AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

May 8, 2024

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *R.D. v. Superior Court of Sacramento County*, No. S284862
Amicus Letter in Support of Petition for Review and Grant and Transfer

Dear Chief Justice Patricia Guerrero and Associate Justices:

The American Civil Liberties Union of Northern California urges this Court to grant review in *R.D. v. Superior Court of Sacramento County*, No. S284862. Review is necessary to provide guidance to lower courts and litigants about a novel and critically important question: What remedies are available for a violation of the California Racial Justice Act of 2020 (RJA)? The answer to that question is central to the effective implementation of this landmark legislation intended to limit racial bias in the criminal legal system. At a minimum, because the Court of Appeal summarily denied the petitioner's writ, this Court should grant the petition and transfer this case to the Court of Appeal for a written opinion.

This case involves a clear and egregious RJA violation. In denying release from custody on electronic monitoring, a judge described the petitioner—a juvenile—as a "serious gang banger" who has "got it in his blood, in his culture" and "can't get it out of his system." The trial court found that this squarely violated the RJA, as it "reflected the potential bias or animus that the Legislature intended to address" through the Act. (See Pen. Code, § 745, subd. (a)(2) [prohibiting, among other things, the use of "racially discriminatory language about the defendant's race"].)[1] Despite finding an RJA violation, however, the court refused to grant *any* remedy. The trial

[1] All undesignated statutory references in this letter are to the Penal Code.

court reasoned that the remedies requested by the petitioner—dismissal or reduction of the charges—were statutorily unavailable, either because they were not expressly enumerated in the statute (in the case of dismissal) or because they were not "specific to the violation" (in the case of the reduction of the charges). (See § 745, subd. (e).) The trial court refused to order any other remedy, and held that Section 745, subdivision (e)(4) did not authorize other non-enumerated remedies.

The trial court's interpretation of the RJA is contrary to the statutory text and undermines the Legislature's clear intent. The Court of Appeal's wholesale failure to meaningfully consider the issue and evaluate the trial court's analysis leaves litigants and judges statewide without clarity about whether and which remedies are available for RJA violations. This Court's intervention is necessary.

I. Interests of *Amicus Curiae*[2]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. For decades, the ACLU of Northern California has advocated to advance racial justice for all Californians. The ACLU of Northern California has participated in cases, both as direct counsel and as *amicus curiae*, involving the enforcement of constitutional guarantees of equal protection and due process for people of color, including in connection with harms resulting from their involvement with the criminal legal system. The ACLU of Northern California, along with the ACLU's other California affiliates, were major supporters of the RJA. Since the enactment of the RJA, the ACLU of Northern California has been actively involved in litigation, legislative advocacy, and other work to ensure the effective implementation of the RJA. The ACLU of Northern California has a vested interest in ensuring that the RJA is applied in a manner consistent with its purpose of addressing and ameliorating systemic racial disparities in the criminal legal system.

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[2] Pursuant to Rule 8.520(f)(4), *amicus* states that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

II. This Case Concerns an Important and Novel Question Left Unanswered by the Court of Appeal's Summary Denial.

This case concerns a central and novel issue relevant to the effective implementation of the RJA: What are the available remedies under the law? Review is necessary to settle this important legal issue.

California enacted the RJA to remove barriers to challenging racial bias in the criminal legal system. The RJA establishes that it violates state law to "seek or obtain a criminal conviction" or sentence "on the basis of race, ethnicity, or national origin." (§ 745, subd. (a).)[3] The plain language of the RJA, as well as its stated intent, requires that the court impose a remedy upon the finding of an RJA violation. The RJA's remedy provision, subdivision (e) of Section 745, provides: "if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list." (*Id.*, subd. (e).) Subdivision (e)(1) provides a list of available remedies for an RJA violation found prior to the entry of judgment: declaration of mistrial; discharging of a jury; and dismissal of enhancements, special circumstances or special allegations, or reduction of charges. (See *id.*, subd. (e)(1).) The RJA's remedy provision also provides another enumerated list of available remedies for an RJA violation found after the entry of judgment (*id.*, subd. (e)(2)), and separately prohibits death-sentence eligibility in any instance in which an RJA violation is found (*id.*, subd. (e)(3)). Within the same remedy provision, the RJA provides that the trial court may order "any other remedies available under the United States Constitution, the California Constitution, or any other law." (*Id.*, subd. (e)(4).)

The Court of Appeal summarily denied the petitioner's writ petition, leaving unanswered the critical question of which remedies are available to litigants and judges in the event of an RJA violation. This issue has not yet been addressed in a published decision. In *People v. Simmons*, the only published decision that considers subdivision (e), the Court of Appeal held that any RJA violation mandates a remedy. (*People v. Simmons* (2023) 96 Cal.App.5th 323,

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[3] As relevant to the instant case, a person may establish a violation of the RJA by showing, with a preponderance of the evidence, that "[t]he judge . . . . used racially discriminatory language about the defendant's race, ethnicity, or national origin, whether or not purposeful." Pen. Code, § 745, subd. (a)(2).

337 ["The statute forecloses any traditional case-specific harmless error analysis."].) *Simmons*, however, arises from dissimilar facts—finding ineffective assistance of counsel due to delayed identification of an RJA violation—leaving only a cursory analysis of the types of remedy available under the law. (*Ibid.*) This issue is nonetheless arising in cases across the state.

A robust interpretation of the RJA's remedy provision is necessary both to ensure compliance with the statutory language and to satisfy the legislative intent of the RJA to limit racial biases that undermine the integrity of the criminal-legal system. The trial court's interpretation, which was left standing by the Court of Appeal, would strip the RJA of its consequence, as many RJA violations would be effectively without remedy. It would also strip judges of the discretion to order the most appropriate remedy for the violation. This Court should not permit that state of affairs—and, at the very least, it should demand that the Court of Appeal explain how that result can be squared with the RJA's text, history, and purpose.

III. The RJA Does Not Limit the Available Remedies Only to Those Expressly Enumerated By Statute.

Subdivisions (e)(1) and (e)(2) of Section 745 do not limit a court's ability to order other remedies not enumerated in these specific provisions. The Legislature recognized as much in providing that the expressly delineated remedies "do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law." (§ 745, subd. (e)(4).) Indeed, subdivision (e)(4) is specifically included among the list of remedies available for an RJA violation; the statute therefore plainly envisions that the trial court can exercise its discretion to order additional remedies not among those expressly enumerated in the prior provisions of the same section, so long as they are authorized by law. Any other reading would render this provision superfluous or without meaning. As further explained below, it would also leave many RJA violations with no remedy at all and severely limit judicial discretion to impose remedies appropriate to the circumstances.

Under the trial court's interpretation here, there would be only four available remedies in the instance of *any* pre-judgment RJA violation, and only two for any post-judgment violation.[4] This would

[4] Subdivision (e)(1) of Section 745 provides that pre-judgment, "the court may impose any of the following remedies: (A) Declare a mistrial,

exclude from available remedies, for instance, the removal of a judge or prosecutor from a case, prohibiting or striking certain language or testimony, suppressing evidence, and compelling certain jury instructions.[5] This would also eliminate as a possible remedy the dismissal of counts where the offense was found to be charged or sentenced disproportionately against individuals of a particular race, ethnicity or national origin, in violation of subdivisions (a)(3) or (a)(4) of Section 745—even though this remedy may be (and often will be) the most appropriate remedy in certain such instances.

Moreover, defendants would lack *any* available relief in instances where the remedies enumerated in subdivisions (e)(1) or (e)(2) were unavailable in light of the procedural posture of the case or the charges filed. The pre-judgment remedies in subdivision (e)(1) are unavailable, for instance, where a trial has not yet begun; a jury is not

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if requested by the defendant. (B) Discharge the jury panel and empanel a new jury. (C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges." Subdivision (e)(2) provides as available post-judgment remedies vacatur of the conviction and/or sentence and the ordering of new proceedings; or in certain instances, modification of the judgment and sentence. (Pen. Code, § 745, subd. (e)(2) ["(A) . . . if the court finds that 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). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a), the court may modify the judgment to a lesser included or lesser related offense. On resentencing, the court shall not impose a new sentence greater than that previously imposed. (B) After a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed."].)

[5] For instance, under the trial court's logic, neither the release of the petitioner in the instant case, nor substitution of the judge, would be a permissible remedy under the RJA—since these are not listed as available remedies under (e)(1) despite being clearly "specific to the violation," under any definition. Here, the petitioner was released from custody the day after he filed a motion to dismiss for an RJA violation; and the case was also no longer heard before the judge who committed the RJA violation, though not as a result of any court order.

yet empaneled; and where there are no enhancements, special circumstances, or special allegations charged, or lesser offenses available.[6] It cannot be the law that pre-judgment remedies are available only in such limited scenarios.

IV. By Its Terms, the RJA Requires a Remedy in the Event a Court Finds a Violation.

The RJA, by its terms, requires the court to impose a remedy in the event of a violation. The remedy provision states that a "court *shall* impose a remedy specific to the violation" if the "court finds, by a preponderance of evidence, a violation" of the RJA. (§ 745, subd. (e), italics added.) "The plain language of the statute thus mandates that a remedy be imposed without requiring a show of prejudice." (*Simmons*, *supra*, 96 Cal.App.5th at p. 337.)

Contrary to this plain language, the trial court's analysis would limit the availability of remedies to a limited set of circumstances—only where the court determines the remedy sufficiently related to the violation found, and only where the remedies expressly enumerated in subdivisions (e)(1) and (e)(2) are available in light of the procedural posture of the case. This would eliminate RJA remedies in many circumstances and render meaningless the mandatory nature of the remedy provision.

The Legislature recognized an RJA violation as a "miscarriage of justice" that required remedies—not just to repair "the harm to the defendant's case" but also "to the integrity of the judicial system." (Assem. Bill No. 2542 (2019–2020 Reg. Sess.) § 2(i); see *Simmons*, *supra*, 96 Cal.App.5th at p. 337.) The Legislature expressly rejected the pre-RJA system, which "generally only address[ed] racial bias in its most extreme and blatant forms." (Assem. Bill No. 2542 (2019–2020 Reg. Sess) § 2(c); see also *id.* at § 2(j).) If the law allowed only for the recognition of violations without any meaningful remedy, this would not constitute a change from the pre-RJA system. The law then would not remedy even the immediate violation recognized, let alone provide a deterrent to future RJA violations or any salve to the integrity of the judicial system.

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[6] Real Party in Interest conceded that the enumerated remedies of Section 745, subdivision (e)(1) were largely unavailable in Petitioner's case at the time of the hearing on remedies due to the case's procedural posture. (Op. at p. 26 ["In this case, many of these remedies were inapplicable when respondent court ruled."].)

The Legislature clearly did not intend that the language that a remedy be "specific to the violation" eliminate the mandatory nature of the remedy, as the trial court's interpretation would require. Subdivision (e)(3), which prohibits the imposition of the death penalty for *any* RJA violation, makes plain that the Legislature did not have such a cramped reading of this language. (See § 745, subd. (e)(3).) Indeed, subdivision (e)(3) is expressly included as a remedy in the "list" of remedies that must be "specific to the violation." However, this remedy would in fact be *unavailable* to the trial court for most RJA violations on the trial court's reading that all available remedies must be, for instance, narrowly tailored to responding to the particular violation, or limited to purging the taint. Removing the death penalty as an available punishment is not directly responsive to, *e.g.*, a juror or prosecutor's biased language in violation of the RJA.

In any event, here, the trial court failed to order *any* remedy—whether expressly enumerated or not. This cannot be squared with its finding of a violation under the RJA.

V. Conclusion

For the foregoing reasons, *amicus curiae* respectfully urges this Court to either grant the petition for plenary review or issue an order transferring the matter to the Court of Appeal for further review.

Dated: May 8, 2024

Sincerely,

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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On May 8, 2024, I served the attached:

Amicus Letter in Support of Petition for Review and Grant and Transfer in *R.D. v. Superior Court of Sacramento County*, No. S284862

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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BY MAIL: I mailed a copy of the document identified above to the following case participants by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid:

Clerk of the Superior Court
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Trial Court, Case No. JV140057

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 8, 2024, in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant