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Supreme Court of California
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DEATH PENALTY

No. S159120 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ALEX DEMOLLE,
Defendant and Appellant.

Alameda County Superior Court, Case No. 140729
The Honorable Larry J. Goodman, Judge

SUPPLEMENTAL ANSWERING BRIEF

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INTRODUCTION

Under the guise of playing video games, Alex Demolle lured 11-year-old Jaquita Mack into his apartment. Once Jaquita was inside, Demolle raped her and, after ejaculating, strangled her for 15 to 20 minutes. Demolle then threw Jaquita's dead body and her pink bicycle out the back window of his apartment, later dumping her body in a nearby vacant lot. In his Supplemental Opening Brief, Demolle argues that the prosecutor's penalty-phase closing argument referring to Demolle as a predator and comparing him to a wolf in sheep's clothing rendered his sentence invalid under California's Racial Justice Act (RJA). (SAOB 9.) As discussed below, Demolle has not demonstrated a violation of the RJA as the challenged language was not racially discriminatory and did not reflect racial bias or animus. Moreover, any RJA violation did not contribute to Demolle's sentence and was therefore harmless beyond a reasonable doubt. The judgment of conviction and sentence of death should therefore be affirmed.

PROCEDURAL HISTORY

On March 20, 2007, Demolle was convicted by jury of the first degree murder of Jaquita Mack, with the special circumstance allegations of murder while committing rape and while committing a lewd or lascivious act on a person under the age of 14 years found to be true. (8CT 2035-2036.) On December 14, 2007, Demolle was sentenced to death. (8CT 2207.)

On December 6, 2023, this Court directed the parties to file supplemental briefs on "any changes in the law . . . relevant to

this appeal." On October 8, 2024, Demolle filed his Supplemental Opening Brief. Pursuant to this Court's order, respondent files the instant Supplemental Answering Brief addressing the merits of Demolle's RJA claim.

In his Supplemental Opening Brief, Demolle argues that the prosecutor used discriminatory language at the penalty phase closing argument in violation of the RJA, specifically Penal Code section 745, subdivision (a)(2).[1]

ARGUMENT

I. DEMOLLE'S RJA CLAIM IS MERITLESS BECAUSE HIS SENTENCE WAS NOT OBTAINED ON THE BASIS OF HIS RACE

Demolle contends the prosecutor's description of him as a predator and comparison of him to a wolf in sheep's clothing during penalty phase closing argument violated the RJA because the "animal comparison and dehumanizing language evoked racial stereotypes of Black men as violent and threatening." (SAOB 9.) This claim lacks merit because the prosecutor's argument, which is set forth in detail below, was a fair comment on the evidence and would not have been understood by an objective observer as appealing to racial bias, nor as exhibiting racial bias or racial animus toward Demolle. (See § 745, subds. (a)(2), (h)(4).) In any event, any error was harmless as the circumstances surrounding Demolle's rape and murder of Jaquita, and the other evidence regarding the impact of Jaquita's murder on her family were overwhelming as to Demolle's suitability for the death penalty.

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[1] Undesignated statutory references are to the Penal Code.

A. Summary of prosecutor's penalty-phase closing argument

The prosecutor began his penalty-phase closing argument by telling the jurors that they needed to answer the question of what punishment Demolle deserved. He told the jury, "We are all here this morning because that man trapped an innocent 11-year-old girl in his apartment and he used her young body to satisfy his sexual perversions," (15RT 3436) and argued the jurors needed to ask themselves, "is it fair that he can trap an 11-year-old girl in his apartment, sexually brutalize her, strangle the life out of her?" (15RT 3437.) He argued that death was "the only just verdict in this case." (15RT 3437.)

The prosecutor next explained the law regarding the jury's consideration of aggravating and mitigating factors and discussed their application to this case. (15RT 3438-3468.) In discussing the aggravating factors, the prosecutor discussed Demolle's battery of Robert Barnes, his threat to shoot Jeff Samuel (15RT 3459-3462), and the impact Jaquita's murder had on her friends and family (15RT 3463-3468).

The prosecutor's argument then turned to the jury's consideration of the section 190.3, factor (a), circumstances of the rape and murder of Jaquita. The prosecutor told the jury that it needed to understand "the horror and the hurt that Jaquita suffered." (15RT 3468.) He argued:

> I want to talk a little bit about the evidence that came in in the guilt phase that relates to how this attack developed, what led up to what the defendant did to Jaquita on that mattress in his apartment. Because you need to understand how this developed to really understand the enormity of his behavior and how he

> basically set a trap for her. He was the predator, captured and he killed her.

(15RT 3468-3469.)

The prosecutor urged the jurors to listen to the taped statements of Demolle to the police because listening to what Demolle had said would give them "new insight as to how it developed." (15RT 3469.) He reminded the jury that Chris Aubrey had testified that when she went out looking for Jaquita, she saw Demolle and asked him whether he had seen a little girl. Demolle told her he had not. (15RT 3472.) In his taped statement to the police, however, Demolle said that he told Chris Aubrey that he *had* seen a little girl riding her bike down the street. (15RT 3472.) The prosecutor explained that when Chris Aubrey asked Demolle whether he had seen a little girl on her pink bicycle, Demolle realized that there was a little girl on her bike who was missing and not under the control of the drug addicts who were charged with her supervision. (15RT 3473.) The prosecutor argued that Demolle knew that if the police believed that he had lied to Chris Aubrey when he said he had not seen a little girl, it would mean that "the trap [was] set from the get-go," that "it shows the true predator he is and he doesn't want the police . . . to realize what the true predator that he is." (15RT 3471-3472.)

The prosecutor also pointed out the inconsistencies in Demolle's statement to the police regarding how Jaquita entered his apartment. (15RT 3473-3474.) Initially, Demolle told the police that he was sitting *outside* when Jaquita came by. Then he said he was not outside but was sitting by the door playing video

games. (15RT 3474.) Finally, he said he was "up there laying, just playing a game when I saw her come to the window." (15RT 3474.) The prosecutor argued: "Because you know it's not good to be outside, to be the predator out there who sees the missing girl and wave her in, suggest to her come on down because that's predatory behavior and shows you how evil this really was." (15RT 3474.)

The prosecutor also focused on Demolle's statement to the police that Jaquita had approached him and asked what he was doing, if she could come inside, and if she could play his video game, "[a]s if he had nothing to do with this. He's just being a nice guy, he loves kids, plays videogames, that she asked him." (15RT 3475.) The prosecutor argued that Demolle's version of events lacked common sense:

> Is the idea of coming to that apartment that night going to generate from her or does it generate from a predator who uses his Play Station as a rape station, who uses it to entice an 11-year-old girl to be trapped inside his apartment? And there he says it right there, that's when I asked her, Can you come in and play my Play Station little girl? Would you like to come in my place?

(15RT 3475.)

The prosecutor told the jury to consider what a "decent human being who is not a predator" would do in that situation. (15RT 3475.) He argued, that "[t]he good, decent non-predator" would tell Jaquita that her aunt was looking for her and that she needed to go home (15RT 3476), and that Demolle could not explain to the police why he had not told Jaquita that her aunt was looking for her because the answer was, "I am a predator."

(15RT 3476.) The prosecutor highlighted how Demolle had gotten Jaquita to go into his apartment, gotten Jaquita's bicycle into the apartment, and then closed the door, closing "the trap for this little girl." (15RT 3478.) He argued that the police had focused on why Demolle closed the door when they questioned him because "they realized the predatory behavior of this defendant." (15RT 3478.)

The prosecutor summed up this portion of his argument by telling the jury that it needed to listen to the tapes to get "a real understanding" of what had happened. (15RT 3479.) He argued that the tapes showed that Demolle had minimized his behavior and that things "did not quite go down the way the defendant wants everyone to believe it went down." (15RT 3479.) He argued that Demolle knew "this is easy prey" because Jaquita was not being supervised by anyone who had their "wits about them." (15RT 3479.) The prosecutor continued:

> Jaquita that night, . . . she's trying to get out of the house she was in because it was bad there with her mom. So she goes out and she's separated from there. She's out looking for an escape from there. In the face of this guy, she is like a wounded lamb that has been separated from the flock. And she goes to this place or she's out there and he presents himself as this nice guy. Hey, I got video games. You like video games? Why don't you come on in. Bring your bike in here. And it's inviting. Around the corner it's bad. Video games are fun. . . . [T]his guy is being nice. He's going to let me play his video games. It's like the video games today of what the candy was, I guess, when I was going to school. You know, hey, kid, you want a piece of candy? Come on and get in my car. The defendant, what's sickening about this is he knew how much kids liked these games because he sat there and played with them

> with his nieces and nephews. He realized what great bait.
>
> Quite frankly, ladies and gentlemen, the defendant in this case is the wolf in sheep's clothing. Jaquita is the wounded lamb. She's 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 3479-3480.)

Next, to aid the jury in evaluating the "moral weight" of Demolle's actions, as relevant under section 190.3, subdivision (a), the prosecutor discussed what Jaquita must have experienced while Demolle raped and killed her. (15RT 3480-3482.) In describing Demolle's actions in raping Jaquita, the prosecutor stated: "And then he's on her like the wolf. He's violating her body." (15RT 3482.) After discussing how Demolle strangled Jaquita, wrapped her body in a sheet and threw her out the window and into the trash, the prosecutor summarized Demolle's efforts to cover up his crimes by disposing of Jaquita's bicycle as follows:

> And then he takes her bicycle, drops it on top of her. And he's so concerned about her, you know, what's he thinking about the bike? Oh, I can't leave that there. That might lead them to me. So he takes the bike, pulled it out by the fence. What's he thinking about? He's thinking about getting away with it. The predator is thinking about covering his tracks now. The wolf doesn't want to be caught. So he takes his shirt and he wipes this thing clean, the fingerprints. That's what's going through his mind, got to get away with this. And he throws the bike over the fence.

(15RT 3485.)

The prosecutor argued that when the factors in aggravation were compared to those in mitigation, the aggravating factors "[o]verwhelmingly outweighed" the mitigating. (15RT 3488.) After a break (15RT 3488-3490), the prosecutor resumed his argument regarding the moral weight of the aggravating circumstances versus the mitigating circumstances and argued that it was "not even close" and that a death verdict was a just sentence under the circumstances of the case. (15RT 3491-3502.)

Finally, the prosecutor discussed the lack of remorse as reflected by Demolle's actions after the murder when covered up the evidence of his crimes and then left on a fishing trip with friends (15RT 3503-3515) and the reasons why the jury did not need to show Demolle mercy (15RT 3514-3521).

B. The Racial Justice Act

Effective January 1, 2021, the Legislature enacted the RJA expressly "to eliminate racial bias from California's criminal justice system" and "to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing." (Stats. 2020, ch. 317, § 2, subd. (i); see *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 149-150.)[2] The Legislature intended "to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination." (Stats. 2020, ch. 317, § 2, subd. (j).)

Pursuant to the RJA, "[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the

[2] The RJA is codified at sections 745, 1473, subdivision (e), and 1473.7, subdivision (a)(3).

basis of race, ethnicity, or national origin." (§ 745, subd. (a).) "The Act sets forth four categories of conduct, any of which, if proved, is enough to 'establish' a violation of section 745, subdivision (a)." (*Young*, *supra*, 79 Cal.App.5th at p. 147; see § 745, subds. (a)(1)–(a)(4).)

Demolle relies exclusively on section 745, subdivision (a)(2), which provides that a violation occurs when, "[d]uring the defendant's trial, . . . an attorney in the case . . . 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." (See SAOB 18.) "Racially discriminatory language" is "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." (§ 745, subd. (h)(4).)

It is the defendant's burden to establish a violation of section 745, subdivision (a), by a preponderance of the evidence. (§ 745, subd. (a).) The defendant does not need to prove intentional discrimination. (§ 745, subd. (c)(2).) In cases where the judgment was entered before January 1, 2021, if a violation is established under section 745, subdivisions (a)(1) or (a)(2), the defendant is entitled to relief "unless the [S]tate proves beyond a reasonable doubt that the violation did not contribute to the judgment." (§ 745, subd. (k).)

C. Demolle has not demonstrated a violation of the RJA by a preponderance of the evidence

Demolle contends the prosecution's description of him as a "predator" and comparison of him to a "wolf in sheep's clothing" during the penalty phase closing argument violated the RJA because such terms are "dehumanizing" when applied to persons of color. (SAOB 9-34.)

As noted, to prove an RJA violation, a defendant must prove by a preponderance of evidence that (among other criteria) an attorney in the case "used racially discriminatory language about the defendant's race . . . or otherwise exhibited bias or animus towards the defendant because of the defendant's race . . . ." (§ 745, subd. (a)(2).) As used in this case, the term "predator" and the metaphor of a "wolf in sheep's clothing" are race neutral. It was Demolle's predatory actions that rightfully earned him the prosecution's condemnation. Demolle's RJA claim is without merit.

1. The prosecutor's description of Demolle as a "predator" was race neutral

Demolle's argument that the prosecutor violated the RJA by describing him as a predator lacks merit as the term "predator" is race neutral. An objective observer would not perceive any explicit or implicit bias or racial animus toward Demolle by the prosecutor's use of the word.

Any person who committed the violent acts of which Demolle was convicted would be equally subject to the descriptor of predator, regardless of race, ethnicity, or national origin. Before the penalty phase of the trial, Demolle had been convicted of

raping and murdering 11-year-old Jaquita after inviting her into his apartment to play video games. It was reasonable to infer from the evidence that Demolle knew Jaquita was on her own in the neighborhood without adult supervision at the time he enticed her to come into his apartment under the guise of playing video games. As such, the prosecutor's use of the word in his penalty-phase closing argument was a proper comment on the evidence.

"'"Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence."'" (*People v. Fayed* (2020) 9 Cal.5th 147, 207; accord, *People v. Tully* (2012) 54 Cal.4th 952, 1021.) Prosecutors have wide latitude in closing argument to comment on the evidence and reasonable inferences based on the evidence. (*People v. Leon* (2015) 61 Cal.4th 569, 606; *Tully*, *supra*, at p. 1021 [prosecutor is allowed wide latitude as long as arguments "are not inflammatory and principally aimed at arousing the passion or prejudice of the jury"].) They are not required to discuss violent crimes "dispassionately or with philosophic detachment." (*Leon*, *supra*, at p. 606.) Thus, in the context of claim of prosecutorial misconduct, this Court has concluded that the prosecutor's use of the term "predator" could be a proper comment on the evidence. (See *People v. Jackson* (2016) 1 Cal.5th 269, 368 [holding that it was not misconduct for the prosecutor to argue "there are evil predators that exist in our community"]; *People v. Riggs* (2008) 44 Cal.4th 248, 323 [holding it was not misconduct and "not unduly

inflammatory" for the prosecutor to argue that "we know we got a predator sitting right here in the courtroom with us"].)

People v. Quintero (2024) 107 Cal.App.5th 1060 is directly on point. There, the court concluded "that the prosecutor's use of the race-neutral terms 'monsters' and 'predators' in closing argument did not violate the [RJA]" in a case where the defendants "found the victim in an inebriated state, alone in the street in the middle of the night; took her into their car; drove her 50 miles away; and committed multiple sex crimes in concert against her." (*Id.* at p. 1064.) The court reasoned that the prosecutors' use of the terms "undoubtedly referred to defendants' conduct" and that "[c]haracterizing defendants' conduct as predatory was justified based on the evidence." (*Id.* at p. 1078.)

Similarly here, the prosecutor's remarks describing Demolle as a predator were neither explicitly nor implicitly racially laden; rather, they constituted proper race-neutral argument based on the state of the evidence. Demolle lured an 11-year-old girl off the street into his apartment, closed the door behind her, and then brutally raped and strangled her to death. "Predator" referred to Demolle's plainly predatory conduct in this case, not his race.

Moreover, Demolle has made no showing that the term "predator" is used disproportionately in cases where the defendant is of a specific race, ethnicity, or natural origin. Indeed, "predator" is a commonly used descriptor of specific types of human behaviors which are engaged in irrespective of race. As the court reasoned in *People v. Quintero*, *supra*, 107 Cal.App.5th

at page 1078, the term "predator" is commonly used in reference to human behavior. (*Ibid*. citing Merriam-Webster's Collegiate Dict. https://unabridged.merriam-webster.com/collegiate/predator [as of Dec. 31, 2024][defining "predator" as "one who injures or exploits other for personal gain or profit"].)

As the *Quintero* court further noted, "our own laws use the terms 'predator' and 'predatory' in reference to human behavior" including under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.) which defines individuals who have certain mental health disorders and have been convicted of a sexually violent offense as "sexually violent predators" (Welf. & Inst. Code, § 6600, subd. (a)(1)) and defines "'predatory'" as meaning "an act . . . directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with who a relationship has been established or promoted for the primary purpose of victimization" (Welf. & Inst. Code, § 6600, subd. (e)). (*Quintero*, *supra*, 197 Cal.App.5th at p. 1078; see also *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 198 [describing a procedural maneuver in court as "[m]oving in for the kill"]; *United States v. Bonilla-Comacho* (7th Cir. 1997) 121 F.3d 287, 289 [describing how officers "closed in for the kill" to arrest a target in a sting operation].)

Nothing in the prosecutor's closing argument suggested that he referred to Demolle's predatory conduct as a means of appealing to racial bias, or that an objective observer would

perceive it as such. As such, the prosecutor's comments did not violate the RJA.

2. The prosecutor's comparison of Demolle to a "wolf in sheep's clothing" was race neutral

Contrary to Demolle's assertion, the prosecutor did not violate the RJA by analogizing Demolle's conduct to the fable of the "wolf in sheep's clothing," which teaches the moral that appearances can be deceiving.

While the RJA prohibits the use of animal imagery that, to an objective observer, appeals to racial bias, given the context of the prosecutor's use of the wolf-in-sheep's-clothing metaphor here, doing so did not violate the RJA. The prosecutor's analogy and argument were a reasonable description of Demolle's *conduct*; they were not a reference to Demolle based on his race, and an objective observer would not have perceived them to be an appeal to racial bias. It was reasonable to infer from the evidence that Demolle had initially persuaded Jaquita to come into his apartment by telling her that she could play video games, thus, appearing as a friendly, harmless neighbor. But, once Demolle had Jaquita and her bicycle inside and had shut the door, this guise came off and Demolle revealed his true intent to rape and murder her. Thus, the evidence fairly supported the prosecutor's analogy of Demolle's conduct to the familiar tale of the wolf in sheep's clothing, and the jurors would have understood it as such.

Unlike analogies to other quintessential wild African animals that might violate the RJA, wolves are not a quintessential wild African animal and the fable of the wolf in sheep's clothing is not an analogy that, to an objective observer,

would implicitly appeal to racial bias (§ 745, subd. (h)(4)) or be used in reference to a defendant's race (§ 745, subd. (a)(2)). Indeed, the metaphor has biblical origins (Matthew 7:15 ["Beware of false profits, which come to you in sheep's clothing, but inwardly they are ravening wolves"]) and has been used in court opinions that in no way relate to race, ethnicity or natural origin. (See, e.g., *People v. Stapleton* (2017) 9 Cal.App.5th 989, 995 [condition of probation restricting residence of defendant, a registered sex offender, "is not a wolf in sheep's clothing; it is not designed to banish defendant or to prevent him from living where he pleases"]; *Lawless v. Steward Health Care Sys., LLC* (1st Cir. 2018) 894 F.3d 9, 15 [noting that while the appeal seemed to present a single question, "appearances can be deceiving, cf. Aesop, The Wolf in Sheep's Clothing (circa 550 B.C.), and at oral argument, a threshold question emerged]; *Lanfear v. Home Depot, Inc.* (11th Cir. 2012) 679 F.3d 1267, 1274, fn. 12 [describing mischaracterized legal claim as "a wolf in sheep's clothing" and citing Aesop's Fables].)

Although the challenged analogy involves an animal, the RJA does not prohibit a prosecutor from using the analogy to make a fair comment on the evidence. (*People v. Krebs* (2019) 8 Cal.5th 265, 341 [condoning "'opprobrious epithets' . . . 'to describe the egregious nature of the defendant's conduct,'" where supported by the evidence]; *People v. Parker* (2022) 13 Cal.5th 1, 72 [prosecution given wide latitude to make fair comment on the evidence in opening and closing statements].)

As this Court wrote in *People v. McDermott* (2002) 28 Cal.4th 946, in the context of a claim of prosecutorial misconduct (in a case that predated the RJA), "we do not condone the use of opprobrious terms in argument, but such epithets are not necessarily misconduct when they are reasonably warranted by the evidence." (*Id.* at p. 1002.) In *McDermott*, the prosecutor's comments in closing argument described the defendant "as 'a mutation of a human being,' a 'wolf in sheep's clothing,' a 'traitor,' a person who 'stalked people like animals,' and someone who had 'resigned from the human race.'" (*Id.* at p. 1003.) The court rejected the defendant's claim of prosecutorial misconduct, finding that when the comments were considered in the context of the defendant's planning and execution of the murder, the references were "within the permissible bounds of argument, and in any event would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence.' [Citation.]" (*Ibid.*)

We disagree with Demolle's assertion that the RJA "expressly prohibits 'language that compares the defendant to an animal.'" (SAOB 25-28.) While the RJA generally precludes language that compares a defendant to an animal (§ 745, subd. (h)(4)), his argument that there is a categorical prohibition of the comparison of a defendant or his actions to an animal, as Demolle construes the RJA to provide (SAOB 25-28), ignores the limiting language in subdivision (h)(4) and the purpose of the RJA. The comparison employed must, *to an objective observer*, appeal to racial bias or animus. (§ 745, subd. (h)(4).) As explained above,

"wolf in sheep's clothing" does not do so. Further, the purpose of the RJA is to "eliminate racially discriminatory practices in the criminal justice system." (Stats. 2020, ch. 317, § 2, subd. (j).) Prohibiting the comparison of a defendant's conduct to that of *any* animal (for example, a "busy bee" or an "eager beaver") does nothing to make the criminal justice system more fair.

Demolle's reliance on *Bennett v. Stirling* (4th Cir. 2016) 842 F.3d 319 (SAOB 26) is misplaced, but that case is instructive. There, the court found prejudicial prosecutorial misconduct where the prosecutor referred to the African-American defendant as an "'old caveman,'" a "'mountain man,'" a "'monster,'" a "'big old tiger,'" and "'King Kong.'" (*Id.* at p. 324.) "The prosecutor's comments were poorly disguised appeals to racial prejudice. It is impossible to divorce the prosecutor's 'King Kong' remark, 'caveman' label, and other descriptions of a black capital defendant from their odious historical context. And in context, the prosecutor's comments mined a vein of historical prejudice against African-Americans, who have been appallingly disparaged as primates or members of a subhuman species in some lesser state of evolution." (*Id.* at pp. 324-325.) The court held the reference to King Kong "in particular" stoked race-based fears. (*Id.* at p. 325.) The court also noted that the particular circumstances of the case "[did] not leave any doubt" that the comments were appeals to racial prejudice because the prosecutor had also invoked animal imagery during the opening statement, which was then reinforced by a government witness, "[r]ace was a recurrent theme throughout the capital sentencing proceeding, a

theme designed to implant both racial fears and prejudices in the mind of the jury by playing upon ancient staples of racial disparagement and discrimination," and the prosecutor had not invoked racially charged arguments in front of an earlier mixed-race jury and only brought them out when in front of an all-white jury. (*Id.* at pp. 325-327.)

The same is not remotely true here where the wolf-in-sheep's-clothing metaphor was used in closing argument and in reference to the evidence of Demolle's conduct, not in an attempt to stoke race-based fears. (Cf. *People v. Simmons* (2023) 96 Cal.App.5th 323, 336 [RJA violated where prosecutor's argument "equate[d] appellant's skin tone and 'ethnic presentation' with deception, implying that he was not a credible witness because the color of his skin fooled women and confused strangers"].)

For these reasons, Demolle has not demonstrated by a preponderance of the evidence that the prosecutor's use of the challenged metaphor violated the RJA.

D. Any RJA violation was harmless

Demolle argues that if the Court finds an RJA violation, prejudice is presumed and his sentence of death must be vacated. (SAOB 34-35.) However, because judgment in this case was entered before January 1, 2021, any violation is subject to harmless error review. (§ 745, subd. (k).) If the state can prove, beyond a reasonable doubt, that the violation did not contribute to the judgment, Demolle is not entitled to relief. (*Ibid.*) Here, the record demonstrates beyond a reasonable doubt, that any

RJA violation did not contribute to Demolle's penalty-phase judgment and was therefore harmless beyond a reasonable doubt.

1. No prejudice has been demonstrated in light of the overwhelming nature of the aggravating factors

> "[T]he focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase."

(*People v. Taylor* (2010) 48 Cal.4th 574, 658, quoting *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267.) Jurors are provided factors to consider in making that moral decision. (§ 190.3.) In this case, the nature of the aggravating factors was overwhelming compared to the mitigating factors. Accordingly, the prosecutor's challenged remarks did not shift the jury's normative decision to such an extent that they would have contributed to the death verdict.

As summarized in respondent's brief (RB 11-22 [summarizing guilty-phase evidence]), there were no extenuating circumstances that mitigated Demolle's rape and murder of Jaquita. The circumstances of the crimes and the other evidence regarding the impact of Jaquita's murder on her family were overwhelming as to Demolle's suitability for the death penalty.

Given the atrocious nature of the instant crimes, in denying the automatic motion to reduce the penalty, the trial court stated:

> The Court . . . independently finds the jury's assessment that the evidence in aggravation substantially outweighs the evidence in mitigation so as

> to support the selection of the death penalty as the appropriate penalty for the Defendant Alex Demolle is overwhelmingly supported by the weight of the evidence.
>
> As to the Defendant Alex Demolle, the Court has independently reviewed the presence and absence of each aggravating and mitigating factor listed in Penal code Section 190.3, and specifically agrees that the jury's findings that as to the Defendant Alex Demolle the circumstances in aggravation substantially outweigh the circumstances in mitigation is supported by the weight of the evidence presented.

(16RT 3629.)

> The court further stated:
>
> While it is difficult to choose words that can fairly describe the murder of Jaquita Mack, the Court has independently reviewed the evidence and independently finds beyond a reasonable doubt that the evidence of the murder was cruel, shows a cruel, senseless, depraved, evil and vicious act and this evidence is overwhelming.
>
> The Court has independently reviewed the evidence and independently finds beyond a reasonable doubt that the predatory nature of the lewd acts upon, the rape of and the murder of Jaquita Mack by the Defendant Alex Demolle is shocking and callous beyond any civilized norms.
>
> More particularly, the Court has independently reviewed the evidence and independently finds beyond a reasonable doubt the following circumstances of the crimes of Alex Demolle convicted of in the present proceedings:

(16RT 3633.)

The court summarized the facts and circumstances of Demolle's offenses, the investigation, Demolle's arrest and his confession. (16RT 3634-3637.) Next, the court addressed its

independent review of the evidence of the "incredibly devastating impact the murder of Jaquita Mack had on her family and loved ones." (16RT 3637.)

As to mitigation, the court stated:

> The Court has independently reviewed the evidence, independently taken into consideration any other circumstances which would extenuate the gravity of the crime even though it is not a legal excuse for the crimes and any sympathetic or other aspect of the defendant's character or record that the defendant has offered as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> The Court has independently reviewed the evidence, independently finds beyond a reasonable doubt that there is no such evidence which extenuates the gravity of the crimes nor mitigates the crimes.
>
> Further, the Court independently finds beyond a reasonable doubt that there is no sympathetic or other aspect of the defendant's character or record that the defendant has offered for a sentence less than death whether or not related to the crime for which he is on trial.

(16RT 3640-3641.)

The court concluded as follows:

> Based upon my independent review of all the evidence presented at both the guilt phase and the penalty phase, the Court independently finds beyond a reasonable doubt that the circumstances in aggravation substantially outweigh the circumstances in mitigation.
>
> The Court further finds beyond a reasonable doubt that the circumstances in aggravation are so substantial in comparison to the circumstances in mitigation that the death penalty is warranted in this case.

(16RT 3641.)

In light of the extremely aggravating circumstances of the instant crimes, the presence of Demolle's prior criminal activity, and the relatively minimal mitigation evidence, the asserted penalty-phase RJA violation did not contribute to the jury's death verdict and was therefore harmless under section 745, subdivision (k).[3]

2. Harmless error review applies to RJA claims raised on direct appeal

Contrary to Demolle's suggestion that harmless error review is only available to RJA claims raised in *petitions* for relief (SAOB 34), an RJA violation in a case in which the judgment was entered prior to January 1, 2021, should be analyzed for harmlessness, regardless of the vehicle by which the claim was brought. (But see *People v. Stubblefield* (2024) 107 Cal.App.5th 896 [holding § 745, subd. (k), applies only to post conviction "petitions"], review granted Mar. 12, 2025, No. S289152, 330 Cal. Rptr. 3d 331.)

Section 745, subdivision (k), states:

> For petitions that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.

---

[3] Should the Court find prejudicial error under the RJA, respondent does not concede that Demolle is no longer eligible for the death penalty. (See SAOB at 34, citing § 745, subd. (e)(3).) The application of section 745, subdivision (e)(3), may pose constitutional concerns that require consideration and development beyond the briefing in this case.

(§ 745, subd. (k).)

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, [the court begins] by examining the language of the statute. [Citations.]

(*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "If the language is clear and unambiguous, [the court follows] the plain meaning of the measure." (*People v. Canty* (2004) 32 Cal.4th 1267, 1276.) However, "the plain meaning rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The language is construed "in the context of the statute as a whole and the overall statutory scheme." (*Canty*, *supra*, at p. 1276.) "The intent prevails over the letter, and the letter will, if possible, be read so as to conform to the spirit of the act." (*Lungren*, *supra*, at p. 735.) Where ambiguity exists, it "is appropriate to consider evidence of the intent of the enacting body in addition to the words of the measure, and to examine the history and background of the provision, in an attempt to ascertain the most reasonable interpretation." (*Canty*, *supra*, at p. 1277.)

Section 745, subdivision (k), is properly construed as allowing harmless error review in any case (involving a violation of paragraph (1) or (2) of subdivision (a)) in which the judgment was entered before January 1, 2021. That is so whether the claim is brought in a petition for writ of habeas corpus, in a

motion to vacate a conviction or sentence under section 1473.7, or as here, in a direct appeal from the judgment. Significantly, section 745 was expressly prospective when enacted. After the Legislature modified the statute to apply to pre-2021 cases, it added subdivision (k) allowing harmless error review in limited cases and under a stringent standard. Presumably, it did so in recognition that RJA violations may arise under a wide variety of circumstances, and that it would be unfair to automatically reverse every case no matter the circumstances, when the affected parties had no notice of the change in the law. (See *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 814 ["Retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct"].)

That lack of notice represents the dividing line between cases that are and are not subject to harmless error review. The vehicle by which a convicted defendant may raise an RJA claim is reliant upon whether the supporting facts appear on or off the record and whether the defendant is in or out of custody. These matters are out of the parties' control and bear no relation to the merits of the claim. For this reason, there would be no logical reason for the Legislature to differentiate claims raised in a petition for writ of habeas corpus from those raised in section 1473.7 motions or direct appeals for purposes of permitting harmless error review. Indeed, the harmless error standard the Legislature chose—harmless beyond a reasonable doubt—is applied daily by state courts adjudicating federal constitutional claims raised on direct appeal. *Chapman v. California* (1967) 386

U.S. 18, the United States Supreme Court case from which the standard was taken, was itself a direct appeal. It would be anomalous to hold that this well-known and commonly used standard applies to habeas corpus proceedings, but not to direct appeals, in the RJA context.

The legislative history supports respondent's position that "petitions" in section 745, subdivision (k), should not be read literally to mean petitions for writs of habeas corpus. Notwithstanding the language in the statute, the analyses of Assembly Bill No. 1118 prepared by the Senate and Assembly Committees on Public Safety both describe existing law at the time the bill was being considered as permitting harmless error review "for *petitions* (*motions*) that are filed in cases for which judgment was entered before January 1, 2021." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1118 (2023-2024 Reg. Sess.), as amended May 18, 2023, p. 3, italics added; Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1118 (2023-2024 Reg. Sess.), as amended Mar. 15, 2023, p. 4, italics added.) The Committees' inclusion of section 1473.7 motions as "petitions" reflects their understanding that harmless error review applies to qualifying pre-2021 RJA violations regardless of the vehicle by which the claims are brought. The same conclusion holds true now that Assembly Bill No. 1118 has been enacted. "Petitions" is shorthand for "petitions, motions, and appeals," i.e., any post-judgment challenge under the RJA.

Accordingly, section 745, subdivision (k), applies to the RJA claim Demolle raises here.

CONCLUSION

For these reasons, as well as those in Respondent's Brief, respondent respectfully requests that this Court affirm the judgment of conviction and sentence of death.

Respectfully submitted,

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May 1, 2025

CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL ANSWERING BRIEF uses a 13 point Century Schoolbook font and contains 6,654 words.

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May 1, 2025

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **People v. Alex Demolle**
No.: **S159120 (Capital Case)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On May 1, 2025, I electronically served the attached **Supplemental Answering Brief** by transmitting a true copy via this Court's TrueFiling system, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 1, 2025, at San Francisco, California.

Beverly Wong	/s/ Beverly Wong
Declarant	Signature

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/1/2025 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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5/1/2025

Date

/s/Beverly Wong

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