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IMMEDIATE RELIEF REQUESTED: STAY OF SUPERIOR COURT PROCEEDINGS AT ORANGE COUNTY SUPERIOR COURT NO. 19CF3406; NEXT HEARING PRETRIAL HEARING ON DECEMBER 6, 2024

IN THE SUPREME COURT OF THE OF THE STATE OF CALIFORNIA

OMAR MILLER, *Petitioner,* v. **ORANGE COUNTY SUPERIOR COURT,** *Respondent;* **PEOPLE OF THE STATE OF CALIFORNIA,** *Real Party in Interest.*	Supreme Court No. Court of Appeal No. G064653 O.C. Sup. Ct. No. Case No. 19CF3406 The Honorable Gary S. Paer 700 Civic Center Drive West Dept. C36 Santa Ana, CA 92701 (657) 622-5236

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Omar Miller (Petitioner) respectfully petitions for review of the summary denial of his petition for writ of mandate, challenging Respondent's denial of Petitioner's motion to dismiss and for an evidentiary hearing pursuant to Penal Code section 745, subd. (c), the Racial Justice Act (hereinafter RJA.) [003-014.][1] Respondent made three separate errors of law in denying Petitioner's claims:

(1) Respondent erred by ruling that Petitioner's statistical report of racial disparity in the charging of robbery and burglary special circumstances was insufficient to establish a prima facie case of a violation of section 745, subd. (a)(3) under section 745, subd. (c.)

(2) Respondent erred by ruling that racially discriminatory language used by the prosecutor, specifically, that *"Black individual can commit different types of murder than White individuals,"* in a response to a pretrial motion was not made, "at defendant's trial, in court and during the proceedings" within the meaning of Section 745 subd. (c)(2.)

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[1] References to the consecutively numbered pages of the volume of exhibits filed below are indicated in brackets. All further statutory references are to the Penal Code unless otherwise specified.

(3) Respondent erred by ruling that Petitioner did not establish a prima facie case that the statement, *"Black individual can commit different types of murder than White individuals,"* was racially discriminatory language in violation of section 745, subd. (a)(2) and (h)(4.)

The Court of Appeal's summary denial dated September 26, 2024 is attached as Exhibit 1. The trial court's Order Denying Motion to Dismiss is attached as Exhibit 2

Petitioner respectfully petitions this Court to (1) issue a stay of further proceedings and (2) grant his petition for review, or, in the alternative, grant his petition for review and transfer the case back to the Court of Appeal with an order to issue an order to show cause.

A stay is necessary because Petitioner seeks pretrial dismissal of the special circumstances charged against him, which is a remedy available to him under the RJA. (§ 745, subd. (e)(1)(C).)

ISSUES ON REVIEW

I. Whether a statistical comparison of individuals who commit "similar conduct," that is robbery and/or burglary, and are "similarly situated," in that they have been charged with homicide in the course of robbery and/or burglary, which demonstrates a racial disparity in the charging to the robbery and burglary special circumstances under sections 190.2(a)(17)(A) and (G), is sufficient to establish a

prima facie case of a violation of section 745, subd., (a)(3), or if the movant must provide "factual comparisons between [movant's] case and that of [movant's] of other races," as Respondent ruled in this case. [012-014]. This is a question of law which is subject to a de novo standard of review. (*Mosby v. Superior Court* (2024) 99 Cal.App.5th 106, 122.)

II. Whether section 745, subd. (a)(2)'s prohibition on the use of "racially discriminatory language," by an attorney in the case, "[d]uring the defendant's trial, in court and during the proceedings," applies to statements made in pleadings filed during pretrial proceedings. This is a legal question subject to de novo review. (*Id.*)

III. Whether a trial court may provide its own interpretation of language asserted to be "racially discriminatory language," pursuant to sections 745, subds. (a)(2) and (h)(4) and conclude that the language is not "racially discriminatory language," without ordering an evidentiary hearing, when that interpretation is not the literal or "prima facie" interpretation, is not the only possible interpretation, and supplies context other than the context in which the statement is found. This is a question of law which is subject to a de novo standard of review. (*People v. Howard* (2024) 104 Cal.App.5th 625, 324 Cal.Rptr. 848, 867.)

IMPORTANCE OF THE ISSUES ON REVIEW

Petitioner has no adequate appellate remedy, as the remedy he seeks is not to be tried on the special circumstances, a remedy available to him under the Racial Justice Act. (Pen. Code, § 745, subd. (e)(1)(C.)) Writ relief is appropriate for the denial of an evidentiary hearing under Penal Code section 745, subd. (c.) (*Mosby v. Superior Court* (2024) 99 Cal.App.5th 106.)

All three of the issues raised are issues of first impression of widespread interest that have arisen repetitively throughout the state. (*Omaha Indemnity Company v. Superior Court* (1989) 209 Cal.Ap.3d 1266, 1273 [Writ relief is warranted when "the issue tendered in the writ petition is of widespread interest."].) The issue of whether a statistical analysis of cases involving defendants who are similarly situated and have engaged in similar conduct is sufficient to establish a prima facie case of a violation of section 745, subd. (a)(3) is of particular importance in instructing the bench and bar as to how to procced in these case, which may have broad implications beyond the particular case, may consume substantial public resources, and implicate issues at the heart of the fairness of the criminal justice system. The issue was presented in *Mosby v. Superior Court* (2024) 99 Cal.App.5th 106, but a majority of the *Mosby* Court found it unnecessary to reach the issue, although the concurring justice would have reached the issue and ruled in favor of the movant.

The lack of clarity on the requirements to show "similar conduct" and whether members of the pool are "similarly situated," for a prima case, under the unique statutory scheme of the RJA, which expressly rejects traditional equal protection analysis, has led to significant uncertainty as the requirements of a claim of disparate treatment of racial groups under section 745, subd. (a)(3) and (a)(4) and threatens to undermine the legislative intent of the RJA by importing subjective considerations into the analysis that introduce the very kind of implicit bias that the RJA sought to eliminate, defeating the express legislative purpose.

Similarly, the RJA contains ambiguity as to when "racially discriminatory language" may be used in court proceedings, using the phrase, "[d]uring the defendant's trial, in court and during the proceedings," which Respondent interpreted to permit racially discriminatory language during pretrial proceedings, undermining the legislative purpose of the RJA. (§ 745, subd. (a)(2).)

Further, there is a need for guidance to trial courts as to how to approach an assertion that "racially discriminatory language," has been used, to avoid the trial court substituting its own interpretation of the language for an evidentiary hearing, as occurred in this case. (*See e.g, Howard, supra,* 104 Cal.App.5th 625, 324 Cal.Rptr. 3d 848, 869.[Observing that a conclusion that the prosecutor's cross-examination was not intentionally racially biased does not end the inquiry, because purposeful discrimination

"is not a statutory requirement, nor is it even the primary object of the statute."].)

VERIFICATION

I, Markéta Sims, declare as follows

I am an attorney at law licensed to practice in all of the Courts of California and I am employed as a Deputy Alternate Public Defender for the County of Orange.

In that capacity, I am attorney of record for Petitioner in the foregoing Petition for Review. I make this declaration on his behalf for the reason that the facts alleged therein are more within my knowledge than his.

I have read the foregoing petition and exhibits attached thereto, and I know the contents thereof to be true based upon my reading of true copies of court documents on file in this action. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of October at Santa Ana, California.

/s/*Markéta Sims*
Markéta Sims
Deputy Alternative Defender

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 19, 2021, the Orange County District Attorney's Office ("OCDA") charged Petitioner with, at Count I, murder (§187(a)), at Count II, conspiracy to commit first degree robbery in concert (§§ 211/212.5(a)/213(a)(1)(A).), and, at Count III, assault with a firearm. (§ 245(a)(2).)

OCDA further charged the special circumstances of murder during the commission of robbery and murder during the commission of burglary (§ 190.2(a)(17)(A)) and § 190.2(a)(17)(G)) and enhancements pursuant to Penal section 12022.53(b) (personal use of a firearm) and section 12022.5(a) (personal use of a firearm) with respect to Counts I and II, and an enhancement for great bodily injury with respect to Count III pursuant to section 12022.7(a).

A second amended information substituted a violation of section 245(b) for the violation of section 245(a)(2) charged at Count III and added various sentencing allegations. A third amended information added additional sentencing allegations.

Petitioner pled not guilty and subsequently filed his Motion to Dismiss Special Circumstances Pursuant to Penal Code Sections 745(a)(3) and 745(e)(1)(C) and for an Evidentiary Hearing. [18-121.] That motion asserted that Black defendants charged with homicide with allegations

of robbery and/or burglary, such as Petitioner, are charged with special circumstances pursuant to Penal Code section 190.2(a)(17)(A) and 190.2(a)(17)(G), more frequently in Orange County, than similarly situated White defendants charged with homicide with allegations of similar conduct, that is robbery and/or burglary in violation of section 745, subd. (a)(3.)

Petitioner attached a report on "Racial Disparity in Orange County Special Circumstances Homicide: Penal Code section 190.2(a)(17)(A) and 190.2(a)(17)(G) Charging Outcomes," by Beth Redbird, Assistant Professor of Sociology at Northwestern University, in which Professor Redbird used commonly accepted conservative statistical techniques to analyze data publicly provided by the OCDA for homicide cases involving allegations of homicide committed during the commission of robbery and/or burglary between 2000 and 2022 to determine if racial disparity exists in the charging of the robbery and burglary special circumstances between similarly situated Black and White homicide defendants charged with similar conduct, that is allegations of robbery and/or burglary. [042-121).]

Professor Redbird is a computational methodologist, with expertise in survey design and analysis, big data, and measurement of invisible or hard to quantify processes. She has published in leading sociology journals on the topics of methodology, law and society and race.

Professor Redbird is qualified to conduct and evaluate quantitative and statistical methodologies,

including computational, natural language, and machine learning, econometric and cause inference methods. [114-115.] She has provided expertise on the measurement of racialized processes in multiple court cases and has been qualified to testify about racial disparity in a capital case. (*Id.*)

Professor Redbird's report was admissible and relevant evidence for the purposes of both the motion and the evidentiary hearing. (§ 745, subd. (c)(1).) ["At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses…For the purposes of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred."].)

Professor Redbird analyzed racial disparity in charging outcomes between similarly situated Black and White Orange County defendants in 1,378 Orange County homicide cases involving robbery and/or burglary between 2000 and 2022, relying on publicly available data provided by the OCDA and matched against data provided by Orange County law enforcement to the California Attorney General's Office regarding referrals made by law enforcement to the OCDA. [068-072.]

These similarly situated cases involved any homicide incident in which an involved investigating law

enforcement agency concluded that the conduct was a robbery under Penal Code sections 190.2(a)(17)(A), 211, 212, 212.5, 213 or 664-211 or a burglary under 190.2(a)(17)(G), 459, 460, 461, or 664-259. [062.] Professor Redbird obtained the data on charging decisions for the Orange County homicides from the OCDA's Transparency Portal. (https://orangecountyda.org/transparency/.) [068.] The portal provides detailed and comprehensive information on cases referred by law enforcement, including charges filed, case dispositions, and defendant characteristics from the years 2000 to 2022. [068.]

Additional law enforcement assessments of defendant conduct came from Supplemental Homicide Reports (SHR), filed by the primary investigating Orange County law enforcement agency with the California Attorney General. The investigating agency files the SHR with the Attorney General after the case is cleared. The SHRs contain in-depth information on each homicide, including victim demographics (race, age, gender,) the relationship of the victim to the suspect, the location of the incident, and the weapon used. Additionally, the SHRs document 21 precipitating events and related circumstances, along with a complete list of all the special circumstances factors, excluding Penal Code section 190.2(a)(17)(J) (mayhem) and 190.2(a)(22) (rape by instrument). [070-072.]

Professor Redbird used the SHRs to determine those Orange County homicides for which the reporting law

enforcement agency identified conduct that could be charged as robbery or burglary, or related offenses and attempts, thus identifying "similar conduct" within the meaning of Penal Code section 745(h) (1.)

Professor Redbird applied a risk ratio analysis to the similarly situated comparison groups to determine the relative risks of White and Black defendants alleged to have committed homicide with similar conduct, allegations of robbery and/or burglary, to be charged with the robbery or burglary special circumstances. The pool was made up of White and Black defendants who were at risk of being charged with either the robbery or the burglary special circumstance, or both, between 2000 and 2022, normalized on the population of White and Black individuals in Orange County. [077-080.]

The risk ratio quantifies the strength of the association between the race of a defendant, who has been charged with robbery and/or burglary in the course of a homicide, and being charged with the robbery special circumstance, the burglary special circumstance, or both. [077-078.] The risk ratio is the commonly accepted scientific standard for studying criminal justice outcomes and has been in wide-scale use across California criminal justice institutions for nearly fifty years. [078.]

Calculating the risk ratio for the pool of similarly situated Black and White homicide defendants, Professor Redbird reached the following conclusions:

(1) Among all White defendants, who could have been charged with Penal Code section

190.2(a)(17)(A), the robbery special circumstance, 70% were charged with the robbery special circumstance, whereas out of all of the Black homicide defendants who could have been charged with the robbery special circumstance, 88.46% were charged. Thus, similarly situated Black defendants, who were alleged to have engaged in similar conduct, had 126.37% the likelihood, or had 1.26 times the risk, of being charged with the robbery special circumstance than similarly situated White defendants, who engaged in similar conduct. [083.]

(2) Among all White defendants, who could have been charged with Penal Code section 190.2(a)(17)(G), the burglary special circumstance, 43.75% were charged with the burglary special circumstance, whereas out of all the Black defendants, who could have been charged with the burglary special circumstance, 86.67% were charged. Thus, similarly situated Black defendants, who engaged in similar conduct, had 198.1% the likelihood, or had 1.98 times the risk, of being charged with the burglary special circumstance than similarly situated White suspects, who were alleged to have engaged in similar conduct. [084.]

(3) Among all White defendants, who were alleged to have committed both robbery and burglary, 80% were charged with a robbery special circumstance, 70% were charged with a burglary special circumstance, and 60% were charged with both. Among all Black defendants, who were alleged to have committed both robbery and burglary, 100% were charged with a robbery special circumstance, 100% were charged with a burglary special circumstance, and 91.31% were charged with both. Thus, Black defendants had 153.85% the likelihood or 1.54 times the risk of being charged with both the robbery and special circumstance, as similarly situated White defendants, who engaged in similar conduct. [085.]

Accordingly, Professor Redbird, using standard, and conservative, statistical methods, found significant racial disparity in charging of the robbery and burglary special circumstances between similarly situated White and Black defendants, who engaged in similar conduct in Orange County between 2000 and 2022.

In its "Opposition to Defendant's Motion for Evidentiary Hearing Pursuant to Penal Code Section 745" [122-167], the OCDA rejected Professor Redbird's introductory explanation of how aggregate statistics work to determine racial disparity, asserting that "*Black*

individuals can commit different types of murder than white individuals,"

Petitioner filed a reply, in which he raised an additional claim under Penal Code section 745, subdivision (a)(1) and (2). [168-194], alleging that the prosecutor's assertion, without citation, that "*Black individuals can commit different types of murder than White individuals."* violated Penal Code section 745, subd. (a)(1) and(2), which provide that:

> The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:…During the defendant's trial, in court and during the proceedings, the judge, *an attorney in the case*, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful."

(Pen. Code, § 745, subd. (a)(1) and (2).) (Emphasis supplied.)

"Racially discriminatory language" is defined as:

> [l]anguage, that to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to racially charged or racially coded language, language that compares defendant to an animal, or language that references the defendant's

> physical appearance, culture, ethnicity, or national origin.

(Pen. Code, § 745, subd. (h)(4).)

Thereafter, Real Party in Interest filed a Supplemental Opposition to Defendant's Motion for Evidentiary Hearing Pursuant to Penal Code Section 745 and Motion to Dismiss Pursuant to Penal Code Section 745(a) (2.) [197-212].

On July 18, 2024, Respondent denied the motion as to both claims, explaining its reasoning in its accompanying written Order Denying Motion to Dismiss. [0003-0014; 241:1-9.]

With respect to the first claim, Respondent ruled that Petitioner had established a prima facie showing of "apparent disparate treatment in the charging of special circumstances murder involving burglary and/or robbery between Black and White defendants in Orange County." [012]; however, Respondent ruled Petitioner failed to make a prima facie showing that he had been charged with more serious conduct than defendants of other races who have engaged in similar conduct and are similarly situated. (*Id.*) In so ruling, Respondent rejected Petitioner's claim that the alleged commission of robbery and/or burglary, as reflected in the law enforcement data Dr. Redbird relied on, was sufficiently similar conduct and rendered the individuals in the pool sufficiently similarly situated to satisfy the requirements for a prima facie case under Penal Code sections 745, subd. (h)(2.)

Rather, Respondent concluded that Petitioner was required to introduce "factual comparisons" between [Petitioner's] case and that of defendants of other races who are similarly situated and engaged in similar conduct." ([012-014].)

Respondent also denied Petitioner an evidentiary hearing on his second claim, under Penal Code section 745, subd. (a)(2), ruling that the statement "was not made during the defendants' trial, in court, and during the proceedings." [015].

Respondent ruled, in the alternative, that Petitioner failed to establish a prima facie case that the statement violated Penal Code section, subds. (a)(1) and (a)(2) and constituted "racially discriminatory language" within the meaning of Penal Code section 745, subd. (h) (4.)

ARGUMENT

I. Respondent Erred in Ruling that Dr. Redbird's Report was Insufficient to Establish a Prima Facie Case of Violation of Penal Code section 745, subd. (a)(3)

The RJA as codified at Penal Code section 745, subdivision (a), provides that, "[t]he state shall not seek or obtain a criminal conviction, or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." (Pen. Code, § 745, subd. (a)(1).) The uncodified legislative findings unequivocally state the Legislature's intent to address, and eradicate, racial, ethnic and national origin

discrimination in the criminal justice system, without regard to discriminatory intent. "Because uncodified findings of legislative intent are voted upon by the entire legislative body, enrolled and signed by the Governor, they may be entitled to somewhat greater weight than traditional legislative history materials (e.g., draft language of bills, committee reports, bill analyses.)" (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 157.) Accordingly, legislative findings "are given great weight and will be upheld unless they are found to be unreasonable and arbitrary." (*Id.* [Citation omitted.] In *Young,* the Court held that, because of "the specificity of the findings accompanying the Racial Justice Act," the legislative findings are entitled to "considerable weight." (*Young, supra,* at p. 157.)

In the legislative findings, the Legislature stated, "[d]iscrimination in our criminal justice system based on race, ethnicity, or national origin (hereafter "race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole." (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2, subd. (a).) It "undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law." (*Id*.)

The Legislature acknowledged that "racial bias is often insidious, and that purposeful discrimination is often masked, and racial animus disguised." (*Id.* at subd. (h).) It also expressed awareness that "all persons possess implicit biases, that these biases impact the criminal justice system,

and that negative implicit biases tend to disfavor people of color." (*Id*. at subd. (g).) For these reasons, the RJA specifically states that "[t]he defendant does *not need to prove intentional discrimination*." (§ 745(c)(2).) (Emphasis supplied.)

The Legislature further stated in the uncodified sections of the Act that, "[i]t is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of the criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the law and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings, similar to intentional bias. 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. *It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining conviction or in sentencing.* It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice system are inevitable, and to actively work to eradicate them." (Assem. Bill No. 2542, *supra*, at subds. (i), (j).) (Emphasis supplied.) Indeed, the Legislature vowed to "provide remedies that will eliminate racially discriminatory practices in the criminal justice system." (Assem. Bill No. 2542, *supra,* at subd (j).)

Thus, in enacting the RJA, the Legislature roundly rejected the United States Supreme Court's infamous conclusion in *McCleskey v. Kemp* (1987) 481 U.S. 279, 312, that "[a]pparent [racial] disparities in sentencing are an inevitable part of our criminal justice system," which dissenting Justice Brennan, characterized as "a fear of too much justice." (Id., at p. 339) (Brennan, J., dissenting.) The Legislature further rejected the *McCleskey* Court's holding that despite statistical evidence of racial disparity in the application of the death penalty, which the Supreme Court accepted as true, the defendant had failed to demonstrate a violation of the Equal Protection Clause of the United States Constitution because he had failed to demonstrate intentional racial discrimination against him personally. (*McCleskey,* 481 U.S. at p. 292.)

The RJA provides for the defendant to file a motion asserting a violation of the RJA. (§ 745(b); *Young, supra,* at p. 148.) If the defendant makes a prima facie showing of the alleged RJA violation, the Court must hold a hearing. (§ 745, subd. (c); *Young, supra,* at p. 148.) A prima facie showing "means that the defendant produced facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred." (§ 745(h)(2).) A "substantial likelihood" "requires more than a mere possibility, but less than a standard of more likely than not." (*Id.*) "To summarize, a defendant seeking relief under the Racial Justice Act must state fully and with particularity the facts on which relief is sought and include copies of reasonably available documentary evidence supporting the

claim. The court should accept the truth of the defendant's allegations, including expert evidence and statistics, unless the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by the court's own records." (*Finley v. Superior Court* (2023) 95 Cal.App.5th 12, 23.)

Here, Petitioner met the very low prima facie standard. He stated, "fully and with particularity the facts on which relief is sought," and included, in the form of Professor Redbird's report, "reasonably available documentary evidence supporting the claim." The underlying data supporting Professor Redbird's report are also reasonably available, as the data consists of data publicly made available by the OCDA itself, and publicly available data from the California Attorney General. Under *Finley,* the trial court was required to accept the truth of Petitioner's allegations and the "expert evidence and statistics," because neither was "conclusory, unsupported by the evidence in support of the claim, or demonstrably contradicted by the court's own records." (*Finley, supra,* at p. 23.)

The Legislature was particularly concerned with longstanding racial and ethnic disparities in charging decisions, resulting in punishment based upon race and ethnicity. Indeed, this was the heart of the issue in *McCleskey,* in which the Supreme Court acknowledged that the defense had demonstrated significant racial disparities in the application of the death penalty but dismissed such disparities as "inevitable." Accordingly, a defendant

establishes a violation of the RJA "if the defendant proves, by a preponderance of the evidence [that] …The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who 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 of obtained." (§ 745, subd. (a)(3); *Young, supra,* at p. 147.) The RJA provides that:

> 'More frequently sought or obtained' or '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, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider but is not necessary to establish a significant difference.
>
> In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall.
>
> Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that

> are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.

(§ 745, subd. (h)(1).)

Professor Redbird concluded that the robbery and burglary special circumstances were "more frequently sough or obtained" against similarly situated Black defendants, than similarly situated White defendants by calculating the risk of a Black defendant being charged with a robbery or burglary special circumstance, or both, versus a similarly situated White defendant alleged to have engaged in similar conduct, that is the commission of robbery and/or burglary in the course of commission of a homicide. [083-085.]

"Similarly situated" "[m]eans that the factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical." (§ 745(h)(6).) In Professor Redbird's report, she identifies "Similarly Situated Companion Cases" to include any homicide incident in which an involved investigating law enforcement agency (the police or the prosecutor) concluded that the conduct was a robbery under Penal Code section 190.2(a)(17)9(A), 211, 212, 212.5 or a burglary under Penal Code sections 190.2(a)(17)(G), 459, 460, 461, or attempts of those offenses. [062.]

The RJA does not define "similar conduct" (*Mosby, supra,* 99 Cal.App.5th at p. 129.) The *Mosby* Court concluded that "similar conduct" "refers to 'behavior' of a person on a particular occasion that logically refers to the

underlying facts of the crimes rather than just a recitation of charged crime, and as that term has traditionally been defined in other criminal cases." (*Mosby, supra,* 99 Cal.App.5th at p. 129.) The *Mosby* Court did *not* decide whether statistical evidence that compares groups who are engaged in similar conduct and are similar situated may be enough to make a prima facie showing under Penal Code section 745, expressly declining to reach the issue. (*Mosby, supra,* 99 Cal.App.5th at p. 130.) Accordingly, Respondent erred in characterizing *Mosby* as "binding precedent" on this issue. [011.] "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gray* (2023) 15 Cal.5th 152, 169, fn. 4.) [Citations omitted.]

Further, the *Mosby's* court's statement that "similar conduct" refers to something other than charged conduct does not find any support in the RJA or case law interpreting it. Professor Redbird's analysis in the present case was based upon Black and White defendants engaged in "similar conduct" as she relied upon the OCDA data and the SHR's, which reflect law enforcement's characterization of the underlying conduct as burglary and/or robbery. Accordingly, Respondent erred in relying on *Mosby* to find that Petitioner had failed to make a prima facie case of racial disparity among defendants alleged to have engaged in similar conduct.

Justice Frank J. Menetrez, in his concurring opinion in *Mosby*, stated that he would have reached the issue and ruled that statistical evidence of racial disparity *is* sufficient to establish a prima facie case under Penal Code section

745(h)(2), reasoning that (1) the Legislature rejected *McCleskey's* holding that statistical evidence was insufficient to *prevail* on an equal protection claim, so that it would be nonsensical for the Legislature to provide that statistical evidence is insufficient merely to establish a prima facie case; (2) in order to prevail on an RJA claim, a defendant need not negate every possible race-neutral reason for the disparity, rather the burden is on the prosecution to prove such reasons. "A fortiori the defendant need not negate every possible race-neutral reason for the disparate treatment *in order to make a prima facie case.* Showing the disparate treatment itself — which can be done through statistical evidence — is enough." (*Mosby, supra,* 99 Cal.App.5th at pp. 133-138. (Menetrez, J., concurring.) (Emphasis in original.)

Justice Menetrez opined that, "[i]n my view, the relationship between RJA and *McCleskey v. Kemp* (1987) 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (*McCleskey*) shows that the trial court's ruling — that statistical evidence cannot be sufficient to make a prima facie case— cannot be correct." (*Mosby, supra,* 99 Cal.App.5th at p. 135.) (Menetrez, J., concurring.) "Directly contrary to *McCleskey's* requirement that an equal protection claimant prove 'purposeful discrimination' (*McCleskey, supra,* 481 U.S. at p. 292, 107 S.Ct. 1756), the [RJA legislative] findings acknowledge the existence of 'implicit bias,' which is 'often unintentional and unconscious,' and the findings express the Legislature's intent 'to remedy the harm to the defendant's case and to the integrity of the

justice system' caused by such bias. (Assem. Bill 2542, § 2, subd. (i).) Accordingly, the RJA provides that '[t]he defendant does not need to provide intentional discrimination.' (§ 745, subd. (c) (2).)" (*Id.*, at p. 136.)

Justice Menetrez further reasoned that statistical evidence was sufficient to establish a prima facie case because "[t]he Legislature set a low standard for a prime facie case under the RJA: the defendant need only show that there is 'more than a mere possibility' that subdivision (a) of section 745 has been violated (§ 745, subd. (h)(2)). see also *Finley v. Superior Court* (2023) 95 Cal.App.5th 12, 21-22; 313 Cal.Rptr. 907 [discussing the standard for a prima facie case under the RJA, which is lower than the prima facie standard for writs of habeas corpus.].)" (*Mosby, supra,* 99 Cal.App.5th at p. 136. [Menetrez, J, concurring].)

Justice Menetrez further explained that "[s]tatistical techniques such as regression analysis can show that racial disparities exist even when one controls for various relevant characteristics, meaning that racial disparities exist among defendants who are similarly situated (i.e., defendants who share those relevant characteristics.) The statute's reference to defendants who are 'similarly situated' thus does not mean that a defendant must prove, at the prima facie stage, that there is at least one other defendant who is *identical* except for race and has an *identical* case except for race but who was treated less harshly." (*Mosby, supra,* 99 Cal.App.5th at p. 681.) (Menetrez, J., concurring.) (Emphasis in original.) Indeed, section 745, subd. (h)(6) provides that, "similarly situated,"

means merely that, "[f]actors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical." (§ 745, subd. (h)(1).)

The RJA does not define "similar conduct." The allegations of robbery and/or burglary in the present case constitute "similar conduct," within the meaning of Penal Code section 745, subd. (a)(3), and no greater degree of similarity of conduct is required under the statute.

Respondent's approach, rejecting statistical analysis and requiring "factual comparison" between cases, would lead to an entirely subjective, discretionary inquiry ripe for the very implicit bias that the Legislature recognized exists and sought to eradicate. For example, Real Party in Interest offered unspecified "unusual circumstances" and unspecified "dangerousness" as factors it considers in determining whether to charge the robbery and burglary special circumstances. [137.] These are not workable legal standards to determine the similarity or dissimilarity of cases in a court of law, especially when the stated statutory goal is to avoid explicit and implicit bias, by applying objective, rather than subjective standards. Moreover, it ignores the fact that the statute specifically provides for the use of statistical analysis. (§ 745, subd. (c)(1).)

II. Respondent Erred in Ruling that the Prosecutor did not Make her Statement that, "*Black Individuals Can Commit Different Types of Murder than White Individuals*," during the Proceedings

In its statement of legislative intent, the Legislature declared: "It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, *at any stage of a criminal trial*, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California" (AB 2542, § 2, subd. (i).) (Emphasis supplied.) Courts "consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, citing, *Dubois v. Worker's Comp. Appeals Board* (1993) 5 Cal.4th 382, 388 ["When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. [Citations omitted.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations omitted]."]

Respondent's interpretation of section 745, subdivision (a)(2) as *only* prohibiting "racially discriminatory language," during trial, while the speaker is in court, and court is in session ("during the proceedings") failed to give significance and effect to the term "during

the proceedings," in the statute as distinguished from "trial" and "in court."

Moreover, Respondent ruled, "[t]he statement was not made during the defendant's trial, in court**,** and during the proceedings." [015.] (Emphasis on added comma supplied.) The oxford comma Respondent placed after "in court" does *not* appear in the statute. Penal Code section 745, subd. (a)(2) states in pertinent part,

> During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror used racially discriminatory language about the defendant's race, ethnicity, or national origin…

(Pen. Code, § 745, subd. (a)(2).)

By adding the oxford comma, Respondent made a series out of the adverb prepositional phrase, "[d]uring the defendant's trial…," that begins section 745, subdivision (a)(2), resulting in a misconstruction of the statute. Respondent misinterpreted the statute as a list of increasingly narrow circumstances in which section 745, subdivision (a)(2) applies; however, elsewhere in Penal Code section 745, subd. (a)(2), the Legislature used the oxford comma to indicate a series. Immediately after the phrase in question the Legislature wrote a complete series using an Oxford comma: "the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror…" Thus, the Legislature did not intend for

"during the defendant's trial, in court and during the proceedings," to be a list.

The correct grammatical construction of the adverb prepositional phrase, "[D]uring the defendant's trial," modifies the verb "used" in the section 745, subdivision (a)(2), to describe when "racially discriminatory language" may not be "used." Further, the object of this adverb prepositional phrase, "defendant's trial," is modified by the following adjective prepositional phrases, "in court" and "during the proceedings." (*Id.*) These two adjective prepositional phrases should be interpreted to provide a more expansive view of the object of the leading adverb prepositional phrase, "defendant's trial," as opposed to Respondent's more restrictive interpretation, that even racially discriminatory language during trial is not prohibited, if it was not *also* used "in court" and "during the proceedings."

Thus, section 745, subdivision (a)(2) prohibitions encompass any criminal court proceeding at the trial court level and are not limited to "racially discriminatory language" used in front of a trial jury or while the judge is on the bench. Indeed, there is no indication in the statute that the Legislature intended to limit its prohibition on "racially discriminatory language" so narrowly. To the contrary, the Legislature expressly stated that it intended "to eliminate racial bias from California's criminal justice system because racism in any form or amount, *at any stage of a criminal trial*, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI

of the California Constitution, and violates the laws and Constitution of the State of California" (AB 2542, § 2, subd. (i).) (Emphasis supplied.)

The Legislature's use of the broad word "proceedings" indicates an intent for the prohibition on racially discriminatory language by attorneys and others to extend to all of the trial court proceedings, including, as here, pretrial motions. (*See People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1628.)

Further, the legislative history of AB 2542 demonstrates that the phrase, "[d]uring the defendant's trial, in court and during the proceedings, " is intended to include all stages of trial court criminal proceedings. The original draft of AB 2542 on July 1, 2020, only included the words "In court and during the criminal proceedings." This initial version did not include the word "trial." (2019 California Assembly Bill No. 2542, California 2019-2020 Regular Session, July 1, 2020.) In subsequent drafts of the bill after amendments were accepted, the phrase "in court and during criminal proceedings" was removed completely and replaced with "[d]uring the trial." (2019 California Assembly Bill No. 2542, California 2019-2020 Regular Session, Aug. 1, 2020; 2019 California Assembly Bill No. 2542, California 2019-2020 Regular Session, Aug. 20, 2020.)

However, the final version of AB 2542 that was passed and signed into law begins section 745, subdivision (a)(2) with "During the defendant's trial, in court and during the proceedings." (California Racial Justice Act of

2020, A.B. 2542, 2019–2020 Reg. Leg. Sess.) Therefore, from the historical analysis and legislative history of the drafting of AB 2542, the intent of section 745, subdivision (a)(2) is to prohibit racially discriminatory language throughout all stages of defendant's criminal proceedings.

If the Legislature intended for section 745, subdivision (a)(2) to cover only conduct that occurred during a trial then the Legislature would have passed the version that only had the phrase, "during the trial." However, before enacting the bill the Legislature specifically added back in the phrases, "in court and during the proceedings," making it clear that section 745, subdivision (a)(2) covers all conduct during all criminal proceedings. The Legislature uses the term "trial" as an all-encompassing word to label the entire prosecution of a criminal defendant.

If the Legislature's intent was to make section 745, subdivision (a)(2) only apply to specific stage of a defendant's prosecution, then the legislature would have explicitly stated that stage. Indeed, a claim under Penal Code section 745, subd. (a)(1) may be brought even for conduct that does not occur "during the proceedings." Thus, if racially discriminatory language or bias is exhibited in pretrial motions that conduct at the very least is covered under the section 745, subdivision (a)(1) prohibitions which act as a catch all.

Accordingly, Respondent erred in holding that that racially discriminatory language used by an attorney during

pretrial proceedings does not fall within the prohibitions in Penal Code section 745, subds. (a)(1) and (a)(2).

III. Respondent Erred in Ruling that Petitioner was not Entitled to a Prima Facie Hearing on the Issue of Whether the Prosecutor's Statement that, *"Black Individuals Can Commit Different Types of Murder than White Individuals,"* was Racially Discriminatory Language within the Meaning of Penal Code section 745, subds. (a)(2) and (h)(4)

In rejecting Petitioner's motion for an evidentiary hearing on whether the prosecutor's statement, *"Black individuals can commit different types of murder than white individuals,*" is racially discriminatory language, Respondent erred in failing to read the statement literally – Black individuals can, that is, are able to commit different types of murder than White Individuals. The statement, on its face, that is, "prima facie," asserts that Black individuals are capable of crimes that White individuals are not capable of and are, therefore, uniquely criminal. That statement, prima facie, falls within the definition of "racially discriminatory language," in Penal Code section 745, subd. (h)(4) because it is "language, that to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to racially charged or racially coded language, language that compares defendant to an animal, or language that references the defendant's physical appearance,

culture, ethnicity, or national origin." (Pen. Code, § 745, subd. (h)(4).) Thus, an evidentiary hearing was required.

Rather than holding an evidentiary hearing, Respondent did not read the statement literally, rather proving its own interpretation that was *not* the only reasonable interpretation and, in fact, was unreasonable because it was not supported by the context of the statement in the prosecutor's brief.

The prosecutor made the statement in response to a general, introductory statement Professor Redbird made about statistics. Specifically, Professor Redbird stated:

> This is the power of statistics: while this case is unique in many ways, this is true of every case. However, when cases are aggregated, the individual idiosyncrasies and nuances fall away. If one case is unusual in one aspect, another case is unusual in another aspect. Together, their distinctiveness becomes noise, and overall patterns emerge. Statistics enable us to see the "forest through the trees." The sheer volume of criminal cases, coupled with the stability of the legal system and criminal processes, provides abundant opportunities for valid and highly relevant statistical studies.

[053.]

In response, the prosecutor wrote:

> Similarly on page 5, Redbird states that while there are differences from one case to the other, when you compare large data sets, 'their distinctiveness becomes noise." That

> assertion is incorrect. *The reason is because Black individuals can commit different types of murders than White individuals. There is absolutely no reason to expect that two different groups of people will commit the same type of murder, or the same type of robbery, just because you have a large number of people. Redbird's assertion would be true if race were randomly assigned. But it is not.*
>
> [145.] (Emphasis supplied.)

Without benefit of an evidentiary hearing, or citation to the prosecutor's brief, Respondent supplied *its own* interpretation that, "[t]he challenged statement attributed to the People in their written opposition was made to dispute Professor Redbird's perceived assumption, which was an apparent basis of the report's findings and conclusions, that all racial groups engage in the same type of crimes at the same rate." [015.] (Emphasis supplied.) Respondent then concluded that, "[t]aking all circumstances into account, an objective observer aware of all the relevant facts would not consider the challenged statement attributed to the People an impermissible use of racially discriminatory language about the defendant's race." [015.]

Respondent's ruling that the prosecutor's challenged statement, "was made to dispute Professor Redbird's perceived assumption, which was an apparent basis of the report's findings and conclusions, that all racial groups engage in the same type of crimes at the same rate." [015] finds no support in the record and Respondent cited none. As the Legislature has already decided that aggregate

statistics are admissible evidence in support of a Racial Justice Act claim, an assertion that they are not because, *"Black individuals commit different types of murder than White Individuals,"* is an attack on the Racial Justice Act itself, not Professor Redbird's methodology. (§ 745, subd. (c)(1) [At the hearing evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data …"]

Respondent erred by supplying its own interpretation of what it apparently believed the prosecutor meant by the phrase, "*Black individuals can commit different types of murder than while individuals*," when that interpretation was not supported by the context of the statement. While the prosecutor did assert elsewhere that disparity of rates of commission of "types" of homicide would negatively affect Professor Redbird's analysis, the challenged statement was not made in the context of the prosecutor's argument that alleged higher rates of commission of "types" of homicide explain the racial disparity, but rather in response to the mere statement that, "Aggregate statistical frameworks are particularly well-suited to the examination of racial disparity in legal processes," a proposition which the Legislature has already endorsed in providing for the admission of such evidence in support of a claim under the RJA.

More importantly, the prosecutor did not state that Professor Redbird's findings were invalid because Black people commit homicide in the course of robbery and/or burglary at higher rates than White people, a proposition for

the prosecution provided no evidence, but that, *"Black individuals can commit different types of murder than white individuals,"* a very different statement, implying that Black individuals have inherent differences in criminality from White individuals, a statement providing the basis for, at the very least, an evidentiary hearing under sections 745, subds. (c) and (h)(4.)

Respondent erred in failing to take the prosecutor's words at face value. "*Black individuals can commit different types of murder than White individuals,*" plainly is "language that appeals to racial bias," within the meaning of Penal Code section 745, subd. (h)(1), and "rests on stereotypical or derogatory thinking," that the Legislature sought to eliminate in enacting the RJA. (*Young v. Superior Court* (79 Cal.App.5th 138, 149.) Indeed, the Legislature specifically identified a case in which an expert testified that, "People of Indian descent are predisposed to commit bribery," as the type of case reached by the RJA. (Assem. Bill 2542, *supra,* at subd. (d), referencing *United States v. Shah* (2019) 768 Fed. Appx. 637.) The United States Supreme Court has held that "[i]t would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race." (*Buck v. Davis* (2017) 580 U.S. 100, 119.)

Respondent made the same error the trial judge recently made in *People v. Howard* (2024) 104 Cal.App.5th 625, 324 Cal.Rptr. 848, 869-878, failing to recognize that an evidentiary hearing is required when counsel's statement may reveal implicit bias. The prosecutor responded to the

mere statement that aggregate statistical frameworks are particularly well-suited to the examination of racial disparity in legal processes, a proposition the Legislature has explicitly endorsed, with the statement that *"Black individuals can commit different types of murder than White individuals."* An evidentiary hearing was required.

CONCLUSION

Petitioner established that he was entitled to a prima facie hearing on both his claim of racial disparity in charging the robbery and burglary special circumstances under Penal Code section 745, subd. (a)(3) and his claim that the prosecutor used racially discriminatory language in the proceedings under Penal Code section 745, subdivisions (a)(1) and (2.) Accordingly, Petitioner respectfully urges the Court to issue a stay, grant the petition for review, or in the alternative, grant the petition for review and transfer the case back to the Court of Appeal for the issuance of an order to show cause.

Dated: October 3, 2024

Respectfully submitted,

/s/ Markéta Sims
Markéta Sims
SBN: 144324
Deputy Alternate Defender

CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, rule 8.520(c)(1), the attached Petition for Writ of Mandate in this action contains 7,993 words according to the word count computer program used to prepare this document.

/s/ Markéta Sims

Markéta Sims
SBN: 144324
Deputy Alternate Defender

PROOF OF SERVICE

I, Markéta Sims, declare:

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 200 W. Santa Ana Blvd., Suite 600, Santa Ana, California, 92701. I served the document(s) described as Petition for Review as follows:

By TrueFiling

On October 3, 2024, I served via TrueFiling, without an error report, copies of the documents identified above on the following recipients:

Orange County District Attorney's Office
Todd Spitzer, District Attorney
appellate@ocdapa.org
300 N. Flower Street
Santa Ana, CA 92703

Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266
Sdag.docketing@dog.ca.gov

By U.S Mail

On October 3, 2024, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Superior Court Clerk
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

/s/ Markéta Sims
Markéta Sims

EXHIBIT 1

(Summary Denial from the Court of Appeal, September 26, 2024)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OMAR MILLER, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	G064653 (Super. Ct. No. 19CF3406) O R D E R

THE COURT:*

The petition for writ of mandate and request for a stay are DENIED.

SANCHEZ, ACTING P. J.

* Before Sanchez, Acting P. J., Motoike, J., and Delaney, J.

EXHIBIT 2

(Order Denying Motion to Dismiss, July 18, 2024)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. OMAR MILLER ANDRE ANDREWS, Defendants.	Orange County Superior Court Case Number: 19CF3406 **ORDER DENYING MOTION TO DISMISS**

TO: THE OFFICE OF THE ORANGE COUNTY DISTRICT ATTORNEY AND COUNSEL FOR THE DEFENDANTS:

HAVING REVIEWED AND TAKEN UNDER SUBMISSION DEFENDANTS' MOTION TO DISMISS SPECIAL CIRCUMSTANCES ALLEGATIONS PURSUANT TO PENAL CODE § 745(a)(2) and (a)(3) AND REQUEST FOR AN EVIDENTIARY HEARING, THE PEOPLE'S OPPOSITION, DEFENDANTS' REPLY, AND THE PEOPLE'S SUPPLEMENTAL OPPOSITION, THE COURT RULES AS FOLLOWS:

I.

Defendants are charged via a third amended information with special circumstances first-degree murder committed during a burglary and robbery [Pen. Code, § 187(a)/§ 190.2(a)(17)(A), (G)], conspiracy to commit a robbery in concert [Pen. Code, § 182(a)(1)/§ 211/§ 212.5(a)/§ 213(a)(1)(A)], and assault with a semiautomatic firearm [Pen. Code, § 245(b)]. As to all but the last offense, defendants are further charged with having committed the offenses through the personal use of a firearm [Pen. Code, § 12022.5(a)/§ 12022.53(b)). Defendants have entered pleas of not guilty and

denied all enhancements and allegations. Defendants remain in custody awaiting trial with bail set at no bail.

According to the People's summary of relevant facts, it is alleged defendants flew to Los Angeles from Florida on October 25, 2019. Defendant Andrews, accompanied by defendant Miller, rented a white 2019 Infinity SUV with the pair meeting up with co-defendant Devon Washington Quinland[1] the same day or early the next day. During the early morning hours of October 26, 2019, Irvine Police Department officers were dispatched to a home inhabited by four roommates, three of whom were involved in the illegal marijuana business. Responding officers found 400 lbs. of marijuana and $158,000 in cash. Defendants broke into the home through the kitchen. Defendants beat and tied up one of the home's occupants in his bedroom before fighting with and fatally shooting another occupant and fleeing from the scene in a white Infinity SUV. It is believed the victim was fatally shot by defendant Miller. Defendants were arrested in Florida on December 17, 2019.

II.

On February 2, 2024, the defense filed a motion moving for dismissal of special circumstances allegations filed against them pursuant to Penal Code § 745(a)(3) asserting the Office of the Orange County District Attorney charges Black defendants with special circumstances murder committed during a burglary and/or robbery more frequently than similarly situated White defendants who have engaged in similar conduct. In support, defendants principally rely on a January 2024 statistical and analytical report titled, "Analysis of Racial Disparity in Orange County Special

1 Defendant Quinland is charged with and awaiting trial on charges of conspiracy to commit robbery in concert, assault with a semiautomatic firearm, and misdemeanor possession of marijuana for sale.

Circumstances Homicide - § 190.2(a)(17)(A) and § 190.2(a)(17)(G) Charging Outcomes" prepared by Beth Redbird, Assistant Professor of Sociology at Northwestern University. The report examines 1,378 homicide cases filed in Orange County between 2000 and 2022. The report analyzes charging decisions made by the District Attorney's Office in those cases comparing them against data reflected in corresponding Supplemental Homicide Reports filed by Orange County law enforcement agencies with the California Department of Justice after cases are cleared in order to arrive at two groups of homicide cases committed under circumstances in which burglary (both actual and attempted) and/or robbery (both actual and attempted) charges as well as burglary and/or robbery special circumstances were or could have been charged. The two groups are distinguished by an offender's race (i.e., Black, White) and meant to show offenders who are similarly situated and who engaged in similar conduct at the time charging decisions were made by the District Attorney's Office.

According to the report, there were 229 homicide cases that were assessed as eligible for robbery charges. Of these cases, 13.51% involved White defendants while 23.42% involved Black defendants. Overall, 75.68% of the 229 cases were eligible to have a robbery special circumstance allegation filed with 12.5% of the cases involving White defendants and 27.38% involving Black defendants. Out of all White defendants charged with murder who also could have been charged with a robbery special circumstance allegation, 70% were charged with a robbery special circumstance allegation compared to 88.46% of all similarly situated Black defendants charged with the same special circumstance. Thus, similarly situated Black defendants charged with murder who were alleged to have engaged in similar conduct had a 126.37% likelihood or 1.26 times the risk of being charged with a robbery special circumstance allegation

compared to similarly situated White defendants who engaged in similar conduct.

According to the report, there were 75 homicide cases that were assessed as eligible for burglary charges. Of these cases, 21.33% involved White defendants while 20% involved Black defendants. Overall, 65.33% of the 75 cases were eligible to have a burglary special circumstance allegation filed with 14.29% of the cases involving White defendants and 26.53% involving Black defendants. Out of all White defendants charged with murder who also could have been charged with a burglary special circumstance allegation, 43.75% were charged with a burglary special circumstance compared to 86.67% of all similarly situated Black defendants charged with the same special circumstance. Thus, similarly situated Black defendants charged with murder who were alleged to have engaged in similar conduct had a 198.1% likelihood or 1.98 times the risk of being charged with a burglary special circumstance compared to similarly situated White defendants who engaged in similar conduct.

According to the report, among all White defendants charged with murder who also could have been charged with both robbery and burglary special circumstances allegations, 80% were charged with a robbery special circumstance, 70% were charged with a burglary special circumstance, and 60% were charged with both compared to 100%, 100%, and 92.31% respectively for all similarly situated Black defendants. Thus, similarly situated Black defendants charged with murder who were alleged to have engaged in similar conduct had 153.85% or 1.54 times the risk of being charged with both robbery and burglary special circumstances compared to similarly situated White defendants who engaged in similar conduct.

According to the report, a greater racial disparity in charging decisions was found in homicide cases involving the use of a firearm. The risk of Black defendants being

charged with a robbery or burglary special circumstance allegation increased from 87.04% to 90.62% increasing the risk ratio from 142.42% to 226.56% compared to similarly situated White defendants who engage in similar conduct whose risk dropped from 61.11% to 40%.

The report concludes that racial disparities in the charging of robbery and burglary special circumstances allegations were not influenced by and could not be explained by differences in offenders' prior felony convictions.

Via its reply brief filed on June 21, 2024, the defense also moves for dismissal of special circumstances allegations claiming a separate violation of the Racial Justice Act (Pen. Code, § 745(a)(2)). Specifically, the defense asserts the prosecution used racially discriminatory language about defendants' race in its written opposition to the pending motion for dismissal when it stated that "Black individuals can commit different types of murder than White individuals" while arguing that Professor Redbird's methodology is flawed. The defense construes the prosecution's statement as "baseless" and without foundation representing "stereotypical and derogatory thinking" indicating that Black individuals are uniquely criminal in a way dissimilar to White people. The defense views the prosecution's statement as suggesting without evidence that murders committed by Black people are more aggravated than those committed by White people and might explain the disparate treatment in prosecution of special circumstances murder involving robbery and/or burglary between Black and White defendants at issue in this case.

Based on the aforesaid evidence, the defense asserts it has met its burden of setting forth a prima facie case for relief entitling it to an evidentiary hearing on the motion.

The People oppose the motion claiming defendants do not meet their burden of setting forth the required prima facie showing of a violation under the Racial Justice Act. Specifically, the People maintain defendants do not demonstrate they are charged with a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated. The defense is further faulted for failing to show that the prosecution more frequently sought or obtained convictions for more serious offenses against individuals who share the defendants' race, ethnicity, or national origin in Orange County considering race-neutral factors as well as the totality of the evidence. The People contend the defense's alleged violation of Penal Code § 745(a)(3) is without evidentiary support because Professor Redbird's unsworn report is conclusory, unsupported, and flawed. Characterizing the charged offenses as a sophisticated, well-planned, and financed home invasion armed robbery of a high value target carried out by the defendants who travelled from Florida to California to commit the same, the People maintain the pending charges were filed because the People can prove them beyond a reasonable doubt based on the evidence.

The People also strenuously reject the defense's alleged violation of Penal Code § 745(a)(2) faulting the defense for misrepresenting and misconstruing the People's arguments. Specifically, the People argue the defense extracts one sentence out of their 43-page opposition addressing perceived flaws in Professor Redbird's methodologies and unsupported assumptions including the notion that all racial groups commit the same crimes at the same rate. The People maintain no violation of Penal Code § 745(a)(2) is established because the alleged exhibition of bias claimed by the defense 1) is not directed towards the defendants, 2) was not made during trial

proceedings and in court, and 3) is not "discriminatory language" as the term is defined by statute.

III.

"The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." (Pen. Code, § 745(a).) A violation is established if the defendant proves, by a preponderance of the evidence, that "during the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (Pen. Code, § 745(a)(2).) A violation is established if the defendant proves, by a preponderance of the evidence, that "the defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who 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." (Pen. Code, § 745(a)(3).)

"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." (Pen. Code, § 745(c).) A "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." (Pen. Code, §

745(h)(2).) "A defendant seeking relief under the Racial Justice Act must state fully and with particularity the facts on which relief is sought and include copies of reasonably available documentary evidence supporting the claim. The court should accept the truth of the defendant's allegations, including expert evidence and statistics, unless the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by the court's own records." (*Finley v. Superior Court* (2023) 95 Cal.App.5th 12, 23.)

IV.

In order to establish a prima facie violation based on Penal Code § 745(a)(3), the plain language of the statute requires that a defendant "show that he was charged with a more serious offense than defendants of other races who have engaged in similar conduct and are similarly situated and that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." (*Mosby v. Superior Court* (2024) 99 Cal.App.5th 106, 127.)

The motion seeking relief based on an alleged violation of the Racial Justice Act as specified in Penal Code § 745(a)(3) is denied. The defense does not meet its burden of setting forth a prima facie showing of a violation of the Act as required under § 745(a)(3) and *Mosby v. Superior Court* (2024) 99 Cal.App.5th 106 whose holding is binding precedent under principles of stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) "A concurring opinion is not precedential authority." (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1442.)

At the prima facie stage, the defense adequately sets forth sufficient evidence showing apparent disparate treatment in the charging of special circumstances murder

involving burglary and/or robbery between Black and White defendants in Orange County. (See, Pen. Code, § 745(c)(1); *Finley v. Superior Court, supra,* 95 Cal.App.5th at 23.)

However, and unlike the defendant in *Mosby*, the defense makes no concrete effort to satisfy the first prong of the statutory requirement placing the burden on defendants to show they have been charged with a more serious offense than defendants of other races who have engaged in similar conduct and are similarly situated. Defense did not point to *one single case* where another defendant engaged in similar conduct as defendant did in this case and is similarly situated to defendant. No factual comparisons between defendants' case and that of defendants of other races who are similarly situated and engaged in similar conduct is offered by the defense. It should be noted that in *Mosby*, the defendant presented the facts of nine different cases where the White defendants were treated differently. Defense in this motion has shown *zero* different cases. Absent such a showing, the defense fails to make the requisite prima facie showing of a violation under Penal Code § 745(a)(3).

To the extent the defense contends Professor Redbird's statistical report and analysis satisfies this requirement, such contention is not persuasive because it is ultimately based on assumptions rather than a comparison of specific facts between cases. By the defense's own admission, "Professor Redbird's analysis proceeded on the assumption that these individuals who entered the criminal justice "pipeline" by being arrested for similar conduct, constitute a group of similarly situated cases." Thus, still missing from the defense's motion are the required factual comparisons between defendants' case and that of defendants of other races who are similarly situated and engaged in similar conduct as argued by the People. "Conduct" is "defined as a mode or

standard of personal behavior especially as based on moral principles." "While it is unclear as to why the Legislature changed the term "similar offense" to "similar conduct" both traditionally have referred to the underlying facts of the crimes and not simply the charged crimes. Since the Legislature did not provide a definition of "similar conduct," we rely on the plain meaning, which refers to "behavior" of a person on a particular occasion that logically refers to the underlying facts of the crimes rather than just a recitation of the charged crime, and as the term has traditionally been defined in other criminal cases." (*Mosby v. Superior Court, supra*, 99 Cal.App.5th at 129.)

Even if statistical and aggregate evidence alone can constitute an adequate prima facie showing of a violation of § 745(a)(3) in an appropriate case as suggested by *Mosby*, Professor Redbird's report does not meet this threshold because it does not satisfy the statutory requirement. As previously noted, the defense concedes the report is principally based on assumptions the subject defendants are similarly situated for similar conduct based on the types of offenses defined by statute and reported by law enforcement to the Department of Justice. There are no specific factual comparisons between cases involving the two defendants before the court and defendants of other races who are similarly situated and engaged in similar conduct.

The report does not consider the myriad ways offenses can be committed nor the different roles defendants played in committing the offenses. Criminal liability for murder may stem from a defendant's role as a direct perpetrator, a direct aider and abettor, a co-conspirator, or, prior to the January 1, 2019, operative date of Senate Bill Number 1437 amending Penal Code § 188 and § 189 and adding former § 1170,95 (current § 1172.6), as an indirect aider and abettor or co-conspirator to whom malice is imputed based solely on a defendant's participation in a crime. None of these distinctions are

referenced in the report.

Absent a baseline showing of a factual comparison between the two defendants before the court and defendants of different racial groups who are similarly situated and have engaged in similar conduct, a prima facie showing of a violation of Penal Code § 745(a)(3) is not made by the defense. As suggested by *Mosby*, such a showing is necessary to effectively litigate and adjudicate claims of Penal Code § 745(a)(3) violations by ascertaining whether race-neutral explanations exist for the alleged disparate treatment. Without such a showing, it is nearly impossible to effectively litigate such claims without readily ascertainable reference points for comparative purposes.

V.

A violation of the Racial Justice Act is established if the defendant proves, by a preponderance of the evidence that "*during the defendant's trial, in court and during the proceedings* [emphasis added], the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (Pen. Code, § 745(a)(2).) ""Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory." (Pen. Code, § 745(h)(4).)

The motion seeking relief based on an alleged violation of the Racial Justice Act as specified in Penal Code § 745(a)(2) is denied. The defense does not meet its burden of setting forth a prima facie showing of a violation under the Act as required under § 745(a)(2).

Based on Penal Code § 745(a)(2)'s plain language defining several of the statutory prerequisites for establishing a violation in the conjunctive, no actionable violation is established based on the challenged statement attributed to the People in their written opposition to the motion. The statement was not made during the defendants' trial, in court, *and* during the proceedings.

Moreover, the challenged statement attributed to the People in their written opposition to the motion is taken out of context and, as a result, does not reasonably rise to the level of racially discriminatory language that explicitly or implicitly appeals to racial bias from the perspective of an objective observer. The challenged statement attributed to the People in their written opposition was made to dispute Professor Redbird's perceived assumption, which was an apparent basis for the report's findings and conclusions, that all racial groups engage in the same type of crimes at the same rates. The statement is not directed at the defendants, nor does it represent an exhibition of bias or animus towards them. Assessed in its proper context, the challenged statement constitutes permissible argument from a party within the framework of litigation of a disputed legal issue rather than an expression of racially discriminatory language about the defendants' race. In other words, the inference derived by the defense from the statement that Black people commit more aggravated murders than White people is without substance and unreasonable based on the record before the court. Taking all circumstances into account, an objective observer aware of

all the relevant facts would not consider the challenged statement attributed to the People an impermissible use of racially discriminatory language about the defendants' race.

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Penal Code § 745 does not define what it means to be an "objective observer." No published opinion to date has construed the term as used in the statute. Nevertheless, the objective person standard has been defined in other legal contexts.

Within the context of evaluating the propriety of disqualifying a judge for cause based on grounds that a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial (Code of Civ. Proc., § 170.1(a)(6)(A)(iii)), the standard employed to assess the issue is based on the perspective of an objective, reasonable person. "The applicable disqualification standard is an objective one: if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified ... 'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer." '... 'The partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard.' " ... Moreover, the reasonable person must be viewed from the perspective of the reasonable layperson, "someone outside the judicial system," because "judicial insiders, 'accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would.' " (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391, citations omitted.)

Assessing the issue through the analogous objective reasonable person standard employed under Code of Civil Procedure § 170.1(a)(6)(A)(iii), defendants do not meet their burden of making a prima facie showing of a violation of Penal Code § 745(a)(2). An objective observer aware of all the relevant facts would not consider the challenged statement attributed to the People an impermissible use of racially discriminatory language about the defendants' race nor does the challenged statement, when assessed in context, constitute an exhibition of bias or animus towards the defendants because of their race, ethnicity, or national origin.

VI.

The defense does not meet its burden of making a prima facie showing of violations of the Racial Justice Act as required under Penal Code § 745(a)(2) and (a)(3) as well as *Mosby v. Superior Court* (2024) 99 Cal.App.5th 106. The motion to dismiss special circumstances allegations and request for an evidentiary hearing are DENIED.

Dated: 7/18/24

Judge of the Superior Court