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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALEX DEMOLLE, Defendant and Appellant.	No. S159120 Alameda County Superior Court No. 140729 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

The Honorable Larry J. Goodman

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALEX DEMOLLE, Defendant and Appellant.	No. S159120 Alameda County Superior Court No. 140729 CAPITAL CASE

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

I.
THE PROSECUTOR'S COMPARISON OF MR. DEMOLLE TO AN ANIMAL — A "WOLF" —DURING PENALTY PHASE CLOSING ARGUMENT RENDERS HIS SENTENCE INVALID UNDER THE RACIAL JUSTICE ACT

During the closing argument of Mr. Demolle's penalty phase trial, the prosecutor described Mr. Demolle, a Black man, as a predator and explicitly compared him to an animal – a wolf. The prosecutor's animal comparison and dehumanizing language evoked racial stereotypes of Black men as violent and threatening. The message was clear: Mr. Demolle was subhuman and undeserving of human empathy; like the wolf, he was a predator who would hunt members of the community unless he was put to death.

Since the filing of Mr. Demolle's reply brief, the Legislature enacted the Racial Justice Act (RJA). (Assem. Bill No. 2542 (2019-

2020 Reg. Sess.)), as amended by Stats. 2022, ch. 739 (Assem. Bill No. 256), § 2 eff. Jan. 1, 2023, and Stats. 2023, ch. 464 (Assem. Bill No. 1118) § 1, eff. Jan. 1, 2024.) This act creates a statutory framework for combatting racial discrimination and disparities in the criminal legal system. The RJA prohibits not only overt racial discrimination, but also tactics that potentially activate, unintentionally or unconsciously, implicit racial bias in criminal trials and provides a remedy to defendants who faced them. (Pen. Code § 745, subds. (a)(2) & (h)(4).)[1] Importantly, the RJA expressly prohibits the use of language that compares the defendant to an animal. (§ 745, subd. (h)(4).)

Here, the prosecutor's use of coded rhetoric, and in particular the comparisons of Mr. Demolle to a wolf and a predator, appealed to racial stereotypes and violated the RJA. (§ 745, subds. (a)(2) & (h)(4).) Under section 745, subdivisions (e)(2) and (e)(3), Mr. Demolle is no longer eligible for the death penalty and must be resentenced.

A. Relevant factual background

Mr. Demolle was convicted, by an Alameda County jury that included no Black jurors,[2] of one count of first-degree murder with

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[1] All further statutory references will be to the Penal Code unless otherwise noted.

[2] There were no Black members on the jury, and all but one of the sitting jurors described themselves as "Caucasian" or "white" on their juror questionnaires. (9CT 2257 [Juror 1]; 9CT 2290 [Juror 2]; 9CT 2323 [Juror 3]; 9CT 2356 [Juror 4]; 9CT 2389 [Juror 5]; 9CT 2422 [Juror 6, identified as Japanese]; 9CT 2455 [Juror 7]; 9CT 2488 [Juror 8]; 9CT 2521 [Juror 9]; 10CT 2554 [Juror 10]; 10CT 2587 [Juror 11]; 10CT 2620 [Juror 12].)

true findings regarding rape and lewd and lascivious conduct special circumstances. (8CT 2035-2036.) There was no dispute that Mr. Demolle assaulted and killed Jaquita Mack. The question for the jury was the appropriate sentence — life without the possibility of parole or death.

1. Prosecution's Case in Aggravation

The prosecution's case in aggravation consisted of the circumstances of the crime, the special circumstances, and victim impact evidence (§ 190.3, factor (a)), as well as two unadjudicated incidents pursuant to section 190.3, factor (b). The aggravating evidence and proceedings are described in detail in Appellant's Opening Brief (AOB), at pages 23-30, 139-193.[3] For context, that evidence is summarized here.

a. The Barnes Incident

When Robert Barnes and Mr. Demolle were teenagers, Barnes got in an argument with Myisha Green, another teen, that escalated into a physical altercation. (13RT 3017-3031.) A group of African American teens, that included Mr. Demolle, surrounded Barnes and hit him, until "some tall, white dude," Russ Kunzler, intervened. (13RT 3017-3024, 3034-3039, 3050-3051.) One of the boys said, "I'm going to come back, white boy, come and shoot you. You're dead." (13RT 3043.) Barnes identified Mr. Demolle as kicking him while he was on the ground and Kunzler identified Mr. Demolle

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[3] In Argument V of the AOB, Mr. Demolle challenged the admission of the factor (b) evidence on several grounds.

as the person he pulled off Barnes. (13RT 3063-3065, 3067, 3084-3085.)

Myisha Green testified that she knew Barnes from school, they exchanged words, and Barnes spit on her and called her a "bitch." (14RT 3191-3193, 3200, 3209.) Barnes motioned like he was going to hit her, and they began to fight. (14RT 3192, 3200.) Mr. Demolle attempted to break up the fight but the whole group ended up fighting. (14RT 3191-3192, 3200-3204.)

b. The Samuel Incident

Jeff Samuel testified that in 1998, he was working with a construction crew in the parking lot at Kaiser Hospital. (13RT 3090-3091.) Mr. Demolle drove his car past a barricade onto a freshly paved section of asphalt. (13RT 3093.) Samuel asked Mr. Demolle to move his car but he refused. (13RT 3095.) Samuel had a shovel in his hand and was angry. Mr. Demolle responded, "if you yell at me one more time, I'll shoot your ass," but moved his car. (13RT 3095, 3097-3098.) Police were called to the scene and found no weapon on Mr. Demolle's person or in his car and did not arrest him. Mr. Demolle was never charged with a crime. (13RT 3112.)

c. Victim impact evidence

The prosecutor presented victim impact testimony from Jaquita's aunt and younger cousin who described her as fun, funny, and energetic. (13RT 3118-3119, 3128.) Her older brother described Jaquita as his connection to their biological family. (13RT 3133-3135, 3141.) The family members described how difficult her disappearance was and how her death affected them as individuals.

(13RT 3120-3125, 3129-3132, 3139-3141.) The prosecutor also presented the testimony of Jaquita's fifth-grade elementary school teacher who described Jaquita as having a friendly, bubbly personality, and about the impact she had on her as a new teacher and her reaction to the news of her death. (13RT 3146-3153.)

2. Defense case in mitigation

The defense presented over two dozen mitigation witnesses, including family, friends, a teacher, fellow church members, and law enforcement officials, who testified about Mr. Demolle's positive attributes.

Mr. Demolle was originally from Louisiana but grew up in California surrounded by a large extended family. (12RT 2938, 2940, 2943; 14RT 3250-3255.) Family and friends described Mr. Demolle as reliable, positive, fun, generous, considerate, and a helpful contributor to the family who often watched the younger children in the family. (14RT 3258-3259, 3306-3308, 3311, 3313-3316, 3324; 15RT 3339-3340.) They also described him as a very good father to his daughter. (14RT 3261, 3306-3308, 3311, 3316, 3321, 3324; 15RT 3339-3340; 3363-3364.) Mr. Demolle's family and friends were shocked by the charges in this case. (14RT 3175, 3262, 3264-3265, 3283, 3288; 15RT 3340-3341.) His family and friends loved him and would miss him if he was executed. (12RT 2942, 2955-2956, 2965; 14RT 3263, 3272, 3316; 15RT 3358, 3431.)

Fellow church members described that as a teenager, Mr. Demolle was a youth pastor, supervisor, and counselor for a youth group. He was quick to volunteer and never caused trouble. (14RT 3172-3173, 3246-3249,3330-3332, 3335-3338, 3366-3369.) After he

was married, Mr. Demolle attended a different church with his wife and watched children in his role there. (14RT 3246-3279; 15RT 3352-3354.) Church members there similarly described Mr. Demolle as a loving father and good friend. (14RT 3174-3175, 3281-3282, 3287; 15RT 3347-3350.)

Finally, Mr. Demolle was a model inmate while awaiting trial. (14RT 3220-3245; 15RT 3374, 3412-3414.) Alameda County Sheriff personnel described him as quiet, compliant, never threatening to law enforcement or other inmates, and never causing issues during his lengthy stay at the jail. (14RT 3220-3224, 3229-3245.) Based on this record, Daniel Vasquez, a former warden and prison expert, testified about Mr. Demolle's likely successful adjustment to prison. (15RT 3371-3380, 3413-3414.)

3. Prosecutor's closing argument

The prosecutor's case for the death penalty turned on his use of animal imagery and metaphor. He began his penalty phase closing by generally arguing that the jury should return a death verdict because it would be an injustice to give leniency to Mr. Demolle, who "trapped" Jaquita in his apartment and committed the acts he was convicted of. (15RT 3436-3437.) He dismissed the mitigating factors and argued that the defense presentation in mitigation should carry little weight. (15RT 3441-3459.)

The prosecutor then turned to the factors in aggravation. After providing a summary of the Barnes and Samuel incidents, however, he acknowledged that the factor (b) evidence did not "deserve a lot of weight." (15RT 3460-3462.)

After outlining the victim impact testimony (15RT 3463-3468), the prosecutor turned to the details of the offense. He argued that Mr. Demolle set a trap for Jaquita (15RT 3468) and was a "predator" who "captured and killed" his victim. (15RT 3469.) He encouraged the jury to relisten to the taped statements from the interrogation (15RT 3469) and suggested that Mr. Demolle demonstrated his predatory nature throughout the exchange. The prosecutor argued, "it shows the true predator he is and he doesn't want the police, he doesn't want Sergeant Longmire and Dave Stein to realize what the true predator he is." (15RT 3471-3472.) He continued, "[b]ecause you know it's not good to be outside, to be the predator out there who sees the missing girl…. because that's predatory behavior and shows you how evil this really was." (15RT 3474.)

The prosecutor argued that Mr. Demolle's inviting Jaquita into his apartment was the tactic of "a predator" to "trap" a girl inside his apartment. (15RT 3475.) In describing Mr. Demolle's reaction to Chris Aubrey looking for Jaquita, the prosecutor asked the jury, what would a "decent human being who is not a predator do" when a young person shows up at his door with her bicycle. (15RT 3475.) He asked what would "[t]he good, decent non-predator" say. (15RT 3476.) And in trying to explain Mr. Demolle's response to Dave Stein asking him why he did not tell Jaquita that her aunt was looking for her, "You can't explain it because the answer is I'm a predator." (15RT 3476.)

Describing Mr. Demolle's interrogation, the prosecutor noted the officers focused on Mr. Demolle shutting the door to his

apartment, "because they realized the predatory behavior of this defendant." (15RT 3478.) Mr. Demolle's inaction in response to someone looking for Jaquita, the prosecutor argued, was a sign that "[n]ow he knows this is easy prey." (15RT 3479.)

The prosecutor concluded his discussion of the charged conduct by directly comparing Mr. Demolle to a wolf:

> the defendant in this case is the wolf in sheep's clothing. Jaquita is the wounded lamb. She is out looking for some escape here and he's this inviting, looking like a sheep, come on in. They're not taking care of you. We can have some fun here. And he shuts the door and the s[h]eep's clothing comes off and he is a wolf.

(15RT 3480.) The prosecutor again referred to Mr. Demolle as a wolf: "And then he's on her like the wolf." (15RT 3482.) Describing how Mr. Demolle disposed of Jaquita's bicycle, the prosecutor argued to the jury, "[t]he predator is thinking about covering his tracks now. The wolf doesn't want to be caught." (15RT 3485.)

Finally, the prosecutor concluded his closing argument by addressing the moral weighing of aggravating and mitigating circumstances (15RT 3494), reminding the jurors that, under the law, death is the more serious punishment (15RT 3495), arguing that Mr. Demolle made all the wrong choices (15RT 3516-3518), and asking the jury to give justice for Jaquita and her family by returning a verdict for death. (15RT 3521.)

4. Defense closing and jury deliberations

The defense argued this sexual crime was an aberration and wholly out of character for Mr. Demolle. (15RT 3544, 3580-3581, 3588.)

Following instructions and the readback of guilt and penalty phase testimony, the jury deliberated for approximately *five days* before it returned a verdict of death. (8CT 2172.)

B. The Racial Justice Act is a paradigm shift rejecting prior precedents that tolerated many forms of racial bias as inevitable.

In enacting the RJA, the Legislature recognized that "[e]ven though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms." (Stats. 2020, ch. 317, § 2, subd. (c).)[4] Racial bias persisted because legal mechanisms to combat racial bias in the justice system required proof of purposeful discrimination, which can be "nearly impossible to establish." (*Ibid.*) Pre-RJA legal precedents thus frequently resulted in "courts sanctioning racism in criminal trials." (*Id.* at § 2, subd. (d).)

In 2020, however, the Legislature enacted the RJA to "eliminate racial bias from California's criminal justice system" because "racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice ..." (Stats. 2020, ch. 317, § 2, subd. (i).)

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[4] *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 149 [uncodified legislative findings for the RJA "provide an illuminating guide to the legislative objectives in passing the Act"]; see *California Housing Financial Agency v. Elliott* (1976) 17 Cal.3d 575, 583 [legislative findings "are given great weight and will be upheld unless they are found to be unreasonable and arbitrary"].

Importantly, the Legislature recognized that "[i]mplicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias." (Stats. 2020, ch. 317, § 2, subd. (i); *Bonds v. Superior Court of San Diego County* (2024) 99 Cal.App.5th 821, 828 ["Indeed, the primary motivation for the [RJA] was the failure of the judicial system to afford meaningful relief to victims of unintentional but implicit bias."].) The RJA was thus designed, "not to punish" implicit racial bias, "but rather to remedy the harm to the defendant's case and to the integrity of the judicial system" and "ensure that race plays no role at all in seeking or obtaining convictions or sentences." (Stats. 2020, ch. 317, § 2, subd. (i).)

1. Section 745 prohibits the use of racially discriminatory language at trial.

Section 745 describes four types of RJA violations that can be established under a "preponderance of the evidence" standard. (§ 745, subd. (a).) The preponderance standard is at "the other end of the spectrum" from the beyond a reasonable doubt standard typically applied in criminal cases. (*People v. Arriaga* (2014) 58 Cal.4th 950, 961; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1177 ["Proof by a 'preponderance of the evidence'" is "a considerably lower burden of proof than the due process requirement of proof beyond a reasonable doubt for a charged offense."].) As relevant here, an RJA violation occurs if:

> During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, *used racially discriminatory language*

> about the defendant's race, ethnicity, or national origin, *or otherwise exhibited bias or animus towards the defendant* because of the defendant's race, ethnicity, or national origin, *whether or not purposeful*. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(§ 745, subd. (a)(2), emphasis added.) "Racially discriminatory language" is further defined in the RJA as:

> language that, to an *objective observer*, *explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal*, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(§ 745, subd. (h)(4), emphasis added; see Stats. 2020, ch. 317, § 2, subd. (e) ["Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system."].)

The RJA does not expressly define what it means to be an "objective observer." However, in the context of similar laws designed to eliminate racial bias, the Washington Supreme Court 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." (*State v. Zamora* (Wash. 2022) 512 P.3d 512, 523.) The California Legislature has similarly defined an "objectively reasonable person" as one who "is aware that unconscious bias, in addition to purposeful discrimination, has resulted in the unfair exclusion of potential jurors in the State of California." (Code Civ. Proc., § 231.7, subd. (d)(2)(A).)

Additionally, applying the objective observer test is not confined to evaluating each statement or exhibition of bias in isolation. Rather, 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. Humphrey* (1996) 13 Cal.4th 1073, 1083 [self-defense]; *People v. Moore* (2011) 51 Cal.4th 386, 395 [custodial interrogation].)

The RJA is retroactive to "all cases in which judgment is not final." (§ 745, subd. (j)(1).) RJA claims may be raised by way of "a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7, in a court of competent jurisdiction, alleging a violation of subdivision (a)." (§ 745, subd. (b).) However, "for claims based on the trial record, a defendant may raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence." (*Ibid.*)

Finally, when a violation is found, the RJA sets forth a series of remedies, without regard to the speaker's purpose, the overtness of the appeal to bias, or the measurable effect on the outcome. (See § 745, subd. (e); but see § 745, subd. (k) [if the defendant files a *petition* for relief for a judgment entered prior to January 1, 2021, the defendant is entitled to relief "unless the state proves beyond a

reasonable doubt that the violation did not contribute to the judgment"].) As relevant here, when an RJA violation is found after judgment has been entered and "only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid and impose a new sentence." (§ 745, subd. (e)(2)(B).) Additionally, a violation of subdivision (a), regardless of when it is found, renders the defendant ineligible for the death penalty. (§ 745, subd. (e)(3).)

2. Animal comparisons dehumanize defendants and trigger implicit racial bias.

In enacting the RJA, the Legislature expressly recognized that certain stereotypes and coded language evoke racial bias in jurors and other actors in the criminal justice system. (Stats. 2020, ch. 317, § 2 subds. (a), (e), (h).) Accordingly, to understand why the prosecutor's language violated the RJA in this case, it is important to first consider how coded language and animal comparisons prime the jury's implicit biases by appealing to historically racist stereotypes and imagery.

a. Racially coded language primes the jury and activates implicit bias.

Although most Americans believe they live in a race-neutral society, none of us are immune to racial bias that is "implicit, subtle, and often unintended." (Goff et. al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences* (2008) 94 J. Pers. Soc. Psychol. 292; Liu, *Implicit Bias, Structural Bias, and Implications for Law and Policy* (2023) 25 U. Pa. J. Const. L. 1280, 1290 ["Judges and lawyers are also not

immune to implicit bias."].) Implicit bias describes the cognitive process where, despite even the best of intentions, people automatically classify information in racially biased ways. Research on implicit bias focuses on how these negative attitudes are "activated through 'priming,' which involves presenting information in ways that trigger association with other ideas." (Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Res. L.Rev. 39, 57, citing Berger, Legal Persuasion: A Rhetorical Approach to the Science (2018) p. 105 [defining priming as "the unconscious influence of individual's cues based on their behaviors"].)

Racially coded language plays an important role in activating or priming stereotypes because something is required to trigger the power of the stereotype for people who do not harbor explicit bias. For example, words like "breed" and "superpredator" can invoke stereotypical associations between Black people and animals "without directly referencing them." (Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions* (2023) 32 Cal. Interdisc. L.J. 515, 527 ["Coded language is powerful in triggering stereotypes precisely because it does not reference race explicitly."].)

In a criminal trial, coded language primes the jury by activating a juror's implicit racial biases towards the accused. (Bowman, *supra*, 71 Case W. Res. L.Rev. at pp. 61-62.) For example, language or imagery that defines the defendant as the "'other'. . . . someone outside of the moral community" can "induce a negative emotional response towards the defendant." (Alford, *Appellate*

Review of Racist Summations Redeeming the Promise of Searching Analysis (2006) 11 Mich. J. on Race & L. 325, 335.) Coded language may similarly prime the jury by introducing "themes or euphemisms that evoke a conception of 'us' versus 'them,'" which highlights the difference between jurors and Black defendants, suggesting that Black defendants "are inherently different from white jurors and deserve less sympathy. . . ." (*State v. Bagby* (Wash. 2023) 522 P.3d 982, 993, quoting Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3101-3102.) Simply put, "[w]hen prosecutors utilize racially coded language, jurors respond with their own 'latent biases.'" (*Bagby*, *supra*, 522 P.3d at p. 794.)

In fact, coded language may prime racial stereotypes and trigger implicit bias more effectively than explicit racial slurs, because race-neutral language sidesteps conscious egalitarian beliefs without the recipient's awareness. (Bowman, *supra,* 32 Cal. Interdisc. L.J. at p. 527; Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research* (2003) 78 Chicago-Kent L.Rev. 997, 1011-1012.) Studies also 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.)

Isolated use of coded language, however, does not eliminate the effect of priming and implicit bias. As the Legislature recognized, the "'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.'" (Stats. 2020, ch. 317, § 2, subd. (a), quoting *Buck v. Davis*, (2017) 580 U.S. 100, 122.)[5] As the leading study the Legislature expressly relied on in framing the RJA explained:

> Over a decade of research shows that implicit racial stereotypes can be activated easily and can lead to biased decision-making . . . Researchers have found that even the 'simplest of racial cues' can automatically evoke racial stereotypes and affect the way jurors evaluate evidence . . . Once racial stereotypes have entered a trial, the defendant's ability to be judged by an impartial jury is lost. While jurors may be more 'careful and thoughtful' about their opinions when a prosecutor explicitly references race, they are not usually as careful with implicit racial references.

(Prasad, *supra,* 86 Fordham L.Rev. at pp. 3101-3102, cited in Stats. 2020, ch. 317, § 2, subd. (e).)

The RJA thus recognizes that racially coded language — though not explicitly racist — can prime the jury and activate subconscious or implicit bias. (§ 745, subds. (a)(2) & (h)(4); Stats. 2020, ch. 317, § 2, subd. (i), citing Prasad, *supra,* 86 Fordham L.Rev. at p. 3101 ["Even the "simplest of racial cues" can automatically evoke racial stereotypes and affect the way jurors evaluate evidence"]; see also *State v. Zamora, supra,* 512 P.3d at p. 521

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[5] In *Buck*, the Court found the defendant was prejudiced by a defense expert's testimony that although he was not a probable future danger, his Blackness was statistically associated with violent behavior. Although there were only two references to Buck's race in the testimony, they evoked the "powerful racial stereotype" of Black men as violence prone. (*Buck v. Davis, supra*, 580 U.S. at p. 121.)

[subtle references "are "just as insidious" and "[p]erhaps more effective. . ."].) Moreover, implicit bias is not assessed based on whether the comments at issue are susceptible to benign interpretations, but rather, whether they appeal to racial bias through the lens of an "objective observer." (See § 745, subd. (h)(4).)

b. The Racial Justice Act expressly prohibits animal comparisons.

Before the enactment of the RJA, California courts repeatedly permitted prosecutors to analogize and compare Black defendants to animals. (See Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animal Imagery in Criminal Trials*, (2015) 51 Crim. L. Bull. 870 [exploring effects of prosecutors referring to Black defendants with animal imagery and noting, inter alia, more than twenty examples of California prosecutors using the "Bengal Tiger analogy"].) Recognizing that these analogies are racially discriminatory and can prime the jury and trigger implicit bias, however, the RJA explicitly prohibits "language that compares the defendant to an animal." [6] (§ 745, subd. (h)(4).)

Animal comparisons, including the portrayal of Black men as predatory animals, like tigers or wolves, has a particularly fraught

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[6] The legislative findings for the RJA refer to language or images that depict a defendant of color as an animal as "animal imagery." (Stats. 2020, ch. 317, § 2, subd. (e).) These terms, "animal comparison" and "animal imagery," are used interchangeably here to refer 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).)

history and potential to trigger implicit racial bias. (Stats. 2020, ch. 317, § 2, subd. (e) ["Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory."]; Hetey & Eberhardt, *Cops and Criminal: The Interplay of Mechanistic and Animalistic Dehumanization in the Criminal Justice System* in Humanness and Dehumanization (Bain, Jeroen, Vaes, & Leyens edits., 2014) p. 147, citing Spence, *The Human Bestiary* (2001) 96(4) Modern Language Review 913 [The use of animal metaphors to describe people of color "far more than mere rhetorical flourishes, actually shape thought."].)

The legislative findings for the RJA expressly cited as an example of racially discriminatory animal comparisons, "cases where prosecutors have compared defendants who are people of color to Bengal tigers." (Stats. 2020, ch. 317, § 2, subd. (e); see also *Bennett v. Stirling* (4th Cir. 2015) 842 F.3d 319, 321, 324 [prosecutor's descriptions of the accused as a "big old tiger," among other dehumanizing comments, "were poorly disguised appeals to racial prejudice"].) The Legislature also cited with disapproval, two capital cases in which courts upheld convictions where prosecutors compared defendants who are people of color to Bengal tigers and other animals, despite acknowledging that such statements are "highly offensive and inappropriate." (Stats. 2020, ch. 317, § 2, subd. (e), citing *Duncan v. Ornoski*, (9th Cir. 2008) 286 Fed.Appx. 361, 363 and *People v. Powell* (2018) 6 Cal.5th 136, 182-183.)

Comparing a Black defendant to a wolf, a predatory animal like a Bengal tiger, is similarly likely to prime a juror's implicit

racial bias. A wolf, like a tiger, is often featured in fiction and fairy tales as dangerous, untamed, and a hunter, which can directly invoke the caricature of Black men as a criminal and a predator. (See Vogel & Costello, *Implicit Bias Is Not A Fairytale: From the Classroom to the Courtroom: The Connection Between Racial Bias in Early Education and Its Impact on Stereotypes and Interactions with the Criminal Justice System* (2022) 20 Seattle J. for Soc. Just. 695, 702-708 [In a large study involving a simulated mock trial based on the fairytale, Goldilocks, Black students were disproportionality cast as the Big Bad Wolf after the participants were told that the wolf "was the actual perpetrator of the crimes, had a history of criminal behavior, and was generally not to be trusted or believed."].)

The criminal justice policies of the 1990's, and the resulting over-policing of communities of color, also relied heavily on wolf comparisons to marginalize a generation of Black men and boys using racialized images of "wolf-packs" threatening White communities. (See Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) pp. 58, 188 ["the War on Drugs has given birth to a system of mass incarceration that governs not just a small fraction of a racial or ethnic minority but entire communities of color"].) The prosecution of the Central Park Five publicized themes of young Black men accused (falsely) of committing violent crime, using terms like "wolf packs, rat packs, savages, and animals." (Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man* (2004) 25 Cardozo L.Rev. 1315, 1348.) And the assault on Rodney King and acquittal of

his assailants similarly evoked images of law enforcement navigating threats of inner-city barbarians and preternaturally powerful Black men who posed a potential threat to White Simi Valley. (Alper et al, *Rodney King Assault Trial* (2005) 12 Clinical L.Rev. 1, 16.) These are just a few high-profile examples.

Comparing a Black defendant to a "predator" is similarly dehumanizing and reinforces other coded language depicting the defendant as an animal whose natural state is to commit violent crime. (See *People v. Hardin* (2024) 15 Cal.5th 834, 905 (dis. opn. of Evans, J.) ["The superpredator myth "relied heavily on 'racist imagery and stereotypes' and harkened back to 'historic representations of African Americans [and other people of color] as violence-prone, criminal and savage."]; *State v. Belcher* (2022) 268 A.3d 616, 627 [prosecutor impermissibly compared the defendant to a predator, which "employed a particular tool of dehumanization—portraying Black people as animals"].)[7]

Language that refers to a person's actions, rather than the person himself, as "animalistic, brutal, and impulsive," can also trigger the caricature in the minds of jurors whose mental models of Black people include this stereotype. (*Bowman*, *supra*, 71 Case W. Res. L.Rev. at p. 61.) Thus, prosecutors can evoke the stereotype of a Black defendant as a dangerous animal through verbs commonly associated with predatory animals like "hunt" and "prey." (*Ibid.*)

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[7] The superpredator myth turned out to be "baseless and false," disproven by empirical evidence. (*People v. Hardin*, *supra*, 15 Cal.5th at p. 904 (dis. opn. of Evans, J.).)

The "brute" caricature is yet another extension of animal imagery that has historically been used to dehumanize Black defendants and reduce feelings of empathy. (Prasad, *supra,* 86 Fordham L.Rev. at pp. 3105–3106; see also Lynch & Haney, *Looking Across the Empathic Divide Racialized Decision Making on the Capital Jury* (2011) Mich. St. L.Rev. 573, 603 [discussing findings that Black defendants do not benefit from mitigation evidence in the same way as white capital defendants, "racial bias is often manifested through a lack of empathy for the defendant and disregard for mitigating evidence—especially mitigation that stems from the defendant's life experiences that jurors may perceive are not directly connected to the crime itself."].) Animal imagery both depends on and perpetuates negative implicit bias suggesting stereotypes of Black people having animalistic tendencies or behaving like an animal. (*Ibid.*) Post-reconstruction racists thus created the "Black brute" to justify repressive measures, portraying "Black men as innately savage, animalistic, destructive, and criminal — deserving of punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace." (Alford, *supra*, 11 Mich. J. on Race & L. at p. 345.) Psychologists documenting this pervasive stereotype of Black men have also found that the association is both automatic and unconscious. (California Reparations Final Report (2023) Ch. 11, pp. 404-405, <https://oag.ca.gov/ab3121/report> (as of Sept. 24, 2024.) The RJA has made it clear that the use of such

animal comparisons that trigger implicit racial bias can no longer be tolerated.[8]

C. The prosecutor violated the Racial Justice Act by using animal comparisons and coded language that called upon damaging stereotypes of Black men during closing argument at the penalty phase.

By using animal comparisons and language that implicitly appealed to racial bias in his penalty phase closing argument, the prosecutor primed the jurors to view Mr. Demolle as an animal whose nature made him violent, inhuman, incapable of redemption, and unworthy of their sympathy or mercy. Whether intentional or not, this argument violated the RJA.

The prosecutor's comparison of Mr. Demolle to a wolf violated the RJA's prohibition on "language that compares the defendant to an animal." (§ 745, subd. (h)(4).) In his closing argument, the

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[8] This Court recently rejected a prosecutorial misconduct claim challenging a closing argument that compared the White defendant to a "tattooed hyena" and described him as a "vile, nasty predator." (*People v. Nadey* (2024) 16 Cal.5th 102.*)* Justice Liu, in dissent, stressed that such "blatant efforts to dehumanize and denigrate a criminal defendant in order to achieve a death sentence should be reproved" and are incompatible with the constitutional requirement that "each defendant in a capital case" be treated "with that degree of respect due the uniqueness of the individual." (*Id.* at p. 207, reh'g denied (Sept. 13, 2024), quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605. Indeed, "the fundamental respect for humanity underlying the Eighth Amendment," (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plur. opn.)) is precisely what makes the "task ... of determining whether a specific human being should die at the hands of the State" an "awesome responsibility." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330.)

prosecutor began by laying out his theory of how the crime happened, and then layered on the predatory animal metaphor. (See 15RT 3469-3478.) As he built his case for the death penalty, the prosecutor used the terms "predator" and "predatory behavior" ten times during closing argument just before directly comparing Mr. Demolle to a wolf. (See, e.g., (15RT 3469) ["he was a predator, captured and killed her"]; (15RT 3471) ["it shows the true predator he is"]; (15RT 3472) ["what a true predator that he is"]; (15RT 3474) ["to be the predator out there . . . that's predatory behavior"]; (15RT 3475) ["does it generate from a predator"]; (15RT 3475) [what would a "decent human being who is not a predator do"]; (15RT 3476) [what would "[t]he good, decent non-predator" say]; (15RT 3476) ["you can't explain it because the answer is I'm a predator"]; (15RT 3478) ["they realized the predatory behavior of this defendant"]).)

The prosecutor then directly compared Mr. Demolle to wolf *four* times – "the defendant in this case is a wolf in sheep's clothing. . . he is a wolf" (15RT 3480), "he's on her like a wolf" (15RT 3482), "[t]he predator is thinking about covering his tracks now. The wolf doesn't want to be caught." (15RT 3485.) The prosecutor's use of the wolf language in this case — involving a Black man accused of crimes against a child — primed the jury with racialist stereotypes of Mr. Demolle as a deadly threat by nature, innately criminal, and subhuman.

In short, the prosecutor's comparison of Mr. Demolle to a wolf, layered with predator rhetoric, primed the jury to perceive Mr. Demolle as innately predatory and subhuman. Like the Bengal tiger comparison the Legislature cited as an example of impermissible

animal imagery, the wolf comparison encouraged the jury to see Mr. Demolle as a predatory animal who commits murder in his natural habitat. As the Legislature recognized, this racialized dehumanization is, in effect, an improper thumb on the scales in a capital case, negating mitigating evidence that presents the defendant as a human being and making it easier for a jury to return a death sentence. (See also Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L. Rev. 1447, 1454 [Dehumanization is "one of the most powerful cognitive processes that can distance people from the moral implications of their actions" and improperly diminishes the jury's sense of responsibility for its sentencing decision].)

Although perhaps more subtle than the overt animal comparison, the prosecutor also used language evoking the brute caricature. (See, e.g., (15RT 3437) ["sexually brutalize her"]; (15RT 3451, 3467) [treated the victim with "brute force"]; (15RT 3450-3451) [describing him as a "giant'"]; (15RT 3467) ["he brutalized [Jaquita]. He brutalized so many more people."] The brute caricature is an extension of animal imagery, which dehumanizes Black defendants and reduces feelings of empathy. (Prasad, *supra,* 86 Fordham L.Rev. at pp. 3105–3106.)

Further, after ensuring that the jury did not include even one Black juror[9] the prosecutor presented aggravating evidence that played to the "superpredator" stereotype. Specifically, the

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[9] The prosecutor exercised a peremptory challenge to the only Black prospective juror. (8RT 2105; 23CT 6108.)

prosecutor's introduction of the Barnes incident described a group of Black teens fighting along with a racial threat made to a White man primed the jury for the closing argument, which further played to implicit racial biases. Taken together, this invocation of implicit bias unfairly conflicted with the substantial mitigating evidence that Mr. Demolle was a non-violent and caring friend and family member who got along with young people. (15RT 3545-3550.) The mitigation witnesses described how the conduct was completely out of character for Mr. Demolle and was comprised of Mr. Demolle's good qualities including: participation in church groups (see, e.g., 14RT 3172-3174, 3180, 3246-3249, 3269-3271; 15RT 3332-3333, 3350), closeness with his extended family (see, e.g., 14RT 3257-3260, 3317-3319), love for his daughter and excellent parenting skills (see, e.g., 14RT 3260-3261, 3287, 329403295, 3306, 3311; 15RT 3337-3338, 3363-3364), and his hobbies such as fishing and playing games (see, e.g., 12RT 2952-2954; 14RT 3255-3257, 3263, 3272, 3309-3314).

This Court does not endorse "phrases that liken a defendant to an animal," like those the prosecutor used throughout his closing argument in Mr. Demolle's trial, and the RJA expressly prohibits them. (*Nadey, supra*, 16 Cal.5th at p. 186; § 745, subd. (h)(4).) While the appeals to bias in Mr. Demolle's case would be apparent to any objective observer when considered in isolation, they become *more* apparent when viewed together. They also become more harmful. (See Thompson, *supra,* 2018 Mich.St. L.Rev. at p. 1268.)

This case involved language and evidence that primed several mutually reinforcing stereotypes: Mr. Demolle, a Black man, acted as a "wolf" and a "predator" when he committed this crime reflecting

his innate character as violent, inhuman, incapable of redemption, and unworthy of jury sympathy. An objective observer — aware of the history of race discrimination in America and aware of how that impacts our perceptions — would view the comparison and the statements as racially discriminatory.

D. The sentence must be vacated and the case remanded to the trial court for resentencing.

The trial record in this case shows by a preponderance of the evidence that the prosecutor violated the RJA in the sentencing portion of Mr. Demolle's trial by using racially discriminatory animal comparisons, whether purposeful or not. The statute does not require proof of prejudice for claims raised on direct appeal. (See § 745, subd. (e); compare, § 745, subd. (k) [imposing harmless error standard for *petitions* for relief based on violation of § 745, subds. (a)(1) or (a)(2), for judgments entered prior to January 1, 2021]; *People v. Simmons* (2023) 96 Cal.App.5th 323, 334-335.)

The remedy, at this procedural posture, therefore, is to, "vacate the sentence, find that it is legally invalid, and order new proceedings consistent with [the RJA]." (§ 745, subd. (e)(2)(A).) At the resentencing hearing, Mr. Demolle "shall not be eligible for the death penalty." (§ 745, subd. (e)(3).) Accordingly, the Court should vacate Mr. Demolle's sentence, enter an order finding that he not eligible for the death penalty, and remand the matter to the trial court for resentencing. (See § 745, subds. (e)(2)(B) & (e)(3).)

CONCLUSION

For the foregoing reasons, the death judgment must be reversed and the matter remanded for resentencing proceedings.

DATED: October 8, 2024

Respectfully Submitted,

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/S/
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Attorneys for Appellant

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

I am the Deputy State Public Defender assigned to represent appellant, ALEX DEMOLLE, 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 6,616 words in length.

DATED: October 8, 2024

/s/
BETHANY O'NEILL
Deputy State Public Defender

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Case Number: **Supreme Court Case No. S159120**
Alameda County Superior Court No. 140729

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

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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 **October 8, 2024**, at Sacramento, CA.

Ann-Marie Doersch

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