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SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE
(Riverside)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

MICHAEL EARL MOSBY, III,
Defendant.

Case No. RIF1604905

MOTION FOR A HEARING & RELIEF PURSUANT TO THE RACIAL JUSTICE ACT Penal Code § 745(C)

Date: 12/16/2022
Time: 8:30 a.m.
Dept. 44

TO: MICHAEL HESTRIN, DISTRICT ATTORNEY FOR RIVERSIDE

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PEOPLE OF THE STATE OF CALIFORNIA,

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APPENDIX IN SUPPORT OF DEFENDANT'S MOTION

Date: 12/16/2022
Time: 8:30 a.m.
Dept. 44

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE
(Riverside)

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHAEL EARL MOSBY, III, Defendant.	Case No. RIF1604905 **MOTION FOR A HEARING & RELIEF PURSUANT TO THE RACIAL JUSTICE ACT Penal Code § 745(C)** Date: 12/16/2022 Time: 8:30 a.m. Dept. 44

TO: MICHAEL HESTRIN, DISTRICT ATTORNEY FOR RIVERSIDE

COUNTY, KIMBERLY DEGONIA, W. MATTHEW MURRY AND EMILY HANKS, DEPUTY DISTRICT ATTORNEYS, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on December 16, 2022, the defendant, Michael Earl Mosby III, through his counsel, will and hereby does move the court for an order ruling that Mosby has established a prima facie violation of the California Racial Justice Act [CRJA] and is therefore entitled to an evidentiary hearing to prove violations of the CRJA.

This motion is made on the ground that the failure to grant the motion would deprive defendant of his rights as guaranteed by Penal Code section 745 and his right to equal protection of the law,[1] and would cause a miscarriage of justice.[2]

Dated: December 6, 2022

Respectfully submitted
Steven L. Harmon, Public Defender

David J. Macher
Deputy Public Defender

[1] Assem. Bill No. 1542 (2019-2020 Reg. Sess.) § 2(a); Cal. Const., art. I, § 7.

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I.

INTRODUCTION

Michael Mosby moves for an order granting him an evidentiary hearing and, ultimately, an order barring the death penalty under the California Racial Justice Act, Penal Code § 745. This consolidated motion incorporates the evidence, arguments, and replies he has previously presented in several pleadings, and proffers additional evidence in response to the Court's suggestion at the motion hearing on October 28, 2022. Specifically, the Court denied Mr. Mosby's motion for an evidentiary hearing without prejudice to his filing a renewed motion, if supported by evidence of "similarly situated" defendants who escaped capital charging and sentencing. This motion proffers evidence and argument based on a list of similarly situated cases.

In 2020, the Legislature passed Assembly Bill 2542, the California Racial Justice Act ["CRJA"], codified at P.C. § 745. The CRJA is an ambitious law.[3] The intent of the Legislature in enacting it was to extinguish

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[2] Cal. Const., art VI.

[3] The legislative findings accompanying AB-2542 are entitled to "considerable weight" in construing Penal Code section 745. (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 157 [294 Cal.Rptr.3d 513].)

the effects of race in the criminal justice system.[4] The Legislature explained, "In California, in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in the criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California."[5]

Elimination of explicit bias in the courtroom has been a longstanding judicial goal.[6] The federal Supreme Court has congratulated itself for its alleged "unceasing efforts" to eliminate racial prejudice from the criminal justice system.[7] As seen above, the Legislature has found racial bias continues to be rampant in California courts.[8] AB 2542 was adopted to

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[4] AB-2542, *supra*, at § 2(i) ["It is the intent of the Legislature to eliminate racial bias from California's criminal justice system. . ."]

[5] *Id.* at § 2(g).

[6] See e.g., *Strauder v. West Virginia* (1880) 10 Otto 303, 100 U.S. 303, 312 [25 L.Ed. 664] [State violates equal protection when an accused is put on trial before a jury from which members of his race have been purposely excluded].

[7] *McCleskey v. Kemp* (1987) 481 U.S. 279, 309 [107 S.Ct. 1756, 95 L.Ed.2d 262] ["Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."]; *Batson v. Kentucky* (1986) 476 U.S. c79, 85, fn. 3 [106 S.Ct. 1712. 90 L.Ed.2d 69] [listing 14 case between 1880 and 1986 in which the Court upheld the right of Black people to serve as jurors]. Apparently, the Court lacked a sense of irony. The "unceasing efforts" to stamp out racism in the criminal justice system apparently did not extend to people of color subjected to systemic racism in administration of the death penalty in Georgia.

[8] AB 2542 at § 2(h) ["Examples of the racism that pervades the criminal justice system are too numerous to list."]

eliminate racial bias and racial disparities in the criminal justice system.

This year, the Legislature passed, and the Governor signed, a follow-up bill, AB 256, amending Penal Code § 745 to make the CRJA retroactive and adding other clarifying provisions.[9] Although the amendments are not effective until January 1, 2023, the revised CRJA will be cited here as litigation on CRJA issues will doubtless continue into the new year.

II.

PROCEDURAL BACKGROUND

On July 26, 2022, Michael Mosby moved for an evidentiary hearing and relief under the CRJA. In support of the motion, he submitted a list of 696 cases in which the Riverside County District Attorney ("DA") charged defendants with murder under P.C. § 187 between January 1, 2016 and January 1, 2021, along with the declarations of Brian G. Cosgove, Esq., explaining how he compiled the list.[10] The motion also included the declaration-report of Marissa Omori, Ph.D., who analyzed the data and concluded that Black defendants were significantly more likely to face

[9] Penal Code, § 745, subd. (h). Statutory references are to the Penal Code unless otherwise indicated.

[10] *See* Appendix to this Consolidated Motion at A001 to A028 (Exhibits A C, and D to the motion for an evidentiary hearing and relief under the CRJA, filed July 26, 2022).

capital prosecution than White defendants.[11]

On September 22, 2022, the DA filed its opposition to Mr. Mosby's request for an evidentiary hearing and relief under the CRJA.

On September 28, 2022, Mr. Mosby submitted a supplemental proffer to further support his motion for evidentiary hearing and relief. This supplemental proffer included two additional expert declarations describing statistical studies on racial disparities in charging, sentencing, and the imposition of the death penalty in Riverside County. First, the supplemental proffer included a declaration and report by Nick Petersen, Ph.D., who ran regression analyses on two independent lists of P.C. § 187 cases between January 1, 2007, and July 8, 2019, and between 1976 and 2018, respectively. Petersen's analyses of the data concluded that Black defendants are significantly more likely to face capital charges and death sentences than White defendants.[12]

The supplemental proffer also included the declaration-report of Frank Baumgartner, Ph.D., which described his compilation of another independent list of death-sentenced Riverside County cases between 1972 and 2021, his analysis of the data, and his conclusion that Black

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[11] A030 (Exhibit B to motion filed July 26, 2022).

[12] A073-116 (Exhibits 1 and 2 to Defendant's Supplemental Proffer, filed September 28, 2022).

defendants are significantly more likely to receive death sentences than White defendants.[13] Finally, the supplemental proffer included a narrative and an annotated chronology of the history of incidents of racial violence and racial bias in Riverside territory beginning in 1849.[14]

On September 29, 2022, Mr. Mosby submitted a reply to the District Attorney's opposition. It rebutted the District Attorney's claims that the history of racism in Riverside County is irrelevant to the court's analysis of a claim under the CRJA and addressed the DA's erroneous allegations of "serious flaws" in Dr. Omori's analysis.

On October 14, 2022, Mr. Mosby submitted a supplemental reply in support of his motion for an evidentiary hearing and relief under the CRJA. It included additional declaration-reports by Dr. Omori and Dr. Petersen, who had read and responded to the DA's arguments.[15] Dr. Omori's new declaration described her updated analyses of the data, which found that the results and conclusions did not change even after she removed seven

[13] A135-43 (Exhibits 5 and 6 to Defendant's Supplemental Proffer, filed September 28, 2022).
[14] A195-256 (Exhibit 8 to Defendant's Supplemental Proffer, filed September 28, 2022).
[15] A044, A118 (Exhibits A and B to Defendant's Supplemental Reply, filed on October 14, 2022).

cases involving juvenile defendants from the list.[16]

On October 28, 2022, this Court heard argument and denied Mosby's motion for an evidentiary hearing without prejudice. The Court ruled that to receive an evidentiary hearing under the CRJA, Mosby must demonstrate that he was charged more harshly or faces a prospectively more severe punishment than similarly situated White defendants in Riverside County who have engaged in similar conduct. Mr. Mosby includes a proffer of such evidence with this consolidated motion.

III.

THE REQUIREMENTS OF THE CRJA

A. The CRJA Does Not Require Proof of Explicit Racial Bias.

The CRJA does not require proof of overt racial animus. It does not require proof anyone is racist. The CRJA does not require evidence any actor had the intent to discriminate against a defendant of color. AB 256 makes this explicit: as amended, P.C. § 745(c)(3)(2) now reads in relevant part: "The defendant does not need to prove intentional discrimination."

The statute is focused on the harm to individual defendants and to

[16] A045-47 (Exhibit A to Defendant's Supplemental Reply, filed on October 14, 2022).

the criminal justice system.[17] Whether discrimination is overt, implicit, or structural, the defendant is harmed and public confidence in the courts is brought into question.[18]

The present motion does not allege that District Attorney Hestrin or any member of his team entertains conscious racial bias. Rather, the motion focuses on disparate outcomes that can result from implicit and structural bias. Mr. Mosby does not allege, and the statute does not require him to prove, an absence of good faith in any of the individual decisions in the cases that comprise the aggregate presentation.

B. RACIAL DISCRIMINATION AND DISPARATE IMPACTS MAY BE EMPIRICALLY IDENTIFIED AND MEASURED

In enacting P.C. § 745, the Legislature recognized three forms of bias: explicit or conscious bias; implicit or unconscious bias; and systemic bias, which is also known as structural or institutional bias.[19]

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[17] AB 2542 § 2(i). ["The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system."]

[18] *Id.* at § 2(a). ["Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal protection of the law."]

[19] See AB 2542 § (c) ["Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only racial bias in its most extreme and blatant form.]; § (g) ["The Legislature has acknowledged that all persons possess implicit biases."]; § (f) ["Existing precedent also accepts racial disparities in our criminal justice system as inevitable."]

1. Racial Discrimination Can Be Explicit, Implicit or Systemic

"Explicit bias need not be graphic, extreme, or large in magnitude although it sometimes is. Instead, it is better to understand 'explicit' as being subject to direct introspection."[20] Explicit bias is endorsed as appropriate by the person who harbors it.[21]

"Implicit racial biases refer to the unconscious stereotypes and attitudes that we associate with racial groups. These biases are pervasive and can influence real world behaviors."[22] Implicit biases "are not consciously accessible through introspection. Accordingly, their impact on a person's decision making and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways the person would not endorse as appropriate if he or she had conscious awareness."[23]

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[20] Kang, What Judges Can Do About Implicit Bias at p. 78. https://www.njcourts.gov/courts/assets/supreme/judicialconference/Kang-2021-What-Judges-Can-Do-About-Implicit-Bias.pdf [as of July 18, 2022].

[21] Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1129. https://law.ucla.edu/news/implicit-bias-courtroom [as of July 21, 2022].

[22] Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom Cook County: Racism and Injustice in America's Largest Criminal Court* (2017) 126 YLJ 862, 876. https://www.yalelawjournal.org/aarticle/systemic-triage-implicit-racial-bias-in-the-courtroom [as of July 21, 2022].

[23] *Implicit Bias in the Courtroom, supra,* 59 UCLA L. Rev. 1124, 1129.

As for systemic, structural, or institutional bias, research has shown that "discrimination can be built into institutional structures, practices and norms—literally into the fabric of an institution—and that actors within these structures act according to established institutional norms and practices that may reflect discriminatory beliefs."[24]

Institutional processes "can lock in past inequalities, reproduce them and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong."[25] As a result, institutional practices "perpetuate racial inequality without relying on racist actors."[26] With institutional bias, causation is understood as a cumulative process rather than the result of any particular moment of decision-making.[27]

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[24] Paterson, Rapp & Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine* (2008) 40 Conn. L. Rev. 1175, 1188 [*The Id, the Ego, and Equal Protection*]. https://semanticscholar.org/paper/The-Id%2C-the-Ego%2C-and-Equal-Protection%3A-A-Reckoning-Lawrence

[25] *Implicit Bias in the Courtroom, supra,* 59 UCLA L. Rev. 1124, 1133.

[26] Powell, *Structural Racism: Building upon the Insights of John Calmore* (2008) 86 N.C. L. Rev 791, 795 [*Structural Racism*]. https://case.edu/thinkbig/sites/case.edu/thinkbig/files/2021-02/powell202008.pdf

[27] *Id.* at p. 796.

The National Research Council ["NRC"] of the National Academy of Science, Engineering, and Medicine has explained how systemic discrimination develops:

> "[T]he United States has a long history as a racially biased society. This history has done more than change individual cognitive responses; it has also deeply affected institutional processes. Organizations tend to reflect many of the same biases as the people who operate within them. Organizational rules sometime evolve out of past histories (including past histories of racism) that are not easily reconstructed, and such rules may appear quite neutral on the surface. But if these processes function in a way that leads to differential racial treatment or produces differential racial outcomes, the results can be discriminatory. Such an embedded institutional process—which can occur formally and informally within society—is sometimes referred to as structural discrimination."[28]

Professor Kang and co-authors emphasize the importance of understanding the interaction among conscious, unconscious, and structural bias because "all are involved in producing unfairness in the courtroom."[29]

2. Racial Disparities Can Arise from a Variety of Factors

"A disparity is an inequality, difference, inconsistency, or imbalance between groups of people, and may highlight policies or practices that

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[28] NRC, Measuring Racial Discrimination (2004) at p. 63 https://nap/nationalacademies.org/read/10887/chapter/1 [as of July 19, 2022]

[29] *Implicit Bias in the Courtroom, supra,* 59 UCLA L. Rev. 1124, 1132.

might be implemented unfairly. Disparities can be caused by unconscious or conscious bias and from outwardly neutral policies and practices that in fact cause unequal effects based on race, sex, age, etc."[30]

Racial disparities are not always or exclusively the result of racial discrimination.[31] Instead, "disparity is used to denote between-group differences in outcomes, irrespective of their origin. (Disparity might stem from differences in offending, from laws or policies that differentially impact minority youth, or from racism in the juvenile justice system.)"[32] In the criminal courts, "[d]isparities can be caused by conscious or unconscious bias and from outwardly neutral policies and practices that in fact cause unequal effects based on race, sex, age, etc."[33]

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[30] Measure for Justice, The Power, and Problem of Criminal Justice Data: A Twenty-State Review at p. 12 https://measureforjustice,org/about/docs The_Power_And_Problem_Of_Criminal_Justice_Data.pdf (measuresforjustice.org) [as of July 19, 2022].

[31] NRC, Measuring Racial Discrimination, *supra*, at p. 15.

[32] National Research Council, Reforming Juvenile Justice: A Developmental Approach (2013) at p. 214. https://nap,nationalacademies.org/download/14685 [as of July 19, 2022].

[33] *The Power and Problem of Criminal Justice Data, supra*, at p. 12; see also *Measuring Racial Discrimination, supra*, at p. 5 ["differential outcomes may indicate that discrimination is occurring, that the historical effects of racial exclusion and discrimination (cumulative disadvantage) continue to influence current outcomes, that other factors are at work, or that some combination of current and past discrimination and other factors is operating."]

Whatever the origin, "persistent disparity should be taken as a strong signal that some underlying problematic circumstance and process are operating, whether or not direct race bias is the cause."[34] It should be recalled that § 745, subdivisions (a)(3) and (a)(4), do not require a showing that any disparity was the result of racial discrimination. As the Court of Appeal has explained:

> "By endorsing statistics as an appropriate mode of proof and eliminating any requirement of showing discriminatory purpose, the Racial Justice Act revitalizes the venerable principle recognized 135 years ago in *Yick Wo* [*v. Hopkins*] that we must offer a remedy where a facially neutral law is applied with discriminatory effect."[35]

3. Quantifying Discrimination and Disparities

To begin, "statistical significance" is a term that measures how likely it would be to observe a difference consistent with the one observed in the data if the difference occurred by chance. Under Cal. Penal Code § 745, subdivision (h)(1), "statistical significance is a factor that the court may consider, but is not necessary, to establish a significant difference."

In the declaration proffered with Mr. Mosby's original CRJA filing on July 26, 2022, Dr. Omori explained, "In the social sciences, a probability value (p-value) of 0.05 (5%) is a common threshold for statistical

[34] Reforming Juvenile Justice, *supra,* at p. 214.

significance. Because the American Statistical Association discourages strict thresholds for statistical significance, I report both whether the statistical test meets the 0.05 threshold and is statistically significant or not, and the actual probability value along with an interpretation."[36] While the statistical evidence is important, in the end defendant has raised a legal issue rather than a scientific question.[37]

Whether a finding is of practical significance is not dependent upon statistical significance.[38] Practical significance also requires an understanding of the magnitude of the disparities observed, the sample size of the data analyzed, and the contextual importance of the reported results.[39] Practical significance "means that the magnitude of the effect being studied is not de minimis—it is sufficiently important substantively for the court to be concerned."[40]

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[35] *Young v. Superior Court, supra,* 79 Cal.App.5th 138, 165.
[36] A033 n.6 (Exhibit B to Defendant's Motion for an Evidentiary Hearing and Relief filed July 26, 2022).
[37] See *State v. Gregory* (Wash. 2018) 192 Wash.2d 1, 19 [427 P.3d 621, 633] ["The most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty. We make this determination by way of legal analysis, not pure science."]
[38] Kaye & Freedman, Reference Guide on Statistics (2011) p. 252. https://nap.nationalacademies.org/read/13163/chapter/7 [as of July 21, 2022].
[39] *Id.* at pp. 252-253.
[40] Rubinfeld, Reference Guide on Multiple Regression at p. 318.

Practical significance has no preset value: "There is no specific percentage threshold above which a result is practically significant. Practical significance must be evaluated in the context of a particular legal issue."[41] In assessing practical significance, it is important to recognize that because discrimination and disparities are cumulative, data examining one particular point in a system may not tell the whole story. "Small levels of discrimination at multiple points in a process may result in large cumulative disadvantage."[42] Moreover, the effects of discrimination may cumulate over time through the course of an individual's life across different domains."[43]

Because it is much easier to "assess the occurrence of discrimination at one point in a process than to identify effects of discrimination that occur earlier in a process," it is useful "to combine methods, using data and results from multiple sources."[44] To be confident in statistical findings of observational data, social scientists look for convergent validity, to see if other relevant data suggest the same outcome. "Consistent patterns of

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https://nap.nationalacademies.org/read/13163/chapter/8#304 [as of July 21, 2022].

[41] *Id.* at p. 318, fn. 40.

[42] Measuring Racial Discrimination, *supra*, at p. 69.

[43] *Id.* at p. 68.

[44] *Id.* at p. 73.

results across studies and different approaches tend to provide the strongest argument" a result is externally valid.[45]

The practical significance of the results from analysis of observational data is thus supported when the outcome or association at issue "is seen in studies with different designs, on different kinds of subjects, and done by different research groups. That reduces the chance that the association is due to a defect in one type of study, a peculiarity in one group of subjects, or the idiosyncrasies of one research group."[46]

C. The Statute Permits a Defendant to Establish a CRJA Violation by Making One Evidentiary Showing Based on Statistical Proof and Does Not Require Him to Identify Factually Similar Cases That Received More Favorable Treatment.

1. Introduction

Subdivision (a)(3) of Penal Code section 745 states:

> The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who [**commit similar offenses/have engaged in similar conduct**[47]] and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

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[45] *Id.* at p. 5.

[46] Reference Guide on Statistics, *supra*, at p. 221.

[47] Bold-faced text reflects first the original language and then the amended language contained in A.B. 256.

Subdivision (a)(4)(A) is similar:

> A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

The DA argued, and this Court ruled on October 28, that these statutes impose a two-part test for relief that includes a required demonstration by each defendant that discrimination in his own case resulted in less favorable treatment.[48] The Court held:

> And my reading of the statute is that there has to be some showing more than statistical analysis that individually these defendants, I'm talking about Mr. Mosby and Mr. Austin, are being discriminated against, vis-a-vis, nonminority defendants that are similarly situated, with similar cases, charges, and all of the other factors that go into it. . . . My reading of the statute is, is that in order to make that prima facie showing, it is necessary to show that individuals who are similarly situated are treated differently.
>
> In effect, there are two elements to a violation under this subdivision: One, that the defendant personally was charged more harshly than similarly situated defendants or of other races or ethnicity; and, two, that this disparity is part of a historical pattern in the county. Both elements are

[48] District Attorney's Opposition to Motion for a Hearing and Relief filed on September 22, 2022, at 3-6; A300-301; A303-05 (Transcript of Prima Facie Hearing, Octo. 28, 2022, at 115-16, 118-20).

important to implement the legislative intent. . .. I read this legislative intent in conjunction with the codified text to meaning that Section 745 is not a tool to wrench population level statistics into a superficial racial equilibrium. Instead, it is a tool for investigating whether a particular defendant has suffered from systemic or other bias; and, thereby, to promote justice at both the individual level and, ultimately, at a societal level.

* * *

[T]he second prong of the second requirement is that these defendants are being improperly or unfairly charged or more severely or harshly dealt with because of their race or ethnicity. The defendants have failed to offer any evidence to show that any systemic bias has manifested in they themselves being more harshly charged than similarly situated defendants of other races. In other words, they have only established one of the two necessary elements in order to receive such a hearing. There is no evidence that defendants have been charged more severely due to their race. . .. [T]he defendants' own situation and the pattern of disparate treatment are two separate elements of a violation.

With regard to Defendant Mosby, his basic failure then is in the failing to give any reason to think that a defendant of another race who is also alleged to have personally murdered someone in a drive-by shooting and a criminal history that includes two other murders would be treated more leniently. The same is true of Defendant Austin in that he has offered no evidence that a defendant of a different race alleged to have committed domestic violence-related multiple murders of a pregnant woman and her fetus would be treated less harshly. These failures hold for both prosecutors' charging decisions and for their intent to seek capital punishment.[49]

[49] A300-301; A303-05.

The Court's creation of a two-element test contravenes the plain language of the statute and the Legislature's intent. As amended by AB 256, P.C. § 745(h)(6) provides that "'Similarly situated' means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical." The Court's ruling in effect requires Mr. Mosby to offer a case, on all fours with his factually, in which a white defendant did not face death. That is not what the statute requires.

The Court also misinterpreted the plain language, the legislative intent, and the policy aims of §§ 745(a)(3) and 745(a)(4).

2. **The plain language of Penal Code section 745, subdivision (a)(3) permits a defendant to establish an CRJA violation by making one evidentiary showing based on statistical proof**.

As described above, the Court read the language of subdivision (a)(3) and (a)(4)(A) to erect two distinct evidentiary hurdles to proving a violation of the California Racial Justice Act. The Court appears to believe that, first, a defendant must be able to identify and produce factual details about other, specified, defendants who are alleged to have committed similar offenses or engaged in similar conduct and are similarly situated to him but were charged or sentenced less seriously than the defendant. Second, the defendant must also produce evidence that members his racial group are

more frequently charged with more serious charges or face more serious sentences than members of another racial group.

This interpretation of subdivisions (a)(3) and (a)(4)(A) converts what should be a singular determination as to whether similarly situated racial groups are being treated differently into *both* a group and individual assessment. Under the Court's reading of the CRJA, it is not enough to show that the defendant is a member of a racial group that has been treated disparately compared to other similarly situated racial groups; he must also prove that he personally has been treated more harshly than individual defendants in the comparator group.

Properly read, subdivisions (a)(3) and (a)(4)(A) require only one evidentiary burden that does not require affirmative evidence of prejudicial impact and that can be sustained by statistical or aggregate evidence alone. That is what the two halves of subdivisions (a)(3) and (a)(4)(A) require when read as a whole: that similarly situated racial groups have been disparately impacted in charging, conviction, or sentencing. Thus, the first half—that a defendant was charged or convicted of a more serious offense or received a more serious sentence than defendants of other races, ethnicities, or national origins who have committed similar crimes and are similarly situated—ensures that the second half—evidence that

establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained—is comparing apples with apples. If the similarly situated language of the first part of each subdivision was not included, then the second half would allow a CRJA violation to be established based on "raw" or unadjusted disparities alone. For example, without the first portion of subdivision (a)(3), a Black defendant would be entitled to relief under the CRJA upon a mere showing that Black people are more often charged with special circumstances than White people. Yet such a disparity may simply indicate a differential rate of offending. So, in light of the first part of (a)(3), to prevail he would have to show—with statistical or aggregate evidence—that Black people who are accused of special-circumstance murder are similarly situated to White people accused of murder but not charged with a special circumstance.

3. **The legislative history of AB 2542 makes it clear that only one evidentiary showing was intended**.

To the extent that the plain language of subdivision (a)(3) leaves any doubt that only one evidentiary burden was contemplated, the legislative history of AB 2542 makes it abundantly clear that the Court has misunderstood its provisions. When the language of a statute is

ambiguous, courts should look to the legislative history to ascertain the Legislature's intent in enacting the provision.[50] The legislative history of AB 2542 shows that the Legislature intended a unitary evidentiary burden that does not require proof of prejudicial impact on a particular defendant and that can be satisfied with statistical evidence.

As originally proposed by Assemblymember Kalra, the language of what would become subdivision (a)(3) read:

> The prosecution sought or obtained a conviction for an offense for which convictions are more frequently sought or obtained against people who share the defendant's race, ethnicity, or national origin than for defendants of other races, ethnicities, or national origins in the county where the convictions were sought or obtained.[51]

On August 1, 2020, Assemblymember Kalra amended AB 2542 to require that the disparities remedied by the CRJA relate to groups of

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[50] *See Young v. Superior Ct. of Solano County* (2022) 79 Cal. App. 5th 138, 156 [294 Cal.Rptr.3d 513] ("If the language of a statutory provision remains unclear after we consider its terms, structure, and related statutory provisions, we may take account of extrinsic sources—such as legislative history—to assist us in discerning the relevant legislative purpose.") quoting *Gund v. County of Trinity* (2020), 10 Cal.5th 503, 511, [268 Cal.Rptr.3d 119, 472 P.3d 435].

[51] Assem. Bill 2542 (2019-2020 Reg. Sess.) as amended in Senate July 1, 2020 [then-designated subd. (b)(4)]. The provision that would become subdivision (a)(4)(A) included parallel language. *Ibid*. [then-designated subd. (b)(5)].

people who were charged with, or convicted of, similar offenses. Thus, what would become subdivision (a)(3) was revised to read:

> The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.[52]

Shortly after this August 1st amendment, an in-depth bill analysis was prepared by the Senate Committee on Public Safety.[53] The analysis[54] indicated that the bill was designed to be a countermeasure to the "widely condemned" decision in *McCleskey v. Kemp*.[55] In *McCleskey*, the defendant offered a statistical study showing that defendants who were accused of killing White people were more than four times as likely to receive a death sentence as were similarly situated defendants accused of killing Black people. A majority of the United States Supreme Court held that such statistical evidence was insufficient to establish an equal protection violation because it did not prove that any particular person had

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[52] Assem. Bill 2542 (2019-2020 Reg. Sess.) as amended in Senate Aug. 1, 2020 [then-designated subd. (d)(4)]. Again, what would become subdivision (a)(4)(A) received parallel revisions. *Ibid*. [then-designated (d)(5)].

[53] Sen. Com. on Public Safety, Analysis of Assem. Bill 2542 (2019-2020 Reg. Sess.) Aug. 5, 2020.

[54] *Id.* at p. 7.

intentionally discriminated against Mr. McCleskey or that racial bias actually played a role in the imposition of his death sentence.[56] A four-justice minority vigorously disagreed. As Justice Brennan explained in his *McCleskey* dissent, statistics, including those produced by multiple-regression analysis, "identify patterns in the aggregate, even though we may not be able to reconstitute with certainty any individual decision that goes to make up that pattern."[57] Thus, in Justice Brennan's view, it was enough that McCleskey had shown a significant risk that racial bias infected his case.

The August 5, 2020, bill analysis observed that *McCleskey* required both an intent to discriminate and prejudice, stating: "The Court began its analysis with the principal [sic] that a defendant who alleges an equal protection violation has the burden of proving purposeful discrimination that had a discriminatory effect on the defendant."[58] Further, the analysis emphasized the *McCleskey* majority had rejected statistical evidence as an avenue to proving intent and effect vis-à-vis an individual defendant.[59]

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[55] *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262].
[56] *Id.* at p. 292-293.
[57] *Id.* at p. 327 (Brennan, J., dissenting).
[58] Sen. Com. on Public Safety, Analysis of Assem. Bill 2542 (2019-2020 Reg. Sess.) Aug. 5, 2020, p. 8.
[59] *Ibid*.

Under AB 2542, and in contrast to *McCleskey*, a defendant can demonstrate racial bias via statistical or aggregate evidence and without proving intent or prejudice. The bill analysis explained:

> *This bill allows racial bias to be shown by*, *among other things, statistical evidence* that convictions for an offense were more frequently sought or obtained against people who share the defendant's race, ethnicity or national origin than for defendants of other races, ethnicities or national origin in the county where the convictions were sought or obtained; or longer or more severe sentences were imposed on persons based on their race, ethnicity or national origin or based on the victim's race, ethnicity or national origin. *This bill does not require the discrimination to have been purposeful or to have had prejudicial impact on the defendant's case.*[60]

Thus, the CRJA was enacted specifically to repudiate the majority's analysis in *McCleskey*. Interpreting subdivisions (a)(3) and (a)(4)(A) to mandate two distinct prongs, or evidentiary showings, would return in large part to the *McCleskey* approach the Legislature repudiated. Although intentional discrimination would not need to be established, a defendant would still need to prove that he has actually been prejudiced by racial bias—rather than showing a significant likelihood or risk of such prejudice—and statistical or aggregate evidence would once again be insufficient to establish a CRJA violation.

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[60] Sen. Com. on Public Safety, Analysis of Assem. Bill 2542 (2019-2020 Reg. Sess.) Aug. 5, 2020, p. 9, italics added.

In sum, the history of AB 2542 demonstrates that this Court's interpretation of subdivisions (a)(3) and (a)(4)(A) is at odds with the Legislature's intent in enacting the CRJA in two fundamental ways. First, if a defendant must provide some kind of factual narrative of one or more cases to show that the defendant has been more harshly charged than similar situated defendants of other races, then statistical or aggregate evidence would *never* be sufficient to prove a violation. This is not what the Legislature intended. Second, as interpreted by the Court, a defendant would have to somehow prove he personally was prejudicially impacted by the charging disparities at issue, rather than that there was a significant likelihood or risk of prejudice because he was among a group disparately treated. Again, this is not what the Legislature intended.

4. **The legislative history of AB 256 confirms Mr. Mosby's interpretation of subdivisions (a)(3) and (a)(4)(A)**.

The legislative history of AB 256 confirms Mr. Mosby's interpretation of subdivisions (a)(3) and (a)(4)(A) by reaffirming that statistical evidence alone may prove an (a)(3) or (a)(4) violation and that no prejudice need be shown. Several bill analyses of AB 256 explain that under AB 2542, racial bias may be shown by statistical evidence that more serious charges were more frequently sought against a particular racial group compared to

similarly situated people of a different racial group.[61] The analyses further declare that "[t]he CRJA does not require the discrimination . . . to have had prejudicial impact on the defendant's case."[62]

5. **Interpreting subdivisions (a)(3) and (a)(4)(A) to encompass two distinct prongs would make it extremely difficult, if not impossible, to get relief under the CRJA.**

The Legislature's intent in enacting the CRJA was to depart from a standard, embraced by *McCleskey*, that is "nearly impossible to meet."[63] Yet the Court's interpretation of subdivision (a)(3) would once again prevent a defendant from relying on statistical evidence that shows patterns in the aggregate and a significant risk that racial bias has infected his case but cannot prove it with certainty.

Tellingly, nothing in the CRJA indicates how defendants could make the kind of showing this Court seems to contemplate. For example, how would a court qualitatively evaluate the relative egregiousness of multiple cases? And how would defendants make factual comparisons of their own cases with those of others along multiple potentially relevant dimensions? If

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[61]Sen. Com. on Public Safety, Analysis of Assem. Bill 256 (2021-2022 Reg. Sess.) June 27, 2021, p. 8; see also, Assem. Com. on Appropriations, Analysis of Assem. Bill 256 (2021-2022 Reg. Sess.) April 12, 2021, p. 2; Assem. Com. on Public Safety, Analysis of Assem. Bill 256 (2021-2022 Reg. Sess.) Mar. 22, 2021, p. 7.

[62] *Ibid.*

they offered cases that were comparable in terms of crime facts, they might not be comparable in terms of defendants' criminal records. If they offered cases that were comparable in terms of one special circumstance, they might not be comparable in terms of other special circumstances.

Furthermore, how could a defendant obtain an adequately detailed and accurate picture of the facts of other cases? If he or she is represented by appointed counsel, the information available to him or her on the Riverside Superior Court website provides the kind of information relevant to charging, disposition, and sentencing that can be statistically analyzed but not a factual narrative that would serve to qualitatively compare case severity. Although defendants represented by the Public Defender's Office may have greater access to factual information in multiple cases, it would require the office to pit clients against each other, by designating some as having committed more serious acts than others. That cannot be what AB 2542 was intended to require.

In sum, this Court's imposition of a two-part test to establish a violation of subdivisions (a)(3) and (a)(4)(A) contradicts the statute. It should assess this renewed motion under a unitary interpretation.

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[63] Sen. Com. on Public Safety, Analysis of Assem. Bill 2542 (2019-2020 Reg. Sess.) Aug. 5, 2020, p. 9.

D. The Court Must Order an Evidentiary Hearing Upon a Prima Facie Showing, More Than a Mere Possibility, Of a CRJA Violation

A defendant is entitled to an evidentiary hearing upon prima facie showing of a CRJA violation.[64] The prima facie standard is a low burden of proof. It is defined in the CRJA: "'Prima facie showing' means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred. For purposes of this section, a 'substantial likelihood' requires *more than a mere possibility*, but less than a standard of more likely than not."[65]

In assessing a defendant's proffer, the court must accept the facts alleged by the defendant at face value.[66] The court does not weigh conflicting evidence, assess credibility, or draw inferences. Instead, the court acts as a gatekeeper to filter out frivolous allegations.[67] The statutory definition of prima facie as a substantial likelihood is equivalent to

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[64] "If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing." (§ 745, subd. (c).)

[65] § 745, subd. (h)(2) (emphasis added).

[66] *Burtscher v. Burtscher* (1994) 26 Cal.App.4th 720, 725-726 [31 Cal.Rptr.2d 682] ['the trial court may not make findings as to the existence of facts based on a weighing of competing declarations. Whether or not the evidence is in conflict, if the petitioner has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the trial court must grant the petition."]

[67] *Id.* at p. 726.

"reasonable probability."[68] A reasonable probability means only a "reasonable chance" or "more than an abstract possibility."[69] If this low threshold is satisfied, defendant is entitled to an evidentiary hearing.

IV.

THE PROFFERED EVIDENCE, THE DA'S OBJECTIONS, AND MOSBY'S RESPONSES

A. The History of Racial Violence and Discrimination in California and Riverside County Corroborates the Other Evidence Of This County's Disproportionate Capital Charging And Sentencing Decisions.

The CRJA was passed by the Legislature and signed by Governor Newsom against a history of pervasive racial discrimination dating back to the colonial era. In the view of the Legislature, the CRJA was necessary considering "history and human experience."[70] The findings of fact accompanying AB-2542 describe the persistence of racial discrimination and the inadequacy of current law to eliminate this bias.[71]

The exhibits to this motion include an overview and annotated

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[68] *Id.* at pp. 725-726 ["we reject defendants' contention that establishing a 'reasonable probability' under the statute goes beyond a prima facie case. As defendants themselves concede, the "seminal" case, *Hung v. Wang* (1992) 8 Cal.App.4th 908 [11 Cal.Rptr.2d 113], interprets 'reasonable probability' under section 1714.10 to mean only a prima facie showing."]

[69] *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [77 Cal.Rptr.3d 226, 183 P.3d 1199].

[70] *McCleskey v. Kemp, supra,* 481 U.S. 279, 328 (dis. opn. of Brennan, J.).

timeline of racism in the Inland Empire from 1849 to the present.[72] This narrative history provides critical context to Mr. Mosby's proffered statistical racial disparities. The narrative includes the following incidents:

- In 1971, the Riverside police raided a Black neighborhood, and broke into Black churches, in response to a police shooting, despite witness accounts indicating that three of the four shooters had been white.
- In 1988, a former prosecutor reported hearing colleagues in the Riverside County District Attorney's Office refer to Black defendants as "n******."
- In 1998, Riverside police officers shot and killed a 19-year-old Black woman who was sleeping in her car with a handgun on her lap. In May 1999, the Riverside County District Attorney decided against filing charges against the four White officers involved in her killing.
- In 2001, a Riverside County prosecutor argued in summation at the capital trial of a Black man that the defendant was a bloodthirsty Bengal tiger "in the jungle in his natural habitat, hungry and on the prowl, long teeth glistening as he licked his chops at you." The jury sentenced the defendant to death.

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[71] Assem. Bill AB-2542 (2019-2020 Reg. Sess.) § 2.

[72] A195 (narrative), A230 (annotated chronology) (Exhibit 8 to Defendant's Supplemental Proffer, filed September 28, 2022).

- In 2002, the same Riverside County prosecutor made the same "Bengal tiger" argument in another capital trial of another Black man. This jury also sentenced the defendant to death.
- From 2013-2020, a Black person in Riverside County was 1.6 times as likely to be killed by the police as a White person.

Riverside County's racially violent and discriminatory history provides corroboration to the patterns of disparate treatment described in the ensuing sections of this motion. It helps confirm that the patterns are not just the result of random chance.

Furthermore, the history provides context. The present is a product of the past. Without the context provided by earlier times, the current moment would be inexplicable. Everything—the language we speak, the clothing we wear, the cars we drive—is derived from the interaction of the present and the past. William Faulkner was correct when he wrote, "The past is never dead. It is not even past."[73] Because the past and present are intertwined, today is not independent from yesterday, last year or the last century.

The District Attorney has acknowledged the history of racism described in the initial motion for a hearing is "without a doubt, horrific, and sure to inflame the emotions of anyone considering a motion under Penal

Code section 745," but claims the incidents are not relevant to this Court's CRJA analysis.[74] More specifically, the District Attorney denies that the incidents included in the narrative involve law enforcement or prosecutors, and claims that few of them involved Black citizens.[75] The argument is mistaken on several levels.

First, the examples bulleted above demonstrate bias and racial violence in law enforcement and prosecution decisions involving Black citizens of Riverside County stretching back to the 1970s.

Second, the District Attorney's position contradicts the CRJA. Legislative findings which accompanied the CRJA quoted an opinion by Justice Sotomayor: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with *eyes open to the unfortunate effects of centuries of racial discrimination*."[76]

Third, state high courts have recently recognized that a history of

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[73] William Faulkner, Requiem for a Nun (1951).

[74] District Attorney's Opposition to Motion for a Hearing and Relief filed on September 22, 2022, at 2.

[75] *Id.* at 2-3; A295 (Transcript of Prima Facie Hearing, Octo. 28, 2022, at 110).

[76] *Schutte v. Coalition to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equality by Any Means Necessary* (2014) 572 U.S. 291, 380-381 [134 S.Ct. 1623, 188 L.Ed.2d 613] (dis. opn. of Sotomayor, J.) (emphasis added) [*Schutte v. Coalition*].

racial violence and discrimination can help explain—and substantiate—statistical evidence of systemic bias in prosecution and sentencing.[77]

Finally, the District Attorney's position defies logic. Although some might believe that Southern California was distanced and excluded from Civil War and Jim Crow-era discrimination against people of color, systemic racism can be tracked across nearly two centuries of history in the Inland Empire. This history demonstrates a clear, cross-generational record of white supremacy and state-sponsored maltreatment of the region's people of color—by the California legislature, school boards, mayors, and the leaders of the Ku Klux Klan alike. The vestiges of the racial violence and discrimination within our very county are not relics of our collective past. Rather, this history provides us with a nuanced backdrop for understanding how contemporary institutions and systems function—and who they were designed to benefit or subjugate.

Racism did not disappear with the passage of the Civil Rights Act in

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[77] *See*, *e.g.*, *State v. Gregory*, (2018) 192 Wash. 2d 1 [427 P.3d 621, 635] (Washington Supreme Court relied on state's history of racial discrimination against Black defendants as support for statistical analysis that found Black defendants more than four and a half times more likely to be sentenced to death than similarly situated White defendants). *Cf.* Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 51-55 (2007) (describing the role of such histories in providing "some evidence" of intentional

1964.[78] Centuries of mistreatment have scarred African Americans and, left Caucasians with an ignoble history of cruelty and exploitation. This past has helped shape social institutions, including the criminal justice system. In light of this history, George Floyd was right to fear the police.[79]

In summary, overt, implicit, and structural racism have existed in California from the Gold Rush to today. This survey of explicit racism in California has shown a comprehensive effort to marginalize Black people in every area of life, from rejection of the Fourteenth and Fifteenth Amendments by the Legislature to red lining housing to inferior education resources to a legal system which results in the mass incarceration of young Black men. California, like the rest of America, has a dishonorable history of racism. The animus towards Black, Hispanic, and Asian people continues to this day, as seen in the many hate groups located in Southern California.

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discrimination, beyond mere statistics, needed for a claim under the Equal Protection Clause of the U.S. Constitution).

[78] National Archives, Civil Rights Act (1964), https://www.archives.gov/milestone-documents/civil-rights-act [as of Sept. 29, 2022].

[79] George Floyd's America, A Knee on his Neck, The Washington Post https://www.washingtonpost.com/graphics2020/national/george-floyd-america/policing/ [as of Sept. 26, 2022].
["Floyd knew the routine. His muscles tensed. He was frustrated. He was in distress and scared."]

As the survey also shows, Riverside County has not been immune from this legacy, and has seen multiple incidents of racial bias and violence directed at Black persons by police and prosecutors in the course of their work.

The legacy of centuries of slavery, segregation and racism cannot be wiped away in a generation. Hundreds of years of seeing Black people as inferior persons with "no rights which the white man was bound to respect,"[80] cannot be blinked away in a moment. As Justice Brennan noted concerning race and the death penalty in Georgia, "we cannot pretend in three decades we have completely escaped the grip of a historical legacy spanning centuries."[81]

B. Statistical Studies by Dr. Omori, Dr. Petersen, and Dr. Baumgartner Find Stark Racial Disparities in Riverside County's Death Penalty System.

Mr. Mosby's request for relief authorized by the CRJA relies not only on the historical evidence but on several statistical analyses of Riverside County's death penalty system, each of which will be explored in this section. These statistical studies—conducted by three scholars who utilized different data sets and analytical methodologies—reach a mutual conclusion: race shapes death penalty outcomes in Riverside County.

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[80] *Dred Scott v. Sandford* (1857) 60 U.S. 393, 407 [19 How. 393].

1. Dr. Marisa Omori Finds Stark Racial Disparities in Riverside County Death Penalty Outcomes

The statistics analyzed by Marisa Omori, Ph.D., confirm what experienced practitioners in the Riverside County criminal courts have seen for years. In Riverside County, Black defendants receive the harshest punishment of any racial or ethnic group. Black people are 5.89 times more likely to have murder charges filed against them than Caucasians, 12.98 times more likely to have special circumstances filed, and 21.21 times more likely to have death notices filed.[82] All these discrepancies are statistically significant.[83]

These numbers, described in more detail below, are more than sufficient to make out a prima facie showing.

a. Dr. Omori's Data Set

The declaration of Deputy Public Defender Brian Cosgrove describes the process by which he accumulated statistics for the period from January 1, 2016, through December 31, 2021.[84] During this six-year period, the District Attorney filed murder charges against 696 adults. The accused are

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[81] *McCleskey v. Kemp, supra,* 481 U.S. 279, 344 (dis. opn. of Brennan, J.).
[82] A046, ¶ 14 (Ex. A to Defendant's Reply in Support of Motion October 28, 2022).
[83] A046, ¶ 15.
[84] A023 (Ex. C to Defendant's Motion for Evidentiary Hearing, July 26, 2022).

listed in a pdf file arranged alphabetically by the last name of the defendant. A copy of the list was attached as Exhibit A to defendant's July 26 motion and appears in the appendix to this consolidated motion at A001. This information was turned over to Dr. Omori. Her work with the data set is detailed in her declaration dated June 16, 2022, which was attached to the July 26 motion as Exhibit B and appears in the appendix to this consolidated motion at A029. For reasons discussed below, Dr. Omori updated her work in a declaration dated October 10, 2022, by dropping seven cases from her analysis. This discussion uses her updated data set of 689 cases.[85]

b. **Dr. Omori's Analysis of the Data**

To determine whether any group was disproportionately charged with murder, Dr. Omori obtained adult population numbers for Riverside County from the American Community Survey [ACS] of the United States Census Bureau.[86] For the period from 2016 through 2020, the White non-Hispanic population was 700,651 (38.4%), the Black non-Hispanic population was 115,632 (6.3%), the Hispanic population was 825,328 (45.2%), and others were 182,854 (10.0%).

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[85] A043 (Ex. A to Defendant's Reply in Support of Motion, October 27, 2022).

[86] United States Census Bureau, American Community Survey

Dr. Omori used these numbers for the following calculations, which highlighted the differences in charging rates for white and Black defendants:

- White non-Hispanic defendants had murder cases filed at a rate of 20.27 per 100,000 population, while Black non-Hispanic defendants had murder cases filed at a rate of 120.21 per 100,000 population. In other words, *Black people received murder charges at a rate over 5 times that of whites, a statistically significant difference.*
- White non-Hispanic defendants had special circumstances filed at a rate of 4.85 per 100,000 population, while Black non-Hispanic defendants had murder cases filed at a rate of 64.86 per 100,000 population. In other words, *Black people received special circumstances at a rate over 13 times that of whites, a statistically significant difference*.
- White non-Hispanic defendants had death notices filed at a rate of 0.29 per 100,000 population, while Black non-Hispanic defendants had murder cases filed at a rate of 6.05 per 100,000 population. *In other words, Black people received death notices at a rate over 20 times that of White people, a statistically significant difference*.

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https://www.census.gov/programs-surveys/acs/ [as of July 20, 2022].

Dr. Omori also calculated that almost 25% of White defendants charged with murder received special circumstances notices, but over 54% of Black defendants charged with murder did. *This was a statistically significant difference.* She found a large difference between the percentage of White defendants charged with special circumstances who received death notices (5.7%) and the percentage of Black defendants who received death notices (9.3%). *Because of the small number of cases, this difference was non-significant.*

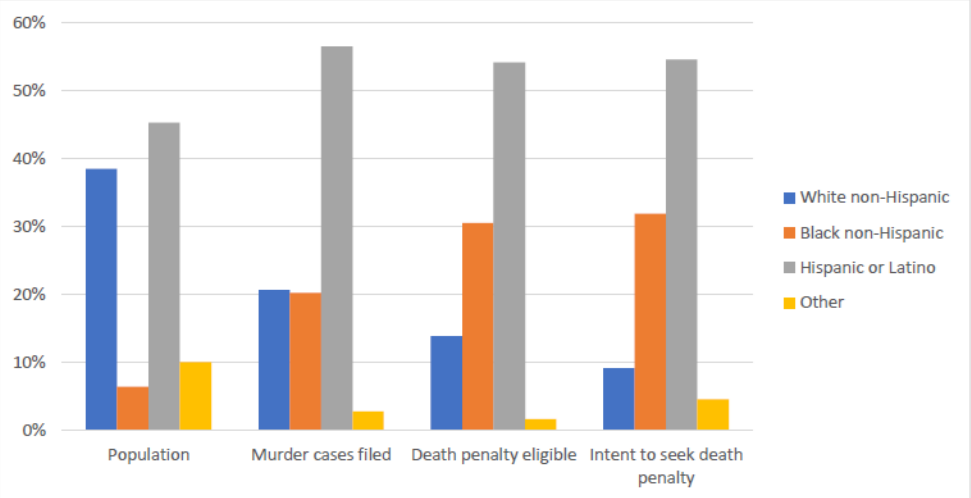
Dr. Omori's statistics show Black people are charged with more murders, special circumstances and notices of intent to seek the death penalty than White offenders, in violation of section 745, subdivision (a)(3). Black people also received more severe sentences than Whites charged with the same crimes, contrary to section 745, subdivision (a)(4)(A).[87]

[87] A045-51.

	Adult population		Murder cases filed		Death penalty eligible		Intent to seek death penalty	
	N	%	N	%	N	%	N	%
White non-Hispanic	700651	38.4%	142	20.6%	34	13.8%	2	9.1%
Black non-Hispanic	115632	6.3%	139	20.2%	75	30.5%	7	31.8%
Hispanic or Latino	825328	45.2%	389	56.5%	133	54.1%	12	54.5%
Other	182854	10.0%	19	2.8%	4	1.6%	1	4.5%
Total	1824465	100.0%	689	100.0%	246	100.0%	22	100.0%

Note: Population estimates from ACS Census from 2016-2020 for Riverside County

Figure 1: Percent of Adult population, murder cases filed, death penalty eligible, and death notices filed in Riverside County



Dr. Omori's chart and the graph demonstrate that Black defendants are increasingly over-represented compared to their representation in the adult population of Riverside County—and White defendants are increasingly under-represented—as cases progress from murder charges to special circumstance filing to death notice filing. Specifically, only 6.3% of Riverside County's adult citizens are Black, but Black defendants comprise 20.2% of those charged with murder, 30.5% of those charged with special

circumstances, and 31.8% of those who receive death notices. In contrast, 38.4% of the Riverside County's adult citizens are White, but only 20.6% of those charged with murder, 13.8% of those charged with special circumstances, and 9.1% of those who receive death notices are White.

The DA has made several criticisms of Dr. Omori's analyses, all without merit. First, Dr. Omori's original dataset included seven juvenile defendants who were not eligible for the death penalty.[88] Although the DA did not explain why the inclusion of those seven cases would invalidate her overall conclusions, Dr. Omori dropped the cases and updated her analyses. None of the disparities she found in her original 696-case dataset changed when she repeated them with her updated 689-case dataset.[89] The numbers described above derived from the updated analysis.

Even without additional corroboration from the statistical analyses conducted by Dr. Nick Petersen and Dr. Frank Baumgartner, Dr. Omori's statistical analysis satisfies the CRJA's minimal burden needed to obtain a hearing on the merits.

[88] District Attorney's Opposition to Motion for a Hearing and Relief filed on September 22, 2022, at 6-7.
[89] A045-49.

2. Dr. Nick Petersen's Charging Study Corroborates Dr. Omori's Conclusions.

Mr. Mosby has also proffered two studies conducted by Dr. Nick Petersen of the University of Miami.[90] Using different data and methods of analysis from Dr. Omori's, he reached similar conclusions. His first study analyzed Riverside County prosecutors' decisions whether to allege special circumstances and death notices, and jurors' decisions whether to impose death.

a. Dr. Petersen's Charging Study Data Set

Dr. Petersen used a case list provided by the Riverside County District Attorney to the State Public Defender in response to a request under the California Public Records Act, Cal. Gov. Code § 2651 et seq. The Public Defender requested, for the time from January 1, 2007, to July 8, 2019: (1) every case in which the District Attorney charged a suspect with a violation of Penal Code § 187, (2) every case in which the District Attorney filed a special circumstance, (3) every case in which the District Attorney filed a notice of intent to seek the death penalty, and (4) every

[90] A072, A113 (Ex. 1 and 2, Defendant's Supplemental Proffer, September 28, 2022.

case in which a jury or judge imposed death.[91] From the District Attorney's response, Dr. Petersen compiled a list of over 800 cases. He added information about each case obtained from the electronic case dockets maintained on the Riverside County Clerk's website, data on murder victim demographics and incident characteristics obtained from the California Department of Justice, and data on which cases received death sentences obtained from the State Public Defender.[92]

b. Dr. Petersen's Analysis of the Data Set

Dr. Petersen began by examining "unadjusted" rates of capital charging and sentencing for different racial[93] categories. In other words, he examined simple percentages. He found that, although only 20% of all murder defendants were Black, they comprised 26% of those served with special circumstances, 39% of those who received death notices, and 36% of those who received death sentences. In contrast, while 25% of all murder defendants were White, they were only 18% of those who received

[91] A066 (Ex. 4 to Defendant's Supplemental Proffer, September 28, 2022).
[92] A074, A082.
[93] For technical reasons explained in his report, Dr. Petersen uses the terms "race" and "racial" as shorthand for "race/ethnicity" and "racial/ethnic." A074 n.1.

special circumstances, 9% of those who received death notices, and 4% of those who received death sentences.[94]

Dr. Petersen next investigated whether legitimate case characteristics or other non-racial factors could account for the racial disparities summarized above, using logistic regression. Logistic regression is a well-established statistical approach for investigating racial disparities in death penalty decision-making.[95] Regression models allow researchers to control for, or take into account, numerous non-racial factors (independent variables), to assess the impact of race on key decision points in the capital sentencing process (the dependent variable). "For example, with such an analysis, one can compare the likelihood that a Black, Hispanic, or White

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[94] A090.

[95] *See* David Baldus, George Woodworth, and Charles Pulaski, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); David Baldus et al., Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH (Charles S. Lanier,William J. Bowers, &James R. Acker eds., 2009); Nick Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases A Case Study of Police and Prosecutorial Discretion*, RACE JUSTICE 2153368716645842 (2016); Nick Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities*, CRIM JUSTICE REVIEW. 1–25 (2017); Glenn Pierce & Michael Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 ST. CLARA REV. 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina*, 1980-2007, 89 NCL REV 2119(2010).

defendant will receive a death notice in cases with similar independent variables corresponding to victim/defendant demographics (e.g., age, gender, etc.) and case characteristics (e.g., felony-murder charge, multiple-victim charge, etc.)."[96] Petersen controlled for defendant race/ethnicity and prior criminal history, victim race/ethnicity, age, and gender, and multiple case characteristics.[97]

For each variable in each model, the regression equation generated an odds ratio indicating how much that variable's presence increased or decreased the likelihood of the outcome under analysis (compared to its absence), while taking into account the other variables in the model.

Dr. Petersen built three regression models that studied the impact of race on the outcomes of charging special circumstances, filing death notices, and imposing death sentences. He found that race of defendant had a statistically significant impact on all three outcomes, even taking into account the other variables in each model. Accounting for all other variables, Black defendants remained 1.71 times more likely to be charged with a special circumstance, 9.06 times more likely to receive a death

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[96] A077.

[97] These included multiple victims, multiple defendants, the presence of a death-eligible felony or pending case, use of a firearm or knife, victim-defendant stranger relationship, and crime location in residence or on the street. A094.

notice, and 14.09 times more likely to receive a death sentence than White defendants.[98] These observed effects were statistically significant.[99] The most statistically significant relationship was the 9.06 times increased likelihood that a Black defendant charged with special circumstances would go on to receive a death notice. This variable was statistically significant at $p < .05$, meaning there was less than a 5% chance that a relationship this strong (between being a Black defendant and receiving a death notice) would occur by random chance. Among the variables that were statistically significant at $p < .05$, the Black defendant variable had the largest effect in the model, with a greater impact on the filing of a death notice than having multiple victims or contemporaneous felonies.[100]

The strong relationship between race of defendant and the filing of both special circumstances and death notices in Dr. Petersen's analyses corroborates Dr. Omori's finding that Black defendants received special

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[98] A115; A093-94 & Table 2.

[99] Dr. Petersen explains that "in the death penalty context, p-values correspond to the probability that 'a [racial] disparity could occur by chance." A081 n.23 (quoting David Baldus et al., "Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty," in Charles S. Lanier et al., *The Future of America's Death Penalty: An Agenda for The Next Generation of Capital Punishment Research* 171 (1990). In the social sciences, p-values less than 0.05 are typically considered statistically significant, but researchers sometimes use a cutoff point of 0.10 for analyzing the practical significance of results observed in populations and small samples. A081-82, A088.

circumstances and death notices at significantly higher rates, relative to their proportion in the population.[101] The two experts' use of different data sets and analyses to arrive at similar conclusions strengthens confidence in their findings.

Finally, Dr. Petersen studied the impact of victim-defendant racial interactions on the three outcomes of charging special circumstances and receiving death notices and death sentences. Because of the small number of cases in certain victim-by-defendant racial combinations, he grouped Black and Hispanic individuals into one minority category for this analysis.[102] He found that, compared to cases involving a White victim and a White defendant, every other combination of defendant race (White or minority) and victim race (White or minority) significantly increased the likelihood of receiving a death notice. Minority defendants charged with killing minority victims were 10.65 times more likely to receive death notices than White defendants charged with killing White victims, a result that was significant at $p < .05$, meaning that there was less than a 5% chance that a

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[100] A094.

[101] A035, A036, A039 (Exhibit B to Defendant's Motion for Evidentiary Hearing, July 26, 2222).

[102] A097-98.

relationship as strong as the one observed in the model would occur by random chance.[103]

3. Dr. Petersen's SHR Study Further Demonstrates the Role of Race in Capital Sentencing in Riverside County.

In the second study, Dr. Petersen analyzed data derived from Riverside County homicides from 1976 through 2018 as reported in the Supplementary Homicides Reports ("SHR").[104] The SHR is a database of homicides in the United States maintained and published annually by the Federal Bureau of Investigation ("FBI"). The SHRs provide detailed information about each reported homicide, such as the age, sex, and race/ethnicity of the victim, the weapon used to commit the offense, the circumstances surrounding the homicide, and the relationship between the victim and offender, if known.[105] The overarching goal of Dr. Petersen's SHR study was to analyze broader death-sentencing trends in Riverside County from 1976 through 2018. Unlike the charging study, this SHR study focused on death-sentencing outcomes within a large set of Riverside County cases over a wider range of years without analyzing the intermediate decision points.[106]

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[103] A99-100 & Table 3.
[104] A102.
[105] A074.
[106] A074.

a. Dr. Petersen's SHR Study Data Set

To develop a dataset for the SHR study, Dr. Petersen first used the SHR to gather information about all homicides reported to police in Riverside County from 1976 to 2018. Next, Dr. Petersen cross-referenced this pool of more than 3,000 homicides with death-sentencing data collected over the same period from the Habeas Corpus Resource Center ("HCRC") and the California Appellate Project ("CAP").[107] Dr. Petersen next matched the reported homicides from the SHR with the subsequent criminal cases in Riverside County that ultimately resulted in death sentences.[108] Dr. Petersen then excluded homicides committed by juveniles, who are ineligible for the death penalty, homicides without race information (most commonly missing because there was no arrest), and other cases missing necessary information.[109] The resulting dataset included information for 101 homicides that resulted in death sentences and 2781 homicides that did not.[110]

b. Dr. Petersen's Analysis of SHR Data

Dr. Petersen first examined the "unadjusted" percentages of Riverside County homicides that resulted in death sentences. He found that

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[107] A103.
[108] A103.
[109] A104.

homicides with Black suspects were more likely to result in death sentences than homicides with White suspects. For example, only 19% of all Riverside County homicides involved a Black suspect, but 39%—more than double the percentage—of Riverside homicides with a death sentence had a Black suspect.[111] Though 44% of Riverside County homicides had White suspects, only 28% of homicides with a death sentence had White suspects.[112]

Dr. Petersen also analyzed death sentencing trends in Riverside County by race of victim. He found that homicides were more likely to result in death sentences when they involved White victims. For example, 46% of Riverside County homicides involved White victims, but 53% of homicides with death sentences had White victims.[113] By contrast, Dr. Petersen found that homicides of Black victims were less likely to result in death sentences. According to the SHR study, 17% of Riverside County homicides involved Black victims, but just 13% of Riverside County homicides with death sentences had Black victims.[114]

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[110] A104.
[111] A106, Table 4.
[112] A106, Table 4.
[113] A106, Table 4.
[114] A106, Table 4.

As in the charging study, Dr. Petersen then conducted a logistic regression analysis. This allowed him to determine whether other legally relevant non-racial factors (such as multiple victims or contemporaneous felonies) were driving these outcomes.[115] Even after accounting for legally relevant non-racial factors, however, Dr. Petersen found that victim and suspect race shaped death penalty outcomes. "According to the logistic regression model, homicides with non-White (Black/Hispanic) victims are less likely to result in a death sentence, while those with a non-White (Black/Hispanic) suspect are more likely to result in a death sentence."[116] Homicides with Black suspects were 3.96 times more likely to result in a death sentence than homicides with White suspects.[117] Homicides with Black victims were 77% less likely to result in a death sentence than homicides with White victims.[118] These calculations were statistically significant at the 0.01 p-value level, meaning there was less than a 1% chance that these disparities occurred by random chance.

The SHR study then considered "interaction effects for victim and suspect race dyads."[119] Stated more simply, Dr. Petersen used the data

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[115] A106-07.
[116] A107.
[117] A107.
[118] A107.
[119] A108.

from the SHR study to determine the likelihood that homicides involving various combinations of suspects and victims of various racial groups would result in death sentences. According to Dr. Petersen's analysis, homicides involving a Black suspect and a White victim were 4.75 times more likely to result in a death sentence than homicides involving a White suspect and a White victim.[120] This calculation was highly statistically significant at the $p < .001$ level, signifying less than a one-tenth of one percent chance that the result occurred by random chance.[121]

Dr. Petersen concluded:

> In sum, while the charging study and the SHR study utilized different data sources covering distinct time periods and analysis techniques, they tell a similar story regarding victim/defendant racial disparities. Taken together, the results highlight large-scale and widespread racial disparities in Riverside County over four decades, where Black/Hispanic defendants and victims are systematically disadvantaged at multiple death penalty decision-making points. In fact, the convergence of the studies' findings gives me greater confidence that race plays an important role in shaping death penalty outcomes in Riverside County. Because I have employed state-of-the-art statistical methodologies to analyze robust datasets, I believe that my findings offer strong empirical evidence of racial disparities within Riverside County's death penalty system from 1976-2019.[122]

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[120] A110, Table 6.
[121] A110, Table 6.
[122] A116.

4. Dr. Frank Baumgartner's Statistical Analysis Finds Glaring Racial Disparities Among Late Adolescents Sentenced to Death

A study by another scholar working from a different dataset than those utilized by Dr. Omori and Dr. Petersen provides further support for Mr. Mosby's prima facie case under the CRJA. Dr. Frank Baumgartner, a professor of political science at the University of North Carolina at Chapel Hill, authored a June 2022 report on the race and age characteristics of those sentenced to death in this country. He evaluated sentencing rates before and after the Supreme Court decided in *Roper v. Simmons*[123] that juveniles under age 18 are categorically ineligible for the death penalty.[124]

Working from a "comprehensive database covering the universe of U.S. death sentences from 1972 [the year of the Supreme Court's decision in *Furman v. Georgia*[125]] through the end of 2021," Dr. Baumgartner inquired about the combined effects of youth and race on the sentencing decision by investigating the racial characteristics of those in the two younger categories—juveniles under 18 (permitted pre-*Roper*) and late

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[123] *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 21].

[124] A135; Exhibit 6 to Defendant's Supplemental Proffer, September 28, 2022.

adolescents aged 18 to 20—at the time of the crimes.[126] He found that Black prisoners represented 49% of the two younger groups and only 38% of those aged 21 and over.[127] In his second inquiry, he looked at post-*Roper* outcomes and compared those in the late-adolescent category (but at least 18) with those 21 and over. He found that Black prisoners have represented an even larger share of late adolescents sentenced to death. They "represent an absolute majority," 51% of those in the late adolescent category, but less than 40% of those aged 21 or older.[128]

More recently, Dr. Baumgartner examined the Riverside County cases in his database to ask whether the national pattern he reported in June 2022 holds true here. He found that it does.[129] Because of the smaller number of county-wide cases compared to the nationwide numbers he analyzed in his June report, he grouped minority defendants together to facilitate meaningful comparisons between groups.[130] Just as in the nationwide data, minority representation in the late adolescent group of death-sentenced defendants was higher than it was in the older group, and

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[125] *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346].
[126] A136-37.
[127] A137.
[128] A138.
[129] A 140; Exhibit 5 to Defendant's Supplemental Proffer, September 28, 2022.

that gap worsened after *Roper*.[131] Moreover, the data reflected an even larger gap between minority and white representation among late adolescents sentenced to death in Riverside County than in the nation at large.

> Since Furman, minority members have comprised 61.47% of the late adolescents sentenced to death nationwide and 84.21% of that cohort sentenced to death in Riverside. Since Roper, minority members have comprised 78.17% of the late adolescents sentenced to death nationwide and 80% of that cohort sentenced to death in Riverside.[132]

Although Dr. Baumgartner's analysis did not focus primarily on the older group, his Riverside County data also reflect disproportionate representation of minority members among death-sentenced persons aged 21 and older at the time of the homicide (although smaller than the disproportion in the late adolescent group). Since *Furman*, minority defendants have comprised 66%, and White defendants only 26%, of the older defendants sentenced to death in Riverside County. Since *Roper*, minority defendants have comprised 75%, and White defendants only 25%, of the older defendants sentenced to death in Riverside. For all age groups,

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[130] A141.
[131] A142.
[132] A142.

66% of those sentenced to death since *Furman* and 70% of those sentenced since *Roper* have been minority members.[133]

Dr. Baumgartner's results coincide with other California research. A white paper prepared by the Office of the State Public Defender for the Commission on Revision of the Penal Code reported that California's death row is disproportionately populated by people who were 25 or younger, and that youthful prisoners are disproportionately members of minority groups. 82% of youthful offenders under 21 who were sentenced to death in California between 2006 and 2020 were Black or Latinx.[134] The Commission reported similar statistics:

> Racial disparities are especially pronounced in young people sentenced to death. While 68% of all people on death row are people of color, the percentage jumps to 77% for people who were 25 or younger at the time of their offense, and to 86% for people who were 18 at the time of their offense.[135]

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[133] A142.

[134] Office of the State Public Defender, White Paper Rept. to the Com. on Rev'n of the Penal Code, *California's Broken Death Penalty: It's Time to Stop Tinkering with the Machinery of Death* 32 & n.139 (March 2021) (citing Blume et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 941 (2020)).

[135] California Committee on Revision of the Penal Code, *Death Penalty Report* 30 (November 2021), http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf (visited Sept. 16, 2022) (citing data provided by DCDR Office of Research, September 2021).

This evidence of glaring racial disparities at various levels of Riverside's capital punishment system strongly supports the conclusion that Mr. Mosby should be entitled to relief under the CRJA.

C. The Historical and Statistical Evidence Presented by Mr. Mosby Establishes Prima Facie Violations Of Section 745, Subdivisions (A)(3) And (A)(4)(A).

Under Penal Code section 745, subdivision (a), the state "shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence of death on the basis of race, ethnicity, or national origin."[136] Where a defendant alleges that multiple provisions of the CRJA have been violated, this Court must not treat these provisions as "isolated pathways to proving a violation."[137] Rather, evidence offered to demonstrate violations of multiple subdivisions of the statute "may work in tandem" as claims that provide mutually-reinforcing and corroborative evidence of a CRJA violation. In this motion, Mr. Mosby offers evidence that Riverside's death penalty system violates subdivisions (a)(3) and (a)(4)(A) of the CRJA.

Subdivision (a)(3) of the CRJA provides that a violation is established when:

> The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who [**commit similar**

[136] Cal. Penal Code § 745(a).
[137] *Young v. Superior Court, supra,* 79 Cal.App.5th 138, 164.

> **offenses/have engaged in similar conduct]** and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.[138]

Subdivision (a)(3) makes clear that a CRJA violation is established when a Black defendant presents evidence which establishes that Black defendants are charged with murder or have special circumstances filed against them at a significantly higher rate than similarly situated White defendants in their county.

Subdivision (a)(4)(A) of the CRJA provides that a violation is established when:

> A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.[139]

Subdivision (a)(4)(A) means that a CRJA violation is established when a Black defendant presents evidence which establishes that Black

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[138] Cal. Penal Code § 745(a)(3).
[139] Cal. Penal Code § 745(a)(4)(A).

defendants are sentenced to death at a significantly higher rate than similarly situated White defendants in their county.

Penal Code § 745, subdivision (h), as amended, provides more clarity on the meaning of subdivisions (a)(3) and (a)(4)(A), stating: "'More frequently sought or obtained' and 'more frequently imposed' means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated…"[140] Further, the "totality of the evidence" that the court can consider under this statute "may include statistical evidence, aggregate data, or nonstatistical evidence."[141]

Mr. Mosby need only make a prima facie showing of a violation of Penal Code § 745(a) to be entitled to an evidentiary hearing.[142] As described above, the CRJA sets a low burden, more than a mere possibility that he will be able to prove a violation at a hearing.[143]

Under the language of the CRJA, this Court must accept the facts that the defense had produced at face value, without "weighing conflicting

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[140] Cal. Penal Code § 745(h)(1).
[141] *Id*.
[142] Cal. Penal Code § 745(c).
[143] Cal. Penal Code § 745(h)(2).

evidence, determining credibility, or drawing inferences."[144] The Court must then determine whether there is more than a mere possibility that the facts—already accepted as alleged by the defendant—amount to a violation of Penal Code § 745, subdivision (a).[145] And, as discussed in detail above, the Court should not employ a two-part test requiring Mr. Mosby to demonstrate different outcomes in factually similar cases involving White defendants.

Dr. Omori's statistical analysis finds stark racial disparities in the Riverside County District Attorney's charging, filing of special circumstances, and the filing of death notices. Dr. Petersen's charging and SHR studies and Dr. Baumgartner's late adolescent study further corroborate the immense racial disparities in death penalty decision-making identified by Dr. Omori. Together, these studies provide compelling evidence that Black people in Riverside County are more likely to be charged with murder, to have special circumstances and death notices filed against them, and to face punishment by death than *similarly situated* White people.

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[144] *Burtscher v. Burtscher,* 26 Cal. App. 4th 720,725-726, 31 Cal. Rptr. 2d 682 (1994), quoting *Hung v. Wang*, 8 Cal. App. 4th 908, 931, 11 Cal. Rptr. 2d 113, 127 (1992).

[145] Cal. Penal Code § 745(h)(2).

The statistical disparities presented by Mr. Mosby speak for themselves: Riverside County's capital system has historically functioned—and continues to operate—in a racially disparate manner. Moreover, these disparities evidence the very systemic bias that the California Racial Justice Act is meant to eradicate. Especially when considered within a centuries-long historical context of racial violence, subjugation, and discrimination in Riverside County, the statistical evidence produced by the defense unquestionably demonstrates a prima facie violation of Penal Code § 745, subdivisions (a)(3) and (a)(4)(A). Mr. Mosby should receive a hearing to prove that the CRJA bars a death sentence in his case.

D. THE COURT SHOULD REJECT THE DISTRICT ATTORNEY'S RESPONSES TO THE DEFENSE'S PROFFERED EVIDENCE AND MR. MOSBY'S REPLIES.

The DA has advanced several theories for denying Mr. Mosby relief. They all lack merit.

1. The History of Racial Violence and Discrimination in Riverside County is Highly Relevant to the Court's CRJA Analysis.

The DA claims that the well-documented history of racial violence and discrimination in Riverside County is "without a doubt, horrific, and sure to inflame the emotions of anyone considering a motion under Penal Code section 745." Nevertheless, the DA argues that this history is "unrelated" to

a successful CRJA claim.

Section VI of this motion discussed in detail the value of this history, which gives deeper meaning to the racial disparities in Riverside County's capital system proffered by Dr. Omori, Dr. Petersen, and Dr. Baumgartner. The DA also claims that "the general history of Black oppression in California has little if anything to do with actions by law enforcement," but the annotated chronology found at A229 specifically includes well-documented historical moments evidencing racism in Riverside County's law enforcement. Moreover, the California Legislature specifically notes that courts may consider "nonstatistical evidence," which necessarily includes well-documented county history, when evaluating a CRJA claim.

2. The District Attorney Erroneously Argues that the § 745(a)(4)(A) Claim Should Fail as a Matter of Law.

The DA claims that since Michael Mosby is currently awaiting trial and no sentence has been imposed, the § 745(a)(4)(A) claim "fails as a matter of law."

This argument is clearly mistaken. Even before AB 256 made the CRJA fully retroactive, the law provided remedies for motions before judgment. For example, § 745(e)(1)(C) notes that if the court finds by a preponderance of the evidence a CRJA violation before a judgment has been entered, the Court may dismiss enhancements, special

circumstances or special allegations, or reduce one or more charges.[146] Additionally, § 745(e)(3) notes that "when a Court finds that there has been a violation of § 745, subdivision (a), the defendant shall not be eligible for death.[147] Therefore, a successful showing under subdivision (a) would demonstrate that Mr. Mosby is ineligible for the death penalty and his case should proceed non-capitally. Withholding CRJA remedies for meritorious motions before judgment would require reading subdivision (e)(3) out of the statute and strip the CRJA of a crucial intended function: protecting pretrial capital defendants from racially biased capital prosecution.

In any event, as discussed, the statute is now fully retroactive and specifically provides that its terms apply "to all cases in which judgment is not final."[148]

3. The District Attorney's Claims that Dr. Omori's Conclusions "Contain Serious Flaws" Lack Merit.

The DA argues that Dr. Omori's declaration-report contained three major shortcomings. First, the DA notes accurately that Dr. Omori's statistical analysis of 696 death-eligible cases incorporated seven juveniles. As this Court is aware, juveniles are ineligible for capital punishment.[149]

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[146] Cal. Pen. Code. § 745(e)(1)(D).
[147] Cal. Pen. Code § 745(e)(3).
[148] P.C. § 745(j)(1) (as amended).
[149] *Roper v. Simmons*, 543 U.S. 551 (2005).

However, though the inclusion of seven juvenile cases within a statistical analysis of nearly 700 cases amounts to a drop of water in an ocean of evidence, the defense asked Dr. Omori to re-run her analyses excluding these seven cases. After removing the juvenile cases, Dr. Omori still found immense racial disparities at each procedural stage, and all of her conclusions remained unchanged.[150]

Second, the DA argues that Dr. Omori "[conceded] that she could not find a statistically significant difference in Black non-Hispanic and White non-Hispanic groups."[151] Dr. Omori explained in her original declaration that, because of the small number of cases using **one** means of analysis at **one** decision point—the filing of death notices among the defendants charged with special circumstances—the difference between the death notice rates for Black and White non-Hispanic defendants was not statistically significant. The difference in the rates for the two groups of defendants was nevertheless substantial: .093 for Black defendants vs. .057 for White defendants.[152]

Moreover, when Dr. Omori used a different means of analysis to

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[150] A045-47, ⁋⁋ 9-13 (Exhibit A to Defendant's Supplemental Reply, filed October 14, 2022).

[151] District Attorney's Opposition to Motion for Hearing and Relief, filed on September 22, 2022, at 6.

examine the death notice rates, she did find statistically significant differences between the rates for Black and White defendants.[153] The District Attorney did not mention that Dr. Omori also found statistically significant differences between the rates for Black and White defendants at other decision points: filing murder charges and filing special circumstances.[154] In an updated declaration, Dr. Omori provides a detailed explanation of the reasons that one of the seven statistical analyses that she conducted for Mr. Mosby did not show a statistically significant difference. Her explanation is clear: the sample size of cases was just not large enough for a difference of this size to reach statistical significance.[155]

Especially since § 745, subdivision (h)(1) is clear that statistical significance is not required for the court to acknowledge the validity of a statistical analysis, this Court should dismiss the DA's argument that Omori's declaration-report had "serious flaws."

E. White Offenders Similarly Situated to Mr. Mosby Have Not Had to Face the Death Penalty.

For the reasons explained above, the multiple statistical analyses by

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[152] A39-40 ¶ 35 & n.9 (Exhibit B to Defendant's Motion for Hearing and Relief, filed July 26, 2022.

[153] A039, ¶¶ 33, 34.

[154] A033, A036, ¶¶ 15, 23, 25.

[155] A047, ¶ 14 (Ex. A, Defendant's Supplemental Reply, filed October 14, 2022.

Professors Omori, Petersen, and Baumgartner all demonstrate a violation of P.C. § 745. As a group, White people charged with murder, charged with special circumstances, and subject to death notices are similarly situated to Black people who face each of those same charges. Mr. Mosby's evidence shows that at each stage, Black people are more likely to progress to the next stage than similarly situated White people.

This Court, nevertheless, has denied Mr. Mosby's motion for an evidentiary hearing based on that evidence, without prejudice to renewing the motion with additional evidence that provides factual comparisons of his case with those of similarly situated White defendants who escaped capital prosecution. Even if a defendant must provide case-specific factual comparisons to demonstrate entitlement to a hearing and relief—although, as argued above, Mr. Mosby need not do so—the Court should grant him a hearing. The factual comparisons below, along with the aggregate evidence already proffered, establish a prima facie case. There is no advocacy for death in these comparisons. Instead, the argument is that Mr. Mosby, like these defendants, should not face a death notice, capital trial and sentencing, or execution in the name of the People of the State of California.

Penal Code § 745, subdivision (h)(6), as amended, defines "similarly

situated." It provides, in relevant part: "'Similarly situated' means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's conviction history may be a relevant factor to the severity of the charges, convictions, or sentences."

To determine whether any of the foregoing individuals were similarly situated to Michael Mosby, it is necessary to briefly summarize the case against Mosby.

It is alleged that on April 8, 2014, Mr. Mosby, two women, and a child were in a Cadillac in Moreno Valley. A man named Darryl King-Divens was sitting on a bicycle in the neighborhood where the Cadillac was driving. Michael Mosby, the alleged driver of the Cadillac, reportedly made a U-turn and pulled up alongside King-Divens. Mr. Mosby did not know Mr. King-Divens before this encounter. Words were exchanged between the two men and gunshots were fired. Mr. King-Divens ran away but collapsed and died near an apartment building stairwell.

Mr. Mosby was 24 years old at the time of the alleged offense. In his pending case, the District Attorney alleges two special circumstances: 190.2(a)(21), discharge of a firearm from a motor vehicle, and 190.2(a)(2), prior murder convictions. The basis for the prior murder circumstance is Mr.

Mosby's conviction in January 2017 of two murders in Los Angeles County, which took place a few weeks before the King-Divens homicide. Besides the prior murder convictions, Mr. Mosby has no criminal record.

On March 15, 2019, the District Attorney's Office announced its decision to pursue the death penalty against Mr. Mosby.

The Riverside County Public Defender's Office is aware of at least 20 cases in which the District Attorney decided, between 2016 and 2022, not to seek death against White defendants similarly situated to Mr. Mosby. The list includes cases managed by the Riverside County Public Defender and three cases managed by private defense attorneys. The full list of these cases and accompanying factual summaries can be found at A258. There may be significantly more cases involving similarly situated White defendants, represented by private defense attorneys, who did not face capital prosecution.

The sections that follow compare cases that were similar to Mr. Mosby's in several relevant categories of facts and circumstances but involved White defendants who did not receive death notices.

1. Murders by White Defendants with Similar Factual Circumstances Who Did Not Face Capital Prosecution

In 2018, the Riverside DA decided not to seek death against a White man named Ronald Ricks, who was convicted of a 2017 murder in

Riverside County. Ricks allegedly pulled his Dodge Ram pickup truck up to a house in Banning, where he pointed his gun out the window and fired multiple shots at individuals standing in front, killing a man named Michael Gordon. Ricks' girlfriend, Salena Holmes, later indicated that the deceased was her best friend. Ricks' case is scheduled for jury trial in 2023.

In 2019, the Riverside DA decided not to seek death against a White man named Noy Boukes, who was convicted of a 2016 murder. Boukes drove a white Toyota Camry to a cul-de-sac near Hemet, where he shot and killed a fellow member of a white supremacist gang called the "Coors." After the shooting, according to the police reports, Boukes told the girlfriend of the deceased to "get in the car and shut the fuck up or [Boukes] would kill her." Boukes drove off with the woman and did not allow her to leave the car for several hours, during which she feared that he would kill her if she tried to escape. Boukes was sentenced to life without parole in 2019.

There is no meaningful difference between Mr. Mosby and these similarly situated White defendants, both of whom were charged with special circumstances but did not receive death notices, except race.

2. Multiples Murders by White Defendants Who Did Not Face Capital Prosecution.

In 2017, the Riverside DA chose not to seek death against a White defendant named Robert Lars Pape, who was convicted of killing three

people, one of whom was Pape's ex-girlfriend. After killing them, Pape set the three bodies on fire. The bodies were burned beyond recognition and were found at a residence in Pinyon Pines. The District Attorney did not seek death against Pape, and he is serving a term of life without parole.

In 2019, the Riverside DA chose not to seek death against a White defendant named Jared Bischoff, who is charged with two separate murders which took place within less than three weeks. First, Bischoff allegedly killed a man named Jaren Hilbert who was flirting with Bischoff's girlfriend at the time, Bailey Sharp. A few weeks later, Bischoff allegedly killed Sharp, with whom he had an extensive history of arguments and domestic violence. Bischoff allegedly pulled Sharp from the passenger seat of his car and stabbed her in her neck and around her body six times until she bled to death. Bischoff's cases are set for a Trial Readiness Conference and a motion to consolidate on January 13, 2023.

Like Pape and Bischoff, Mr. Mosby is accused of committing several murders over a three-week period in 2014. There is no meaningful difference between him and these similarly situated White defendants except race.

3. Murders by White Defendants in Young Adulthood Who Did Not Face Capital Prosecution

In 2018, the Riverside DA chose not to seek death against a White defendant named James Coon, who robbed a gas station clerk at a Circle-K in Lake Elsinore where he was formerly employed. Once Coon had taken several items without payment, the store clerk attempted to take a picture of him, and Coon fired several rounds into the clerk's body and head, killing the man. Coon was 26 on the date of the offense. He was sentenced to life without parole in 2019.

In 2019, the Riverside DA chose not to seek death against a White defendant named Melissa Unger, a codefendant in a gang murder that involved the kidnapping and torture of the victim. Unger was 23 years old on the date of the murder. Unger pled guilty to voluntary manslaughter, P.C. § 190(a) in 2022.

In 2021, the Riverside DA chose not to seek death against a White defendant named Owen Skyler Shover. He is accused of killing his 16-year-old girlfriend, whose body has still not been recovered. Shover was 18 years old at the time of the offense.

In 2022, the Riverside DA chose not to seek death against a White defendant named Andrew Burke, who stabbed his adopted parents/grandparents to death with a knife. Burke was 25 years old on the date of the offense.

In the Pape case discussed above, the defendant was 18 years old on the date he committed multiple murders.

In the Bischoff case discussed above, the defendant was 25 years old on the dates of the alleged murders.

Like the similarly situated White defendants mentioned above who were young adults when they allegedly committed offenses, Mr. Mosby was 24 years old when the alleged offense took place in April of 2014. Only he faces the death penalty.

4. Highly Aggravated Murder by White Defendant Who Did Not Face Capital Prosecution

In 2017, the Riverside County District Attorney decided not to seek death against a White man named Maxamillion Eagle. A few weeks before the killing, Eagle allegedly raped a woman named Melissa Gale. Upset by the prospect that she would report the incident to the police, Eagle killed her by strangulation. First, he struck her with an unidentified object to subdue her, and then he brought her inside an empty residence and strangled her first with his hands and then with a rope to “hog tie” her so she could not run away. Gale soon stopped breathing. Eagle then decided to hide her body in a duffel bag, dumped the bag into a trash can, and secured it with chain and lock. Eagle had one prior strike on his record: a

2016 conviction for P.C. 245 assault with a deadly weapon. Eagle was sentenced to life without parole in 2018.

Mosby is not accused of killing a witness, committing a sexual offense against the decedent, nor attempting to hide a body. Nevertheless, he faces the death penalty and Eagle does not.

5. Murders by White Defendants with Extensive Criminal Histories Who Did Not Face Capital Prosecution

The Riverside DA has often sought not to pursue death against White defendants accused of murder who also have extensive criminal histories.

In the Ricks case mentioned above, the defendant had several priors, including (1) 2006 P.C. § 496(d) receiving a stolen vehicle, (2) 2008 P.C. § 496(a) receiving stolen property, and (3) P.C. § 459 first degree burglary.

In the Boukes case mentioned above, the defendant had several notable priors——(1) P.C. § 186.22 criminal gang activity, (2) P.C. § 459 first degree burglary, (3) P.C. § 496(d) receiving stolen property, (4) P.C. § 12021 felon with a firearm.

In the Eagle case mentioned above, the defendant had a prior conviction for P.C. § 245 assault with a deadly weapon.

Unlike the White defendants mentioned above, Michael Mosby has no prior criminal history. Nevertheless, he faces the death penalty and they do not.

6. Conclusion: Similarly Situated White Defendants Have Been Treated Less Harshly than Mr. Mosby.

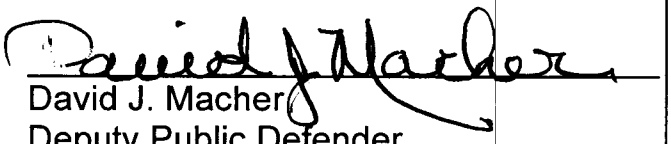
The factual comparisons above illustrate that the Riverside DA's decision to seek death against Mr. Mosby means that he faces a significantly harsher punishment than the punishment faced by "similarly situated" White defendants "who engage in similar conduct." Although Mr. Mosby need not make this case-specific showing at all, it adds further weight to the aggregate evidence that establishes a prima facie violation of P.C. § 745. This Court should therefore order an evidentiary hearing and, ultimately, relief.

CONCLUSION

For the foregoing reasons, it is respectfully requested the court grant the motion for a hearing and, after a hearing, P.C. § 745 relief.

Dated: December 6, 2022

Respectfully Submitted,
Steven L. Harmon, Public Defender



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PROOF OF SERVICE

I am an employee of the County of Riverside, State of California, over the age of 18 years and not a party to the within action. My business address is: 4075 Main Street, Suite 100, Riverside, CA 92501.

On the date of execution of this document, I personally served a true and correct copy of the attached **MOTION FOR A HEARING & THE RELIEF PURSUANT TO THE RACIAL JUSTICE ACT Penal Code § 745 (C)** via email to the following:

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

Executed this 6th Day of December 2022, at Riverside, California.

Lisa Duarte