No. S044739
CAPITAL CASE

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

ANTHONY BANKSTON,
Defendant and Appellant.

On Appeal from the Judgment of the Los Angeles County Superior Court, Case No. VA007955, The Honorable Nancy Brown, Judge

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APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of neither party in response to the court's supplemental briefing order of June 12, 2025.

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the rights of the people of the state generally and the victims of crime particularly to fundamental fairness in the decision of criminal cases is under grave threat. A statute purporting to be about justice threatens widespread major miscarriages of justice. This threat is presented by a statute purporting

to require reversal of judgments for trivial violations that cause no actual harm. The threat is further aggravated by the retroactive nature of the statute which fabricates violations from actions of trial participants that were entirely proper under the law at the time and which, in fact, have nothing whatever to do with racial bias. To compound the threat further, the law purports to exempt some of California's most heinous murderers from their just punishment because of events at trial that were not actually biased, caused no harm, and have nothing whatever to do with the question of the just punishment for the crime committed.

All of these threats are contrary to the interests that CJLF was formed to protect.

Need for Further Argument

Although amicus has not yet seen the Attorney General's brief in response the order, as it is due on the same day, it appears from the oral argument and the supplemental briefing that preceded it that additional argument is needed. The Attorney General is expected to defend the constitutionality of statutes so long as a reasonable argument can be made, but in this case the statute in question does impair several constitutional rights of the people: to have their judgments preserved absent prejudicial error; to due process of law; to equal protection of the laws; and to the integrity of voter-enacted initiatives. Vigorous defense of these rights requires an unconflicted advocate. Further argument is therefore needed.

Date: September 25, 2025

Respectfully Submitted,

KENT S. SCHEIDEGGER
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INTRODUCTION AND SUMMARY OF ARGUMENT

By orders of June 12, 2025, in three pending capital cases, this court directed supplemental briefing by the parties and authorized briefs by amici curiae addressing three questions:

> (1) Once a violation of Penal Code section 745, subdivision (a)(2) is established on direct appeal, is an analysis for harmless error required under article VI, section 13 of the California Constitution before relief can be granted under Penal Code section 745, subdivision (e)(2), regardless of whether there is a statutory obligation to conduct a harmless error analysis under Penal Code section 745?
>
> (2) Does the Legislature have authority to declare that certain errors are a "miscarriage of justice" within the meaning of article VI, section 13 of the California Constitution and thereby obligate courts to reverse a judgment whenever such an error is found, even when the error in question would otherwise be subject to review for harmless error?
>
> (3) If a Racial Justice Act violation has occurred, is the defendant ineligible for the death penalty under Penal Code section 745, subdivision (e)(3) regardless of whether the violation was prejudicial? If so, would reversal of a death judgment under Penal Code section 745, subdivision (e)(3) without possibility of retrial on penalty be barred by the "Briggs Initiative" (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978))?

Reversal of a judgment in the absence of prejudicial error is forbidden by article VI, section 13 of the California Constitution. Exceptions are limited to structural errors and to cases where a limited remand is necessary because the record on appeal is insufficient to determine prejudice. The rule and the exceptions are matters of interpretation of the constitutional provision, which is the province of the judicial branch, not the legislative branch. A statute purporting to alter these rules in a particular class of cases is unconstitutional.

The Racial Justice Act, section 745 of the Penal Code, is a problematic statute raising numerous constitutional doubts regarding equal protection of the laws and the people's right to due process. These doubts were further aggravated by an amendment making the law retroactive. They are aggravated yet further by purported limitations on harmless error analysis.

The constitutionality of the statute cannot be salvaged by interpretation. Subdivisions (e)(2) and (k), taken together, clearly require a higher standard than *Watson* in retroactive application cases and automatic reversal in prospective application cases. Avoidance of constitutional doubt cannot be stretched to the point of distortion of the clear language of the statute. Both subdivisions are unconstitutional and void to the extent they conflict with the constitutional provision, and the *Watson* standard remains in force.

Subdivision (e)(3) purports to exclude from capital punishment certain murderers who are clearly within the eligible class as defined by an initiative statute, Proposition 7 of 1978. Article II, section 10, subdivision (c) of the California Constitution forbids amendment of an initiative statute by the Legislature unless the initiative permits amendment or the amendment is approved by a vote of the people. Under many precedents of this court, the prohibited amendments are not limited to actual amendment of the section enacted by the initiative but also include separate sections that take away from what the people have enacted. Excluding murderers that the initiative includes is an exemplar of such taking away. Subdivision (e)(3) is unconstitutional on its face, and no harmless error analysis is needed.

I. Article VI, section 13 of the Constitution forbids reversal absent a reasonable probability of a different result, regardless of the statute.

No principle is more solidly established in American law than the supremacy of the Constitution over statutes. "[A]n act of the legislature, repugnant to the constitution, is void." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.) In California, the harmless error rule is written into the Constitution. (Cal. Const., art. VI, § 13.) While the meaning of the phrase "miscarriage of justice" in that section is not evident on its face, it has been refined by over a century of judicial interpretation. When the court of last resort has definitively interpreted the Constitution, that interpretation cannot be overridden by statute. (See *Dickerson v. United States* (2000) 530 U.S. 428, 437–438.)

The general definition of harmless error and the scope of structural errors not requiring a harmless error analysis are well established in this court's cases, as discussed below. No, the Legislature cannot legislate to the contrary. The only surprise here is that the question can be seriously asked.

After the progressive movement swept into power in California, the Legislature proposed "a quite extraordinary array of more than 20 proposed constitutional amendments," including among others women's suffrage, the initiative and referendum, and the constitutional harmless error rule, initially limited to criminal cases. (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1040–1041 & fn. 7.) The people voted on the amendments in a special election on October 10, 1911. (*Ibid.*) Senate Constitutional Amendment 26 proposed to add section 4½ to article VI of the Constitution:

> "Section 4½. No Judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or

> for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The Secretary of State published an early version of what is now called a voter information guide. (See Proposed Amends. to the Const. of the State of Cal., with Legis. Reasons for and against Adoption Thereof, Special Statewide Elec. (Oct. 10, 1911), available at UC Law SF Scholarship Repository, <https://repository.uclawsf.edu/ca_ballot_props/24/> [as of Aug. 8, 2025].) The image at that repository is difficult to read, so we have included a transcript in the Appendix to this brief. Unfortunately, a few passages are illegible. The guide included arguments written by members of the Legislature. There are arguments for and against many of the measures, but for this one there are only two arguments in favor. That is evidently because no member of the Legislature was opposed. The bill to put the measure on the ballot passed both houses unanimously. (See Argument of Sen. Boynton, Appendix.)

The harmless error amendment passed by a landslide. The vote was 75% to 25%. (Ballotpedia, California 1911 Ballot Propositions, <https://ballotpedia.org/California_1911_ballot_propositions>.)

Early 20th-century progressives understood that the progress of society requires an effective criminal justice system. For criminals to escape justice on grounds that do not actually cause an unfair trial or raise genuine doubts about their guilt is deeply corrosive to society. "The reversal of the just conviction of a guilty man upon purely technical points is the prime cause of want of confidence in our courts." (Argument of Sen. Boynton, Appendix.)

Reversal for minor error also diminishes the deterrent force of the criminal law. "Criminals knowing that one of the most

fruitful sources of escape from the clutches of the law has been cut off [by enactment of the proposed amendment], would hesitate before committing crime." (Argument of Sen. Boynton, Appendix.)

In addition, a strict rule of reversal for any error coupled with the fact that only the defendant can appeal tends to skew the trial judge's decisions. "Every judge knows that a new trial always means great expense and generally ends in an acquittal. They are, therefore, compelled, in order to save some justice for the people, to rule almost every point unfairly against the people and in favor of the accused." (Argument of Sen. Birdsall, Appendix.)

The advocates naturally cited some exceptionally trivial errors that had been deemed grounds for reversal, such as an indictment misspelling the word "larceny." (*Ibid*., citing *People v. St. Clair* (1880) 56 Cal. 406.) That does not mean that the amendment is limited to such trivia. It "is designed to render it impossible for the higher courts to reverse the judgments of our trial courts in criminal cases for unimportant errors." (Argument of Sen. Birdsall, Appendix.) "[I]ts purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors." (Argument of Sen. Boynton, Appendix.) That is a broader standard, and the appellate courts were expressly authorized to examine the evidence to make the determination, eliminating a prior objection based on jurisdiction. (*Ibid*.)

This court addressed the meaning of the new amendment just a year and a half after enactment in *People v. O'Bryan* (1913) 165 Cal. 55. Although *O'Bryan* is a split decision, this court has relied on the lead opinion many times. (See, e.g., *People v. Watson* (1956) 46 Cal.2d 818, 835; *People v. Cahill* (1993) 5 Cal.4th 478, 491; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.)

O'Bryan noted that the phrase "miscarriage of justice" "is a general one and has not as yet acquired a precise meaning." (165 Cal. at p. 64.) The opinion noted that the English courts, where a similar rule had been enacted four years before California's, had not given it a precise meaning but proceeded case by case. (*Id.* at p. 65.) It noted the similar practice of the U.S. Supreme Court in defining "due process of law" by " 'the gradual process of judicial inclusion and exclusion.' " (*Ibid.*, citing *Davidson v. New Orleans* (1878) 96 U.S. 97, 104.)

Even so, *O'Bryan* was able to mark out some boundaries. First, the section

> "must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted." (*Ibid.*)

Second, *O'Bryan* anticipated the structural error rule, noting that some violations constitute real injury no matter how clearly guilty the defendant is. Jury trial and double jeopardy are noted as examples. (*Id.* at pp. 65–66.) While the term "structural error" has been adopted more recently (see *In re Christopher L.* (2022) 12 Cal.5th 1063, 1074), the basic concept has been part of the interpretation of the state constitutional provision from the beginning.

Third, *O'Bryan* noted that "[t]he mere fact that the assignment of error is based upon a provision of the constitution is not conclusive." (165 Cal. at p. 66.) This conclusion was essential to the case before the court. The defendant had been brought before the grand jury and questioned without warning. Introduction of his answers in evidence was deemed a violation of the state

constitutional privilege against self-incrimination. (*Id*. at pp. 60–61.) The relevant facts were also proved by other, unchallenged evidence. Consequently, "we should certainly not be justified in forming or expressing the opinion that the admission of this testimony had resulted in a miscarriage of justice." (*Id*. at p. 67.) This holding of *O'Bryan* was among the cases listed as "no longer the law in this state" in *People v. Sharer* (1964) 61 Cal.2d 869, 872, but it would be back in *Cahill*.

For criminal cases, the constitutional provision has not materially changed since *O'Bryan*. It was expanded to civil cases in 1914 and renumbered with wording changes as section 13 in 1966. (See *People v. Cahill*, 5 Cal.4th at p. 527 (dis. opn. of Mosk, J).) The Revision Commission's only comment was "Section 13 is a restatement of existing Section 4½ without change in meaning." (California Constitution Revision Commission, Proposed Revision of Article III, Article IV, Article V, Article VI, Article VII, Article VIII, Article XXIV of the California Constitution (1966) p. 92.)

After four decades of experience with section 4½ and various formulations laid down in various cases, this court established the general rule that remains today. "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, 46 Cal.2d at p. 836.) *Watson* did not, however, change the holding of *O'Bryan* regarding the category now known as structural error. (See *People v. Cahill*, 5 Cal.4th at p. 493, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309–310.)

Whether a given error of state law falls within the very limited category of errors reversible per se or the much broader category of errors subject to the *Watson* standard is a matter of interpretation of the California Constitution. Reconsidering the

classification of admission of a coerced confession as reversible per se, *Cahill* held that "the California decisions in question lost sight of the principal purpose and significance of the 1911 enactment of California's constitutional provision explicitly addressing the matter of reversible error." (*Id.* at p. 503.) It is undoubtedly true that a confession is such powerful evidence that wrongful admission of one will almost always be prejudicial error under the *Watson* standard, but that is not good enough to dispense with the analysis. "[T]he California constitutional reversible-error provision was adopted for the specific purpose of eliminating just such a prophylactic approach to reversible error." (*Ibid.*) Can the Legislature enact a statute contrary to the specific purpose of the constitutional provision? Of course not.

Cahill clearly establishes that the choice between the *Watson* standard and reversibility *per se* (or any other standard more stringent than *Watson*) is a matter of interpretation of the constitutional provision. Subsequent cases are consistent with that conclusion. *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108, notes both the general rule and the "structural defect" exception as coming from article VI, section 13. (Accord, *TriCoast Builders, Inc. v. Fonnegra* (2024) 15 Cal.5th 766, 786.)

Whether an error is structural or subject to the usual standard does not depend on how important the underlying right is. The right of a criminal defendant not to be convicted on the basis of a coerced confession, at issue in *Fulminante* and *Cahill*, is surely among the most important rights in constitutional criminal procedure. The test instead is whether the nature of the error precludes a determination of how the trial would have been resolved without it. (*TriCoast Builders, Inc.*, 15 Cal.5th at p. 786.)

In re Dezi C. (2024) 16 Cal.5th 1112 is an unusual case involving a family law proceeding and a California statute intertwined with a federal one, the Indian Child Welfare Act. The

court held that an insufficient inquiry into whether a child had Indian ancestry "renders it impossible to review for prejudice the trial court's implied finding that ICWA does not apply." (*Id*. at p. 1137.) The court decided on a conditional reversal rule whereby the juvenile court could reinstate its judgment after the needed inquiry had been made and ICWA has been actually found not to apply. (*Id*. at p. 1152.)

The *Desi C.* court rejected the dissent's assertion that it was finding a structural error. "To the contrary, our holding today is premised on the fact that when an inquiry is inadequate, the record is insufficient to determine whether the error is harmless under *Watson*." (*Id*. at p. 1137, fn. 11.) There is no substantial discussion of article VI, section 13, despite the court of appeal's and the dissent's reliance on that section. (See *id*. at p. 1127; *id*. at p. 1156 (dis. opn. of Groban, J.).)

Given the majority's holding that a *Watson* determination was not possible, *Dezi C.* is not a holding that a statute can trump the constitutional provision. As the majority noted, limited remands have been used in other situations where the appellate record was insufficient to assess prejudice. (*Id*. at p. 1137.) Thus the limited remand situation, in which the original judgment can be reinstated without a full retrial, must be considered a third category, in addition to the errors evaluated under *Watson* and structural errors. This category does not create the evil that section 13 was designed to prevent, and it is not pertinent to the present cases.

In summary, under long established precedents, the California Constitution forbids reversal in the absence of prejudice as determined under the *Watson* standard except in cases of structural error and a few other situations where it is not possible to apply the *Watson* standard. The interpretation of the constitutional provision "falls within the *judicial* power, not the *legisla-*

tive power." (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 565.) The Legislature cannot legislate a reversibility rule that conflicts with the constitutional provision as this court has interpreted it.

II. To the extent that Penal Code § 745 contradicts the constitutional harmless error rule, it is unconstitutional.

A. The Racial Justice Act and Its Difficulties.

In 2020, the California Legislature enacted a problematic statute raising many interpretive and constitutional issues. The law is titled the Racial Justice Act, even though its overall effect will likely be the obstruction of justice in many cases. Its provisions range from those that are clearly unconstitutional, see Parts II.B. and III, *infra*, to those that might be salvaged if given a saving construction, discussed below, to those that are constitutional but will impose a staggering burden on an already underfunded criminal justice system. (See Pen. Code, § 745, subd. (d).)[1]

Section 745 begins, in subdivision (a), by proclaiming that "[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." That is a noble sentiment, but unfortunately it is all downhill from there.

Subdivisions (a)(3) and (a)(4), if interpreted broadly, will provide immunity against enforcement of criminal statutes to all members of a particular ethnic group if a showing can be made that prosecution rates under those statutes are not uniform across groups among people "similarly situated," and a court finds

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1. All subsequent section references are to the Penal Code, unless otherwise stated. Subdivision references are to section 745, unless otherwise stated.

that the ensuing battle of the experts tips ever so slightly in the defendant's favor. (Subd. (c)(2).) Given the great difficulties involved in proving these matters (see Scheidegger, Rebutting the Myths About Race and the Death Penalty (2012) 10 Ohio St. J. Crim. L. 147, 150–152), it is entirely possible that such a finding could be made without any real racial discrimination being involved. Upon that finding, every member of the affected group would have a defense to prosecution, while people of other groups would continue to go to prison for the same crime. That would, of course, be a blatant violation of the Equal Protection Clause of the Fourteenth Amendment, as well as a fresh violation of subdivisions (a)(3) and (a)(4) compelled by the act itself.

Subdivision (a)(2) forbids "racially discriminatory language . . . whether or not purposeful." But implicit bias is often in the ear of the beholder, and there are no markers to assure people that innocent and unbiased things they say today will not be branded as implicit bias tomorrow. An impossibly vague law that fails to give fair notice as to what is prohibited and *ex post facto* changes in what is considered proper raise serious questions as to whether the act violates the people's right to due process of law. (Cal. Const., art. I, § 29.)

Subdivision (h)(4) defines "racially discriminatory language" as "language that, to an objective observer, explicitly or implicitly appeals to racial bias." It does not account for the obvious reality that objective observers can disagree. In the present case, the defendant claims that "hardcore gang member" is racially discriminatory language, although the Attorney General explains why it is not. (Third Supp. Resp. Brief 9–15.) This is a commonly used and accurate description of a person who is committed to the gang, as opposed to a loosely attached, peripheral member, yet there are now efforts to brand it as a slur, and they have to be litigated.

But it gets worse. Subdivision (h)(4) goes on to include "language that compares the defendant to an animal." If this means *any* animal analogy, regardless of whether it has any racially discriminatory import or not, its retroactive application to deprive the people of their judgment based on language that was proper at the time raises a serious due process question.

Animal stories have been used to illustrate human behavior and character at least as far back as Aesop's Fables. While animal references certainly are used in a racially derogatory manner at some times by some people, a blanket assertion that all such references are "racially discriminatory language" is preposterous on its face. The Legislature can certainly enact a *prospective* ban as a prophylactic rule if it deems that appropriate, but applying such rules retroactively is fundamentally unfair. (See *Johnson v. New Jersey* (1966) 384 U.S. 719, 731 [*Miranda* not retroactive].)

The Bengal tiger story has been approved by this court as a fair prosecutorial argument in a number of cases over many years. (See, e.g., *People v. Duncan* (1991) 53 Cal.3d 955, 976–977; *People v. Spencer* (2018) 5 Cal.5th 642, 688.) It has been used in cases of white defendants (including Spencer) as well as black ones. In society generally, calling someone "Tiger" is often regarded as a compliment, and many sports teams have adopted that name. The golfer regarded by many as the greatest of all time uses that nickname, conferred by his father, rather than his given name. (See Tiger (Eldrick) Woods Biography <https://tigerwoods.com/biography/> [as of Aug. 8, 2025].) Yet the Attorney General throws in the towel, apparently considering subdivision (h)(4) to be an absolute prohibition and not questioning the constitutionality of its retroactive application. (Third Supp. Resp. Brief 20–21.) The People could use a more tiger-like advocate.

These are only a few of the grave problems with this statute. This is background for the question this court invited amici to brief, to which we now turn.

B. Harmless Error.

As discussed in Part I, article VI, section 13 of the California Constitution prevails over any inconsistent statute. Subdivisions (e)(2) and (k) of section 745 are inconsistent, and they are void to that extent. A constitutional doubt may be avoided by interpretation if an alternative realistic interpretation is available, but not when the avoidance requires a strained and distorted interpretation. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1145–1146.) Avoidance is not possible here.

Subdivision (e)(2), on its face, requires reversal upon the finding of any violation. Any possibility of salvaging it through its silence regarding harmless error vanished when subdivision (k) was added. That subdivision, added as part of the retroactivity amendments, attempts to adopt the harmless error standard for federal constitutional violations (*Chapman v. California* (1967) 386 U.S. 18, 24) as the standard for "errors" which are only made erroneous by the retroactive application of the statute. This is emphatically limited to the retroactivity cases ("and only those cases"), and it would make no sense to have a less stringent standard for the prospective cases. So subdivision (e)(2), applied to prospective cases, must indeed be an absolute rule of automatic reversal.

Both rules are squarely in violation of the Constitution, as discussed in Part I. They are unconstitutional. The *Watson* standard applies.

In some cases, the *Watson* standard may take enough edge off of section 745 to avoid its substantive unconstitutionality. In the present case, the Bengal tiger story repeatedly approved by this

court easily meets the standard, and its use avoids, at least for now, the question of whether the retroactive prophylactic rule violates the people's constitutional right to due process of law.

III. Penal Code section 745, subdivision (e)(3) is unconstitutional on its face as an invalid amendment of an initiative statute.

Question 3 of the briefing order asks about the validity of subdivision (e)(3) of section 745 of the Penal Code[2] in relation to harmless errors under that section. There is no need for the qualifier. The subdivision is unconstitutional on its face in all cases. The people of California have specified which murderers are eligible for the death penalty by initiative statute, and article II, section 10, subdivision (c) of the California Constitution forbids the Legislature from altering that specification.

The constitutional limitation on amendment of initiative statutes is not limited to statutes that expressly amend the code sections enacted by initiatives. It has long been established that indirect amendments are invalid as well. (See, e.g., *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 (*Quackenbush*).) "The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " (*Id.* at p. 1484; *People v. Kelly* (2010) 47 Cal.4th 1008, 1025, quoting *Quackenbush*.) "At the same time, despite [this] strict bar ...., [t]he Legislature remains free to address a ' " related but distinct area." ' " (*Kelly* at p. 1025.) The essence of the present question is whether a statute that exempts

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2. As in the previous part, further section references are to the Penal Code unless otherwise specified, and subdivision references are to section 745 unless otherwise specified.

murderers from the death penalty despite their eligibility for it under an initiative statute is legislating in a "distinct area" or "tak[es] away from" the initiative. (See *Kelly* at p. 1027.)

Subdivision (e)(3) of section 745 takes away from Proposition 7 of 1978. Section 190, subdivision (a) provides that the penalty for first-degree murder is one of three choices: death, life without parole, or 25-to-life. The choice among the three is to be determined under sections 190.1, 190.2, 190.3, 190.4, and 190.5. Section 190.2, subdivision (a) narrows the choices to death and life without parole if a special circumstance is found. Section 190.3 provides the manner of choosing between those two. Section 190.5 carves out an exception for juveniles. Before section 745, the only other statutory exception not enacted by initiative was section 1376 on intellectual disability, but this section only implements a federal constitutional limitation that overrides the initiative statute anyway. (See Cal. Stats. 2020, ch. 331, § 1; *Atkins v. Virginia* (2002) 536 U. S. 304, 316.) Now section 745, subdivision (e)(3) purports to exclude certain murderers from capital punishment despite their inclusion by the initiative statute, in some cases for *ex post facto* "errors" that were entirely proper under precedents of this court at the time of the trial. (See *supra* at p. 19.) That is "taking away" by any reasonable understanding of that term, and the precedents on amendment of initiatives affirm that conclusion.

Kelly, at pages 1025 to 1027, noted various formulations of what is and is not an amendment, one of which is "matter that an initiative measure 'does not specifically authorize *or* prohibit.' " (*Kelly*, 47 Cal.4th at pp. 1025–1026, quoting *People v. Cooper* (2002) 27 Cal.4th 38, 47.) However, *Kelly* itself demonstrates that "specifically" cannot be taken literally. The protection against the Legislature undoing what the people have done "would be 'of little worth if it can be evaded by so simple a device' " (*Quackenbush*,

64 Cal.App.4th at p. 1487), i.e., if the Legislature could undermine the effect of an initiative through a mechanism not mentioned in the initiative but contrary to its purpose.

Kelly involved a medical marijuana initiative called the Compassionate Use Act (CUA) and a subsequent legislative statute called the Medical Marijuana Program (MMP). (*Kelly*, 47 Cal.4th at p. 1012.) The initiative simply authorized possession for medical purposes on the recommendation of a physician. It said nothing at all about amounts possessed. It was judicially construed to authorize an amount reasonably related to the patient's medical needs (*id.* at p. 1013), but it did not require the physician's recommendation to specify an amount.

While the initiative only provided an affirmative defense in the event of prosecution, the legislative statute provided protection against arrest. (*Id.* at p. 1014.) However, the legislative statute also capped possession generally at eight ounces of dried marijuana or a larger amount with a doctor's recommendation that it was needed. (*Id.* at 1016.) The MMP statute "thereby burden[ed] a defense that might otherwise be advanced by persons protected by the CUA." (*Id.* at p. 1017.)

Nothing in the CUA specifically prohibited a requirement that a person who needs an unusually large amount get a doctor's recommendation to that effect. Yet the requirement's burden on the right to possession granted by the CUA was enough to make it an amendment within the meaning of section 10(c). (See *Kelly*, 47 Cal.4th at pp. 1043–1044 & fn. 60.) The requirement "takes away" from what the CUA had established, and that is enough. (*Id.* at p. 1044, fn. 60.) In the same sense, subdivision (e)(3) takes away from the capital punishment initiative by excluding murderers that the initiative includes, as discussed *supra*, and it is therefore an amendment within the meaning section 10(c) as construed and applied by *Kelly*.

Subdivision (e)(3) is also an amendment because it changes the decision-maker for the choice between death and life without parole. In *Quackenbush*, an initiative had vested decisions about insurance rates in an elected Insurance Commissioner. A subsequent statute imposed a formula. The statute " 'takes away' from the provisions of Proposition 103, which vest ratemaking determinations with the Commissioner," and hence it was an invalid amendment. (*Quackenbush*, 64 Cal.App.4th at p. 1486.) In the present case, the initiative statute vests the choice between the two punishments in the jury trying the penalty phase of the murder case, but the legislative statute vests it in the judge or appellate court hearing the section 745 claim. This is an amendment under *Quackenbush*.

The cases holding that challenged legislative statutes were not amendments of initiatives are different in kind. *People v. Cooper* (2002) 27 Cal.4th 38, 41–42 involved an initiative that increased sentences for first and second degree murder, but mitigated that increase somewhat by authorizing credit under an existing article of the Penal Code to advance the minimum eligible parole date. The pre-existing statutes the initiative referred to only allowed postsentence credits and did not address presentence credits at all. The Legislature therefore retained the authority to limit application of a presentence credit statute located in a different article not mentioned in the initiative. (*Id*. at pp. 45–47.)[3] Most relevant to the present case, the legislative statute in *Cooper* did not interfere with the intent of the initiative to allow those convicted of murder (other than first degree with special circumstances) to be eligible for parole in two-thirds of the

3. Eliminating postsentence credits for murderers did require a vote of the people, a vote that happened two weeks after Cooper's crime and was not retroactive. (*Id*. at p. 40, fn. 2; Pen. Code, §§ 190, subd. (e), 2933.2.)

nominal minimum time. (See *ibid.*) In the present case, by contrast, subdivision (e)(3) does interfere with the central purpose of the initiative to define the class of murderers subject to capital punishment.

People v. Superior Court (Pearson) (2010) 48 Cal.4th 564 is similar. An initiative statute is the exclusive authority for discovery "in criminal cases." (*Id.* at p. 567.) It only provides for pretrial discovery, and the court declined to construe it to implicitly prohibit posttrial discovery. (*Id.* at pp. 570–571.) A habeas corpus petition collaterally attacking the judgment "has long been considered a separate matter from the criminal case itself." (*Id.* at p. 572.) The initiative statute was a regulation of criminal trials, and it was neither intended to nor suited to regulate postjudgment matters. (*Ibid.*)

Cooper and *Pearson* are prime examples of a legislative statute regulating a related but distinct matter. In neither case was any goal of the initiative impaired. The initiative statutes continued to have the same effect as they did at the time they were enacted, authorizing postjudgment credits in *Cooper* and regulating trial discovery in *Pearson*. The present case is just the opposite. The initiative's central purpose was to expand the scope of murderers eligible for capital punishment. (See Voter Information Guide, Gen. Elec. (Nov. 7, 1978), argument in favor of Proposition 7, p. 33.) Now the Legislature seeks to carve out exceptions on the basis of events at the first trial that have nothing whatever to do with the existence of special circumstances or the balance of aggravating and mitigating circumstance of the crime that are supposed to determine the punishment. (See Pen. Code, §§ 190.2, 190.3.) The Legislature cannot do that.

A number of court of appeal decisions addressed whether Senate Bill 1437 of 2018 invalidly amended Proposition 7 of 1978 or Proposition 115 of 1990. (See, e.g., *People v. Superior Court*

(Gooden) (2019) 42 Cal.App.5th 270, 274 (2019) (*Gooden*).) The bill was enacted "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Id*. at p. 275, quoting Stats. 2018, ch. 1015, § 1, subd. (f).)[4]

For Proposition 7, the case was straightforward. That initiative dealt only with the punishment for murder and did not address the elements of the crime at all. (*Gooden*, 42 Cal.App.5th at pp. 281–282.) The definition of the crime and the specification of the punishment are related but distinct. (*Id*. at p. 282.) Proposition 115 presented a somewhat closer call in that it did address degrees of murder, amending section 189 of the Penal Code to add to the list of crimes for first degree felony murder. (*Id*. at p. 287.) Even so, SB 1437 did not take away from that list but instead addressed the mental state. This is a distinct subject, which no party challenged. The court rejected an argument that a change to a different provision of the same section is an amendment. (*Id*. at pp. 288–289.)

This court addressed a similar issue and came to the same conclusion in *People v. Rojas* (2023) 15 Cal.5th 561, 577, citing *Gooden*. In *Rojas*, an initiative increasing penalties for gang activity did not define or lock in the existing definition of "criminal street gang," so that issue remained open for legislative amendment. (*Id*. at p. 575.) *Rojas* and *Gooden* turn on the "distinction between the electorate's focus on punishment and the Legislature's focus on the substantive elements of the offense."

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4. This standard follows the constitutional limit for capital punishment for felony-murder accomplices. (See *Tison v. Arizona* (1987) 481 U.S. 137, 158.) It was codified in California's capital punishment law by Proposition 115. (See Pen. Code, § 190.2, subd. (d).)

(*Id*. at p. 577.) *Rojas* emphasized that the crime in question was still subject to the same punishment provided by the initiative. (*Id*. at p. 578.) This is a sharp contrast with the present case, where the initiative and the subdivision of the legislative statute in question both deal solely with punishment and neither says anything about the elements of the offenses. They deal with the same topic in opposite ways, not related but distinct topics.

Subdivision (e)(3) of section 745, in all applications and regardless of the harmlessness or harmfulness of the error, is an amendment of statutes enacted in Proposition 7 of 1978, as amendment is defined in the precedents interpreting article II, section 10, subdivision (c) of the California Constitution. The subdivision is void on its face, regardless of the harmlessness or harmfulness of the underlying error. A murderer who was eligible for the death penalty before a finding of section 745 error remains eligible after the finding.

IV. Assembly Bill 1071, if chaptered, will not change any of the foregoing conclusions.

As of the due date of this brief, Assembly Bill 1071 has been enrolled but not yet signed into law. If enacted, the bill will not change any of the conclusions in the preceding parts of this brief. The bill reaffirms the Legislature's intent to contradict the California Constitution's harmless error rule (see Assem. Bill No. 1071 (2025–2026 Reg. Sess.) § 1, subd. (e)), but it does not and cannot authorize that unconstitutional legislation, as explained in Part II.B, *supra*.

The bill endorses the view of a dissenting opinion that racial discrimination is permissible if it is couched in terms of a remedy for past discrimination (see *id*., § 1, subd. (f), citing *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) 600 U.S. 181, 408 (dis. opn. of Jackson, J.)), thereby en-

dorsing measures that binding precedent holds to be a violation of the Fourteenth Amendment. This reinforces the discussion of section 745's constitutional difficulties in Part II.A, *supra*.

The bill would move the prohibition of the death penalty from subdivision (e)(3) of section 745 to new subdivision (l). (Assem. Bill No. 1071 (2025–2026 Reg. Sess.) §§ 2, 2.5.) The explanation is that "this bill clarifies that the prohibition on death sentences for cases in which an RJA violation occurs is categorical, and not a remedy in itself." (*Id*., § 1, subd. (e).) If that move changes anything, it is only to reinforce the conclusion that this provision is indeed an amendment of an initiative statute in violation of article II, section 10, subdivision (c) of the California Constitution, as explained in Part III, *supra*.

Assembly Bill 1071 will therefore change nothing of significance if the Governor does sign it.

CONCLUSION

Upon a finding of error under section 745 of the Penal Code, the remedies in subdivision (e)(2) are subject to the harmless error rule of article VI, section 13 of the California Constitution. Existing subdivision (e)(3) (or new subdivision (l)) is unconstitutional and void in all cases.

Date: September 25, 2025

Respectfully Submitted,

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APPENDIX

The following is a transcription of the pertinent part of Proposed Amendments to the Constitution of the State of California with Legislative Reasons for and Against the Adoption Thereof of to Be Voted Upon at a Special Election to Be Held on Tuesday, the Tenth Day of October, A.D. 1911, available at UC Law SF Scholarship Repository, https://repository.uclawsf.edu/ca_ballot_props/24/.

9. SENATE CONSTITUTIONAL AMENDMENT NO. 26.

CHAPTER 36.—Senate Constitutional Amendment No. 26, a resolution to propose to the people of the State of California an amendment to the constitution of State of California, by adding a new section to article VI thereof, to be numbered section 4½, relating to appeals in criminal cases.

The legislature of the State of California, at its regular session commencing on the 2nd day of January, in the year one thousand nine hundred and eleven, two thirds of all the members elected to each of the two houses of said legislature voting in favor thereof, hereby proposes to the qualified electors of the State of California the following amendment to the constitution of the State of California by adding a new section to article VI thereof, to be numbered section 4½, to read as follows:

Section 4½. No Judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

REASONS WHY SENATE CONSTITUTIONAL AMENDMENT NO. 26 SHOULD BE ADOPTED.

The object of this amendment is to enable our courts of last resort to sustain verdicts in criminal cases unless there has been a miscarriage of justice, or, putting it in another way, its purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through technicalities. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the [illegible] necessity for this amendment lies [illegible] the courts of appeal and the [illegible] supreme court jurisdiction, in criminal cases on appeal, on questions of law only. The reviewing power does not extend to questions of fact. In order to enable the higher courts to determine whether the errors committed by the trial court resulted in a miscarriage of justice, they must have the power to review the facts of the particular case.

The American Bar Association has endorsed a proposed congressional enactment governing procedure in federal courts, which is practically the same as our proposed constitutional amendment, except that it would apply to civil as well as criminal cases. One of the branches of congress has already acted favorably upon such a bill. As was pointed out by Judge Curtis H. Lindley of San Francisco, in a recent address, the adjective branch of our law has not kept pace with the development of substantive law. The trial of a criminal is so hedged about with technicalities that it has grown almost impossible to convict one whose wealth is sufficient to enable him to employ counsel skilled in the technique of criminal law. Thus there has grown up two systems of law—one for the poor, the other for the rich. The

pauper prisoner is subjected to the iniquities of the "third degree" to secure from him incriminating evidence, while the wealthy one is surrounded by a corps of defenders, whose skill in barricading their client behind technicalities is usually commensurate with the fees secured.

At the present time a trial judge is virtually nothing more than a referee. He exists merely for the purpose of seeing that the contending counsel play the game according to technical rules, and like any contest of skill, victory comes to the advocate who is the best player. The duty of the trial judge is to proceed with the cause; he has no time to investigate numerous points of detail, and, naturally, during the course of a long trial he falls into some small error of procedure. When the appellate court at its leisure, and with the aid of partisan counsel, ferrets out the error, the case is reversed. Under the present conditions lawyers try their cases not so much on their actual merits, as to force technical errors in to the record. The reversal of the just conviction of a guilty man upon purely technical points is the prime cause of want of confidence in our courts. This want of confidence often results in mob violence on the part of a long suffering and outraged public. When a peculiarly atrocious crime has been committed, the people have more faith in their own ability to cope with the situation, than in leaving it to the courts, to either reverse a conviction on appeal, or delay execution so long that punishment is no longer a deterrent. In the English colonies not one criminal in the last seventy-five years has been snatched from the hands of the law. We have long since passed the day when it was possible to convict an innocent man; the problem which confronts us to-day is whether we can convict a guilty one. The absurd lengths to which courts have gone in the reversal of cases for immaterial errors is shown by the recital of a few examples:

In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased "instantly died" instead of charging according to the ancient formula that he "'did then and there die." In a Texas case the elimination of the letter "r" from the word "first" saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being.

Under the present system the expense of trying criminals is largely in excess of what it should be. This results from the frequent appeals and reversals of the decisions of the trial courts, and because of the great length of the record due to the unnecessary and superfluous rulings which the trial judge is forced to make against the people and in favor of the accused, in his endeavor not to commit error that can be made the subject of appeal. It is always the chief aim of the attorneys for the defense to "get error into the record" for the sole purpose of securing a new trial or reversal on appeal. This fosters a spirit of contention in the trial of criminal cases, which draws the mind of the jury from the real issues. The adoption of the proposed constitutional amendment would remove these defects by eliminating the cause of frequent appeals. It would allow the appellate court to look at the facts of the particular case unhampered by any presumption or fiction, to see whether or not the accused was unjustly convicted. Justice, and not the means of securing it, would be the object of investigation in such appeal. Judges would be enabled to rule impartially on points presented, secure in the knowledge that any immaterial errors not affecting the cause would be disregarded on appeal. By enabling the appellate court to reverse a case only when injustice has been done by the verdict, a common-sense basis of appeal would be established and public confidence restored. Criminals knowing that one of the most fruitful sources of escape from the clutches of the law has been cut off,

would hesitate before committing crime. The increase of crime would thus be checked, the number of appeals would be greatly reduced, the expense of trying cases would be greatly lessened, the culprits would be punished swiftly and with certainty. Similar legislation has already been adopted in New York, Wisconsin, and Oklahoma.

The proposed constitutional amendment was unanimously adopted by the California legislature. If it is adopted by the people it will go far toward improving our system of criminal procedure.

A. E. BOYNTON, Senator, 6th District.

This amendment, commonly called the Boynton amendment, is designed to render it impossible for the higher courts to reverse the judgments of our trial courts in criminal cases for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through the technicalities of the law. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the error has resulted in a miscarriage of justice. The rule in California in the past has been that an error, committed in the course of the trial, must be presumed to have been prejudicial and a new trial must be granted, it matters not how guilty the party may be, and oftentimes when the result would have been exactly the same if the error had not been committed.

This amendment would permit a new trial only when the error itself results in a miscarriage of justice. The supreme court has held in 21 Cal. 344 that it is a fatal omission to fail to state in an indictment for robbery that the property taken is *not* the property of the person charged, although the very word "robbery" itself conclusively implies this. In 56 Cal. 406 a conviction was set aside because the letter "n" was accidentally omitted from the

word "larceny," though it is probable that no person in the wide world could have had any doubt as to the word intended. In 137 Cal. 590 a conviction for murder was set aside because the indictment failed to state that the man killed was a human being. In 62 Cal. 309 a conviction of murder was reversed because the trial court permitted a surgeon who had examined the wounds to testify as to the probable position of the deceased when the fatal shot was fired. This was in line with the doctrine announced in 47 Cal. 114 that "every error in the admission of testimony is presumed to be injurious, unless the contrary clearly appears." Trial judges of long experience declare that it is almost wholly beyond human skill for the most able and conscientious judge, in the course of a long and busy trial extending over days or weeks, to avoid trifling inaccuracies now and then in the thousand and one rulings that they are compelled to make on the spur of the moment.

The object of the amendment is to cure all such inaccuracies, and compel decisions in accord with the actual justice of each particular case. The greatest injury arising from the present system is not the technical reversals, but it is the constant burden under which trial courts labor, by reason of the technical rule above stated. Every judge knows that a new trial always means great expense and generally ends in an acquittal. They are, therefore, compelled, in order to save some justice for the people, to rule almost every point unfairly against the people and in favor of the accused.

This amendment would be a great help in the administration of the law by enabling judges to rule as freely in behalf of one side as the other, and in its fairness to stop the growing impression that our judicial decisions are based on technicalities, and not in justice.

E. S. BIRDSALL, Senator, 3d District.

CERTIFICATE OF COMPLIANCE

**Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)**

I, Kent S. Scheidegger, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** contains 6329 words, excluding the items listed in Rule 8.520(c)(3), as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: September 25, 2025

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

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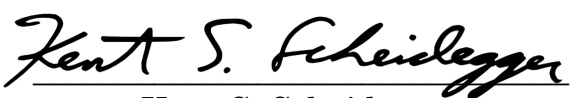
In addition, I sent a copy via U.S. mail to:

David Slayton, Clerk of Court
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

Executed on September 25, 2025, Sacramento, California.



Kent S. Scheidegger