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 SECOND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

KENT S. SCHEIDEGGER
State Bar No. 105178
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345
Fax: (916) 446-1194
Email: Kent.Scheidegger@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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.

APPLICATION FOR PERMISSION TO FILE SECOND 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 pursuant to rule 8.520(f) of the California Rules of Court in response to the court's supplemental briefing order of October 22, 2025.[1]

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

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1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

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

Because the amicus briefs and the parties' briefs are due on the same day, this portion of the application must necessarily be based on what we expect the parties to say based on their prior briefing. The Attorney General will likely continue defending the constitutionality of the statute in question even though it impairs 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 advocate willing to do so. Further argument is therefore needed.

Date: November 17, 2025

Respectfully Submitted,

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

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On October 22, 2025, this court ordered additional briefing on the effect of Statutes of 2025, chapter 721 (AB 1071) on the issues in this case. For the reasons that follow, this statute reinforces the conclusions in CJLF's previous brief.

I. AB 1071 makes the unconstitutional amendment of the death penalty law even more evident.

A. Categorical, Not Remedial.

AB 1071 makes the unconstitutionality of section 745's death penalty exclusion even more clear than it was before. In our previous brief, *Amicus* CJLF showed how the categorical exclusion of the death penalty on retrial was an amendment of the death penalty initiative within the meaning of this court's precedents interpreting article II, section 10, subdivision (c) of the California Constitution. (See [First] Brief *Amicus Curiae* of the Criminal Justice Legal Foundation 21–27 ("First CJLF Brief").) The arguments that former subdivision (e)(3) of section 745 of the Penal Code[2] was a remedy that could somehow be reconciled with the death penalty initiative (see Respondent's Supplemental Brief on Racial Justice Act Remedy Questions in *People v. Bankston*, No. S044739, p. 36; Appellant's Sixth Supplemental Opening Brief in *People v. Barrera*, No. S103358, p. 50) were weak to begin with, but AB 1071 yanks the rug out from under these arguments.

In section 1, subdivision (e), AB 1071 makes the point with unmistakable clarity. "Further, this bill clarifies that the prohibition on death sentences for cases in which an RJA violation

2. Subsequent section references are to the Penal Code unless otherwise indicated.

occurs is categorical, and not a remedy in itself."[3] *Amicus* CJLF could hardly have done better in making our point if we had written this preamble ourselves. Section 2.5 of the bill then makes good on the stated intent by moving the eligibility language out of the remedial subdivision (e) and placing it in a new, stand-alone subdivision (l): "When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty."

Plainly, there is no attempt to make any connection between the attempted redefinition of eligibility for the death penalty on retrial or resentencing and any need to remedy whatever variation there is between the events at a trial held decades ago and the new *ex post facto* rules. Whether that variation was major or trivial, section 745 purports to grant an exemption from deserved punishment.

Can the California Legislature do that? While it is quite true that the Legislature *generally* has plenary legislative authority (*Marine Forests Society v. California Coastal Com*. (2005) 36 Cal.4th 1, 31), in the realm of capital sentencing there are *two* levels of higher law that substantially cramp the Legislature's wiggle room. One is the set of rules micromanaging capital sentencing procedure that the United States Supreme Court has

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3. This statement is followed by the *de rigueur* hyperbole attempting to equate (1) a proportional punishment for horrific crimes imposed with due process of law and extensive review with (2) long-ago atrocities perpetrated by vigilantes and terrorists in violation of the law. This absurd insult to this State, its people, its judiciary, and its law further illustrates the Alice-in-Wonderland quality of section 745 and its amendments. (See also Scheidegger, Rebutting the Myths About Race and the Death Penalty (2012) 10 Ohio St. J. Crim. L. 147 [discussing little-known and underappreciated facts contrary to the prevailing narrative].)

engrafted onto the Eighth Amendment, for better or worse. (See Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism (2019) 17 Ohio St. J. Crim. L. 131, 131–132.) The other is article II, section 10, subdivision (c) of the California Constitution. This provision "protect[s] the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211, internal quotation marks omitted.) The statement in *Marine Forests Society*, *supra*, at page 31 about *specific* limits of the California Constitution therefore requires some qualification. The prohibition against amending initiatives incorporates the limits contained in initiative statutes, and that is quite a broad limit.

B. Structure of Capital Sentencing.

In most of criminal law, the legislative authority of a state has very broad discretion in how to structure the sentencing system. In capital cases, though, the basic framework is set by precedents of the United States Supreme Court, and there is limited variation in the jurisdictions that have capital punishment.

The 1970s saw a chaotic series of cases in which the high court made inconsistent pronouncements on what the United States Constitution requires and what it forbids regarding capital punishment. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 446–449 (conc. opn. of Clark, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 622 (conc. and dis. opn. of White, J.).) The end result, though, is that every jurisdiction with capital punishment must have a two-step process. There is an eligibility decision as to whether the defendant's crime fits within a narrowed subset of murder, and there is a selection decision where a sentencer with discretion makes an individualized determination after consider-

ing mitigating as well as aggravating circumstances. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 971–973.)

The "principle common to both decisions" is to "ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Id.* at p. 973.) California achieves this by defining eligibility as a conviction for murder in the first degree with a finding of a special circumstance, followed by the discretionary selection decision under section 190.3. (*Id.* at p. 975.) The sentencing factors direct the sentencer to "relevant subject matter" (*id.* at p. 978) that parties may argue either aggravate or mitigate the defendant's culpability for the crime.

In addition to the factors considered in the sentencer's discretion, there are also categorical exclusions established by statute, case law, or both. The categorical exclusions have, up to now, involved mitigating factors deemed to be so powerful that by themselves they require a sentence less than death no matter how powerful the aggravating factors might be. The first of these is age. California law has excluded minors under 18 from the death penalty throughout the modern era. (See 2 Witkin, California Crimes (1st ed. 1963) § 1027, p. 973; Pen. Code, § 190.5, subd. (a).) This limitation became a constitutional exclusion in *Roper v. Simmons* (2005) 543 U.S. 551. The holding was squarely based on culpability, finding that "juvenile offenders cannot with reliability be classified among the worst offenders." (*Id.* at p. 569.)

The second exclusion was mental retardation, subsequently renamed intellectual disability. This exclusion came in case law first, with the statute following. (See *Atkins v. Virginia* (2002) 536 U.S. 304; Pen. Code, § 1376, enacted Stats. 2003, ch. 700, § 1.) As with juveniles, the categorical exclusion was grounded solidly on characteristics of persons with intellectual disability which "diminish their personal culpability." (*Atkins*, at p. 318.)

A categorical exclusion which has nothing whatever to do with "any aspect of a defendant's character or record [or] any of the circumstances of the offense" (cf. *Lockett v. Ohio*, *supra*, 538 U.S. at p. 604 (plur. opn. of Burger, C.J.)) does not fit easily into this structure. This court has repeatedly upheld the factors weighed by the jury under section 190.3 against constitutional attack because they are *not* " 'extraneous factors having no rational bearing on the appropriateness of the penalty.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 564, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 990.) An error at the defendant's first trial—even one that actually was error under the law at the time—is relevant to neither the defendant's character nor his record nor the circumstances of the crime. A statement by one of the actors at the trial that was perfectly proper under the law at the time and rendered "erroneous" *ex post facto* by legislation is even more absurd as the basis for such immunity. (See First CJLF Brief 19.) Decision of whether a defendant is eligible for the death penalty through the actions of other people outside his control is essentially random selection, the ultimate arbitrariness.

Whether the existence of a categorical exclusion of this type is unconstitutional would be a question of first impression, as it does not appear that any legislature has had the audacity to create such an exclusion before. That difficult federal constitutional question can be avoided by a more straightforward state constitutional route, which we discuss in the next section.

C. The RJA Exclusion.

The RJA's categorical exclusion is, in the famous words of Monty Python, "something completely different." Subdivision (l) of section 745 would now hand a serial killer a Get Off Death Row Free card because any one of the many actors in the trial (see § 745, subd. (a)(1)) innocently stepped on a well-concealed verbal

land mine and was tagged with a scarlet "R" for "racist" under the *ex post facto* rules of section 745. (See § 745, subd. (c)(3) [intent not required]; First CJLF Brief 19 [analogy expressly and repeatedly upheld as proper by this court now deemed a violation].) As discussed in Part I.A, *supra*, AB 1071 eliminates any argument that this is a remedy and not a categorical exclusion.

As previously explained, when an act of the Legislature is challenged as an unconstitutional amendment of an initiative, the key question is whether the new act "takes away from the initiative" or is legislating in a "distinct area." (First CJLF Brief 19.) By clarifying that the death penalty exclusion is a categorical exception from eligibility and not a remedy, AB 1071 makes even more clear that section 745 takes away from the death penalty initiative.

Beyond genuine debate, a central purpose of the Briggs Initiative was to expand the class of murder defendants who were eligible for the death penalty. The proponents criticized the prior law as "weak and ineffective," and the following paragraphs supporting that claim all dealt with eligibility for the penalty. (Voter Information Guide, Gen. Elec. (Nov. 7, 1978) argument in favor of Proposition 7, p. 34 ("1978 Voter Guide").) The text of the initiative also makes this clear.

> "The 1978 Briggs Initiative expanded the circumstances under which an accused would be eligible for a sentence of death or life without the possibility of parole.... The initiative added several special circumstances to section 190.2 ..., expanded the list of felonies subject to the 'felony-murder' special circumstance, and deleted the requirement that a felony murder be willful, deliberate, and premeditated.... For the most part, these additions broadened the class of persons subject to the most severe penalties known to our criminal law." (*People v. Weidert* (1985) 39 Cal.3d 836, 844, citations omitted.)

The most controversial question regarding this aspect of the Briggs Initiative was whether it expanded the breadth of eligibility too far. Capital defendants regularly argue that the expansion was so broad that it fails to meet the Eighth Amendment requirements discussion in the previous part, and this court regularly rejects that argument. (See, e.g., *People v. Dunn* (2025) 18 Cal.5th 129, 197.) Calls for narrowing eligibility have long been made as a matter of policy, also. (See, e.g., California Commission on the Fair Administration of Justice, Final Report (2008) 138–142.) Yet the Legislature has not attempted to do so for the obvious reason that it cannot do so without approval of the people, who have voted time after time to strengthen, not weaken, the death penalty.

Cases involving amendment of statutes incorporated or referenced by section 190.2 are not pertinent to this case. Those cases involve an issue of statutory interpretation regarding whether the reference is intended to be to the other statute as it existed at the time of enactment or as it may be amended in the future. (See *People v. Rojas* (2023) 15 Cal.5th 561, 570–574.) That interpretive question is absent here. Cases distinguishing a focus on definition of a crime versus punishment for a crime are also inapposite, as previously explained. (First CJLF Brief 26–27.)

Statutory exclusions are part of the definition of the eligible class. As explained *supra* at page 11, the exclusion of minors is a long-standing feature of California law. This exclusion was retained in the Briggs Initiative (1978 Voter Guide, text of Proposition 7, § 12, p. 46), so it does not raise an issue on the amendment of initiatives.

The other valid exclusion is for intellectual disability. Subdivision (b) of section 1376 of the Penal Code provides, "A person with intellectual disability is ineligible for the death penalty." This exclusion goes no farther than the constitutional require-

ment as interpreted by *Atkins*, 536 U.S. at page 321. Section 1376 therefore does not take away from the initiative death penalty statutes anything that was not already taken away by *Atkins*.

The exclusion now before the court is something completely different. Inescapably, it takes away from the class of murderers eligible for the death penalty under the Briggs Initiative, as amended by subsequent initiatives. It does not do so by changing the definition of a crime defined in a statute enacted by the Legislature and referenced in the initiative. It simply, blatantly carves out a group of murderers made eligible for the maximum punishment by the initiative and declares them ineligible. It partially undoes what the people have done, exactly what article II, section 10, subdivision (c) of the California Constitution was enacted to prevent. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1025; First CJLF Brief 21.)

Subdivision (l) of section 745 is unconstitutional on its face.

II. AB 1071 further clarifies that the reach of the RJA exceeds any plausible definition of structural error and violates article VI, section 13.

Apart from the death penalty exclusion issue, the effects of AB 1071 on the issues in the June 12 supplemental briefing order are tangential. The bill does not amend the operative portions of section 745, i.e., subdivisions (e)(2) and (k). (See First CJLF Brief 20.)

The findings and declarations section of AB 1071, section 1, serves to reaffirm the concerns discussed on pages 17 to 20 of our previous brief. That is, that section 745 declares as "error" matters that have little or nothing to do with racial bias, are not conceivably structural error in the sense of being a miscarriage of justice without regard to prejudicial effect, and are quite likely

unconstitutional in themselves as violations of equal protection, the people's right to due process, or both.

Subdivision (c) of section 1 of AB 1071 disparages as "dehumanizing and othering language" a long list of terms including, among others, "terrorist," "brute," and "gangster." Yet there are many criminal cases in which these terms are the plain, simple truth. Some defendants are, in fact, terrorists. (See, e.g., *United States v. Tsarnaev* (2022) 595 U.S. 302, 306–307 [Boston Marathon bomber].) Many more defendants are, in fact, gangsters, including the defendants in two of the present trio of cases. (See Third Supplemental Respondent's Brief in *People v. Bankston*, No. S044739, p. 12 ["proud and committed Blood"]; *People v. Chhuon* (2021) 11 Cal.5th 1, 12 [" 'shot callers' and 'O.G.s' in the Tiny Rascals Gang"].) "Brute" is an accurate description of defendants in a great many cases of violent crime. For defendant Barrera, that term would be a major understatement. (See Brief for Respondent in *People v. Barrera*, No. S103358, pp. 6–10 [extreme, extended abuse of young children, culminating in murder].)

A truthful description of the defendant, based on his choice to commit atrocious crimes against other people, cannot be deemed a denial of any "essential part of justice" such that it constitutes error without regard to whether it had any effect on the trial. (Cf. *People v. O'Bryan* (1913) 165 Cal. 55, 65.) There is serious question whether it can constitutionally be declared error at all. (See First CJLF Brief 9, 18.)

Nor is actual or fantasized bias in language the kind of error that must be deemed structural because prejudice is impossible to assess. In *Buck v. Davis* (2017) 580 U.S. 100, the claimed federal constitutional error was ineffective assistance of counsel. Relief under this claim requires a finding of prejudice, and the high

court had no difficulty making that assessment. (*Id*. at pp. 119–122.)

AB 1071 therefore reinforces the conclusions of CJLF's previous brief. Section 745, as amended, is unconstitutional to the extent that it attempts to supplant the usual harmless error standard for nonstructural error in article VI, section 13 of the California Constitution, as long interpreted by this court.

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. Subdivision (1) is unconstitutional and void in all cases.

Date: November 17, 2025

Respectfully Submitted,

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

CERTIFICATE OF COMPLIANCE

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

I, Kent S. Scheidegger, hereby certify that the attached **SECOND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** contains 2817 words, excluding the items listed in Rule 8.520(c)(3), as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: November 17, 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 SECOND 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.

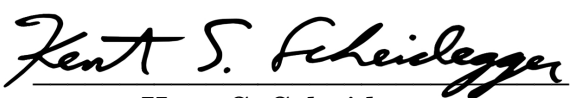
Steven E. Mercer, Deputy Attorney General
300 South Spring Street, Ste. 1702
Los Angeles, CA 90013-1230
Steven.Mercer@doj.ca.gov
Attorney for Respondent

Erik Levin
Supervising Deputy State Public Defender
1111 Broadway, Suite 1000
Oakland, CA 94607
Erik.Levin@ospd.ca.gov
Attorney for Appellant

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 November 17, 2025, Sacramento, California.



Kent S. Scheidegger