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DEATH PENALTY

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 REPLY BRIEF

GALIT LIPA
State Public Defender

BETHANY L. O'NEILL
State Bar No. 184735
Deputy State Public Defender
E-mail: bethany.oneill@ospd.ca.gov
1111 Broadway, 10th Floor
Oakland, CA 94602
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

Attorneys for Appellant

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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 REPLY BRIEF

ARGUMENT

I.
MR. DEMOLLE'S DEATH SENTENCE MUST BE VACATED BECAUSE THE PROSECUTOR APPEALED TO RACIAL BIAS IN VIOLATION OF THE RACIAL JUSTICE ACT

To fulfill the Legislature's objective of eliminating racial bias from the criminal justice system, even when unintentional or unconscious, the Racial Justice Act (RJA) defines racially discriminatory language expansively and expressly includes "racially charged or racially coded language, language that compares the defendant to an animal." (Pen. Code, § 745, subd. (h)(4); Assem. Bill No. 2542 (2019-2020 Reg. Sess.) Stats. 2020, ch. 317, § 2, subd. (e) (A.B. 2542) ["use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted

in our court system"].)[1] The prosecutor violated that provision here by repeatedly calling Mr. Demolle a "predator" and comparing him to an animal, a wolf, during penalty-phase closing argument. (See Supplemental Appellant's Opening Brief (SAOB) 14-16, 30-34.)

Respondent argues that the prosecutor's use of "predator" and "wolf" was a race-neutral, fair comment on the evidence that an objective observer would not understand as appealing to racial bias. (Supplemental Answering Brief (SAB) 7, 15-23.) Further, respondent reads a prejudice requirement into the statute for claims raised on direct appeal and argues that any RJA violation was harmless beyond a reasonable doubt. (SAB 6-7, 23-30.) Respondent's arguments are not supported by the language of the RJA or the Legislature's intent in enacting it. To adopt respondent's arguments would be to ignore the Legislature's unambiguous intent to eliminate the insidious racism in our criminal legal system that the courts have long failed to adequately address.

The prosecutor's use of an animal comparison in the penalty phase of this case involving a Black man accused of sexually assaulting and murdering a child appealed to implicit racial bias. The wolf comparison and predator label worked to convince a nearly all-white jury with no Black members (in Alameda County) to sentence Mr. Demolle to death in violation of the RJA. (SAOB 10, fn. 2, 17-23.) This Court must vacate his sentence and remand the case for resentencing where Mr. Demolle will no longer be death eligible. (§ 745, subds. (e)(2) & (3).)

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

A. The prosecutor violated the RJA when he repeatedly called Mr. Demolle a predator and compared him to a wolf.

Respondent agrees that the RJA prohibits the use of animal imagery that appeals to racial bias but argues the prosecutor's use of "predator" and "wolf" here were race neutral and that Mr. Demolle's "predatory actions" "rightfully earned him the prosecution's condemnation" and did not violate the RJA. (SAB 15, 19.) Respondent sets up a straw man argument that mischaracterizes Mr. Demolle's claim that the prosecutor violated the RJA by calling him a "predator" *and* comparing him to a wolf by disentangling the two and attempting to refute that the prosecutor's use of each individually violated the RJA. (Compare SAOB 30-34 to SAB 15-23.) Respondent's parsing of Mr. Demolle's argument is unpersuasive.

To address the prosecutor's use of the word "predator" in closing argument, after citing inapposite prosecutorial misconduct jurisprudence (see SAB 16), respondent argues that *People v. Quintero* (2024) 107 Cal.App.5th 1060 (*Quintero*) "is directly on point" (SAB 17). It is not, however, in a key respect that destroys respondent's argument. The prosecutors in *Quintero* referred to the Latino defendants accused of abducting and raping a woman as "monsters" and "predators" but did not *also* refer to the defendants as a wolf or any other animal. (SAB 17.) The court held that the prosecutors' use of "monsters" and "predators" in closing argument did not violate the RJA because they "undoubtedly referred to defendants' conduct" and that "[c]haracterizing defendant's conduct

as predatory was justified based on the evidence." (*Quintero, supra,* 107 Cal.App.5th at p. 1078.)

Setting aside whether *Quintero* was correctly decided, which Mr. Demolle does not concede, respondent disregards that while the court found the term "predator" to be race-neutral, it acknowledged that the term "predator" *can also be* "defined as ' "an *animal* that lives by predation." ' " (*Quintero, supra,* 107 Cal.App.5th at pp. 1077-1078, citing Webster's Ninth New Collegiate Dict. (1984) p. 926, italics added.) Furthermore, although not a term used here, the court also "agree[d] that in certain contexts the term 'monster' may be suggestive of an animal or beast and that prosecutors should refrain from describing defendants as 'monsters.'" (*Id.* at p. 1077.) Unlike the prosecutors in *Quintero*, the prosecutor here clarified he was using the definition of "predator" that refers to an animal when he then directly and repeatedly compared Mr. Demolle to a wolf. (See SAOB 31-32; 15RT 3468-3469 ["he was the predator, captured and he killed her"]; 3471 ["it shows the true predator he is"]; 3472 ["what the true predator that he is"]; 3474 ["to be the predator out there . . . that's predatory behavior"]; 3475 ["does it generate from a predator"]; 3475 [what would a "decent human being who is not a predator do…"]; 3476 [what would "[t]he good, decent non-predator" say]; 3476 ["you can't explain it because the answer is I'm a predator"]; 3478 ["they realized the predatory behavior of this defendant"]); 3480 ["the defendant in this case is the wolf in sheep's clothing . . ."he is a wolf"]; 3482 ["he's on her like the wolf"]; 3485 ["the predator. . . the wolf doesn't want to be caught"].)

The issue before the Court, however, is whether the prosecutor violated the RJA by explicitly and repeatedly comparing Mr. Demolle to a wolf. Animal comparisons are a type of coded language that the RJA explicitly defines as "racially discriminatory." (§ 745, subd. (h)(4).) As clear as the statute is, respondent nevertheless argues that the prosecutor's comparison of Mr. Demolle to a wolf was race neutral. (SAB 19.) Respondent's argument is not supported by the plain meaning of the statute or the Legislature's unambiguous intent.

The Legislature clearly identified the problem it sought to address with the RJA: "Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials." (A.B. 2542, § 2, subd. (e).) It explained: "For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers *and other animals*, even while acknowledging that such statements are "highly offensive and inappropriate." (*Id.* at § 2, subd. (e), citing *Duncan v. Ornoski* (9th Cir. 2008) 286 Fed. Appx. 361, 363 (*Duncan*), and *People v. Powell* (2018) 6 Cal.5th 136, 182-183 (*Powell*), italics added.) And it provided social science research to support its position and identified a solution: "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." (*Id.* at § 2, subd. (e), citing Goff et. al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences* (2008) J. Pers. Soc. Psychol. 292-293 (Goff), and

Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3105-3106 (Prasad).)

Accordingly, section 745, subdivision (2), prohibits prosecutors from using racially discriminatory language about the defendant's race or otherwise exhibiting bias or animus towards the defendant based on race. "Racially discriminatory language" is expressly defined 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*." (§ 745, subd. (h)(4), italics added.)

Respondent argues that the prosecutor's use of a wolf comparison here was race neutral and to an objective observer would not be an appeal to racial bias because the prosecutor used the comparison to describe Mr. Demolle's conduct and not to refer to his race. (SAB 19.) Respondent provides no principled distinction between the Bengal tiger example provided by the Legislature, which respondent has conceded in another direct appeal before this Court violates the RJA,[2] and the wolf comparison used by the prosecutor here. There is no such distinction.

The Goff and Prasad articles cited by the Legislative Findings document the historic roots and pernicious qualities of animal imagery and inform what animal imagery the Legislature considered racially discriminatory. (A.B. 2542, § 2, subd. (e).) The authors note that "associations between humans and nonhuman

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[2] See *People v. Bankston*, S044739.

animals have been used to justify slavery in the United States, the Jewish Holocaust of World War II, and widespread violence against immigrants around the world[.]" (Goff, *supra*, at p. 293; Prasad, *supra*, at pp. 3107-3111.) Some animal comparisons stand in for more anachronistic and less socially acceptable forms of racism; for example, the "brute caricature" is "an extension of animal imagery[.]" (Prasad, *supra*, at pp. 3106-3107.) Other common examples of this type of animal imagery from reported cases include: monster, beast of burden, King Kong, ape, curious George, lion and tiger in the jungle, and animal. (*Id.* at p. 3093.)

Some human-animal comparisons have historical and even literal pseudoscientific roots, but even after the explicit human-animal associations are eschewed, implicit racial associations live on through metaphors, visual tropes, and convergence of other related stereotypes. (Goff, *supra*, pp. 293-294.) These implicit biases can be "equally strong" as explicit biases and can be primed and activated with "dire consequences[.]" (*Id.* at p. 294; Prasad, *supra*, at pp. 3099-3102.) "Animal imagery can both depend on and perpetuate the negative effects of implicit racial biases." (Prasad, *supra*, at p. 3105.) For example, certain animal images have been used to "conjure up stereotypes of Black people as having animalistic tendencies or behaving like an animal would[.]" (*Id.* at p. 3106.)

Animal imagery is dehumanizing. "Dehumanization is . . . a central component to intergroup violence because it is frequently the most important precursor to moral exclusion, the process by which stigmatized groups are placed 'outside the boundary in which moral values, rules, and considerations of fairness apply." (Goff, *supra*, at

p. 293.) "Groups that are morally excluded do not count in a moral sense. Consequently, anything that is done to someone who is morally excluded is permissible, no matter how heinous the action." (*Ibid.*) "Dehumanization is one of the most powerful cognitive processes that can distance people from the moral implications of their actions." (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1454; see *People v. Nadey* (2024) 16 Cal.5th 102, 208 (dis. opn. of Liu, J.) [certain terms that include animal comparisons should not be permitted because capital jurors must treat the defendant "as a fellow member of their community" and such terms "invite[] jurors to disregard this essential feature of their role")].)

Prasad notes that animal comparisons can stand in for less socially acceptable forms of racism. (Prasad, *supra*, at pp. 3106-3107; see also Goff, *supra*, at p. 292.) The wolf comparison was less explicit than the racist appeals that preceded it – itself a "wolf in sheep's clothing." For example nearly a hundred years ago a prosecutor in California argued, "It will not be safe if you permit a defendant, a negro, to come in and slaughter a white man. (*People v. Jeans* (1926) 79 Cal.App. 464, 466; see also, e.g., *People v. Singh* (1936) 11 Cal.App.2d 244, 255 [prosecution argued "that it is characteristic of the Hindu race to murder their people in a mysterious manner, to mutilate their bodies, and to come into court and lie and to do all they can to defeat justice"]; *People v. Simon* (1927) 80 Cal.App. 675, 677 [prosecution argued, "There has, of course, grown up a suspicion in this country with reference to fires

whenever a Jew has anything to do with it."].) While such overt racial appeals are no longer common, the wolf comparison allowed the prosecution to perpetuate that same racism by activating the persistent "brute caricature" of a Black man as "innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death" and ask the jury to return a death verdict. (Prasad, *supra*, at pp. 3105-3107, cited in A.B. 2542, § 2, subd. (e).)

Like the Bengal tiger, a wolf is a predatory animal and the fable of a "wolf in sheep's clothing" is like the Bengal tiger fable, because both involve a violent predator hiding its true vicious nature. Respondent points to no meaningful distinction between the Bengal tiger and wolf comparisons. Respondent's assertion that an animal comparison might have a biblical origin or other non-racist roots and can thus be used in a non-racist manner (see SAB 20), is irrelevant because it is the present appeal to racial bias and dehumanization through implicit bias that is the problem. Respondent also argues that a wolf is different from "other quintessential wild African animals" and therefore a comparison of the defendant to a wolf is not covered by the RJA. (SAB 19-20.) This argument based on the animal's origin is specious at best, if not offensive. The RJA does not limit forbidden animal comparisons to African animals. There is no geographic nexus requirement. (§ 745, subd. (a)(2) & (h)(4).) Indeed, the example provided by the Legislature, a Bengal tiger, is not an animal from Africa, they inhabit India, Banglasesh, Bhutan, and Nepal. (Britannica, Bengal Tiger <https://www.britannica.com/animal/Bengal-tiger> [as of June 4, 2025].) Thus, under respondent's interpretation, the specific

example of an improper animal comparison the Legislature cited would not violate the RJA.

Respondent argues that "[p]rohibiting 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." (SAB 21-22.) It is difficult to imagine a prosecutor comparing a defendant or a defendant's conduct to a "busy bee" or an "eager beaver." Considering the social science upon which the RJA relies, it is difficult to see how respondent's examples are the type of animal comparisons the RJA intends to prohibit. This Court remains free to reject a construction "that is contrary to the legislative intent apparent in the statute or that would lead to absurd results." (*Simpson Strong-Tie Co. v. Gore* (2010) 49 Cal.4th 12, 27.) In any event, that is not what happened here.

Respondent also fails to provide authority for its argument that, consistent with the RJA, prosecutors may use animal comparisons to describe a defendant's conduct. (See SAB 21-22.) Respondent fails to explain why this would be the case under the objective observer standard or from where an exception to the RJA's prohibition of animal comparisons generates. It is not supported by the pre-RJA and/or prosecutorial misconduct cases respondent cites. (See SAB 20-22.) The Legislature rejected this jurisprudence.

Instead of looking to the intent or purpose of the speaker invoking an animal comparison, the RJA asks whether the language, "to an objective observer, explicitly or implicitly appeals to racial bias[.]" (§ 745, subd. (h)(4).) The objective observer disregards "whether the person using the discriminatory language intended for

it to be discriminatory." (*People v. Stubblefield* (2024) 107 Cal.App.5th 896, 916, review granted Mar. 12, 2025, S289152 (*Stubblefield*).) This standard presumes an observer who is objective or free of biases and prejudices. (*Ibid.*) It asks whether an objective observer would have understood the prosecutor's remarks as appealing to any bias held by a listener, serving as a "high decibel 'dog whistle.'" (*Id.* at p. 921; *Bonds v. Superior Court* (2024) 99 Cal.App.5th 821, 829 [implicit bias is, by definition, unintentional and unconscious]; A.B. 2542, § 2, subd. (i).) It also presumes an awareness of prejudices and biases, including implicit or unconscious bias, just as it does in the related objective reasonable person standard in Code of Civil Procedure section 231.7. Both statutes share a common purpose—to limit racial discrimination in the administration of justice—and are properly construed together as they stand *in pari materia*. (See *People v. Knowles* (2024) 105 Cal.App.5th 757, 767 [statutes addressing the same subject matter stand *in pari materia* and are properly construed together].) Here, an objective observer—aware of the history of race discrimination in America and how it impacts our perceptions—would view the prosecutor's comparison of Mr. Demolle to a predatory animal as racially discriminatory.

Respondent argues that there is an exception to the prohibition on the use of animal comparisons for describing the conduct of the defendant. (See SAB 21-22.) But the RJA contains only two limited exceptions to the prohibition against racially discriminatory language, neither of which apply here. Racially discriminatory language does not violate the RJA when "the person

speaking is relating language used by another that is relevant to the case[.]" (§ 745, subds. (a)(2) & (h)(4).) Nor does it violate the RJA to refer to the "defendant's physical appearance, culture, ethnicity, or national origin" so long as "the person speaking is giving a racially neutral and unbiased physical description of the suspect." (*Ibid.*) Respondent posits an additional court-created exception for animal comparisons that describe the defendant's conduct. The Legislature rejected this approach through the RJA.

The RJA prohibits both explicit and implicit appeals to racial bias, recognizing that "[i]mplicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias." (§ 745, subd. (h)(4); A.B. 2542, § 2, subd. (i).) For example, one "study measuring the effect of implicit bias on the presumption of innocence showed that jurors struggled to reconcile the presumption of innocence with negative stereotypes of Black people." (Prasad, *supra*, at p. 3102, cited in A.B. 2542, § 2, subd. (e).) And "racially tinted arguments made during trial, whether implicit or explicit, reinforce racial bias." (*Id.* at p. 3094.) Regardless of any other purpose the animal imagery may serve, it primes implicit biases that can cause the listener to prejudge the person in consequential ways. (Goff, *supra*, at p. 294.) This is true regardless of whether racially tinted argument could arguably be described as a description of the defendant's conduct.

The Legislature thus rejected respondent's approach when it disapproved of cases like *Powell* and *Duncan* where the prosecution relied on animal imagery to prove that the defendant was not as peaceful as he appeared in court. (*Powell*, *supra*, 6 Cal.5th at p. 183;

Duncan, supra, 286 Fed. Appx. at p. 363.) The Legislature did not consider potential non-racist purposes to the language to redeem otherwise racially discriminatory language. It cited these cases as examples of "existing precedent" that "tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials." (A.B. 2542, § 2, subd. (e).)

When the prosecution repeatedly called Mr. Demolle a "predator" and then directly and repeatedly compared him to a wolf, it cast him as a brute, supernatural, vicious, animalistic, outside of society, and underserving of the jury's consideration of his humanity, making its decision to sentence him to death easier. The prosecution's use of an animal comparison thus appealed to racial bias. The preponderance standard applicable here "apportions the risk of error among litigants in roughly equal fashion" and 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."].) The trial record in this case shows by a preponderance of the evidence that the prosecutor violated the RJA in the penalty phase of Mr. Demolle's trial by using racially discriminatory language, whether purposeful or not. (§ 745, subd. (e).)

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

When 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); SAOB 34.) In this case, the prosecutor's penalty phase argument violated section 745, subd. (a)(2), and therefore this Court must vacate Mr. Demolle's sentence and find him ineligible for the death penalty. (SAOB 34.)[3]

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[3] In a footnote, respondent argues that even if the Court were to find prejudicial error under the RJA, the remedy outlined in section 745 subdivision (e)(3) "may pose constitutional concerns that require consideration and development beyond the briefing in this case." (SAB 27, fn 3.) Respondent does not specify the constitutional concerns referred to, nor does it explain, why, if any such concerns exist, they cannot be addressed in the brief. Nonetheless, this Court has made clear, there is "a strong presumption favoring the constitutionality of the Legislature's acts [citation], and 'courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears… ." (*People v. Lopez* (2020) 51 Cal.App.5th 589, 596, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 913-913.) Respondent's unspecified "concerns" thus can have no bearing on the application of statutes.

Moreover, to the extent that respondent's footnote is construed as an argument, a litigant cannot bury a substantive legal argument in a footnote and hope to avoid waiver of that argument. (See e.g., *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947 ["Footnotes are not the appropriate vehicle for stating contentions on appeal"]; *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1260, fn. 10 [argument raised in footnote without analysis or discussion is waived].)

Respondent, however, argues that section 745, subdivision (k)'s harmless error provision applies here, and that any violation was harmless beyond a reasonable doubt. (See SAB 23-30.) The RJA does not require proof of prejudice for claims raised on direct appeal. Respondent's argument is not supported by the RJA's plain language or the Legislature's intent. (See *People v. Simmons* (2023) 96 Cal.App.5th 323, 334-339 (*Simmons*); *Stubblefield, supra,* 107 Cal.App.5th at pp. 924-925.)[4] Even if it were, prejudice is shown on the record here.

1. The violation is not subject to harmless error review.

Section 745, subdivision (b) distinguishes between the different procedural routes a defendant may use to pursue an RJA claim: "A defendant may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7. . . . 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."

The plain language of subdivision (k) instructs that the harmless error standard applies to habeas corpus petitions—not direct appeal claims:

> 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

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[4] As noted, this Court has granted review in *Stubblefield* and has ordered further action "deferred pending consideration and disposition of related issues" in *People v. Bankston*, S044739 and *People v. Barrera*, S103358.

> (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.

(§ 745, subd. (k), italics added.)

This language precludes the interpretation that respondent proposes. The word "petition" used in subdivision (k) refers to a petition for a writ of habeas corpus, one of the several distinct procedural vehicles available for raising an RJA claim. What is before the Court here is *not* a "petition," it is a claim alleging a violation of subdivision (a) on direct appeal and thus is outside the category of cases in which the harmless error analysis contained in subdivision (k) can be applied.

Respondent urges the Court to look beyond the plain meaning of the statute "to effectuate the purpose of the law" and allow harmless error review in any case involving a violation of subdivision (a) in which the judgment was entered before January 1, 2021. (SAB 28-29.) First, respondent argues that because subdivision (k) was added when the Legislature made the RJA retroactive, it follows that the Legislature was primarily concerned with the lack of notice offered to parties, and "lack of notice represents the dividing line between cases that are and are not subject to harmless error review." (SAB 29.) Respondent does not offer any authority for this position but instead argues that there is "no logical reason for the Legislature to differentiate claims raised in a petition of habeas corpus from those raised in section 1473.3 motions or direct appeals." (*Ibid.*) However, distinguishing between nonfinal cases on direct appeal and final cases in determining how a defendant accesses benefits of a new law is not new. (See *In re*

Estrada (1965) 63 Cal.2d 740, 745-747; *People v. Frahs* (2020) 9 Cal.5th 618, 627-637; *People v. Nasalga* (1996) 12 Cal.4th 784.) Further, the court in *Stubblefield* rejected this same argument. (*Stubblefield, supra,* 107 Cal.App.5th at p. 926 ["contrary to the Attorney General's assertion, there is nothing unreasonable, much less absurd, about the differential treatment of writ petitions and claims on appeal" citing *In re Reno* (2012) 55 Cal.4th 428, 451].)

Respondent's suggestion that the harmless error standard should apply because it is commonly applied in federal constitutional claims on direct appeal is similarly misplaced. (SAB 29.) The RJA is not a federal constitutional claim, it is a state law remedy crafted by the Legislature in such a way as to "foreclose[] any traditional case-specific harmless error analysis." (*Simmons, supra,* 96 Cal.App.5th at p. 337, quoting A.B. 2542, § 2, subd. (i).)

Respondent argues that the Legislative history supports its reading by citing to analyses of Assembly Bill No. 1118, which characterized subsection (k) to permit harmless error review "for *petitions (motions)* that are filed in cases for which judgment was entered before January 1, 2021." (SAB 30, quoting 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.) Respondent further argues the "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." (SAB 30.)

This legislative history does not support reading "petitions" to apply to claims on direct appeal. First, a claim on direct appeal is neither a petition, nor a motion, so the language cited does not apply. Second, the RJA recognizes post-conviction *motions* under section 1473.7. (§ 745, subd. (b).) Even if respondent's argument regarding motions had merit, there is no support for reading "petitions" to mean more than post-conviction petitions or motions. Moreover, the legislature subsequently amended section 745 to expressly permit certain on-the-record RJA claims to be raised on direct appeal, and did not amend subdivision (k) to expand the harmless error analysis to such claims. (See § 745, subd. (b); Assem. Bill No. 1118 (2023-2024 Reg. Sess.) Stats. 2023, ch. 464.)

Further, respondent's explanation that the legislature was using "petitions" as shorthand for "'petitions, motions, and appeals,' i.e. any post-judgment challenge under the RJA" is wrong. (SAB 30.) 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*, 107 Cal.App.5th at p. 925.) The same applies to Mr. Demolle. He is an appellant, not a petitioner, this is a direct appeal from a sentence of death, not a petition. Respondent provides no authority that would allow this Court to disregard the plain meaning of the statute. (See *People v. Canty* (2004) 32 Cal.4th 1267, 1276 ["If the language is clear and unambiguous, we follow the plain meaning of the measure."].) 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*, 107 Cal.App.5th at p. 928.)

Respondent's interpretation of subdivision (k) is undermined by the statute's plain language, the Legislature's intent, the legislative history, and the lower appellate court opinions that have considered the issue. Mr. Demolle's claim is not subject to harmless error review.

2. Even if harmless error review applies, respondent has not met its burden.

The racialized rhetoric used by the prosecution tainted the jury's death recommendation and demonstrated the precise racial bias that the Legislature found "intolerable" and "inimical to a fair criminal justice system." (A.B. 2542, § 2, subd. (i).) Accordingly, even if the harmless error standard applied, respondent has not met its burden to prove "beyond a reasonable doubt that the violation did not contribute to the judgment." (§ 745, subd. (k).) The burden here is not trivial, respondent must point to some evidence that the prosecutor's use of animal imagery and predator arguments did not activate the subconscious bias of a single juror. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."].) Respondent cannot carry that burden without ignoring the pernicious effects of implicit racial bias the Legislature sought to

remedy in passing the RJA. Respondent's lengthy recitation of the trial court's comments in denying Mr. Demolle's automatic motion to reduce the death penalty (see SAB 24-26; § 190.4, subd. (e)) does not account for how those effects impacted Mr. Demolle's case.

As explained in his Supplemental Opening Brief, the prejudice stemming from the prosecutor's appeal to racist tropes and use of dehumanizing language to argue Mr. Demolle was deserving of death is salient. (SAOB 26.) The prosecutor's comparison of Mr. Demolle to a wolf tracks the clearest example and social science used by the Legislature to demonstrate rhetoric that is impermissibly dehumanizing for defendants of color. (See A.B. 2542, § 2, subd. (e) [citing Bengal tiger argument and research regarding use of racially discriminatory animal imagery]; see also Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions* (2023) 32 Cal. Interdisc. L.J. 515, 527.) Additionally, the prosecutor's rhetoric when describing Mr. Demolle as a predator and a wolf also appealed to one of the most sordid tropes, the Black Brute, which has been historically used to justify severe punishment and death. (SAOB 29.) The trope's history in being weaponized to persuade people that Black defendants are deserving of repressive measures, like the death sentence, cannot be overlooked in assessing the harm of the prosecutor's rhetoric.

Additionally, while courts and the Legislature have recognized that racial bias is a "toxin" even in "small doses" (A.B. 2542, § 2, subd. (a), citing *Buck v. Davis* (2017) 580 U.S. 100, 122, here the offending language was repeated throughout the penalty phase closing argument. The prosecutor used language about

predator behavior ten times and repeated the comparison to a wolf four times in closing argument. (SAOB 31.) Studies show what many lawyers already know, rhetorical repetition creates emphasis, increases emotional power, decreases conscious scrutiny, and increases certainty of belief. (See Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case W. Res. L.Rev. 39, 65.) The repeated descriptions of Mr. Demolle as a predator and comparisons of him to a wolf played a key role in the prosecutor's request for his execution.

Respondent's reference to the nature of the aggravating factors presented at the penalty phase only highlight the impermissible risk that racial bias distorted the jury's judgment for death. (SAB 24.) As respondent notes, compared with the guilt phase, the penalty phase of a capital trial is "more normative and less factual." (SAB 24, quoting *People v. Taylor* (2010) 48 Cal.4th 574, 658.) Studies have shown that the penalty phase is particularly vulnerable to distortion from the injection of racial bias due to the nature of the proceeding. Cognitive biases, like implicit bias, "is especially harmful in the capital sentencing context, where a juror must interpret the *meaning* of evidence of good and bad conduct." (Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America* (2022) 107 Cornell L.Rev. 1513, 1543 ["In deciding whether mitigation outweighs aggravation, when the defendant is of a different race than the juror, the juror is more likely to attribute all of the defendant's bad acts to his character (rather than to child sexual abuse, mental illness, intellectual limitations, or brain damage); he is also more likely to disparage

evidence of remorse, good character, or good deeds as faked, or the product of self-interest."]; see also Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury* (2011) 2011 Mich. St. L.Rev. 573, 603 ["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."].)

Additionally, respondent claims that because "the nature of the aggravating factors was overwhelming compared to the mitigating factors[,]" the "challenged remarks did not shift the jury's normative decision to such an extent that they would have contributed to the death verdict." (SAB 24.)[5] Given the nature of the RJA violation here, it is debatable whether this argument would be persuasive in a capital case even involving no mitigation evidence and a swift decision by the jury, but it is not here. Beyond the crime itself, the factor (b) evidence was not overwhelming, and Mr. Demolle had a clean disciplinary record for the nearly eight years he was awaiting trial. (See SAOB 11-12, 14.) Over two dozen mitigation witnesses including family, friends, a teacher, fellow church

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[5] It is inaccurate to suggest, as respondent implicitly does, that any presentation of facts, however horrendous, means that a death verdict is a foregone conclusion. (See Stetler, *The Past, Present, and Future of Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, (2018) 46 Hofstra L.Rev. 1161, 1186, fn. 142 [describing that death sentences are becoming "vanishingly rare" even in aggravated cases such as those involving child victims].)

members, and law enforcement officials testified on Mr. Demolle's behalf. (See SAOB 13-14.) Faced with this combination of aggravating and mitigation evidence, the jury struggled with its decision—it deliberated for approximately five days before it returned a verdict of death. (8CT 2172.)

Moreover, respondent's recitation of the court's reasoning denying the automatic motion to reduce the penalty is unpersuasive. (SAB 24-25.) This recitation fails to account for racial bias's corrosive effects on decision-making, particularly in the context of a penalty trial in a death penalty case. This corrosive effect is due to implicit racial bias' effect on how facts are perceived, remembered and understood by decisionmakers. (See Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, *supra*, 71 Case W. Res. L.Rev. at pp. 66, 92; Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2009) 84 Notre Dame L.Rev. 1195.) Additionally, "judges, like the rest of us, carry implicit biases concerning race." (Rachlinski, et al., *supra*, 84 Notre Dame L. Rev. at p. 1221.) Here, the trial court heard the same racialized rhetoric, and there is no evidence that it attempted to correct for racial bias. (*Ibid.* ["conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so."].) The animal comparison is reflected in the court's own repetition of such rhetoric in referring to "the predatory nature" of Mr. Demolle's offense in affirming the jury's death sentence. (SAB 25; 26RT 3633.) Given the capacity for bias to influence how facts are understood by everyone, repeating the trial court's pre-RJA "independent review"

of the case does not show that it or the jury were inoculated from racial bias.

Respondent has not met its burden to show the prosecutor's violation of the RJA was harmless beyond a reasonable doubt. The remedy, at this procedural posture, 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 is 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 reasons argued above and in prior briefing, the death judgment must be reversed and the matter remanded for resentencing proceedings.

DATED: June 5, 2025

Respectfully Submitted,

GALIT LIPA
State Public Defender

/S/
BETHANY O'NEILL
Deputy State Public Defender
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 6,148 words in length.

DATED: June 5, 2025

/s/
BETHANY O'NEILL
Deputy State Public Defender

DECLARATION OF SERVICE

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

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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 **June 5, 2025**, at Sacramento, CA.

Ann-Marie Doersch

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O'Neill, Bethany (184735)
Last Name, First Name (PNum)

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Law Firm