassert a point made in the SAOB, Mr. Chhuon does not mean to concede, abandon or waive the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1064–1065), but rather has concluded that the issue has adequately been presented and is fully joined.

A. Respondent's focus on the intent of the speaker and its creation of a "reasonable juror" standard conflict with the language and intent of the RJA

The prosecutor, trial court, and Mr. Chhuon's own defense counsel all used language that, implicitly or explicitly, appealed to racial bias by triggering longstanding anti-Asian stereotypes, dehumanizing Mr. Chhuon, and erasing his individuality. Mr. Chhuon set forth the history and forms of anti-Asian stereotyping to provide the context an objective observer would be aware of when assessing whether a trial actor's language explicitly or implicitly appealed to racial bias, in violation of the RJA. (SAOB 42–52; Pen. Code § 745, subds. (a)(2), (h)(4).)[1] Respondent accepts that background but proceeds to analyze Mr. Chhuon's arguments in a vacuum that excludes cultural context. Respondent does not contest or rebut the sources Mr. Chhuon cites. Instead, respondent disregards them and claims there is no violation because the speakers meant no harm and that "the alleged RJA violations were harmless beyond a reasonable doubt" because "no reasonable juror would have understood the prosecutor's statements as denigrating [Mr.] Chhuon based on race, ethnicity, or national origin." (4SRB 12–13.)

Respondent repeatedly asks this Court to focus on the speaker's intent—despite the statute's rejection of any such requirement. For example, respondent argues that when Mr.

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[1] Statutory references will be to the Penal Code unless otherwise noted.

Chhuon's defense counsel referred to him as a "child from the jungle," it did not violate the RJA because she was attempting to garner sympathy for Mr. Chhuon. (4SRB 35, 38.) But even if counsel's intent was benign, her language referenced Mr. Chhuon's ethnicity and national origin in a way that appealed to racial bias. The jungle allusion appealed to stereotypes of Asian identity as foreign, incompatible with American identity, and to stereotypes of Southeast Asians as primitive and animalistic, drawing negative contrast with the model minority stereotype. (SAOB 76–79.)

Respondent attempts to replace the RJA's objective observer test for evaluating potential violations with a form of misconduct analysis, focusing on whether a "reasonable juror" would have understood the language in an improper manner. (4SRB 36 ["any reasonable juror would have understood that the prosecutor was using" predator in an appropriate way]; 37 [no "rational juror" would have understood a description of Mr. Chhuon as a "child from the jungle" as invoking stereotypes of Cambodians as primitive]; 41 [prosecutor's description of Mr. Chhuon and Tiny Rascal members as youthful, criminal, and predators would not invoke racist superpredator myth "in the mind of a reasonable juror"].) The RJA does not focus on "how an appeal to racial bias might affect a juror's weighing of the evidence; the focus is on whether the challenged language would appeal to the racial bias of a person who simply hears the language." (*People v. Stubblefield* (2024) 107 Cal.App.5th 896, 328 Cal.Rptr.3d 588, 605 (*Stubblefield*).)

The RJA was a paradigm shift, meant to upend "legal precedent [that] often results in courts sanctioning racism in

criminal trials," including by "tolerat[ing] the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials." (Assem. Bill No. 2542 (2019–2020 Reg. Sess.) (A.B. 2542) § 2, subds. (d)–(e).) The Legislature sought "to make clear that this discrimination and these disparities are illegal and will not be tolerated in California." (A.B. 2542 § 2, subd. (g).)

The Legislature indicated that courts should apply the RJA "with eyes open to the unfortunate effects of centuries of racial discrimination." (A.B. 2542, § 2, subd. (b), quoting *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary* (2014) 572 U.S. 291, 380–381 (dis. opn. Sotomayor, J.)).

The RJA defines "racially discriminatory language" as "language that, to an objective observer, explicitly *or* implicitly appeals to racial bias." (§ 745, subd. (h)(4), italics added.) That formulation posits an informed objective observer, someone who understands implicit bias. In his SAOB, Mr. Chhuon cited to *State v. Zamora* (Wash. 2022) 512 P.3d 512, 523, which defined 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." (SAOB 41, 53.) Respondent does not address *Zamora* or challenge that formulation.

Knowledge of history is an essential feature of the objective observer standard. (*Salazar v. Buono* (2010) 559 U.S. 700, 720–721 ["the hypothetical construct of an objective observer . . . knows all of

the pertinent facts and circumstances surrounding the symbol and its placement"].) Indeed, an objective observer would not be able to perform their sole function – identifying language that appeals to bias – unless they have at least some familiarity with history. (See Code Civ. Proc., § 231.7, subd. (d)(2)(A) [defining an objectively reasonable person, 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 in the State of California"].)

The Sixth District Court of Appeal recently demonstrated how the RJA incorporates cultural context into objective observer analysis. In *Stubblefield*,[2] the prosecutor argued that the police did not search Mr. Stubblefield's home in part because Mr. Stubblefield was famous and African-American, and that a search of his home in wealthy Morgan Hill would have opened up a "storm of controversy." (*Stubblefield, supra*, 328 Cal.Rptr.3d at p. 600.) Mr. Stubblefield argued that the comments violated the RJA; the Attorney General argued that the prosecution's comments should not be interpreted as appealing to racial bias. (*Id.* at p. 598, fn. 6.)

The Court of Appeal noted that principles of statutory construction require examining the statutory language in the

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[2] Respondent filed a petition for review in *Stubblefield* but limited its question to whether the drafters of the RJA intended violations of the statute to be susceptible to harmless error review on direct appeal. (*People v. Stubblefield* (Feb. 4, 2025 S289152) Attorney General's Petn. for Rev., p. 12.) Respondent did not take issue with the lower court's substantive RJA analysis and conclusion that an RJA violation occurred in that case. (*Id.* at p. 12, fn. 3.)

"context of the statutory framework as a whole in order to determine its scope and purpose. . . . giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Stubblefield, supra*, 328 Cal.Rptr.3d at p. 599, quoting *People v. Braden* (2023) 14 Cal.5th 791, 804.) The court took notice of the fact that George Floyd was murdered eight weeks before closing arguments and that unrest, and racially motivated backlash to that unrest, was active during the trial. (*Stubblefield, supra*, at pp. 600–602.) The court acknowledged that the prosecutor did not *explicitly* reference the murder of George Floyd, but the RJA required a more nuanced analysis. (*Id.* at p. 602.)

The court noted that the objective observer contemplated by section 745, subdivision (h)(4) must examine whether the language at issue "explicitly or implicitly *appeals* to racial bias." (*Stubblefield, supra*, 328 Cal.Rptr.3d at p. 603, italics in original.) "[T]he statute's inclusion of the word 'appeals' necessarily requires the 'objective observer' to consider the potential effect of the language on a person hearing it—i.e., whether the language appeals to a person's racial bias." (*Id.* at p. 603.) And section 745, subdivision (h)(4) requires the observer to review "racially *charged* or racially *coded* language," such that the observer must be aware of the context and history referenced, even unintentionally, by the language. (*Stubblefield,* at p. 603, italics in original.)

Following the RJA's framework, the court reviewed the prosecutor's argument that a search of Mr. Stubblefield's home would have opened up a "storm of controversy." (*Stubblefield, supra*, 328 Cal.Rptr.3d at pp. 605–607.) The court found that "a listener

who had any basic awareness" of the unrest following the murder of George Floyd "would have to be overly obtuse to lack the ability to associate the prosecutor's remarks with it." (*Id.* at p. 606.) And how the listener processed the allusion to the post-Floyd conflict would be mediated by pre-existing stereotypes of "Black victims of police violence [as] lawless criminals." (*Id.* at p. 606.) In context, the phrase "storm of controversy" would have evoked "images of riots or other civil disruption in the imagination of a listener," given the ubiquity of images of civil unrest during that period. (*Id*. at p. 607.) "By indirectly associating [Mr.] Stubblefield with those events based on his race, the prosecution's statements implicitly appealed to the racial bias of persons who viewed Black men in general as instigators of riots and looting." (*Ibid.*)

In addition to treating the language at issue in this case as if it occurred in a liminal space outside history and culture, respondent's "reasonable juror" also looks at each instance of bias in a vacuum from the others. That is not how bias works or how an objective observer would engage in the analysis. An inherent feature of any objective test is its ability to consider all the circumstances. (*People v. Tacardon* (2022) 14 Cal.5th 235, 238 [warrantless seizure]; *People v. Moore* (2011) 51 Cal.4th 386, 395 [custodial interrogation]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083 [self-defense].) The text and structure of the RJA, specifically section 745, subdivision (a), demonstrate that violations can be corroborative of one another and, for that reason, should be considered together. (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 163.)

Many of the appeals to bias in this case should be apparent to any objective observer even when considered in isolation, but the prosecutor's implicit, and perhaps unintentional, invoking of anti-Asian stereotypes would have conditioned a listener to be receptive to further racially coded language, including animal allusions, and dehumanizing genocide denialist rhetoric. (SAOB 36–37.) Studies show that people who are primed with more stereotypes judge ambiguous behavior more harshly than people who were primed with fewer stereotypes. (Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) 2018 Mich.St. L.Rev. 1243, 1268.)

B. After a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of the RJA, the court shall vacate the conviction and sentence

Respondent argues that violations of the RJA can be found harmless on appeal. (4SRB 50–55.) Not so. "After a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a)." (§ 745, subd. (e)(2)(A).) The Legislature specifically dictated this result, stating in the findings accompanying the original RJA that violations of the statute constitute "a miscarriage of justice under article VI of the California Constitution, and violate[] the laws and Constitution of the State of California." (*People v. Simmons* (2023) 96 Cal.App.5th 323, 333 (*Simmons*), citing A.B. 2542 § 2, subd. (i).)

Respondent argues that section 745, subdivision (k), which sets forth a harmlessness review for certain petitions alleging RJA violations, "is properly construed to apply to direct appeal claims, as in this case." (4SRB 50.) Respondent argues that when the legislature limited harmless error review to petitions, it was saving time by using "petitions" as shorthand to mean "'petitions, motions, and appeals,' i.e. any post-judgment challenge under the RJA." (4SRB 53.) That is wrong.

The Sixth District Court of Appeal examined this argument and dismissed it succinctly: "The plain language of section 745, subdivision (k) limits it to 'petitions' filed by a 'petitioner.' [Mr.] Stubblefield has not filed a petition and he is not a petitioner, so that subdivision does not apply to him." (*Stubblefield*, *supra*, 328 Cal.Rptr.3d at p. 609.) Mr. Chhuon is an appellant, not a petitioner, this is a direct appeal from a sentence of death, not a petition. Respondent agrees that if the language of a statute is clear and unambiguous, courts follow that plain meaning. (4SRB 51, citing *People v. Canty* (2004) 32 Cal.4th 1267, 1276.) As for intent, "[t]he Legislature's expressions of 'zero tolerance' for racial discrimination in the legal system are consistent with the statutory language mandating automatic remedies for RJA violations established on direct appeal." (*Stubblefield*, *supra*, 328 Cal.Rptr.3d at p. 611.)

Respondent filed a petition for review in *Stubblefield*, asking this Court to either overturn the Court of Appeal's holding that section 745, subdivision (k) limits harmless error review to petitions, or to grant review and defer briefing pending the resolution of one or more capital cases raising RJA issues on appeal. (*People v.*

Stubblefield (Feb. 4, 2025 S289152) Attorney General's Petn. for Rev., p. 12.) Respondent faults the court for "narrowly" focusing on the "literal language of the statute." (*Id.* at p. 15.) Respondent claims that applying the RJA as it is written will result in "unwarranted reversals and potential retrials in a number of cases," including cases where "a court can say beyond a reasonable doubt that an RJA violation had no effect on the original trial." (*Id.* at p. 12.) Respondent's alarmism displays a "fear of too much justice," and is irreconcilable with the intent of the drafters of the RJA. (A.B. 2542, § 2, subd. (f), quoting *McClesky v. Kemp* (1987) 481 U.S. 279, 339 (dis. opn. Brennan, J.).) The goal of the RJA is to "remedy the harm to the defendant's case *and to the integrity of the judicial system*." (A.B. 2542, § 2, subd. (i), italics added.)

Respondent acknowledges that, "[t]he Legislature intended 'to provide remedies that will eliminate racially discriminatory practices in the criminal justice system.'" (4SRB 15, quoting A.B. 2542, § 2, subd. (b).) Rendering judgments final despite findings that a judge, attorney in the case, or other enumerated trial actor exhibited bias or animus toward a defendant because of their race, ethnicity, or national origin, would not eliminate racially discriminatory practices in the criminal justice system.

C. The prosecutor employed anti-Asian stereotypes against Mr. Chhuon, in violation of the Racial Justice Act

Whether it was his intention or not, the prosecutor appealed to racial bias by leaning into well-worn anti-Asian stereotypes. Respondent misunderstands Mr. Chhuon's arguments on this front.

For example, in his SAOB, Mr. Chhuon cited to a Department of Justice report explaining that the rise of anti-Asian hate crimes during the pandemic was rooted in longstanding discrimination against Asian and Asian American people as un-American: the perpetual foreigner stereotype. (SAOB 43–44.) Respondent argues that Mr. Chhuon did not demonstrate racial bias was present in his trial in part because Mr. Chhuon's trial took place before the pandemic and had nothing to do with hate crimes. (4SRB 18.) Mr. Chhuon cited the report to explain the history and mechanism of the perpetual foreigner stereotype, not to assert that his trial was affected by COVID-19 era hate crimes. (SAOB 43–44.)

Respondent similarly attempts to pick apart various examples of implicit bias presented by Mr. Chhuon without addressing Mr. Chhuon's core contention: these appeals to racial bias, whether implicit or explicit, worked together to create an environment that an objective observer would recognize as appealing to anti-Asian stereotypes. "Stereotypes as 'perpetual foreigners' and 'model minorities' reinforce monolithic images of Asians as the 'Other' and a group that does not need help, encouraging structural racism." (Muramatsu & Chin, *Battling Structural Racism Against Asians in the United States: Call for Public Health to Make the "Invisible" Visible* (2022) Journal of Public Health Management and Practice 28 (Supp. 1) p. S4.)

1. The prosecutor alluded to the perpetual foreigner stereotype

Respondent argues that the prosecutor's use of "Chaka" and other anglicized nicknames, instead of the proper names of Mr.

Chhuon and Asian American witnesses, would have demonstrated bias only if the prosecutor had created the nicknames. (4SRB 19.) Respondent contends, with no record support, that the monikers were either chosen by their bearers or assigned "as part of initiation into his or her own gang." (4SRB 20.) Respondent's unsupported suggestion itself demonstrates the implicit bias inherent in the use of gang nicknames, by invoking stereotypes that flow from gang association, such as initiation rituals. (See Bozelko, *Five Myths About Street Gangs*, Washington Post (Dec. 17, 2021) [myths about "gruesome" or "deadly" gang initiations are exciting, but gang membership is more casual and fluid than supposed]; Howell & Griffiths, Gangs in America's Communities (3rd Ed.) (Sage Publications 2018) [describing urban legends about violent initiation rites].)

Respondent argues that the prosecutor was careful to use "Chaka" instead of Mr. Chhuon only after first establishing that the witness knew Mr. Chhuon by that nickname. (4SRB 20.) But as Mr. Chhuon set forth in the SAOB, on several occasions the prosecutor led with "Chaka," without first asking a witness if they knew Mr. Chhuon, prompting the witness to continue using the moniker. (SAOB 82; 15RT 2322, 2373.) Compare with the preliminary hearing, outside the presence of a jury, where the prosecutor led with "Mr. Chh[uo]n," prompting witness William Evans to use "Chh[uo]n" instead of "Chaka." (4RT 573, 580.) At the preliminary hearing, the prosecutor continued to use "Mr. Chh[uo]n" even after Kunthea Sar referred to "Chaka," after confirming she knew who Mr. Chhuon was. (4RT 455, 457–458.)

The prosecutor's excessive use of "Chaka" encouraged the trial court to adopt the moniker: "All right, [Mr. Evans] is pointing at defendant Chaka." (SAOB 58–59, 82; 16RT 2629.) Respondent argues that such usage did not evince bias because Mr. Evans[3] was a Tiny Rascal member who knew Mr. Chhuon as "Chaka." (4SRB 22.) But the trial judge was not a member of the Tiny Rascals. That the trial court used "Chaka," as well as other gang monikers, in place of people's true names (SAOB 81) demonstrates that the prosecutor's continued use of nicknames in place of the witnesses' true names, reduced Mr. Chhuon to an "other," rather than an individual who deserved the respect of his own name. Respondent acknowledges that the use of Mr. Chhuon's proper name demonstrated respect and courtroom formality. (4SRB 22.) Respondent suggests, however, that respect is due only when a witness is not gang related. (*Ibid.*)

Even if the prosecutor's use of "Chaka" was limited to the questioning of Tiny Rascal member witnesses, that does not end the inquiry demanded by the RJA. (*People v. Howard* (2024) 104 Cal.App.5th 625, 653 (*Howard*) [that the prosecutor's cross-examination and explanations were supported by the record and facially race-neutral does not mean that the prosecutor's conduct was free of implicit or implied bias].) In *People v. Brown* (2003) 31 Cal.4th 518 (*Brown*) and *People v. Lee* (2011) 51 Cal.4th 620, cases

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[3] Respondent refers to "C.J. Evans" as "neither female nor Asian American," in an attempt to rebut a claim of bias argued by Mr. Chhuon. (4SRB 27.) But William Evans is Asian American. (16 RT 2651 [Mr. Evans testifies that his moniker "C.J." stands for "crazy Japanese," and he is part Japanese].)

decided before the reforms implemented by A.B. 333 and the RJA, this Court found the admission of gang nicknames necessary in specific instances but noted the prosecutors and trial courts in those cases were rightfully careful to prevent "gratuitous use of, or reference to, the nickname." (*Brown, supra,* at p. 551.) The prosecutor's use of "Chaka" 226 times in this case, in addition to the heavy use of other gang monikers, was gratuitous and appealed to racial bias.

As for the use of "Puppet" to replace Bunjun Chhinkhathork, respondent argues that "there was an obvious non-biased and neutral explanation for the prosecutor's approach – referring to gang monikers when the witnesses knew the relevant person by those names." (4SRB 21.) But that is not the explanation the prosecutor gave when introducing Mr. Chhinkhathork to the juries: "We will present at least one accomplice to this particular crime. And I am not going to try to pronounce his name for you because I always mispronounce it. But his moniker, his street name is Puppet." (14RT 2186.) "I will just simply use the name Puppet because its simpler for me to pronounce." (13RT 2064.)

Regardless of whether the prosecutor intended disrespect, an objective observer with an understanding of the perpetual foreigner stereotype would understand that replacing Mr. Chhinkhathork's name with "Puppet," and Mr. Chhuon's name with "Chaka," would encourage a listener to consider Asian names, and those bearing them, foreign and un-American.

In response to Mr. Chhuon's argument that the prosecutor improperly highlighted Mr. Chhuon's refugee status in a way that

appealed to racial bias, respondent again focuses on the speaker's intent. Respondent argues that the record does not show that the prosecutor was attempting to characterize Mr. Chhuon or his family as undeserving welfare recipients when the prosecutor asked Mr. Chhuon's brother, "[t]his country, they brought you here free of charge? You didn't pay to come to this country did you?" (4SRB 22–23; 24RT 4112.) The relevant inquiry under the RJA is not, however, whether the prosecutor acted with discriminatory intent. The question is whether the prosecutor used language that implicitly appealed to racial bias or exhibited "bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745, subd. (a)(2); *Bonds v. Superior Court of San Diego County* (2024) 99 Cal.App.5th 821, 829 [while section 745 can be used to address a claim of purposeful discrimination, "plainly that is not a statutory requirement, nor is it even the primary object of the statute"].)

Respondent notes that the prosecutor argued that immigration provided people like Mr. Chhuon opportunities and a chance (4SRB 30–31), but it elides the full argument: that there were "millions and millions of people that would beg for the chance that Mr. Ch[uo]n and his family had." (27RT 4660.) That argument, along with the prosecutor's characterization of Mr. Chhuon's family coming to America "free of charge" (24RT 4112) appealed to racial bias, specifically the stereotype that Southeast Asian refugees from the war in Vietnam were dependent on American welfare. (SAOB 50, 59, 70–71.)

The prosecutor's argument appealed to a listener primed to believe that Southeast Asian refugees were ungrateful and unfairly receiving benefits. (Mydans, As Cultures Meet, Gang War Paralyzes a City in California, N.Y. Times (May 6, 1991) p. 1 ["The Cambodian people, they are too hard headed. . . . Our Government gives them everything. The rest of us have been living here all our lives and the Government is not giving us anything"].) The stereotype of the ungrateful recipient of American largesse also invoked the contrasting model minority myth: "the idea that Asian Americans 'earn' their place in American society because they 'deserve' it – that it's a privilege bestowed upon them which they can only maintain if they uphold their reputation and their value." (Anise Health, Inc., *Unpacking Asian American Stereotypes: The Nuance of a Rich & Diverse Community* <https://perma.cc/HYT6-CJ2S> (as of Feb. 6, 2025).)

As to Mr. Chhuon's argument that the prosecutor's broad conflation of Cambodian identity with a narrow image of Buddhism evinced bias, respondent again focuses on the prosecutor's intent. (4SRB 23–26.) Respondent argues that the prosecutor intended to make a non-biased point when he told the jury that one of the major tenets of Buddhism is "a reverence for all life" (27RT 4634), that it was "abhorrent to kill anybody or anything," that murder was "totally against the Cambodian people" (27RT 4635), that Buddhists have "an absolute reverence for human life" (27RT 4640), and that Marith Chhuon "did his best to teach his children that absolute reverence for human life" (27RT 4640). (4SRB 24–25.) Perhaps the prosecutor did not "attempt to paint a general picture of Cambodian

Buddhism," (4SRB 24) but an objective observer would recognize that as the effect the statements would have had on a listener.

Respondent seeks to distinguish *Bains v. Cambria* (9th Cir. 2000) 204 F.3d 964 (*Bains*), arguing that in that case, the prosecutor's "arguments were actually more a statement about the stereotypical 'nature' of a particular group rather than an explanation of the beliefs followed (to different degrees and in different ways) by some members of that group." (4SRB 26, quoting *Bains, supra,* at p. 975.) Here, respondent argues, the prosecutor referred to particular beliefs expressed by Mr. Chhuon's father and Mr. Kanly, which were part of Mr. Chhuon's upbringing. (4SRB 26.)

First, it should be noted that *Bains* evaluated the prosecutor's statements under federal due process precedent, not the RJA. Second, the prosecutor here did not discuss whether Mr. Chhuon violated his personal belief system, he argued that "Buddhists" had reverence for all life, and that to take the life of anybody (or anything) was abhorrent and "totally against the Cambodian people." (27RT 4634–4635.) He made similar statements to Mr. Pan's jury: "In fact, they are a very, very – that culture has a great belief in the sanctity of life. . . . And for a Buddhist, the worst thing a Buddhist could do would be to take someone else's life." (25RT 4258.) There was no evidence presented about Mr. Chhuon's belief system, whether he was a Buddhist and, if he was, in what degrees or ways he followed the tenets the prosecutor ascribed to "Buddhists" and "the Cambodian people" writ large.

An objective observer, aware of the history of stereotyping Asian Americans with the religious and cultural practices of their

countries of origin, would recognize the implicit racial appeal of the prosecutor's argument: Cambodians were Buddhists, a people uniquely reverent of all life, and Mr. Chhuon violated a core tenet of "his" people. (See Kim, *The Racial Triangulation of Asian Americans* (1999) 27 Pol. & Soc'y 105, 119; Volpp, *The Excesses of Culture: On Asian American Citizenship and Identity* (2010) 17 Asian Am. L.J. 63, 64; Zou, *Two Axes of Subordination: A New Model of Racial Position* (2017) 112 J. of Personality & Soc. Psych. 696, 698.) In this way, whether intentionally or not, the prosecutor both marked Mr. Chhuon as a member of a foreign people with foreign beliefs and ostracized him from a stereotypical form of that foreign identity, marking him as deviant.

2. The prosecutor alluded to the model minority myth.

Respondent does not dispute the scholarship presented by Mr. Chhuon regarding the history and function of the model minority myth. Instead, respondent argues that the record "contains no references to Asian-Americans (sic) as 'model' minorities or as 'good' immigrants," and that the prosecutor "never mentioned either 'bad immigrant' or 'good immigrant,'" in his penalty phase closing argument. (4SRB 28.) Respondent contends that the prosecutor did not explicitly argue that Mr. Chhuon "deviated from any positive or idealized stereotypes," and that the "prosecutor's obvious, unambiguous point was race-neutral – that [Mr.] Chhuon's childhood and background did not explain or mitigate his criminality." (4SRB 28.) Respondent also argues that the prosecutor did not mean to contrast Mr. Avina and Mr. Huerta's good

immigrant qualities with Mr. Chhuon, the prosecutor was simply providing standard victim impact evidence. (4SRB 29.)

These responses do not address Mr. Chhuon's RJA claims. Appeals to racial bias include racially charged or coded language and can be unintentional. (§ 745, subds. (a)(2), (h)(4); *Howard*, *supra*, 104 Cal.App.5th at p. 653 [that record shows a permissible purpose for questions asked does not necessarily mean prosecutor's conduct was free of implicit or implied bias].)

Respondent contends that when the prosecutor asked if it was "very rare for those people as they grew up to become lawbreakers in this country," it could not violate the RJA, because the prosecutor was asking a question on cross-examination, not making an argument. (4SRB 31–32.) But the RJA covers all in-court proceedings, not just attorney argument. (§ 745, subd. (a)(2); A.B. 2542, §2, subd. (i) ["racism in any form or amount, *at any stage of a criminal trial*," is a miscarriage of justice].)

Respondent further argues that Dr. Sack "carefully qualified" the prosecutor's assertion when he responded: "I can't say I can speak for all Cambodians in the United States. All I can speak for is these two groups that I studied. In those groups I didn't find any major tendencies to this kind of crime." (4SRB 32; 26RT 4574.) Perhaps under prosecutorial misconduct analysis it could be said that Dr. Sack's response mitigated the prosecutor's language, but under RJA analysis the response only highlights the violation. Dr. Sack understood in real time that the prosecutor was painting all Cambodian immigrants with an overbroad brush. In so doing, the prosecutor was appealing to the model minority stereotype of Asian

Americans being law-abiding and obedient to social mores, highlighting Mr. Chhuon's deviancy. (SAOB 48, 65–66.)

As explained in the SAOB, the model minority myth was employed to contrast a small group of high-achieving Asian Americans against Black Americans, to allow for more nuanced racism: if other non-white people can achieve economic and social success, the failure of Black Americans to do so must stem from a lack of hard work. (SAOB 47–49, 66; McGowan & Lindgren, *Testing the "Model Minority Myth"* (2006) 100 Nw. U. L.Rev. 331, 338–339.) Southeast Asian Americans, for a variety of socioeconomic reasons, found themselves subject to "ideological Blackening," and thus on the wrong side of the model minority myth. (SAOB 66–67; Ng et al., *Beyond the Perpetual Foreigner and Model Minority Stereotypes: A Critical Examination of How Asian Americans are Framed*, Contemporary Asian America (2016) p. 576.)

It is in this context that Mr. Chhuon noted that the introduction of People's Exhibit No. 23, an image which portrayed Mr. Chhuon "as having a substantially darker complexion than he, in fact, had," served to place Mr. Chhuon proximate to Blackness, such that allusions to Black-coded stereotypes were more likely to appeal to racial bias in this case. (SAOB 66–67.) Respondent again retreats to literalism, arguing that "nowhere in the record did the prosecutor use the photograph to characterize [Mr.] Chhuon as 'Black' or 'proximate' thereto." (4SRB 33.) The RJA does not require purposeful, explicit displays of racism.

D. The prosecutor's use of "predator" and trial counsel's use of "child from the jungle" stoked contemporary and historical racial biases

To fulfill the legislature's objective of eliminating racial bias from the criminal justice system, even when unintentional or unconscious, the RJA defines racially discriminatory language expansively, as language that includes, but is not limited to, "racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin." (§ 745, subd. (h)(4); A.B. 2542, §2, subd. (i).)

Respondent argues that when the prosecutor made his closing argument urging the jury to vote for death, his description of Mr. Chhuon as a predator was a "single, unadorned reference." (4SRB 34.) Any appeal to racial bias, adorned or not, can constitute a violation of the RJA. There is no requirement that a prosecutor meet a threshold of racially discriminatory language. (§ 745; A.B. 2542, § 2, subd. (a) [quoting *Buck v. Davis* (2017) 580 U.S. 100, 122: "[T]he impact of … evidence [of racial bias] 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"].

Respondent accuses Mr. Chhuon of furnishing no authority that the terms "predator" and "jungle" are "used disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin." (4SRB 35.) This suggests incorrectly that such evidence is required. Section 745, subsection (h)(4) states that in determining whether language is racially discriminatory, "[e]vidence 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," but it is not required.

Respondent, focusing on the prosecutor's presumed intent, contends that the prosecutor "unambiguously" meant to refer to Mr. Chhuon as a "human predator." (4SRB 34–35.) As respondent notes, a predator is defined firstly as "an organism that primarily obtains food by the killing and consuming of other organisms . . . *especially*: an animal that preys on other animals," and secondarily as "one who injures or exploits others for personal gain or profit." (SARB 35–36, quoting Meriam-Webster.com Dictionary, italics in original.) Respondent positions the second definition as unrelated to the first, but the use of "predator" to describe a person who injures or exploits functions by drawing a parallel to the animal act of predation, of preying on a victim. (See Abramsky, Hard Time Blues: How Politics Built a Prison Nation (2002), p. 112 [quoting Mike Reynolds, advocate for California's three-strikes law, "They're little more than animals. They look like people, but they're not. And the unfortunate thing is they're preying on us"].)

As another online dictionary puts it: "A predator is an animal that eats other animals — or people or companies who act like they do. Lions are predators, but so are pickpockets and some giant corporations." (Vocabulary.com Dictionary, "predator" <https://www.vocabulary.com/dictionary/predator> (as of January 6, 2025).) Animals are never described as "lion predator," or "bear predator," but the formulation "human predator," is common, noting for the reader that the human in question has taken on an inhuman quality. (See Ronald Reagan, President of the United States,

Remarks in New Orleans, Louisiana, at the Annual Meeting of the International Association of Chiefs of Police (Sept. 28, 1981) Online by Peters & Woolley, The American Presidency Project <https://perma.cc/VKR5-5UMM> (as of February 10, 2025) ["The portrait is that of a stark, staring face, a face that belongs to a frightening reality of our time—the face of a human predator, the face of the habitual criminal. Nothing in nature is more cruel and more dangerous]."

The RJA cites a study by Dr. Phillip Goff and others to illustrate its conclusion "that use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system." (A.B. 2542, §2, subd. (e), citing Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences* (2008) 94 J. of Personality & Social Psychology 292–293.) That study found that the word "predator" was one of a select group of words that elicited the concept of "ape, monkey, or gorilla," from a majority of the respondents in the study. (SAOB 77; Goff et al., *supra*, at p. 304.) Respondent dismisses Dr. Goff's study as a "secondary authority," without addressing its role in informing the language of A.B. 2542. (4SRB 35.)

As authority for its argument that a person can be described as a predator without implicitly evoking animal imagery in the mind of the listener, respondent points to the codification of the term "predator," in the context of the Sexually Violent Predator Act (SVPA) of 1996, which defines a sexually violent predator as a person with a diagnosed mental disorder that makes that person a likely future danger to the health and safety of others. (4SRB 36.)

The SVPA was titled and enacted in 1996, at the height of the superpredator panic. (See *People v. Hardin* (2024) 15 Cal.5th 834, 905–906 (dis. opn. Evans, J.) [discussion of superpredator panic of 1990s].) Codification of outdated language does not insulate it from review. (See Assem. Bill No. 248 (2023–2024 Reg. Sess.) [The Dignity for All Act: replacing obsolete terminology including the term "retarded" throughout California codes; Assem. Bill No. 1130 (2023–2024 Reg. Sess.) [replacing the term "addict" with "a person with substance use disorder"].)

Respondent relies on cases decided before the enactment of the RJA for the proposition that calling a defendant a "monster" is permissible if the defendant acted like a monster, such that if Mr. Chhuon acted like a predator, it was fair to call him a predator. (4SRB 36, citing *People v. Jackson* (2016) 1 Cal.5th 269, *People v. Chatman* (2006) 38 Cal.4th 344.) Respondent's reliance on prosecutorial misconduct cases again demonstrates its misunderstanding of the paradigm shift created by the RJA.

The RJA specifically cited *People v. Powell* (2018) 6 Cal.5th 136, 182–183, in concluding that comparisons of people of color to "Bengal tigers" and other animals is racially discriminatory. (AB 2542, § 2, subd. (e); see § 745, subd. (h)(4).) In *Powell*, this Court held that the prosecutor's comparison of Mr. Powell to a Bengal tiger was acceptable because the prosecutor meant not to dehumanize Mr. Powell but to argue that the crime was so brutal the defendant acted like an animal. (*People v. Powell, supra,* 6 Cal.5th at pp. 182–183.) Following the enactment of the RJA, the prosecutor's intent is no longer the focus; what matters is whether the language appealed

to racial bias. (Contra, *People v. Quintero* (2024) 107 Cal.App.5th 1060, 328 Cal.Rptr.3d 771, 785–786 [prosecutor's references to person of color as monster and predator did not violate RJA when prosecutor intended to describe brutality of the crime].) The word "predator" may not reference a specific animal, like a Bengal tiger—itself a predator—but it alludes to animalistic qualities, and appeals to racial bias just as much as the tiger reference.

As for defense counsel's description of Mr. Chhuon as a "child from the jungle," respondent's reliance on defense counsel's intent in using that descriptor is again misplaced. (4SRB 38.) Racially discriminatory language, as defined by the statute, constitutes a violation "whether or not purposeful." (§ 745, subd. (a)(2).) As with "predator," "jungle" is one of the words that participants in Dr. Goff's study associated with the concept of "ape." (SAOB 7; Goff et al., *supra*, at p. 304.) Calling Mr. Chhuon a "child from the jungle" referenced Mr. Chhuon's ethnicity and national origin in a way that appealed to racial bias.

E. The prosecutor further dehumanized Mr. Chhuon by invoking racialized gang stereotypes

In addition to using gang monikers in place of real names, the prosecutor, intentionally or not, framed Mr. Chhuon and other Tiny Rascal members within the historically racist superpredator myth through references to their youth and predatory nature. (SAOB 79–87.) Respondent argues that the prosecutor never used the word "superpredator," and thus the prosecutor's language could not have appealed to racial bias. (4SRB 39, 41.) Under respondent's formula, the "storm of controversy" language used by the prosecutor in

Stubblefield could not have run afoul of the RJA because it did not explicitly reference George Floyd.

Respondent contrasts this case with *State v. Belcher* (Conn. 2022) 268 A.3d 616, 625–629, in which the Connecticut Supreme Court held that the sentencing court's explicit mention of superpredators was prejudicial, given the historical and sociological context surrounding the racist myth. (4SRB 40–41.) The Connecticut Supreme Court did not review *Belcher* under the RJA, but it discussed implicit bias—that the sentencing court might not have realized it was relying on racial stereotypes—and it explored the way the superpredator myth functioned, primarily by dehumanizing Black people through animal allusions: the word "super" modified the word "predator," "an animal that depends on predation for its food." (*State v. Belcher, supra,* 268 A.3d at p. 627.)

Under the RJA, language that is racially charged or racially coded can implicitly appeal to racial bias. (§ 745, subd. (h)(4).) The language used by an attorney "doesn't have to directly refer to a stereotype to activate the juror's mental association." (Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case Western Reserve L.Rev 39, 61 (*Confronting*).)

Although the superpredator myth originated as a stereotype against Black youth, racial stereotypes about the "inherent criminality" of young Black and Latino men "can be leveraged equally against Southeast Asian defendants . . . who are subject to 'colorist and anti-Black imaginations that associate darker skin with criminality.'" (*People v. Hin* (Feb. 3, 2025, S141519) at p. 94, quoting Magsaysay, *Asian Americans and Pacific Islanders and the Prison*

Industrial Complex (2021) 26 Mich. J. Race & L. 443, 494.) Prosecutors can evoke the stereotype of a Black (or in this case, Black-coded) defendant as a dangerous animal through verbs commonly associated with predatory animals like "hunt" and "prey." (*Confronting, supra,* 71 Case W. Res. L.Rev. at p. 61.)

The prosecutor referred to Mr. Chhuon as a predator and referred several times to the youthfulness of Tiny Rascal members. (SAOB 85–87.) The prosecutor also engaged in other animalistic allusions, arguing that Mr. Chhuon decided to "hunt down" Mr. Avina and Mr. Huerta and "kill them like dogs." (SAOB 75; 27RT 4625–2636.) Racially charged animal allusions are foundational to the superpredator myth. (DiLulio, *The Coming of the Super-Predators*, Weekly Standard (Nov. 27, 1995) p. 24 [describing juveniles committing violence in "wolf packs"].)

The prosecutor's characterization of Mr. Chhuon's lifestyle further echoed the superpredator myth. "You are eating on the run, stopping for a hotel room here or there, gas. That was his lifestyle, and steal along the way. And that is what he does. That is what he is." (27RT 4625–4626.) Compare with Mr. DiLulio's description of superpredators as living "entirely in and for the present moment; they quite literally have no concept of the future . . . . [S]o for as long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob . . ." (DiLulio, *supra,* p. 26.)

The RJA does not require that an attorney utter specific words or refer explicitly to racist tropes. As the *Stubblefield* court explained, the RJA asks courts to examine whether certain language appealed implicitly to racial bias within the context an

objective observer would possess when reviewing the language. (*Stubblefield*, *supra*, 328 Cal.Rptr.3d at p. 603.)

Finally, respondent argues that "no legal authority" exists for the "dubious assertion" that legal definitions of gang membership emerged alongside the superpredator myth. (4SRB 39.) But, as Mr. Chhuon set forth in his SAOB, legal scholarship supports that understanding. (SAOB 83; see also *People v. Hardin, supra* 15 Cal.5th at p. 903 (dis. opn. Evans, J.) [revision of STEP Act by Proposition 21 in 2000 direct result of superpredator myth].)

F. The prosecutor and court engaged in genocide denialism, casting doubt on the extent of the atrocities committed by the Khmer Rouge, particularly the atrocities suffered by Mr. Chhuon, in violation of the RJA

Genocide denialism is a well-studied phenomenon, with scholarship establishing its causes, permutations, and effects. (SAOB 96–98.) Denialism includes more than a total rejection of the truth of the atrocity, and can function as a form of implicit bias, without malevolent intent. (Cohen, States of Denial: Knowing About Atrocities and Suffering (2001), pp. 5, 33–34.) Questioning of documented facts, downplaying the extent and implications of the genocide, and diminishing the experience of survivors are all forms of denialism. (Savelsburg, *Knowing About Genocide: Armenian Suffering and Epistemic Struggles* (University of California Press 2021) pp. 24–25; Cohen, *supra*, at pp. 12, 95.) Denialism is a form of bias against a person's race, culture, ethnicity or national origin. It both dehumanizes the group targeted by the genocide and "consolidates the putatively inferior status of genocide survivors and

their descendants." (Altanian, *The Epistemic Injustice of Genocide Denialism* (Routledge 2024), pp. 40–41.)

Mr. Chhuon situated his argument within a framework informed by that scholarship: the prosecutor raised doubts as to documented historical facts about the Cambodian genocide, such as the number of victims, the existence of famine caused by the Khmer Rouge, and the extent of the American bombing campaign. (SAOB 91–93.) The trial court was especially affected by the prosecutor's discussion of the role of the American military intervention and was concerned by what it saw as the "politicized nature" of the unedited version of the video offered in mitigation. (SAOB 93–94.) Those concerns led the court to craft a lengthy special jury admonition that instructed the jurors that some of the statements made in the documentary video were argumentative, that the statistics relayed were without foundation, and that unless it was describing the visual scene, the jury should disregard the audio accompanying the video. (SAOB 94–95.) Finally, the prosecutor used his closing argument to cast further doubt on both the facts of the genocide and Mr. Chhuon's personal experience of the atrocity. (SAOB 95–96.)

Respondent does not address the framework set forth by Mr. Chhuon or the scholarship that underpins it. Instead, respondent declares that "[Mr.] Chhuon identifies no instance in which the prosecution or the court said anything to deny or disparage the reality of [the] Cambodian genocide." (4SRB 47–48, fn. 11.) If one were to narrowly define denialism as a complete rejection of the fact the genocide took place, perhaps. But as discussed here, and in the SAOB, pursuant to the accepted scholarly definition of denialism,

the prosecutor's questioning of established facts of the genocide and the diminishment of Mr. Chhuon's experience of that genocide amount to denialism. "The practice of 'denialism' in regard to mass atrocities is usually thought of as a simple denial of the facts, but this is not true. Rather, it is in that nebulous territory between facts and truth where such denialism germinates." (Akçam, *Killing Orders: Talat Pasha's Telegrams and the Armenian Genocide* (Springer 2018), p. 2.)

Respondent asserts that "[t]he prosecutor never questioned the truth of the defense evidence concerning atrocities in Cambodia." (4SRB 42.) Respondent does not address the prosecutor's accusation that Mr. Chhuon embellished his experience of having been tortured while imprisoned as a child in Khmer Rouge slave labor camps. (SAOB 95; 27RT 4607.) Respondent instead claims the prosecutor merely argued that the suffering endured by Mr. Chhuon did not mitigate his crimes. (4SRB 47.) That is not what "embellishment" means. (Merriam-Webster.com Thesaurus, "embellishment" < https://perma.cc/T7LF-XT2J> (as of February 13, 2025) ["to add to the interest of by including made-up details"].)

Respondent contends that when the prosecutor argued that the defense failed to prove that a quarter of the Cambodian population was eradicated over the course of 1975 to 1979, he was not claiming that it did not happen, only that it was not proven to have happened. (4SRB 47; 26RT 4607.) The death toll of the Cambodian genocide is not reasonably disputed. (Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor 1975-80* (2003) 35 Critical

Asian Studies 4, pp. 585–597 [summarizing publicly available studies from the 1970s, 1980s, and 1990s].) As Justice Liu recently noted, "case law supports the unremarkable proposition that reviewing courts need not and should not ignore either widely known facts or their empirical bases." (*People v. Collins* (2025) 17 Cal.5th 293, 328 Cal.Rptr.3d 641, 670 (conc. opn., Liu, J); see *Zainudin v. Meizel* (1953) 119 Cal.App.2d 265, 270 [arrival of refugees in San Francisco "a matter of common knowledge"].)

Respondent does not address the prosecutor's statement that portrayals of mass malnutrition were misleading because "[w]e don't know whether that's malnutrition at that point in time . . . was the result of the Khmer Rouge, or simply because Cambodia was a very poor country and efforts were being made to rebuild it." (SAOB 93; 24RT 4002–4003.) The Khmer Rouge induced famine killed over half a million people, a fact known at the time of Mr. Chhuon's trial. (Kiernan, *The Pol Pot Regime*: *Race, Power, and Genocide in Cambodia under the Khmer Rouge 1975-1979* (1996) pp. 456–460; Berman, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia* (1996) 84 Calif. L.Rev. 817, 836–837; Barrett, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos* (2001) 32 Colum. Hum. Rts. L.Rev. 429, 441.) It is difficult to believe respondent would overlook such a statement if the prosecutor had been dismissive of a Western atrocity, arguing, for example, that we don't know whether the World Trade Center towers collapsed because they were hit by terrorists or because of New York City's inadequate building code.

Respondent argues this is a dispute about evidentiary issues of foundation, authentication, and relevance. (4SRB 45.) That framing fails to confront the way these objections, while perhaps technically legitimate, also served to suggest the defense evidence of the genocide was fabricated or overstated, a form of genocide denialism that appealed to racial bias. Denialism is a well-studied phenomenon of triggering bias without explicit reference to race, culture, ethnicity or national origin. (See Southern Poverty Law Center, "Holocaust Denial" <https://perma.cc/7MV4-ZYBG> (as of February 13, 2025) ["Holocaust deniers and revisionists mask antisemitism and racism under the guise of free speech and 'asking questions'"]; see also Karlsson, *Cultures of Denial: Comparing Holocaust and Armenian Genocide Denial* (2015) Lund Univ. Dept. of History, p. 12 [genocide denial shifts focus to "verifying documents, finding reliable demographic data, and counting victims even when the events as such have been proven beyond doubt"].)

Respondent's reasoning is further undermined by *Howard,* in which the Court of Appeal found that although the prosecutor's cross-examination about Mr. Howard's upbringing in East Palo Alto was relevant and permissible from an evidentiary law standpoint, it nevertheless exhibited bias, whether purposeful or not, by using geography as a proxy for race. (*Howard, supra,* 104 Cal.App.5th at pp. 653–656.)

Here, too, it was inarguably good trial strategy for the prosecutor to argue that the facts of the Cambodian genocide could not be authenticated or had not been proven. The prosecutor's strategy led to the cautionary jury instruction and provided a basis

for arguing that Mr. Chhuon's mitigation evidence regarding his childhood in Cambodia was embellished, thus lessening its impact on the jury. But the prosecutor's conduct also violated the RJA.

An objective observer, someone aware of the well-established facts of the Cambodian genocide and of the history and mechanisms of anti-Cambodian stereotyping, including the trope of Cambodians as ungrateful refugees dependent on welfare, would understand the prosecutor's argument as appealing to the biases of listeners primed with anti-Asian stereotypes. Listeners who were thus susceptible to the trivialization of a genocide involving disfavored minorities that occurred half a world away. (See Cohen, States of Denial: Knowing About Atrocities and Suffering, *supra,* at pp. 12, 95 [denialism more effective when "victims are unimportant, isolated peoples in remote parts of the world," common to claim victims from devalued ethnic groups "don't feel pain as other people do"]; see also Muramatsu & Chin, *Battling Structural Racism Against Asians in the United States: Call for Public Health to Make the "Invisible" Visible*, *supra*, at p. S5 [implicit norms that treat Asians as monolithic lead to the "invisibility" of Asian individuals, further fueling structural racism].)

Respondent argues that the court accepted counsel's representation that she could lay a foundation of the conditions in Cambodia during the genocide, and thus the court did not engage in denialism. (4SRB 45.) But after viewing the video, the court found that although it had an "aura of authentication," it still could not authenticate facts such as the number of children missing or the tonnage of bombs dropped on Cambodia, and thus it would

admonish the jury with a "cautionary instruction" regarding the "audio commentary." (24RT 4064.)

That instruction admonished the jurors that parts of the video were "argumentative," that they should disregard any statements about statistics, and disregard any statements that weren't descriptions of the visuals. (26RT 4459–4460.) Trial counsel alerted the court that the audio portions of the tape were newsworthy and "something that's of common knowledge as to what happened in Cambodia." (24RT 3998.) The trial court acknowledged having read the testimony of another survivor of the genocide, who, when asked about the documentary which trial counsel excerpted, said "it was worse than that." (24RT 3999.) "The judicial branch can rely on history and context on issues of race to the same extent that courts have always relied on history and context to analyze all other issues." (*People v. Hardin*, *supra*, 15 Cal.5th at p. 903 (dis. opn. Evans, J.,) quoting *State v. Hawkins* (2022) 519 P.3d 182, 196; see also, *People v. Virgil* (2011) 51 Cal.4th 1210, 1274–1275 [testimony about experience in Cambodian killing fields was admissible to counter mitigating evidence].)

Finally, respondent contends that "[Mr.] Chhuon's reliance on quotations from the trial judge's self-published book . . . to support a showing of bias is entirely misplaced." (4SRB 49.) But Mr. Chhuon did not rely on the trial judge's book or argue that the judge's questioning of facts regarding the Cambodian genocide stemmed from personal bias. As discussed above, to succeed on a claim pursuant to section 745, subdivision (a)(2), a showing of explicit bias is unnecessary. Respondent's choice to addresses the trial judge's

book in this section is confusing. Mr. Chhuon discussed the appeals to racial bias present in the book as part of his survey of potential extra-record material requiring further development that would militate for remand of this case to superior court, should this Court determine that the RJA violations detailed in the briefing are not sufficiently ripe. Mr. Chhuon did not rely on the book as part of his claims on appeal; respondent's concern is misplaced.[4]

II. THE PARTIES AGREE THE GANG ENHANCMENTS MUST BE STRICKEN. IT CANNOT BE SHOWN BEYOND A REASONABLE DOUBT THAT THE ENHANCEMENTS AND THE EVIDENCE OFFERED TO PROVE THEM DID NOT AFFECT THE VERDICTS IN THIS CASE

Respondent agrees that the gang enhancements in this case must be struck pursuant to Assembly Bill No. 333 (2021–2022 Reg. Sess.) (A.B. 333), but insists that the voluminous gang evidence submitted by the prosecutor to prove the erroneous enhancements had no effect on Mr. Chhuon's guilt or penalty phase trials. (4SRB 57.) The jury's consideration of irrelevant and prejudicial gang evidence violated Mr. Chhuon's rights under the federal and

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[4] Respondent asserts that Judge Perry's repeated use of a slur in the book did not demonstrate racial bias because "the author was presenting Mary's description of events." (4SRB 49.) But Judge Perry did more than quote a witness, he characterized a person whose ethnicity he did not know, or at least did not relate to the reader, with the slur used by the witness. (See Butterfield, *Violent Incidents Against Asian Americans Seen as Part of Racist Pattern* N.Y. Times (Aug. 31, 1985) p. 8 ["They see us basically as one race, and that's what racism is all about"].) Section 745, subdivision (a)(2) does not provide a "safe harbor" for a trial actor to continuously and expansively use a slur outside of its original quoted context.

California Constitutions to due process and to a fair and reliable capital sentencing, requiring reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Respondent argues that the evidence used to prove the gang enhancements was also used to prove identity and motive as to the underlying charges and therefore did not taint Mr. Chhuon's convictions or sentence. (4SRB 60.) But this argument supports Mr. Chhuon's position that it is impossible to disentangle the knot of gang-related evidence, some of which was impermissible pursuant to the limits on gang evidence imposed by A.B. 333. Pursuant to the old STEP Act, the prosecutor used the charged offenses to prove the enhancements, incentivizing him to bring in highly prejudicial gang evidence. (SAOB 122–126.) A.B. 333 was enacted to address racial disparities resulting from lax standards on admissibility of gang evidence. (A.B. 333, § 2, subds. (a), (g).)

The prosecutor chose to join the Sacramento and Pomona incidents and to frame and argue the joined matter as a gang case. (SAOB 109.) But respondent's theory of relevance as to the Sacramento offenses, that the incident was "planned and committed entirely by TRG members," is not a theory of identity or motive. (4SRB 63.) As to the Pomona incident, respondent's argument highlights that, rather than establishing motive, the gang evidence filled in evidentiary holes with gang stereotypes.

The trial court concluded that the Sacramento offenses lacked any evidence of a gang-related motive when it dismissed the enhancements alleged for those offenses at the end of trial: "I don't think there is any evidence that the killings and attempted robbery

and burglary were for the benefit of any criminal street gang." (17RT 2868.) As for identity, there was no dispute that Mr. Chhuon was present at the Florinwood apartments, the only question was the identity of the shooter, and evidence regarding that question was provided by the testifying Le family members, who were not familiar with the Tiny Rascal gang. (14RT 2248–2249, 2271; 15RT 2340–2341.)

In *People v. Garcia* (2024) 107 Cal.App.5th 1040, 328 Cal.Rptr.3d 467, 475–476, the trial court bifurcated the substantive offenses from the gang enhancements but proceeded to admit gang evidence during the case in chief in order to prove a material issue, namely intent. The Fourth District Court of Appeal found that the evidence suggested the incident was not gang related, but that even if the crime was gang related, the gang evidence admitted at trial "had little, if any, relevance to proving the substantive crimes." (*People v. Garcia, supra*, 328 Cal.Rptr.3d at pp. 476–477.) The court noted that sufficient evidence existed to satisfy the elements at issue, absent the gang evidence. (*Id.* at p. 478.) The court concluded that the probity of the gang evidence was "minimal at best" but, despite limiting instructions, the potential prejudice was high, as the gang evidence would have affected the jurors' view of Mr. Garcia's character, and the prejudice was exacerbated by the prosecutor's emphasis of the gang nature of the crime during argument. (*Id.* at p. 480.)

Here, respondent concedes the Sacramento incident was not "directly" gang motivated and offers no substantive argument in support of its assertion that the gang evidence was relevant to prove

identity or motive as to that incident. (4SRB 63.) As set forth in the SAOB, the prosecutor hammered home his gang theory of the case during closing argument, impressing upon the jurors that the victims in Sacramento did not survive their exposure to the Tiny Rascals Gang. (SAOB 124.)

As to the Pomona offenses, the idea that the gang evidence proffered at trial was relevant to show motive appears reasonable at first glance; the theory being that the motive for the shootings was a rivalry between the Tiny Rascals and a gang known as "12th Street." (4SRB 62.) Mr. Evans testified that he had a conversation with Tiny Rascal members in which he heard that the person shot in Pomona was believed to have been a member of 12th Street. (16RT 2654.) He agreed with Mr. Pan's counsel that in 1995, TRG "had problems" with 12th Street and there was an "ongoing dispute." (16RT 2658.)

But the existence of a rivalry between two gangs does not establish that Tiny Rascals members were under an edict to attack perceived rivals, or that the shooting would benefit the Tiny Rascals in some way, even reputationally. In *People v. Albarran* (2007) 149 Cal.App.4th 214, 227, wherein Mr. Albarran was charged with shooting at a house during a party, the prosecutor's theory of the motive was that the shooting would enhance the shooter's reputation, based on testimony from the gang expert that he had heard there were gang members at the party. But, the reviewing court noted, there was scant evidence to support that theory of motive, no evidence the shooters bragged about the crime or announced their presence "before, during or after the shooting." (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 227.) The gang

evidence filled a gap in the prosecution's case with speculative and prejudicial gang stereotypes: Gang members had a motive to shoot perceived rivals, because that is what gangs do.

The legislature noted that A.B. 333 was necessary, in part, because "[g]ang enhancement evidence can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries." (A.B. 333, § 2, subd. (d)(6); *People v. Burgos* (2024) 16 Cal.5th 1, 10.) The legislature went so far as to require bifurcation of substantive charges and gang enhancements, if requested by the defense, to ensure that gang evidence does not taint jurors' consideration of the underlying offense. (A.B. 333, § 2, subd. (a).) Mr. Chhuon does not here argue that the bifurcation requirements set forth in A.B. 333 apply to his case retroactively, but the reasoning behind those requirements weighs in favor of finding the gang evidence and argument here prejudicial. "Erroneous admission of gang-related evidence, particularly regarding criminal activities, has frequently been found to be reversible error, because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability." (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.)

The prosecutor joined the Sacramento offenses and Pomona offenses and constructed an overarching narrative of a violent gang led by Mr. Chhuon who, because of his gang mentality, would be a "danger to every person he comes in contact with for the rest of his life." (47RT 4632.) The state reaped the benefit of that joinder; it should not now be insulated from the consequences. Because

respondent cannot meet the burden of showing beyond a reasonable doubt that the irrelevant and prejudicial gang evidence allowed in by the erroneous gang enhancements was not considered by the jurors in reaching their verdicts or sentence, reversal is required.

III. MR. CHHUON'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FEDERAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND CALIFORNIA'S PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT BECAUSE HE WAS 22 WITH AN UNDEVELOPED PREFRONTAL CORTEX

Respondent argues that this Court's holdings in *People v. Powell* (2018) 6 Cal.5th 136, 191 (*Powell*), *People v. Flores* (2020) 9 Cal.5th 371, 429–430 (*Flores*), and *People v. Tran* (2022) 13 Cal.5th 1169, 1234–1235 (*Tran*), resolve the issue of whether the imposition of the death penalty for offenders under the age of 25 is so disproportionate to their diminished culpability as to be cruel or unusual under the state constitution. (4SRB 68.) As Mr. Chhuon set forth in his opening brief, this Court's ruling in *Powell* relied on its 2010 ruling in *People v. Gamache* (2010) 48 Cal.4th 347, 404–405 (*Gamache*), which in turn relied on the United States Supreme Court's 2005 decision in *Roper v. Simmons* (2005) 543 U.S. 541 (*Roper*). "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." (*Gamache*, *supra*, 48 Cal.4th at p. 405, quoting *Roper*, *supra*, 543 U.S. at p. 574.)

The Supreme Court's *Roper* decision is nearly 20 years old. In concluding that age 18 constituted a bright line for a constitutionally

valid sentence of execution, the high court updated its previous bright line of age 16, established 17 years prior in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 838. In both *Thompson* and *Roper*, the Supreme Court looked to the science, legislation, and trends of the era to draw those lines. (*Thompson v. Oklahoma*, *supra*, 487 U.S. at pp. 823–831 [surveying state laws treating 16-year-olds differently than younger children, state and international laws restricting or abolishing death penalty]; *Roper, supra,* 543 U.S. at pp. 564–570 [surveying scientific literature and state practice, noting that in 10 years before decision, only three states had executed people for crimes committed as juveniles].)

This Court's holdings in *Flores* and *Tran* in turn rely on *Powell* and *Roper*, reasoning that Mr. Flores and Mr. Tran offered only a few legal developments, including a nonprecedential trial court opinion, and not "much in the way of new scientific evidence that might be relevant to the issue." (*Tran, supra,* 13 Cal.5th at p. 1235, quoting *Flores, supra*, 9 Cal.5th at p. 429.) By way of contrast, Mr. Chhuon offers an extensive review of new scientific developments, as well as precedential caselaw from jurisdictions that have examined those developments and concluded that emerging adults share diminished culpability with juveniles. (SAOB 143–156.) Mr. Chhuon also demonstrated statistical trends demonstrating that a significant majority of states do not execute anyone whose offense was committed when they were under the age of 25, and that of the states that still carry out the practice, four of them, Oklahoma, Ohio, Florida, and Texas, account for the vast majority of the total executions of people who committed their

crimes as emerging adults. (SAOB 146–166.) These are the types of developments the high court reviewed when it re-evaluated where to draw the age limit for executions in *Thompson* and *Roper*.

As with Mr. Chhuon's RJA claims, respondent declines to engage with the scientific studies presented by Mr. Chhuon. Respondent waves away the findings compiled and analyzed by Mr. Chhuon as lacking novelty (4SRB 68), and argues that "[m]ost, if not all, of the medical/scientific studies [Mr.] Chhuon cites pre-date *Tran* and *Flores*. [citation omitted] And none documents any fundamental scientific change or development from those relied on in *Roper* or *Miller* [*v. Alabama* (2012) 567 U.S. 460]." (4SRB 73.) Respondent does not specify which, if any, of the studies examined by Mr. Chhuon it believes were before this Court in either *Tran* or *Flores*. Respondent offers no framework for what it considers a novel "fundamental scientific change or development," nor does it offer any scientific studies rebutting the developments provided by Mr. Chhuon or refute Mr. Chhuon's analysis of those developments. (SAOB 146–153.) Mr. Chhuon asks this Court to decline respondent's invitation to ignore the authorities presented by Mr. Chhuon.

Mr. Chhuon explained in his SAOB why executing people for acts committed as emerging adults violates the federal constitution, consistent with the reasoning set forth in *Graham v. Florida* (2010) 560 U.S. 48*, Miller, and Hall*. (SAOB 134–137.) The sentence also violates the California Constitution's prohibition against cruel or unusual punishment. (SAOB 137–142.) Respondent cites *People v. Gonzales* (2012) 54 Cal.4th 1234, 1300, and *People v. Steskal* (2021)

11 Cal.5th 332, 378, for the proposition that this Court must construe Article I, section 17, of the California Constitution as duplicative of the Eighth Amendment of the federal constitution. (4SRB 69.)

In *Steskal*, this Court acknowledged that both constitutions prohibit the imposition of a penalty disproportionate to the defendant's "personal responsibility and moral guilt." (*People v. Steskal, supra*, 11 Cal.5th at p. 378, internal citation omitted.) In *Gonzalez*, this Court agreed that, broadly speaking, both the state and federal analyses require a reviewing court to examine whether the penalty imposed is "grossly disproportionate" to the defendant's culpability. (*People v. Gonzales, supra,* 54 Cal.4th at p. 1300.) Neither case supports an argument that this Court's state constitutional analysis is limited to the application of federal caselaw.

The California Constitution is "'a document of independent force' [citation] that sets forth rights that are in no way 'dependent on those guaranteed by the United States Constitution.'" (*People v. Buza* (2018) 4 Cal.5th 658, 684, internal citations omitted.) The state Constitution is not "some minor codicil" to the federal charter. (*Id*. at p. 707 (dis. opn. of Cuéllar, J.).) The distinction between cruel *and* unusual and cruel *or* unusual is "purposeful and substantive rather than merely semantic." (*People v. Baker* (2018) 20 Cal.App.5th 711, quoting *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.)

Respondent chooses not to address *Jones v. Mississippi* (2021) 593 U.S. 98, 119–120 [Eighth Amendment sets floor, states have

wide latitude to impose additional sentencing limits based on defendant's youth].) (SAOB 141.) But respondent acknowledges that the high courts of Washington, Michigan, and Massachusetts have interpreted their state constitutional guarantees against "cruel or unusual punishment" (Massachusetts, Michigan) or "cruel punishment" (Washington) to provide greater protections than the floor set by the Eighth Amendment's bar against cruel and unusual punishment. (4SRB 74.)

Respondent dismisses the Washington, Michigan, and Massachusetts decisions as outliers that do not establish a consensus that a penalty is cruel or unusual. (4SRB 75–76.) But those state supreme courts acknowledge and reflect an *already existing* consensus that emerging adults are biologically and legally different from fully mature adults. (*People v. Parks* (2022) 510 Mich. 225, 248–252 [987 N.W.2d 161], *Commonwealth v. Mattis* (Mass. 2024) 493 Mass 216, 224, 230–235 [224 N.E.3d 410] (*Mattis*), *Matter of Monschke* (Wash. 2021) 197 Wash.2d 305, 306, 321–323 [482 P.3d 276].)

Respondent argues that to show an Eighth Amendment violation, Mr. Chhuon must demonstrate a "national consensus against the sentencing practice at issue." (4SRB 74, quoting *Graham*, *supra*, at p. 61.) Correct. But respondent argues a national consensus must take the form of "a statutory death-penalty exclusion [sic] persons younger than 23." (4SRB 74.) Not so. Reviewing courts look to the "'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the

sentencing practice at issue," before looking to precedent and using their own "independent judgment" to determine whether the punishment violates the Eighth Amendment. (*Graham, supra*, at p. 61, quoting *Roper*, *supra* at p. 572.) Mr. Chhuon has demonstrated, through a review of legislative changes and national sentencing trends, that there is a national consensus that emerging adults, who share the same brain structures as youth under age 18, are similarly less culpable. (SAOB 154–168.)

Respondent acknowledges that the statistical evidence presented by Mr. Chhuon demonstrates that the application of the death penalty to emerging adults is dwindling, but, it argues, that "logically tends to show that the practice is waning without imposition of a judicial remedy." (4SRB 74.) In other words, because the punishment has become unusual, it has become non justiciable. Such logic would erase the prohibition against unusual punishments from the California Constitution. The use of the death penalty against emerging adults is waning because the developments noted by Mr. Chhuon have led to a Californian and national consensus against executing individuals who committed their crimes when under the age of 25.

Finally, Mr. Chhuon should be categorically excluded from the death penalty because of the risk that it will be arbitrarily applied to emerging adults. For all the reasons set forth in the SAOB and the principles articulated in *Atkins v. Virginia* (2002) 536 U.S. 304, *Roper*, and *Graham*, the immature physical and social makeup of individuals aged 18 to 25 prohibits a Constitutionally reliable death sentence. (SAOB 168–173) Respondent rehashes the same

arguments it relied upon to contest Mr. Chhuon's federal and state cruel or unusual punishment claim. (4SRB 76–78.) The issue has been adequately presented and the positions of the parties fully joined.

CONCLUSION

Based on the arguments made in Appellant's Opening and Reply Briefs, and for all the reasons set forth above and in the Supplemental Opening Brief, the conviction and the sentence of death imposed on the appellant, Run Peter Chhuon, are legally invalid and must be vacated.

DATED: **February 18, 2025**

Respectfully submitted,

GALIT LIPA
State Public Defender

/s/
ALEXANDER POST
Supervising Deputy State
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Attorneys for Appellant
Run Peter Chhuon

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1))

I, Alexander Post, am the Supervising Deputy State Public Defender assigned to represent appellant RUN PETER CHHUON in this automatic appeal. I have 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 is 12,031 words in length excluding the tables and this certificate.

DATED: **February 18, 2025**

/s/
ALEXANDER POST
Supervising Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Run Peter Chhuon and Samreth Sam Pan***
Case Number: **Supreme Court Case No. S105403**
Los Angeles County Sup. Ct. No. KA032767

I, **Glenice Fuller**, declare as follows: I am over the age of 18, and not party to this cause. My business address is: 1111 Broadway, Suite 1000 Oakland, California 94607. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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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 **February 18, 2025**, at Solano County, California.

Glenice Fuller

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GLENICE FULLER

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Glenice Fuller

Signature

Post, Alexander (254618)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm