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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

IN RE

CARL D. POWELL,

On Habeas Corpus

Case No. 19HC00247
Automatic Appeal No. S043520

Related to Sacramento County Superior Court Case No. 113126

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS (VOLUME 4 OF 4: CLAIM XIV)

(CLAIM UNDER THE RACIAL JUSTICE ACT, PEN. CODE, § 745)

DEATH PENALTY

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CLAIM XIV

PETITIONER SUFFERED A VIOLATION OF THE CALIFORNIA RACIAL JUSTICE ACT, PENAL CODE § 745

A. INTRODUCTION

2254. Petitioner Carl Powell, a Black man, is on death row for the 1992 killing of Keith McDade, who was White. Mr. Powell was 18 years old at the time of the offense. Because Mr. Powell's conviction and sentence were both tainted by racial bias, Mr. Powell amends his petition to bring this claim under California's Racial Justice Act ("RJA"). (§§ 745, 1473, subd. (e).)[1]

2255. The RJA, effective January 1, 2021, 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." (§ 745, subd. (a).) The Legislature specified four categories of conduct for relief: (1) if certain case actors "exhibited bias or animus towards the defendant" on the basis of race; (2) if certain identified case actors "used racially discriminatory language about the defendant's race" during trial; (3) if the defendant was "charged or convicted of a more serious offense" than defendants of other races "who have engaged in similar conduct and are similarly situated"; and (4) if the defendant received "[a] longer or more severe sentence" than defendants of other races who are either "similarly situated [and] . . . convicted of the same offense," or "similarly situated" with cases having victims of different races. (§ 745, subds. (a)(1)-(4).) Beginning January 1, 2023, the RJA was made retroactive in capital cases, like Mr. Powell's. (§ 745, subd. (a); Stats. 2022, ch. 739 (Assem. Bill No. 256), §§ 2, 3.)

2256. Mr. Powell's case was infected by racial prejudice in both phases in violation of each of the four provisions of section 745, subdivision (a).

2257. Most egregiously, in the penalty phase, the prosecutor compared Mr. Powell to a

[1] Statutory citations are to the California Penal Codes unless otherwise noted.

Bengal tiger. Analogy of Black people to animals is a well-known form of discrimination that dehumanizes, denies empathy, and justifies brutal and inhumane treatment. The RJA prohibition on "racially discriminatory language," (§ 745, subd. (a)(2)), specifically bars "language that compares the defendant to an animal." (§ 745, subd. (h)(4).) Indeed, the Legislature identified the Bengal tiger analogy—*and Mr. Powell's case in particular*—as a prototypical violation of section 745, subdivision (a)(2). (Stats. 2020, ch. 317 (Assem. Bill No. 2542), § 2, subd. (e) ("AB 2542").) The Attorney General has accordingly conceded that, in cases in which the prosecution relied on the Bengal tiger analogy, resentencing is required. (*See* Ex. 105 at A416-19.) Based on the record establishing this violation, and without need for an evidentiary hearing, Mr. Powell is entitled to resentencing under section 745, subdivisions (a)(1) and (2) and may not be resentenced to death. (§ 745, subd. (e)(3).)

2258. Mr. Powell was also convicted and sentenced by several jurors who expressed overtly racist views. A questionnaire in Mr. Powell's case asked prospective jurors to what extent they agreed or disagreed with the statement, "minorities tend to be more violent than whites." (*See* Ex. 104 at A384.) Juror 11b[2] responded by crossing out the word "minorities," writing in the word "blacks," and marking "strongly agree." (*Id.*) During voir dire, Juror 11b confirmed this view, stating "I am not ignorant about the facts of life," and "there's definitely a problem there[.]" (*Id.* at A302:18-303:13.) Juror 11b also responded to the questionnaire by agreeing with statements that race is a factor in one's propensities for truthfulness and criminality. (*Id.* at A385.) Four other jurors responded similarly, agreeing that race is correlated with violence, truthfulness, and/or criminality. (*Id.* at A382, A389-90, A392-93, A395.) All five of these jurors were seated in Mr. Powell's case. Mr. Powell was thus convicted and sentenced by numerous "juror[s] [who]

[2] Because the names of several jurors were sealed, in an abundance of caution, Mr. Powell refers to all jurors by their seat numbers. Juror 11b is so designated because he initially served as an alternate, but later replaced Juror 11a and served as a seated juror, (*see* ¶ 2303, *post*.)

exhibited bias or animus towards the defendant because of the defendant's race" in violation of section 745, subdivision (a). Based on the record alone, again without need for an evidentiary hearing, Mr. Powell has conclusively shown a violation of the RJA. (§ 745, subd. (e)(2)(A).)

2259. Mr. Powell is also entitled to relief because both the prosecutor and defense counsel described Mr. Powell using a pernicious stereotype that Black youth are dangerous and amoral. This was particularly pronounced during guilt/innocence phase closing arguments, when both counsel told the jury that Mr. Powell instinctively roamed the streets looking for crime and violence. (¶¶ 2318-28, *post*.) Other examples of racialized rhetoric by both counsel abound, all of which signaled to the jury that Mr. Powell was less human, less deserving of empathy, and more worthy of fear, disdain, and harsh treatment. (¶¶ 2329-37, *post*.) All such rhetoric establishes a violation of section 745, subdivisions (a)(1) and (2).

2260. Finally, statistical evidence demonstrates that Mr. Powell was charged, convicted, and sentenced in part on the basis of race—his own, and that of his victim. Mr. Powell presents the results of a statistical study of approximately 80%[3] of the full population of people convicted of first- or second-degree murder between 1988-95 in Sacramento County. These data show that individuals like Mr. Powell who are Black and/or whose victims were White were more likely to face harsher treatment at each decision point, from initial charging of special circumstance murder, to the filing of a death notice, to conviction, and finally to sentencing. Racial disparities were particularly pronounced for individuals like Mr. Powell convicted of the special circumstance of robbery-murder. (§ 190.2, subd. (a)(17)(A).) And this study includes numerous examples of similarly situated individuals who committed similar offenses and were not sentenced to death where the defendant was White and/or the victim was non-White. (*See* Ex. 103

[3] As detailed below, the remaining 20% of casefiles were unavailable at the Sacramento County courthouse at the time of filing. Mr. Powell seeks information pertinent to those cases in a separately filed discovery motion.

at A285-95.) Mr. Powell's comprehensive study establishes a violation of section 745, subdivisions (a)(3) and (4).

2261. The charged offenses in Mr. Powell's case were neither aggravated nor obviously a first-degree murder. Race was a factor in both his conviction and sentence. Discriminatory language by trial actors, and the disparate treatment of like cases in Sacramento County, demonstrate that Mr. Powell's race and that of his victim placed a heavy thumb on the scale in favor of conviction and a sentence of death. The RJA, which specifically identified Mr. Powell's case as marred by intolerable racial bias, was enacted to remedy precisely such injustice. This Court should set aside Mr. Powell's conviction, special circumstance, and sentence.

B. JURISDICTION AND PROCEDURAL BACKGROUND

2262. This Amendment to Petition for Writ of Habeas Corpus incorporates by reference all paragraphs of Mr. Powell's original Petition for Habeas Corpus, paragraphs 1 through 2253.

2263. Mr. Powell is presently unlawfully confined by the California Department of Corrections at California State Prison, Sacramento, by Warden Jeff Lynch. In addition to violations of the California and Federal Constitutions previously alleged, Mr. Powell's incarceration is unlawful under the RJA, section 745, subdivisions (a)(1), (2), (3), and (4).

2264. Mr. Powell's conviction and sentence of death were rendered final on direct appeal by decision of the California Supreme Court on September 17, 2018. (*People v. Powell* (2018) 6 Cal.5th 136.)

2265. Mr. Powell filed a Petition for Writ of Habeas Corpus in the Supreme Court of California on October 27, 2012. By written order dated April 10, 2019, the Supreme Court of California transferred the Petition to the Superior Court of Sacramento. On November 16, 2020, this Court issued an Order to Show Cause as to Petitioner's claims 8 (ineffective assistance of counsel in investigating and presenting evidence of mental health disabilities), 10 (ineffective

assistance of counsel in investigating and presenting mitigating family and social history evidence), 11 (ineffective assistance of counsel in failing to retain a trauma expert), and 13 (cumulative error). After subsequent briefing, on August 12, 2021, the Court also issued an Order to Show Cause as to claim 12 (Mr. Powell cannot be executed under *Atkins v. Virginia* (2002) 536 U.S. 304 because of intellectual impairment). The State has filed a Return as to each of these claims and Mr. Powell has submitted a Traverse. No evidentiary hearing has yet been scheduled.

2266. This Amendment is brought pursuant to section 745, subdivision (b) ("A defendant may file a . . . petition for writ of habeas corpus . . . alleging a violation of subdivision (a)"), and section 1473, subdivision (e) ("If the petitioner has a habeas corpus petition pending in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745.").

2267. This Amendment is timely per section 1473, subdivision (e). It raises a claim under the RJA for the first time and is not successive or abusive.

2268. The only adequate remedy for Mr. Powell is for this Court to grant the Writ of Habeas Corpus and vacate Mr. Powell's conviction and sentence. There is no other plain, speedy, or adequate remedy at law.

2269. Because this Amendment is dispositive and would render moot all claims brought in Mr. Powell's initial Petition, Mr. Powell asks this Court to decide the issues herein first in the interest of judicial economy and to preserve party resources.

C. FACTUAL SUMMARY

(i.) The Prosecutor's Use of Animalistic, Racially Discriminatory Language to Describe Mr. Powell

2270. During the penalty phase of trial, the prosecutor, who was White, repeatedly invoked the image of a "Bengal tiger" to characterize Mr. Powell as a wild and vicious animal

who must be put down.

2271. The prosecutor began by noting that Mr. Powell had appeared "depressed" and "somewhat docile" throughout the trial. (Ex. 4 at A368:1-3.) Lest the jury conclude that Mr. Powell was not dangerous, the prosecutor juxtaposed Mr. Powell's appearance during trial with what he called the "other Carl Powell," using this device to introduce the "Bengal tiger story." (*Id.* at A368:7-8, 12-13.)

2272. That "story" was relayed as follows:

> There was a journalist at the turn of the century in England, and he was at the London Zoo. And he's over at the zoo, and he's at the tiger area. And he's looking at a Bengal tiger in the cage.
>
> And the tiger is lying back and by—by a pond and some bushes. And the tiger is lazily licking his paws, and the tiger's eyes are half open. And he's basking in the sun. And it looks like the tiger is just very content and very peaceful and very placid.
>
> And as the journalist draws near him, he hears, "That is not a Bengal tiger." And he turns around, and there's a hunter in back of him. And he gets into a discussion with this hunter. And he says, "What do you mean, that's not a Bengal tiger? It says 'Bengal tiger' right there on the cage."
>
> And they get into a discussion about what a Bengal tiger is. And they agree that the journalist is going to go to India with the hunter. And they go over to India, and they go out to the jungle. And they're walking through the jungle, and after several days of looking for the Bengal tiger, they come to a clearing. And the journalist enters the clearing before the hunter, and on the other side the clearing before the hunter, he sees the tiger. And the tiger is crouched down, and the tiger's muscles are bulging. And the tiger has seen the journalist. And the tiger's tense, and the tiger's eyes are staring at the journalist. And when the journalist looks into the tiger's eyes, a cold chill comes over him, because he is looking into the eyes of death.
>
> And he hurries back on to where the hunter is, and he says to the hunter, "Look at that; do you see that over there?" And the hunter says, "Now you've seen the Bengal tiger."

(*Id.* at A368:15-69:20.)

2273. The prosecutor then told the jury that this story explained Mr. Powell's "docile" courtroom demeanor, stating "Well, you don't see a Bengal tiger here, because the cage has

descended on him." (*Id.* at A369:21-22.)

2274. The prosecutor returned to this analogy repeatedly throughout his closing argument. Addressing evidence that Mr. Powell had not caused any problems in jail pretrial, the prosecutor said, "that's the Bengal tiger story; he's doing okay in the cage. But out of the cage, different person." (*Id.* at A372:7-10.)

2275. He used the same analogy to suggest that Mr. Powell was too dangerous to be permitted to live, even if incarcerated for the rest of his life:

> Well, he gets paranoid. If you're paranoid and stressed in the institutional setting, is Carl Powell going to be a future danger in prison? Is he going to become the Bengal tiger out in the street, once he knows and once he adjusts to that setting?

(*Id.* at A372:20-24.)

2276. In his rebuttal, the prosecutor again referenced the Bengal tiger story to counteract Mr. Powell's courtroom demeanor, stating, "he looks remorseful now . . . But I'll tell you what. If you want to really see Carl Powell, if you really want to see the Bengal tiger, play [a videotape of Mr. Powell introduced as evidence]." (*Id.* at A374:23-27.)

2277. Referencing a photograph of Mr. Powell presented to the jury during the penalty phase, the prosecutor stated:

> [I]f you look at the curl of his lip in this—see—you see—you see it is—you see just—just how—vicious he is in this thing, how remorseless, what—just a street punk . . . this is the street Carl Powell and the Bengal tiger, this guy laughing here . . . .

(*Id.* at A375:8-14.)

2278. At the end of his rebuttal, the prosecutor recalled this analogy by using the same adjectives he had used to describe the Bengal tiger to refer to Mr. Powell: "There is no question about the remorselessness of it. There is no question about the viciousness of it. There is no question about the cold bloodedness of it." (*Id.* at A377:12-15; *cf*. *id.* at A375:8-14 [characterizing Mr. Powell and the "Bengal tiger" as "vicious" and "remorseless"].)

2279. The historical connection between animal imagery and racism is well documented. For centuries, Western thought embraced the "Great Chain of Being," an ideological hierarchy that identified the White race as the superior form of living being, with different races, and then animals, stratified at lower levels; in this ideology, Black people were placed beneath White people and deemed closer in origin and hierarchy to the ape. Comparison of Black people to animals recalls this ideology and has functioned to convey inferiority and justify subordination. (Ex. 101 at A198-99, ¶¶ 16-20.)

2280. Black people were commonly analogized to animals to justify slavery in the United States; comparison to animals promoted a view of Black people as another form of "beast" to be domesticated for labor. (*Id.* at A199-200, ¶¶ 22-23.)

2281. Following abolition, Black people were characterized using animal imagery to reinforce White supremacy through lynchings, other forms of violence, and segregation. (*Id.* at A201, ¶¶ 30-34.)

2281. The use of animal imagery to demean people of color continues to the present day, including in the criminal legal system. The "Bengal tiger" analogy, for instance, is not unique to Mr. Powell's case. Rather, it has been deployed in at least 26 capital prosecutions and almost exclusively against non-White defendants. Of 26 known instances of the Bengal tiger analogy in capital prosecutions in California, 23 were against non-White defendants (88%), and 14 (54%) were against Black defendants in particular. (*See* Ex. 100 at A007-11, ¶¶ 12-13, 16-17.)

2282. In adopting the RJA, the Legislature explicitly acknowledged this history, finding that "animal imagery is historically associated with racism" and "use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system." (AB 2542, § 2, subd. (e).)

2283. The Legislature identified the "Bengal tiger" analogy in Mr. Powell's case

specifically as a paradigmatic example of prohibited racially discriminatory language. (*Id*. [*citing People v. Powell* (2018) 6 Cal.5th 136, 182-83].)

2284. Analogizing people to animals has profound cognitive effects on the listener. Use of animalistic language to describe a Black man like Mr. Powell triggers unconscious stereotypes and places the subject in the category of "other" and sub-human. Listeners tend to consider the subject less deserving of empathy, less credible, and more fearsome, dangerous, and deserving of harsh treatment. (Ex. 102 at A239-40, A241-42, A248-49, ¶¶ 38-42, 45, 65-69.)

2285. Analogy to animals is particularly dangerous in the capital punishment context, as it has historically proven effective in justifying deadly consequences along racial and ethnic lines. (*Id*. at A240, ¶ 39.)

2286. Comparison to animals also has greater effect when deployed during closing arguments, as jurors are susceptible to recency bias, a phenomenon by which people are more strongly influenced by more recent events. (*Id.* at A249, ¶ 70.)

2287. In Mr. Powell's case, some of the jurors who spoke to defense counsel post-trial recalled voting for a sentence of death on the basis that Mr. Powell did not "have any feelings of remorse, or any signs of *humaneness* in him." (Ex. 4 at A380:17-24, emphasis added).

(ii.) The Explicit Racial Prejudice of Five Seated Jurors

2288. During jury selection, five prospective jurors expressed explicit racial prejudice, and one did so flagrantly. All five were ultimately seated and determined Mr. Powell's guilt, the truth of the special circumstance, and death sentence.

2289. Prospective jurors were given a questionnaire, a portion of which asked questions regarding their views on race and ethnicity. (*See*, *e.g.*, Ex. 4 at A382-83.)

2290**.** For Question 89, prospective jurors were asked to state whether they agreed or disagreed with two statements, (a) and (b), by marking the answer that most accurately reflected

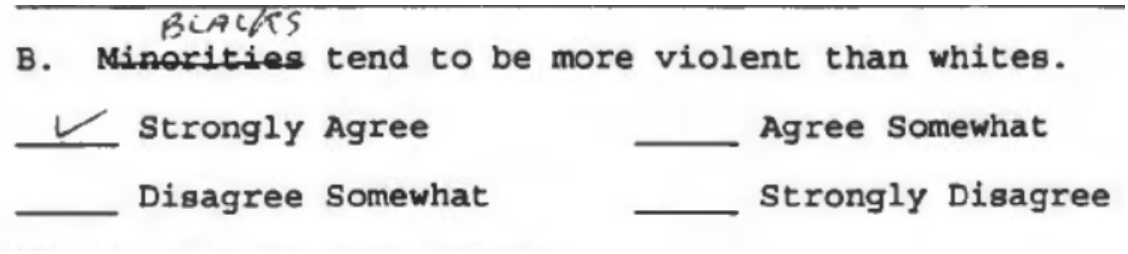
their opinion, whether "strongly agree," "agree somewhat," "disagree somewhat," or "strongly disagree." Statement (b) read, "Minorities tend to be more violent than whites." (*Id.* at A382.)

2291. Question 91 asked prospective jurors whether they thought race was relevant to either (a) "A person's truthfulness or the likelihood that the person will lie," or (b) "The likelihood that a person will be involved in criminal conduct." (*Id.* at A383.) If the juror indicated "yes" to either statement, the questionnaire provided a space to explain why. (*Id.*)

(a) Juror 11b

2292. Juror 11b completed the jury questionnaire. (*Id.* at A384-85.)

2293. In response to Question 89(b)—whether he believed "minorities tend to be more violent than whites"—Juror 11b crossed out the word "minorities," wrote the word "Blacks" in by hand, and marked "strongly agree":


B. ~~Minorities~~ BLACKS tend to be more violent than whites.

✓ Strongly Agree _____ Agree Somewhat

_____ Disagree Somewhat _____ Strongly Disagree

(*Id.* at A384.)

2294. In response to Question 91(a), Juror 11b marked "yes" to indicate that he thought a person's race is a factor in their truthfulness or likelihood to lie. (*Id.* at A385.) Juror 11b did not provide an explanation for this answer in the space provided. (*Id.*)

2295. In response to Question 91(b), Juror 11b marked "yes" to indicate that he thought a person's race is a factor in their likelihood of being involved in criminal conduct. (*Id.*) Juror 11b did not provide an explanation for this answer in the space provided. (*Id.*)

2296. During voir dire, defense counsel Bradley Holmes questioned Juror 11b about his questionnaire.

2297. Regarding Question 89(b), the colloquy went as follows:

Holmes: Well, question number 89(b), you've stricken the word "minorities," and you say "Blacks tend to be more violent than whites."

And with this, you strongly agree?

Juror 11b: That's because I've been—I've seen it and experienced it a lot in my life. And I have learned to—As I live my life, I do surveys—and, you know, from my home, and I evaluate a lot of things. And my conclusion is that there just seems to be a lot of, you know, violence in that area.

Holmes: Okay. By blacks?

Juror 11b: Huh?

Holmes: By blacks?

Juror 11b: Um-hum.

Holmes: Is my client going to be any worse off because of your feelings of that?

Juror 11b: No, it wouldn't be. It's just that I am not ignorant about the facts of life. I was in the Air Force for 23 years, and I lived in the barracks with all different types of people. And I—I evaluated the situations, and wherever I lived, and wherever I exist—And my conclusion always comes out to the fact that there's definitely a problem there, that it's not a comfortable situation.

(*Id.* at A302:18-A303:13.)

2298. Holmes also questioned Juror 11b about Question 91(a), asking, "As far as the truthfulness of a person, do you really think that a person's race, whether he's black, white, Pacific Islander, whatever, has anything to do with his ability to tell the truth?" (*Id.* at A305:21-24.) Juror 11b responded, "No. The ability to tell the truth has nothing to do with your race or – you know." (*Id.* at A305:25-26.). Holmes asked no follow-up on this point.[4]

[4] It is unclear whether Juror 11b intended to disavow his prior answer or whether he was drawing a distinction between Question 91(a) ("likelihood to lie") and Holmes' reframing ("ability to tell the truth"). (*Compare* A385, *with* A305:21-24.)

2299. Juror 11b was not questioned by defense counsel about his answer to Question 91(b), in which he expressed belief that a person's race was a factor in the likelihood that they would be involved in criminal conduct.

2300. The prosecutor did not question Juror 11b about his responses to Questions 89(b) or 91(a) or (b).

2301. No counsel moved to strike Juror 11b for cause. (*Id.* at A304:14-17; A306:2-5.)

2302. Juror 11b was selected as the first alternate. (*Id.* at A311:13-17.)

2303. Prior to deliberation in the guilt/innocence phase, seated Juror 11a[5] was excused by the court and replaced by Juror 11b. (*Id.* at A319:15-A320:26; A321:19-28.) Juror 11b participated in jury deliberations during both phases of trial. (*Id.* at A355:20-24; A357:5-7; A378:9-12; A379:6-7.)

(b) Jurors 1, 4, 8, and 9

2304. Jurors 1, 4, 8, and 9 completed the jury questionnaire.

2305. These jurors each marked "agree somewhat" to Question 89(b)'s statement, "minorities tend to be more violent than whites." (*Id.* at A382; A389; A392; A395.)

2306. Juror 1 marked "yes" and "no" in response to Questions 91(a), whether race is a factor in a person's truthfulness or propensity to lie. (*Id.* at A390.). In the space available, Juror 1 wrote, "Undecided. I believe a person's background plays an important role in the formation of character and moral fiber." (*Id.*) In response to Question 91(b), Juror 1 marked "yes," indicating belief that race is a factor in the likelihood that a person will be involved in criminal conduct. (*Id.*) In the space allotted, Juror 1 wrote, "Only because they have not been afforded the same opportunities and possibly lack education and moral support." (*Id.*)

[5] "Juror 11a" was assigned to seat number 11 before being excused.

2307. Juror 9 marked "yes" in response to Question 91(b), whether race is a factor in the likelihood that a person will be involved in criminal conduct. (*Id.* at A393.) In the space provided, Juror 9 explained, "Some people may 'take' what they want if they feel they will never have the chance to earn it." (*Id.*)

2308. During voir dire, defense counsel Ronald Castro questioned Juror 9 about her response to Question 91(b):

> Castro: . . . And the only thing you checked that made me worry is, (B) where you said the likelihood that a person will be involved in criminal conduct: And your written answer was: "Some people may 'take' what they want if they feel they will never have the chance to earn it." Do you remember that answer?
>
> Juror 9: Vaguely, yes.
>
> Castro: Okay. Were you thinking in terms—Specifically of race, or were you thinking more in terms of socioeconomic conditions?
>
> Juror 9: Probably a combination of both.
>
> Castro: Okay. Do you think people of one particular race are more likely to commit crimes than another one? I mean, is it built into them genetically?
>
> Juror 9: No. I think economics influences that a lot more than race.
>
> Castro: Okay. Well, that's—So, basically, seems like what you're talking about is more their environment and how they grew up?
>
> Juror 9: Yes, sir.
>
> Castro: As opposed to everybody with brown eyes—You know, people with brown eyes are more likely to be criminals than people with blue eyes?
>
> Juror 9: Yes.

(*Id.* at A308:7-A309:4.)

2309. Castro asked no further questions of Juror 9 on this topic.

2310. Neither defense counsel nor the prosecutor questioned any of Jurors 1, 4, 8, or 9 about their "agree somewhat" response to Question 89(b), indicating they agreed somewhat with the statement that minorities are more violent than White people.

2311. Neither defense counsel nor the prosecutor questioned Juror 1 about her response to Questions 91(a) and (b) indicating belief that race is a factor in one's propensity for truthfulness and criminality.

2312. Neither defense counsel nor the prosecutor moved to strike any of Jurors 1, 4, 8, or 9 for cause.

2313. Jurors 1, 4, 8, and 9 were seated and participated in jury deliberations during both phases of trial. (*Id.* at A355:20-A357:1; A378:9-A379:5.)

2314. Studies show that racial stereotypes exert a stronger influence on "high prejudice individuals." For such people, hearing or seeing racial stereotypes from external sources "activates and endorses" their own preexisting biases. (Ex. 102 at A246, ¶ 59.)

2315. Research also shows that people who express "explicit racial bias engage in in-group and out-group thinking and tend to judge members of the outsider group more harshly." (*Id*. at A245, ¶ 55.)

2316. At least five members of Mr. Powell's jury, and one to an extraordinary degree, were thus prone to thinking in terms of negative racial stereotypes, making them especially susceptible to such stereotypes or racialized rhetoric presented at trial. (*Id*. at A246, ¶ 58.)

(iii.) Racialized Rhetoric Demeaning Mr. Powell

2317. Defense counsel Ronald Castro and the prosecutor both relied on racialized language and stereotypes that demeaned Mr. Powell throughout both phases of trial.

(a) Guilt/Innocence Phase Closing Arguments

2318. In the first, guilt/innocence phase of trial, the prosecutor and especially defense counsel depicted Mr. Powell using racial stereotypes of young Black men as incapable of succeeding in civil society and prone to violence and criminality.

2319. Defense counsel conveyed this message first by stating that Mr. Powell's previous employment at KFC, where he had worked for victim Keith McDade, was the greatest achievement he could aspire to and his only prospect for integration into civil society:

- "Remember, that in a very real way, that Kentucky Fried Chicken had become Carl's oasis in the desert of despair that we're talking about *for people not unlike Carl*. We've got a whole generation of people coming up now that have never had a job, you know, who can't read, who can't do simple math. But Carl had found a place where he could at least sell his body and his time." (Ex. 4 at A347:10-16, emphasis added);
- "[Y]ou walk up to the guy [McDade] who holds your—You know, your future in your hands. If he gives you your job back, everything is good again; you can be a good human citizen." (*Id.* at A326:4-7);
- "[The job at KFC] was the only thing that—in his whole life that he had done well. And—and I mean it's literally—that was his lifeline. That was his way up out of where he was." (*Id.* at A335:1-4);
- "Now, that job was—basic [*sic*] his oasis in the desert." (*Id.* at A336:8-9);
- "I mean that was the—the—that [job] was basically Carl's contact to I guess the straight world or something." (*Id.* at A336:13-15);
- "And from his point of view, you know, that literally is killing the goose that laid the golden egg. Keith is his only access to a way—To a life. I mean a real life. And what do we know about Carl at that time? He's down and out. He's in the streets. . . . In our society now *for a young black man*, hey, getting a job, like I said yesterday, is where it's at. If you get a job, you're on your way up, bud." (*Id.* at A349:7-16, emphasis added);
- "Would Carl actually kill the golden goose?" (*Id.* at A350:14.)

2320. Second, and relatedly, Castro told the jury that without the job at KFC, Mr. Powell returned to his natural place "in the streets," part of a netherworld of young Black men trafficking in violence and crime:

- "Did Carl want his job back? Here it is almost nine—eight, nine months

after the job ends and where are we? I mean Carl is out *in the streets*." (*Id.* at A334:7-9, emphasis added);

- "You know, the only people we know he hung out with *in the streets* are guys like Roosevelt [a Black adolescent] and guys—kids—you know, *that group* and, you know, a 15-year-old driving around a wrecked car. I don't mean to speak ill of Roosevelt Coleman and his mom Angie. I mean it's going to be tough for that kid to make anything. . . . That's one group. And then he hangs out with Terry [Hodges, a Black young adult and co-defendant]. I mean *that's his society* other than the people that he works with at K.F.C." (*Id.* at A336:15-25, emphasis added);

- "Terry might be 19. But he's—he's no—no child as far as living *in the streets* are concerned." (*Id.* at A344:1-3, emphasis added);

- "He's been known—Terry's been known to be around—and, you know, when everybody's talking business seems to know what's happening—wise out *in the streets*, makes a little bit—makes a little bit of money dope dealing[.]" (*Id.* at A344:4-8, emphasis added);

- "I know why Carl would want to hang out with Terry. You know. I would say that *within their society*, Terry has a bit more status than Carl. At least he's got a car, you know." (*Id.* at A348:14-17, emphasis added);

- "[Mr. Powell and his co-defendant are] sitting around kicking it, probably talking [like] . . . 'Yeah, man, I know something; I can do this. Yeah, there's an easy lick we can do over here.' You know, talking about—as youngsters will do *in that society*." (*Id.* at A348:20-24, emphasis added);

- "I mean let's face it. Guns aren't that hard to get out *on the street* nowadays. If—you know, I just once heard this Congress lady on TV awhile back saying for a young minority male in our society it's easier to get a gun *on the streets* than it is to get a job, you know. And that's—I think we can safely say that's true." (*Id.* at A342:8-14, emphasis added);

- "I mean, unfortunately in that neighborhood, if what I read in the paper, read in the papers is any evidence, I mean, you know, that's a neighborhood down there—Mack Road, Meadowview—where on a hot summer night when the windows are open, you hear gunshots. I mean, unfortunately, we live in a time of growing lawlessness. And what's spooky is that the youngsters, the ones who grow up watching Sylvester Stallone and Arnold Schwarzenegger and Clint Eastwood, they're starting to grow up with this cult that man's got to have guns. And that's spooky. I

don't know of anybody who does not find that, except, of course, if you're under 18. And I understand what it's like to live out *on the streets* now, you now, *the gang loyalties*, things of that nature." (*Id.* at A325:2-15, emphasis added);

- "You know. [Gun possession by minority youth]—It's a growing, growing problem." (*Id.* at A325:23);

- "It's like down—they're south of Florin, you know, the place where—where I earlier mentioned it's not uncommon to hear somebody emptying a clip in the sky at night. Pretty tough neighborhood." (*Id.* at A346:10-13).

2321. The prosecutor used similar language during his guilt/innocence phase closing, twice telling the jury that Mr. Powell was a "street kid":

- "Carl Powell was a street kid; he was a tough kid. He knew what he was doing." (*Id.* at A351:20-22);

- "He's a street kid, and he's thinking that this gun can get me some money . . . he's thinking about doing an armed robbery." (*Id.* at A354:17-20.)

2322. The guilt/innocence phase arguments from both counsel relied on well-recognized, racially-incendiary stereotypes about young Black men. A common stereotype is that young Black men are incompetent, have poor prospects for success, and must rely on menial, especially physical labor. (Ex. 102 at A253-54, ¶ 82; *see*, *e.g.*, Ex. 104 at A347:15-16 ["he could at least sell his body"].) Another is that young Black men are violent and predatory; still another, closely related, holds that young Black men are street-dwellers affiliated with gangs and criminality. (Ex. 102 at A243-45, A251-52, ¶¶ 51-54, 78; *see*, *e.g.* Ex. 104 at A336:16-17 ["he hung out with [young Black men] in the streets"]; *id.* at A325:13-15 ["I understand what it's like to live out on the streets now, you now, the gang loyalties"]; *id.* at A354:17-18 ["He's a street kid, and he's thinking that this gun can get me some money."].)

2323. At the time of Mr. Powell's trial in 1994, conceptions of young Black men as violent, dangerous, and a threat to civilized society were prevalent. The early 1990's saw emergence of the "hood film genre," which brought wide, White viewership to films like Boyz in the Hood, New Jack City, Juice, and Menace to Society, which focused on the culture of South

Central Los Angeles, where the jury was told Mr. Powell was born and raised. (*See* Wikipedia, "*Boyz n the Hood*" <https://en.wikipedia.org/wiki/Boyz_n_the_Hood> (as of Oct. 3, 2024); Ex. 102 at A249, ¶¶ 69-72.) During the same period, "[t]he gangsta rap subgenre, focused on the violent lifestyles and impoverished conditions of inner-city African American youth, gained popularity[.]" (*See* Wikipedia, "Hip hop music" <https://en.wikipedia.org/wiki/Hip_hop_music> (as of Oct. 3, 2024).)

2324. The impact of this popular media was compounded by extensive press coverage during this period depicting Black youth in handcuffs, jumpsuits, and other criminal imagery. (Ex. 102 at A244, ¶ 52.)

2325. The year after Mr. Powell's trial, the stereotype of young Black men as remorseless predators received a pseudo-academic gloss with the coining of the "superpredator" myth. This myth coupled the prevalent stereotype of young Black men as violent and criminal with a theory that young Black male "superpredators" were a new and growing phenomenon. (*Id.* at A243-44, ¶ 51.) The prevalence of this ideology in mainstream culture and politics resulted in significant and lasting policy shifts treating young men accused of crimes as adults subject to harsh punishment. The view that "superpredators" were irredeemable and an omnipresent threat was used to justify an explosion in sentences of life without the possibility of parole for young Black men beginning in this period. (*See People v. Hardin* (2024) 15 Cal.5th 834, 903-07 (dis. opn. of Evans, J.) [discussing policy and sentencing impacts of "superpredator" myth, including in California].)

2326. The jury in Mr. Powell's case likely absorbed these stereotypes about young Black men through news and popular media. References to such stereotypes by counsel would have primed jurors to assess the evidence based on these stereotypes and other implicit biases. (*See* Ex. 102 at A236-37, A243-45, A249, ¶ 18-19, 48-54, 72.)

2327. The racialized language employed by counsel for both parties also cast Mr. Powell

as "other" to the jury: a person apart from, and less than, their social and moral order. (*See id.* at A238-39, A251, ¶ 22-27, 75.) As a result of this language, the jury was more likely to find Mr. Powell undeserving of empathy, dangerous, and more deserving of harsh judgment.

2328. That both defense counsel and the prosecutor repeatedly depicted Mr. Powell using the same stereotype only reinforced its potency. (*Id*. at A241, ¶ 43.) The negative effect of this stereotyping in closing arguments was further amplified by recency bias. (*Id.* at A249, ¶¶ 70-71.)

(b) Racialized Rhetoric Regarding Mr. Powell and His Peer Group

2329. During both phases of trial, the prosecutor and defense counsel repeatedly used racialized language to describe Mr. Powell's relationship to other Black youth.

2330. On five occasions, the prosecutor used the phrase "running buddy" or "running buddies" with regard to Mr. Powell's relationship with another young Black man. (Ex. 104 at A313:6, A315:21, A362:27-28, A364:7, A367:22.) On one occasion, the prosecutor used the phrase "running mates." (*Id.* at A317:25.) The prosecutor also once employed the phrase "road dogs." (*Id.* at A362:28.)

2331. Defense counsel used the phrase "running buddies" twice, also to describe Mr. Powell's relationship to another young Black man. (*Id.* at A359:28, A360:9.)

2332. These phrases are urban slang that connote criminality and gang culture. The repeated use of such phrases primed the jury to rely on implicit biases about young Black men as delinquent and dangerous. (*See* Ex. 102 at A250-52, ¶ 73-79.)

(c) Defense Counsel's Affectation of African American English

2333. Defense counsel Ronald Castro repeatedly affected African American English (AAE) when referring to, or assuming the voice of, Mr. Powell and a Black female witness, Angela Littlejohn.

2334. For example, Castro often used the colloquial "ain't," but only in regard to Mr. Powell or Ms. Littlejohn:

- "[T]he boy [Mr. Powell] ain't much of a liar." (Ex. 104 at A323:26-27);
- "His [Mr. Powell's] memory ain't bad." (*id.* at A324:21);
- "And she [Ms. Littlejohn] ain't going to give him that gun back until he gives her some money," (*id.* at A339:4-5);
- [Assuming the role of Ms. Littlejohn] "I ain't going to give you nothing, man, till I see my money." (*id.* at A339:14-15);
- "If Carl ain't with them [the Hodge brothers, his co-defendants], then he's going to be against them." (*id.* at A345:6-7.)

2335. Castro attempted an AAE dialect in other ways, but again only when describing, or pretending to speak as, Mr. Powell or Ms. Littlejohn:

- [Assuming the role of Ms. Littlejohn] "He [Mr. Powell] don't pick up too good." (*id.* at A341:12-13);
- [Assuming the role of Mr. Powell] "Probably be out. And bam. There go my family." (*Id.* at A331:11-12);
- "By the time he's [Mr. Powell] at Coalinga he's broke—okay—and Angela got to come in and bail all the guys out." (*Id.* at A343:20-22);
- [Assuming the role of Ms. Littlejohn] "He [Mr. Powell] didn't have no money." (*Id.* at A338:23.)

2336. Defense counsel also disparaged Ms. Littlejohn in colloquial but overtly racial terms, saying:

> Angela seems like a pretty severe woman to me, you know. I forget what it was. It's been so—some old song about—you know, pork [sic] salad and a mean razor-toting woman. You know, that's—I'm sorry. That's—that's Angela Littlejohn, you know. Yeah.

(*Id.* at A339:19-23.) The reference was to the song Polk Salad Annie by Tony Joe White, made famous by Elvis Presley. (*See* Wikipedia, "Polk Salad Annie" <https://en.wikipedia.org/wiki/Polk_Salad_Annie> (as of Oct. 3, 2024).) As applied to Ms. Littlejohn, the characterization as

"severe" and a "mean razor-toting woman" invoked the stereotype of the Jezebel, a devilish Black woman. (*See* Ex. 102 at A252, ¶ 80.)

2337. All such instances of colloquial and AAE-inflected speech further "othered" Mr. Powell to the jury. Castro did not speak in this dialect except to accentuate that Mr. Powell and another Black person were different and, by virtue of the ungrammatical nature of Castro's dialect, *less than* the in-group that included Castro, the jurors, and mainstream White society more broadly. As noted, the jurors were accordingly more likely to view Mr. Powell as undeserving of belief or empathy, and instead as fearsome, dangerous, and meriting harsh treatment. (*See id.* at A235, 238-39, ¶¶ 13, 22-27.)

(iv.) Statistical Evidence Establishes Racial Disparities in Charging and Sentencing

2338. Compelling statistical evidence demonstrates large defendant- and victim-based racial disparities at multiple stages of capital prosecutions in Sacramento County between 1988 and 1995.

2339. Race, of both the defendant and victim, is a reliable predictor of how a case will advance through the charging and death notice process. From 1988 to 1995—the tenure of the Sacramento District Attorney at the time of Mr. Powell's prosecution and trial—Black defendants with White victims were 1.4 to 2.6 times more likely than other defendants to be charged with any special circumstance (making their case death-eligible), and 1.8 to 3.7 times more likely to be charged with the robbery-murder special circumstance, (§ 190.2, subd. (a)(17)(A)), as was Mr. Powell. With respect to Black defendants, those with White victims were 10 times more likely to be death noticed than those with Black victims. (*See* ¶¶ 2345-2348, *post*.)

2340. Race also correlates strongly with imposition of the death penalty in Sacramento. During the same time period, Black defendants with White victims were 3.5 times more likely to receive death sentences than White defendants with White victims. No Black *or* White defendants

charged with the murder of Black victims were sentenced to death between 1988 and 1995. (*See* ¶¶ 2349-2351, *post*.)

2341. This history of racially disparate capital charging and sentencing sits within a long history of struggle by communities of color against White supremacy and racial discrimination in housing, education, and policing in Sacramento County. Capital charging and sentencing disparities are thus properly understood as further manifestation of pervasive, implicit bias. (*See* Damany Fisher & Page and Turnbull, "Sacramento African American Experience History Project: Historic Context Statement" (June 2023) Sac. County Gov.)[6]

(a) Description of Statistical Study

2342. Mr. Powell's statistical proof was developed through a rigorous study supervised by researcher Nick Petersen, Ph.D., Professor of Sociology and Criminology at the University of Miami. (Ex. 103 at A285, ¶ 1.)

2343. Dr. Petersen examined the use of the death penalty under the tenure of Sacramento District Attorney Steven White (the "study period") to assess whether racial disparities were present in the charging of special circumstances and the decision to seek and obtain a death sentence ("Petersen Study").[7] (*Id.* at A285, ¶¶ 1-3.)

2344. Dr. Petersen identified a total population of approximately 300 first- and second-degree murder cases for the study period. To analyze this population for the influence of defendant and victim race on various outcomes, he compiled a data set using California DOJ

[6] <https://www.cityofsacramento.gov/content/dam/portal/cdd/Planning/Urban-Design/Preservation/AAH/2023-06-29-Sacramento-AAE-Historic-Context-Statement-Final.pdf> (as of Oct. 3, 2024).

[7] The Petersen study examined all first- degree and second-degree murder cases from January 1, 1988, to December 31, 1995. As noted, the time frame is based on Sacramento District Attorney Steven White's tenure (1989-1995). Cases from 1988 are included, even though they precede White's tenure, because an individual arrested in 1988 could well have been charged or made death-eligible in 1989 under White. A total of 237 homicide cases are included in the study. (Ex. 103 at A285, ¶ 1 n.1.)

victim homicide data and 257 paper files (approximately 80% of total identified cases) scanned from the Sacramento Courthouse Records Office.[8] Case files pertaining to minor defendants, who are not death-eligible, were removed, resulting in a final data set of 237 cases. (*Id.* at A285-86, ¶¶ 2-5.)

(b) Study Finding: Racial Disparities in Charging

2345. The Petersen Study reveals that Black defendants faced race-based differences in capital charging rates when accused of killing White victims. Black defendants with White victims comprised 9% of the total study population but constituted 16% of those charged with any special circumstance, 21% of those charged with the robbery-murder special circumstance (as Mr. Powell was), and 30% of those death noticed. (*Id.* at A289, ¶ 12.) By way of comparison, White defendants with White victims made up 24% of the study, were 30% of those charged with any special circumstance, 31% of those charged with special circumstance robbery-murder, and 30% of those death noticed. (*Id.* at A289, ¶ 13.) For Black defendants with Black victims, the risk of a death sentence decreased at every stage in the charging process: this group comprised 26% of all cases in the study, but only 18% of those charged with special circumstances and 15% of those charged with the robbery-murder special circumstance; none of these defendants were death noticed. (*Id.* at A289, ¶ 14.) White defendants with non-White victims comprised the smallest group in the study, with 10 cases comprising 4% of the total, 4% of those charged with special circumstances, 3% of those charged with the robbery-murder special circumstance, and, like Black defendants with Black victims, none of those that resulted in a death notice. (*Id*. at A289, ¶ 15.)

2346. The Petersen Study also shows how specific defendant-victim race combinations

[8] An estimated 60 identified case files remained unavailable for scanning at the time data collection ended. (Ex. 103 at A286, ¶ 4 n.6.) Mr. Powell requests these case files in his section 745, subdivision (d) discovery motion accompanying this amendment.

advance differentially, from the decision to make a case death eligible to the filing of a death notice. The data reveal that Black defendants with White victims faced the greatest risk. Of 22 Black defendant/White victim cases in the Petersen Study, 13 (59%) were charged with any special circumstance, and of those charged with any special circumstance, 7 (54%) were death noticed. (*Id*. at A290, ¶ 17.) Of the 58 cases with White defendants and White victims, 24 (41%) were charged with any special circumstance, and of those 7 (29%) were death noticed. (*Id.* at A290, ¶ 18.) Of the 61 cases with Black defendants and Black victims, 14 (23%) were charged with any special circumstance, and 2 (14%) were death noticed. (*Id*. at A290, ¶ 19.) Of the 10 cases where a White defendant was charged in the murder of a non-White victim, 3 (33%) were charged with a special circumstance, and none were death noticed. (*Id.* at A290, ¶ 20.)

2347. The progression of those charged with the robbery-murder special circumstance, as Mr. Powell was, showed even starker race-based disparities. Of the 22 cases with Black defendants and White victims, 8 (36%) were charged with the robbery-murder special circumstance, and 5 of the 8 (63%) were death noticed. (*Id*. at A290, ¶ 22.) Of the 58 cases with White defendants and White victims, 12 (21%) were charged with the robbery-murder special circumstance, and 5 of that number (42%) were death noticed. (*Id.*) Of the 61 cases with Black defendants and Black victims, 6 (10%) were charged with the robbery-murder special circumstance, and 1 of the 6 (17%) received a death notice (but did not receive a death sentence). (*Id.* at A290-91, ¶ 23.) Of the 10 cases where a White defendant was charged in the murder of a non-White victim, one (10%) was charged with the robbery-murder special circumstance, but no White defendants with non-White victims were death noticed. (*Id.*)

2348. The risk of advancing through the charging process towards death qualification is higher for Black defendants with White victims than for any other defendant/victim race combination. Black defendants with White victims are 1.4 to 2.6 times more likely than any other

defendant-victim race combination to be charged with any special circumstance. They are 1.8 to 3.7 times more likely to be charged with the robbery-murder special circumstance. They are 1.8 to 3.8 times more likely, if charged with any special circumstance, to receive death notices. And they are 1.5 to 3.8 times more likely, if charged with the robbery-murder special circumstances, as Mr. Powell was, to receive a death notice. (*Id.* at A291-92, ¶ 25.)

(c) Study Finding: Racial Disparities in Sentencing

2349. The Petersen Study reveals similar race effects in capital sentencing. During the study period, cases with White victims accounted for 41% of the total study population of first- and second-degree murders but were 67% of all cases ending with a death sentence. (*Id.* at A292, ¶ 27.) By way of contrast, cases with Black victims constituted 31% of the cases capitally charged, but none ended in a death sentence. White victim cases were thus 5 to 15 times more likely to result in a death sentence than cases with victims of any other race. (*Id.* at A293, ¶ 29.)

2350. More specifically, cases with Black defendants and White victims comprised 9% of the total study population but 33% of those sentenced to death. By way of comparison, cases with White defendants and White victims made up 24% of the study and were 25% of those sentenced to death. As noted, despite comprising 31% of the total, no case with a Black victim resulted in a death sentence. (*Id*. at A293, ¶ 30.)

2351. Computing this data reveals that Black defendants in cases with White victims were 1.3 times more likely to be sentenced to death than White defendants with White victims. (*Id.* at A293, ¶ 32.)

(d) Similarly Situated Cases

2352. The Sacramento County District Attorney's Office internal guidelines during the study period identified criteria for deciding when to seek death, including, *inter alia*:

- whether circumstances of crime give rise to a special circumstance;

- prior criminal activity involving violence or threat of violence;
- prior felony conviction;
- role of defendant - either as the perpetrator or one who consented to homicide;
- absence of excuse, including duress, mental condition, lack of capacity; and
- age of defendant at time of crime.

(Ex. 103A at A297-98.) These factors should explain why one person was made death-eligible and another was not. Examination of cases factually comparable to Mr. Powell's, however, fails to show that these factors explain the stark racial differences revealed by the Petersen Study.

2353. Mr. Powell was 18 years old at the time of the offense and had no prior convictions. He was charged with one count of first-degree murder (§ 187), robbery (§ 211) and the robbery-murder special circumstance (§ 190.2(a)(17)(A).) Considering his young age and lack of priors, at least three of the factors the District Attorney considered relevant pointed towards non-capital charges.

2354. A review of cases similarly situated to Mr. Powell's, involving murder and robbery or burglary, show that many similarly situated defendants received just such consideration if they were White or their victims were Black. The Petersen Study identified 25 defendants who, like Mr. Powell, were charged with murder and either robbery or burglary, but who were neither charged with the robbery-murder special circumstance nor death noticed.[9] Of these 25, 14 had Black victims. In the remaining 11 cases, the victim was White, but so was the defendant. (Ex. 103 at A294-95, ¶ 34.)

2355. Two of the 25 identified cases are particularly illustrative.

2356. The first involved White codefendants Jeremy Beasley and William Tate (Case

[9] These 25 cases, in addition to Mr. Powell's, are not the sum total of cases with a murder and either robbery or burglary from the study period. In this section, Mr. Powell identifies cases that share critical features of the offense in which the prosecution did not seek death.

No. 93F09172). (*Id.* at A294, ¶ 34 n.11.) Beasley was 20 at the time of the crime and had a prior conviction. He was charged with murder; robbery; possession of stolen property; and initially with the robbery-murder special circumstance. His co-defendant, Tate, reached a plea deal under which his charges were reduced to accessory to murder and residential robbery in exchange for testifying against Beasley and pleading guilty to the robbery charge. Tate was given a maximum sentence of six years. Beasley then pled guilty to murder in exchange for the prosecutor dropping the special circumstance. Beasley was sentenced to 25 years to life, plus 4 years for the firearm, with the possibility of parole, and became parole-eligible in 2022 after serving 29 years. (*Id.* at A295, ¶ 35.)

2357. The second case involved Black codefendants James Bates and Chrystal Montford (Case No. 9400475). (*Id.* at A294, ¶ 34 n.11.) Both had prior convictions for robbery. Both were charged with murder, robbery, burglary, and the robbery- and burglary-murder special circumstances. The victim, who was Black, was discovered bound with his hands behind his back, having been beaten about the head and killed with a coat hanger. Both defendants pled guilty to first-degree murder and robbery and admitted their prior convictions in exchange for the prosecutor dropping the robbery and burglary counts and the special circumstances. Neither defendant was death noticed. The plea hearing transcript makes clear that the prosecutor was aware that both defendants may have been involved in at least one additional murder in Los Angeles. Bates was sentenced to 31 years to life with the possibility of parole. Montford was sentenced to 25 years to life with the possibility of parole and was released in 2021. (*Id.* at A295, ¶ 36.)

D. CLAIM XIV AND GROUNDS FOR RELIEF

2358. The prosecutor's Bengal tiger analogy violated the RJA, section 745, subdivisions (a)(1) and (2).

2359. Five seated jurors were biased against Mr. Powell because of his of race and expressed prejudice against Black people during trial proceedings in violation of the RJA, section 745, subdivisions (a)(1) and (2).

2360. Both the prosecution and defense counsel used racially discriminatory language repeatedly in both phases of trial in violation of the RJA, section 745, subdivisions (a)(1) and (2).

2361. Statistical data reveal that in Sacramento County during the time of Mr. Powell's trial, Black people were more likely than similarly situated White defendants to be charged with a special circumstance, particularly the robbery-murder special circumstance, and ultimately death noticed. This establishes a violation of the RJA, section 745, subdivision (a)(3).

2362. Statistical data reveal that in Sacramento County during the time of Mr. Powell's trial, defendants in cases with White victims, and especially Black defendants in cases with White victims, were more likely to be sentenced to death than similarly situated defendants with non-White victims. This establishes a violation of the RJA, section 745, subdivision (a)(4).

2363. Cumulative evidence establishes a violation of the RJA, section 745, subdivisions (a)(1)-(4).

E. PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Incorporate by reference the certified record on appeal and all of the briefs, motions, orders, and other documents and material on file in *People v. Powell*, Case No. S043520, and *People v. Powell*, Sacramento County Superior Court Criminal Case No. 113126. (*See In re Reno* (2012) 55 Cal.4th 428, 444, 484 [holding habeas petitioner need not request judicial notice of all documents from prior proceedings in capital cases because this Court routinely consults prior proceedings irrespective of formal request]; *see* California Rules of Court, rule 4.751);

2. Order Respondent to show cause why Mr. Powell is not entitled to the relief sought on the grounds in this amendment as well as those set forth in prior pleadings;

3. Grant Mr. Powell sufficient funds to secure investigation and expert assistance as

necessary to prove the facts alleged in this amendment as well as those alleged in prior pleadings;

4. Grant Mr. Powell the authority to obtain subpoenas for witnesses and documents in support of the grounds alleged in this amendment as well as those alleged in prior pleadings;

5. Grant Mr. Powell the right to conduct discovery in support of the grounds alleged in this amendment, as Mr. Powell will request by separate motion;

6. Order an evidentiary hearing on the grounds alleged in this amendment, at which Mr. Powell will offer further proof in support of those grounds, as Mr. Powell will request by separate motion;

7. After full consideration of the issues raised in this amendment to Mr. Powell's habeas petition and those in the original petition, vacate the judgment and sentence imposed upon Mr. Powell in Sacramento County Superior Court, Case No. 113126;

8. In compliance with section 745, subdivision (e)(3), issue an order barring the reimposition of a sentence of death;

9. In compliance with section 745, subdivision (e)(2)(A), order a new trial on guilt or innocence and/or modify the judgment to a lesser included or lesser related offense;

10. In compliance with section 745, subdivision (e)(2)(B), issue an order finding the original sentence legally invalid and imposing a new sentence; and

11. Grant Mr. Powell such further relief as is appropriate and in the interest of justice.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Carl Powell was convicted and sentenced to death in a trial permeated by racial prejudice. Mr. Powell, who is Black, was convicted of killing Keith McDade, a White man, in 1992 when Mr. Powell was 18 years old. Racial stereotypes depicting young Black men as predisposed to violence and criminality were pervasive at that time, and such stereotypes impacted the trial at every stage of the proceedings. The prosecutor likened Mr. Powell to a wild animal—a Bengal tiger—in penalty phase closing argument. Several jurors expressed belief that Black people are less truthful and more prone to violence or crime; one juror made explicit and repeated statements demonstrating anti-Black prejudice. Both defense counsel and the prosecutor depicted Mr. Powell as an outcast who roamed the streets with other predatory, young Black men. And statistical data reveal that in Sacramento during this period, defendants were significantly more likely to be charged, convicted, and sentenced to death for offenses like those for which Mr. Powell was convicted if they were Black and/or their victim was White.

The Racial Justice Act was enacted to remedy such prejudice. In recognition that racial bias is an indelible stain on the criminal legal system that has escaped redress for too long, the Legislature provided "different means of proving that the state exercised its criminal sanctions power 'on the basis of race, ethnicity, or national origin.'" (*Young v. Super. Ct*. (2022) 79 Cal.App.5th 138, 163 [citing § 745, subd. (a)].)

Mr. Powell suffered violations of the RJA under each of the enumerated grounds of section 745, subdivision (a), both individually and cumulatively. This Amendment to the Petition and supporting documentation readily establishes violations of the RJA that merit immediate vacation of Mr. Powell's conviction and sentence based on the record alone—specifically, the prosecutor's Bengal tiger analogy and the seating of jurors who expressed racial bias. But all of

Mr. Powell's claims meet the RJA's prima facie threshold, and if the Court does not grant relief based on the record, it should issue an order to show cause on Mr. Powell's RJA claim, require responsive briefing, and schedule an evidentiary hearing.

II. LEGAL STANDARD

A. The RJA Was Intended to Eliminate Racial Bias and Disparities in the Criminal Legal System, Irrespective of Whether Bias is Purposeful or Unintentional.

The RJA 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." (§ 745, subd. (a).) First enacted in 2020, the RJA was born out of a recognition that although "racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms." (AB 2542, § 2, subd. (c).) In particular, the Legislature observed that under legal precedent pre-dating the RJA, "proof of purposeful discrimination is often required, but nearly impossible to establish." (*Id*.) This emphasis on purposeful discrimination failed to recognize that "[i]mplicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias." (*Id*. at § 2, subd. (i).) The Legislature sought to bridge this gap, enacting the RJA to: 1. ensure that "race plays no role at all in seeking or obtaining convictions or in sentencing," 2. "reject the conclusion that racial disparities within our criminal justice [system] are inevitable, and… work to eradicate them," and 3. "provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination." (*Id*. at § 2, subds. (i)-(j); *see also Bonds v. Super. Ct.* (2024) 99 Cal.App.5th 821, 828 [recognizing "the primary motivation for the legislation was the failure of the judicial system to afford meaningful relief to victims of unintentional but *implicit* bias."].)

To effectuate these purposes, the RJA identified four independent categories of prohibited

conduct:

(1) An actor in the case "exhibited bias or animus towards the defendant because of the defendant's race";

(2) During trial proceedings, an actor in the case "used racially discriminatory language about the defendant's race…or otherwise exhibited bias or animus towards the defendant because of the defendant's race…whether or not purposeful";

(3) "The defendant was charged or convicted of a more serious offense than defendants of other races…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"; and

(4) "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* either "longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race" *or* "longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race" when compared to victims of another race.

(§ 745, subd. (a).) Proof of any these categories of conduct will establish a violation. (*Young*, *supra*, 79 Cal.App.5th at p. 147.)

The RJA was amended effective January 1, 2023, to offer retroactive relief to petitioners sentenced to death before the statute took effect. (§ 745, subd. (j)(2).) If judgment in a case has already been imposed, a petitioner may file a petition for writ of habeas corpus in a court of competent jurisdiction or amend an existing petition to allege a violation. (§ 745, subd. (b); § 1473, subd. (e).)

B. The RJA Establishes a Relaxed Prima Facie Threshold for an Evidentiary Hearing.

A petitioner's burden of persuasion in filing a claim under the RJA is to establish a prima facie case. (§ 745, subd. (c); § 1473, subd. (e).) If the petitioner meets this burden, the "court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause." (§ 1473, subd. (e).) As with any claim brought in habeas

corpus, however, the Court may grant relief on the papers where the facts are undisputed and the law is clear. (*See People v. Duvall* (1995) 9 Cal.4th 464, 478-79 ["Where there are no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing."]; *see also In re Figueroa* (2018) 4 Cal.5th 576, 587-88.)

In the RJA context, a prima facie case requires the petitioner to "produce[] facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred." (§ 745, subd. (h)(2).) A substantial likelihood "requires more than a mere possibility, but less than a standard of more likely than not." (*Id*.) A court "should accept the truth of the [petitioner'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. Super. Ct.* (2023) 95 Cal.App.5th 12, 23.) Courts do not evaluate the entire record and weigh all potentially relevant evidence; the sole task is to "focus[] on and accept[] as true" the evidence put forth as the basis for petitioner's RJA claim. (*Id*. at p. 23.) In keeping with the statutory purpose to illuminate and redress racial bias in the criminal law, this threshold is less stringent than the showing required for other claims in habeas corpus, and is lower than the preponderance of the evidence standard required to prove an actual violation. (*Id*. at p. 22.)

With respect to a claim brought under section 745, subdivision (a)(3), a petitioner may establish a prima facie case that other defendants who "engaged in similar conduct and are similarly situated" to the petitioner were charged less harshly by presenting both (1) statistical evidence demonstrating racial disparities in charging, and (2) some concrete examples of more lenient charging decisions against similarly situated defendants of different racial groups. (*Mosby v. Super. Ct*. (2024) 99 Cal.App.5th 106, 113.)

C. In Post-Conviction Cases, An RJA Violation Generally Necessitates Reversal or Resentencing.

If the petitioner demonstrates a violation of the RJA by a preponderance of the evidence, whether on the pleadings or following a hearing, the court must order relief as provided by the statute. (§ 745, subd. (c)(2), (e).) The limited exception is for cases made final before January 2021, where the violation is solely based on section 745, subdivisions (a)(1) or (a)(2), and the government proves beyond a reasonable doubt that the violation did not contribute to the judgment. (§ 745, subd. (k).)

For post-conviction cases, the presumptive remedy is to vacate the conviction and/or sentence and order new proceedings, with two allowances: 1. If the violation is based on only subdivision (a)(3) of the RJA, then the court may modify the judgment to a lesser included or lesser related offense and impose a new sentence that may not exceed the vacated sentence; and 2. If the RJA violation is limited to sentencing, then the court shall impose a new sentence that may not exceed the vacated sentence. (§ 745, subd. (e).) In a capital case, once any violation of the RJA has been established, the petitioner "shall not be eligible for the death penalty." (*Id*.)

III. ARGUMENT

A. The Prosecutor's Characterization of Petitioner as a Bengal Tiger Was a Per Se Violation of Section 745, Subdivision (a)(2), Requiring Resentencing.

Section 745, subdivision (a)(2) provides that it is a violation of the RJA for an "attorney in the case" to use "racially discriminatory language about the defendant's race…or otherwise exhibit[] bias or animus towards the defendant because of the defendant's race…whether or not purposeful" during trial proceedings. "Racially discriminatory language" is defined by statute to include "language that compares the defendant to an animal." (§ 745, subd. (h)(4).)

The prosecutor's Bengal tiger trope, used to portray Mr. Powell as a vicious, predatory animal, was categorically "racially discriminatory language" under the RJA. As noted, the

legislative findings identified the prosecutor's use of the Bengal tiger analogy, *including in Mr. Powell's specific case*, as a paradigmatic violation:

> [C]ourts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are "highly offensive and inappropriate" (*Duncan v. Ornoski*, 286 Fed. Appx. 361, 363 (9th Cir. 2008); *see also People v. Powell*, 6 Cal.5th 136, 182–83 (2018)). Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system.

(AB 2542, § 2, subd. (e).) Particularly given these statutory findings, the record in this case unequivocally demonstrates a violation of section 745, subdivision (a)(2).

The Attorney General and at least one county district attorney agrees. In the matter of *People v. Bankston*, the Attorney General conceded before the California Supreme Court that record evidence establishing that the prosecutor referred to the defendant as a Bengal tiger during penalty phase closing constitutes a per se violation of section 745, subdivision (a)(2), necessitating vacation of a death sentence and resentencing to life without parole. (*See* Ex. 105 at A416-19.) Likewise, the District Attorney for Los Angeles County has stipulated to an RJA violation requiring resentencing in at least three instances where the prosecutor employed the Bengal tiger analogy during penalty phase closing. (*See* Ex. 106 at A433-36; Ex. 107 at A437-38; Ex. 108 at A442-43.)

The prosecution cannot establish that the Bengal tiger analogy was harmless beyond a reasonable doubt in this case. (§ 745, subd. (k).) As the Legislature noted in its findings, research shows that use of animal imagery leads to more punitive sentencing of Black defendants. (AB 2542, § 2, subd. (e) [citing P. Goff, *et al*., "Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology" (2008) Vol. 94, No. 2, 292–93].) This causal relationship follows a longstanding history of use of animal imagery to justify enslavement, murder, and subjugation of people of

color—and Black people in particular. (*See* Ex. 101 at A199-200, A201, ¶¶ 21-23, 31-34.) From the early 1600s onward, American colonists systematically compared African enslaved people and their descendants to domesticated animals as a rationale for their enslavement; later, during Jim Crow, the rhetoric shifted to describing Black men as beasts and savages, imagery used to defend widespread lynching, violent subjugation, and institutionalized segregation. (*Id*.) The Bengal tiger analogy is consistent with this history, directly invoking the stereotype of Black men as "bestial," predatory, and prone to violence in order to secure a death sentence. Indeed, in the first known training materials to promote this specific trope, the Los Angeles County District Attorney's Office touted the Bengal tiger analogy as a tool to "make a forceful plea for a death verdict." (Ex. 100A at A026.) And in the known instances where the analogy was used, the defendant was overwhelmingly a person of color: 23 out of 26 (88%) Bengal tiger cases were against non-White defendants, and in 14 (54%), the defendant was Black. (Ex. 100 at A011, ¶¶ 16-17; *see* § 745, subd. (h)(4) ["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."].)

The harmfulness of the Bengal tiger analogy is also evident from cognitive science. Studies show that the prosecutor's Bengal tiger analogy would have influenced the jury in myriad ways: triggering jurors' negative stereotypes about Black men; instilling fear; reducing empathy for Mr. Powell; dehumanizing Mr. Powell; casting him as subhuman; and providing moral justification for ending his life. (Ex. 102 at A239-42, A248-49, ¶¶ 38-45, 65-71.) These effects would have been particularly pronounced because racial stereotypes of young Black men as animalistic were highly prevalent at the time of trial. The stereotype of young Black men as "superpredators"[10] was rapidly gaining cultural salience; notably, the prosecutor's description of

[10] That specific term was first published the year after Mr. Powell's trial, but the stereotype well

a Bengal tiger as "vicious," "remorseless," and uncontrollable in the wild directly paralleled the characteristics attributed to young Black men by this stereotype. (*Id*. at A243-44, ¶¶ 49-53.) As a result, the prosecutor's Bengal tiger analogy would have primed the jury to recall preexisting implicit biases in deciding Mr. Powell's case. (*Id*. at A236-38, A248, ¶¶ 17-21, 65-68.) In fact, post-trial juror interviews reveal that at least some jurors cited a perception that Mr. Powell lacked "humaneness" as a basis for their sentence. (Ex. 104 at A380:17-24.)

In light of the uncontroverted facts and law, the State cannot establish that the Bengal tiger analogy was harmless beyond a reasonable doubt. Standing alone, the record in support of this ground conclusively establishes an RJA violation entitling Mr. Powell to relief.[11]

B. Seated Jurors' Demonstrations of Racial Bias Establish a Per Se Violation of Section 745, Subdivisions (a)(1) and (a)(2) as to One Juror, and a Prima Facie Case as to Four More.

Under section 745, subdivisions (a)(1) and (a)(2), a violation of the RJA is established if a "juror exhibited bias or animus towards the defendant because of the defendant's race..." and "during the defendant's trial, in court and during the proceedings…[a] juror[] used racially discriminatory language about the defendant's race . . . . or otherwise exhibited bias or animus towards the defendant because of the defendant's race…whether or not purposeful." Five seated jurors exhibited such bias or animus in responses to juror questionnaires, and two of these five did so during voir dire. One individual, Juror 11b, expressed frank anti-Black prejudice in both instances. The record establishes a per se violation of section 745, subdivisions (a)(1) and (2) as to that juror, and at least a prima facie case as to the remainder.

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preceded it. (Ex. 102 at A243-44, A248, ¶¶ 51, 65.)

[11] At a minimum, the record establishes a prima facie violation of section 745, subdivision (a)(2), which requires a hearing if the Court does not find sufficient grounds to grant relief on the record and pleadings.

1. Juror 11b

Juror 11b expressed overtly racist views towards Black people in his questionnaire and during voir dire. In response to a question gauging jurors' level of agreement with the statement "minorities tend to be more violent than whites," Juror 11b crossed out the word "minorities," wrote in "Blacks" by hand, and marked "strongly agree." (Ex. 104 at A384.) When asked to explain this in voir dire, Juror 11b stated, "I am not ignorant about the facts of life. . . .wherever I lived, and wherever I exist…my conclusion always comes out to the fact that there's definitely a problem there, that it's not a comfortable situation." (*Id.* at A302:18-A303:13.) This juror also indicated his belief that race is a factor in a person's propensity for truthfulness and criminality. (*Id.* at A385.)

Juror 11b's questionnaire answers and statements during voir dire reflect explicit bias, *i.e.* "views about the attributes of particular individuals due to group membership." (Ex. 102 at A235, ¶ 15.) They also plainly reflect long and deeply held beliefs. Juror 11b stated that he had held the prejudice at issue "wherever I lived, and wherever I exist." (Ex. 104 at A303:10-11.) His belief in this stereotype was so strong that he went out of his way to underscore that "Blacks" specifically, and not all "minorities," are especially violent by nature. (*Id.* at A384.) And when given an opportunity to rescind or mitigate this statement, Juror 11b was unapologetic, calling his view "the facts of life" and concluding "there's definitely a problem there." (*Id.* at A303:7, 12.) No more need be shown to establish that Juror 11b was a "juror [who] exhibited bias or animus towards the defendant because of the defendant's race" in violation of section 745, subdivision (a)(1). The same facts also establish a per se violation under section 745, subdivision (a)(2). Juror 11b's questionnaire responses and statements in court were indisputably expressions of bias against Mr. Powell because of his race during trial proceedings and "racially discriminatory language" under section 745, subdivision (h)(4). (*See* § 745, subd. (h)(4) [defining "racially

discriminatory language" as "language that, to an objective observer, explicitly or implicitly appeals to racial bias."])

Because Juror 11b was seated, deliberated, and determined the verdict, the truth of the special circumstance, and sentence, the record conclusively proves a violation of section 745, subdivision (a)(1) and (2), and no evidence could establish beyond a reasonable doubt that Juror 11b's bias did not impact Mr. Powell's conviction and sentence. (*See* § 745, subd. (k).) Social science research shows that individuals who espouse explicit bias "engage in in-group and out-group thinking and tend to judge members of the outside group more harshly." (Ex. 102 at A245, ¶ 55; *see also Turner v. Murray* (1986) 476 U.S. 28, 35 ["[A] juror who believes that [B]lacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors [required for capital sentencing]…"]; *id.* at p. 43 (conc. & dis. opn. of Brennan, J.) ["A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make . . . . he cannot judge because he has prejudged."].)

Nor could the State establish beyond a reasonable doubt that Juror 11b's in-court utterances in the presence of other jurors did not impact them. (Ex. 102 at A234, A245, ¶¶ 10, 55; *see also Powers v. Ohio* (1991) 499 U.S. 400, 412 ["The influence of the voir dire process may persist through the whole course of the trial proceedings."].) Juror 11b's voir dire responses reinforced negative stereotypes, priming other jurors to act upon their own biases. (Ex. 102 at A236-38, ¶¶ 17-21.) Other jurors were thus likely to extend less empathy and credibility to Mr. Powell, and instead view him negatively, fearfully, and as more deserving of harsh treatment. (*Id.* at A238-39, ¶¶ 22-27.) That is particularly so because no counsel moved to strike Juror 11b for cause, nor did the judge exclude them *sua sponte*. (Ex. 104 at A304:14-17; A306:2-5.) This indicated to all jurors that the legal system embraced or at least tolerated the prejudice espoused

by Juror 11b. (Ex. 102 at A245 ¶ 55.) The Court should vacate Mr. Powell's conviction and sentence on this basis.

2. Jurors 1, 4, 8, and 9

Four other seated jurors also indicated racial prejudice toward people who are not White in their questionnaire responses. Jurors 1, 4, 8, and 9 marked "agree somewhat" that "minorities tend to be more violent than whites." (*See*, *ante*, ¶ 2305.) Juror 1 marked "yes" and "no" as to whether she believed race is a factor in one's truthfulness or propensity to lie. (Ex. 104 at A390.) Juror 1 explained that she was "undecided" and believed "a person's background plays an important role in the formation of character and moral fiber." (*Id*.) Juror 1 also marked "yes" that race is a factor in the likelihood that a person will be involved in criminal conduct because "they have not been afforded the same opportunities and possibly lack education and moral support." (*Id*.) Juror 9 marked "yes" that race is a factor in the likelihood a person will be involved in criminal conduct, explaining that "some people may 'take' what they want if they feel they will never have a chance to earn it." (*Id.* at A393.) When questioned about this response, Juror 9 initially confirmed her views, stating that a combination of both race and socioeconomic conditions impact criminality. (*Id.* at A308:7-A309:4.)

These questionnaire and voir dire responses by Jurors 1, 4, 8, and 9 reflect negative racial stereotypes—that members of racial minority groups, like Mr. Powell, are more likely to lie and engage in violence and criminality. These jurors expressed these beliefs to varying degrees and for different reasons, but at bottom, all showed that they held preexisting, negative associations about the conduct and character of people like Mr. Powell. As with Juror 11b, such expressions clearly demonstrate bias in violation of section 745, subdivision (a)(1). And because these questionnaires were filled out in court during trial proceedings, and the voir dire response by Juror 9 was part of the trial proceedings, the bias exhibited by these jurors also establishes a

prima facie case of violation of section 745, subdivision (a)(2).

The State cannot establish beyond a reasonable doubt that the bias of five jurors did not impact Mr. Powell's conviction or sentence. Nearly half of Mr. Powell's jury believed he was more likely to be violent and engage in criminality because he was Black. Mr. Powell has established at least a prima facie case on this ground, and the Court should grant conviction and sentencing relief or issue an order to show cause why relief should not be granted.

C. Racialized Rhetoric by Defense Counsel and the Prosecutor Establish a Violation of Section 745, Subdivisions (a)(1) and (2).

Defense counsel and the prosecutor both depicted Mr. Powell in accordance with pernicious stereotypes about young Black men. During guilt/innocence phase closing argument, defense counsel Ronald Castro told the jury that "for a young black man," (Ex. 104 at A349:14) and "people not unlike Carl," (*id.* at A347:12), a job at KFC was "an oasis in the desert of despair," (*id.* at A347:11-12), "the only thing that—in his whole life that he had done well," (*id.* at A335:1-3), "his lifeline," (*id.* at A335:4), "his way up out of where he was," (*id.*), "[his] contact to . . . the straight world," (*id.* at A336:14-15), "his only access to . . . a real life," (*id.* at A349:8-9), and a place "where he could at least sell his body" (*id.* at A347:15-16). This reflected "the well-worn racial stereotype that Black men lack the ability to succeed in any domain other than in a menial setting." (Ex. 102 at A253, ¶ 82.)

Castro repeatedly stated that without the KFC job, Mr. Powell was "in the streets," (Ex. 104 at A334:9, A336:16), where guns are ubiquitous, (*id.* at A325:2-15, A346:9-13), and where young Black men associate in a separate, unlawful, and dangerous "society" (*id.* at A348:15-24). The prosecutor echoed this depiction, twice characterizing Mr. Powell as a "street kid." (*Id.* at A351:20-21, A354:17-20.) These statements resounded in the stereotypes that young Black men are prone to "street crime" and are "dangerous and threatening predators with little respect for human life." (Ex. 102 at A243-44, ¶ 51; *see also Buck v. Davis* (2017) 580 U.S. 100, 121 [belief

that Black men are "'violence prone'" is "a powerful racial stereotype" and "a particularly noxious strain of racial prejudice"].)

Both Castro and the prosecutor compounded this depiction by repeatedly referring to Mr. Powell and other young Black men as "running buddies" or similar during both phases of trial. (*See* ¶¶ 2330-32, *ante*.) Such language would also have primed the jury to associate Mr. Powell with gang culture and associated stereotypes of violence and criminality, particularly given the prevalence of gang culture in popular media at the time of trial, as well as the fact that the jury knew that Mr. Powell was from South Central Los Angeles. (Ex. 102 at A250-52, ¶¶ 73-79.)

Finally, Castro's affectation of AAE slang in reference to Mr. Powell and Ms. Littlejohn during the penalty phase, (*see* ¶¶ 2333-35, *ante*)—and his arresting reference to Ms. Littlejohn as a "mean razor-toting woman," (Ex. 104 at A339:19-23)—drew a dividing line between Mr. Powell and Ms. Littlejohn, on the one hand, and Castro and the jury, on the other. Castro presented Mr. Powell as "other," signaling that he did not belong to the same moral order but was inferior and less worthy of empathy and belief. Relatedly, by othering Mr. Powell, Castro made the jury "less hesitant to critically judge or punish" him as a "member[] of the out-group." (Ex. 102 at A238-39 ¶¶ 22-27.)

Each of these instances of racialized or stereotypical language readily establishes a prima facie case of violation of section 745, subdivision (a)(2), as "racially discriminatory language about the defendant's race," by "an attorney in the case," uttered "[d]uring the defendant's trial, in court and during the proceedings[.]" The record evidence, particularly as analyzed in Mr. Powell's supporting expert declaration, (*see* Ex. 102 at A250-55, ¶¶ 73-87), establishes "more than a mere possibility" of violation of subsection (a)(2). (§ 745, subd. (h)(2) [defining prima facie standard in RJA context]; *see Finley*, *supra*, 95 Cal.App.5th at p. 23 [in determining existence of prima facie case, court "should accept the truth of the [petitioner's] allegations,

including expert evidence . . . unless conclusory, unsupported . . . , or demonstrably contradicted by the [record]"].) But the same evidence also shows "more than a mere possibility" of violation of section 745, subsection (a)(1). That is, the prosecutor and defense counsel's reliance on racialized rhetoric is evidence that "an attorney in the case . . . exhibited bias or animus towards the defendant because of [his] race[.]" (§ 745, subd. (a)(1).) The State will not be able to establish "beyond a reasonable doubt that the violation did not contribute to the judgment." (§ 745, subd. (k).) The steady drumbeat of racially discriminatory language by counsel for both parties is plain from the record, and established social science shows that it would have had a profound effect on the jury, priming their implicit biases, and othering Mr. Powell to disastrous effect. The Court should issue an order to show cause on this basis.

D. Racially Disparate Charging and Sentencing by the District Attorney Who Prosecuted Mr. Powell Violated the Racial Justice Act.

Mr. Powell has proffered the results of a study that embraces the entire tenure of the Sacramento District Attorney who was in office during the time of Mr. Powell's prosecution, conviction, and death sentence. The cases included in the study comprise about 80% of all the identified, charged first- and second-degree murder cases during the study period. Over that time, the District Attorney aggressively sought death sentences in cases with White victims, especially against Black defendants. Black defendants with White victims faced special circumstance filings, death notices, and death sentences at dramatically disproportionate rates compared to either Black defendants with Black Victims or White defendants with White victims.

These data establish violations of the RJA because they show that Mr. Powell:

- "was charged or convicted of a more serious offense than defendants of other races . . . 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," (§ 745, subd. (a)(3)); and

- received "[a] longer or more severe sentence . . . 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," (§ 745, subd. (a)(4)(A)); and on "defendants in cases with victims of one race. . . than in cases with victims of other races" (§ 745, subd. (a)(4)(B)).

Courts presented with similar showings have found the RJA's minimal prima facie standard satisfied and ordered evidentiary hearings. For example, in *Mosby*, *supra*, 99 Cal.App.5th at pp. 114-20, a Black petitioner presented statistical analyses showing large racial disparities in capital charging and sentencing, along with comparisons of his case with factually comparable cases in which White defendants had not received death notices. The Court of Appeal held that the combination of statistics and factual comparisons established a prima facie case, so it did not need to decide whether the statistical showing alone was sufficient. (*Id*. at p. 130.) Further, the court held that a petitioner need not, at the prima facie stage, "provide an explanation of other relevant factors [in charging and sentencing disparities.]" (*Id*.) The statute provides that "the presentation of race-neutral reasons is a defense *after* the prima facie case has been shown." (*Id*. at p. 132, emphasis added.)

In *People v. Decuir*, the San Francisco County Superior Court ordered an evidentiary hearing on the defendants' section 745, subdivision (a)(3) motion, based primarily on expert analysis finding that Black defendants and other defendants of color were disproportionately charged with special circumstances. (*People v. Decuir* (Super. Ct. S.F. County, Feb. 23, 2023, Nos. 17011544 & 17011543), slip op. at p. 8 (Ex. 109 at 447-73).)[12] The court ruled that the defendant could meet his burden through a statistical showing of racial disparity either in felony-murder cases generally or robbery-murder cases particularly. (*Id*. at A461-66.) The goal, the court ruled, was to employ a level of similarity that would "allow[] for meaningful comparisons." (*Id*. at

[12] Counsel acknowledge that unpublished decisions are not precedential or citable on appeal. (Cal. Rules of Court, rule 8.1115.) Counsel cites to *Decuir* as instructive given the newness of the RJA and the relative dearth of caselaw.

A466.)[13]

Based on the foregoing, statistical evidence showing a racial disparity in charging and sentencing, and other evidence showing more lenient treatment for defendants whose cases are factually comparable except for race, will satisfy the burden of establishing a prima facie case. Mr. Powell has satisfied that burden by presenting evidence demonstrating more than a "mere possibility" that he can prove his claim at an evidentiary hearing, as described below. (*See Finley*, *supra*, 95 Cal.App.5th at p. 20; *Mosby*, *supra*, 99 Cal.App.5th at p. 133.)

1. White-Victim Effects

During the study period, cases with White victims generally, and cases with Black defendants and White victims in particular, were increasingly overrepresented as they progressed from the filing of special circumstances to the filing of death notices and the imposition of death sentences. (*See* Ex. 103 at A288, ¶ 11 & Table D.) Holding the race of the defendant constant and "Black" isolates the White-victim effects.

Category	**Total in Study**	**Special Circ. Charged**	**Robbery Special Circ. Charged**	**Death Notice**	**Death Sentence**
BD/WV[14]	22	13	8	7	4
BD/BV	61	14	6	2	0
Study Total	237	80	39	23	12

For example, while cases with Black defendants and White victims:

- represented only 9% (22/237) of the study population of murder cases during the study period, they

[13] After the hearing, the court denied relief. (*See People v. Decuir*, No. CRI-17011544 (Super. Ct. S.F. County, May 4, 2023) (oral opinion).)

[14] The letters "B," "W," "D," and "V" in these tables stand for "Black, "White," "Defendant" and "Victim," respectively.

- represented 33% (4/12) of the death sentences, a proportion more than three times as large.

At the same time, cases with Black defendants and Black victims were dramatically underrepresented. (*See id.* at A288-89. ¶ 11 & Table E.) They:

- comprised 26% (61/237) of the study population of murder cases, but
- *not one* of them resulted in a death sentence.

A review of the rates at which cases progressed from one procedural stage to the next discloses the same pattern from another perspective. (*See id.* at A290, ¶¶ 17-18.) Of the 22 cases with Black defendants and White victims:

- 59% (13/22) received any special circumstance charges;
- of those, 54% (7/13) received death notices; and
- of those, 57 % (4/7) received death sentences.
- Overall, 18% (4/22) of all cases with Black defendants and White victims received death sentences.

Cases with Black defendants and Black victims, in contrast, progressed at a markedly lower rate:

- 23% (14/61) received any special circumstances;
- 14% of those (2/14) received death notices; and
- again, *none* received death sentences.

The same pattern appears in comparisons of cases involving offenses similar to Mr. Powell's, robbery felony-murders. (*See* Ex. at A290-91, ¶¶ 21-23 & Table F.) For example, cases with Black defendants and White victims received the robbery-murder special circumstance at more than double the representation of that defendant/victim race combination in the study population. That is:

- Cases with Black defendants and White victims represent only 9% (22/237) of the study population of murder cases, but
- They represent 21% (8/39) of the robbery-murder special circumstance charges filed during the study period.

Meanwhile, the proportion of cases with Black defendants and Black victims with the robbery-murder special circumstance was only a little over half their defendant/victim race combination the study population:

- 26% (61/237) of the full study population involved cases with Black defendants and Black victims, but
- only 15% (6/39) of the robbery-felony special circumstances fell in that category.

The numbers tell the same story from a different perspective in a comparison of charging rates for robbery-murder cases:

- 36% (8/22) of all Black defendant/White victim cases received a robbery-murder special circumstance charge, but
- only 10% (6/61) of all Black defendant/Black victim cases received the same special circumstance.

Plainly, from multiple perspectives, county prosecutors more aggressively sought and obtained death sentences for the killing of White victims during the study period.

2. Black-Defendant Effects

While all cases with White victims received disproportionate charging and sentencing, Black defendants received substantially more punitive treatment than White defendants.

Category	**Total # of Cases**	**Spec. Circ. Charged**	**Robbery Special Circ. Charged**	**Death Notice**	**Death Sentence**
BD/WV	22	13	8	7	4
WD/WV	58	24	12	7	3

Study Total	237	80	39	23	12

Black defendants were increasingly overrepresented, and White defendants increasingly underrepresented, as cases progressed from charging to sentencing. (*See id.* at A288-89, ¶ 11 & Table E.) Black defendants with White victims:

- Were 9% (22/237) of the total study population; but
- 16% (13/80) of those charged with any special circumstances;
- 21% (8/39) of those charged with the robbery-murder special circumstance;
- 30% (7/23) of those death noticed; and
- 33% (4/12) of those sentenced to death.

In contrast, the percentage of cases involving White defendants and White victims fluctuated very little from one stage of prosecution to the next. Those cases were:

- 24% (58/237) of the total study population;
- 30% (24/80) of those charged with any special circumstances;
- 31% (12/39) of those charged with robbery special circumstances;
- 30% (7/23) of those who received death notices; and
- 25% (3/12) of those who received death sentences.

The rates at which White victim cases progressed through the procedural stages evidenced a wide difference between Black and White defendants. (*See id.* at A288, ¶ 11 & Table D.)

- 59% (13/22) of Black defendants with White victims received any special circumstance charges;
- 36% (8/22) of them received robbery special circumstance charges;
- 54% (7/13) of those special circumstance cases received death notices;
- 57% (4/7) of those death noticed cases received death sentences.

White defendants with White victims received special circumstance charges, death notices, and sentences, at much lower rates:

- 41% (24/58) of White defendant/White victim cases received any special circumstance charges;
- 21% (12/58) received robbery special circumstance charges;
- 29% (7/24) of those special circumstance cases received death notices;
- 43% (3/7) of those cases received death sentences.

A race-of-defendant comparison for *all* White victim cases in the study reveals dramatically disproportionate death sentencing rates. Eighteen percent (4/22) of all Black defendant-White victim cases, but only 5% (3/58) of all White defendant-White victim cases, received death sentences. Thus, Black defendants with White victims received death sentences at more than triple the rate of White defendants with White victims. By all these metrics, the district attorney who prosecuted Mr. Powell sought the death penalty more aggressively against Black defendants.

3. Factually Similar Cases

As in *Mosby*, a review of two groups of cases from the study period that factually resemble Mr. Powell's discloses another dramatic contrast: in the identified cases of similar offenses where either the defendant was White, the victim was Black, or both, none received death sentences, and most did not face capital prosecution. (*See* ¶¶ 2353-2357, *ante*.)

One such case involved a pair of White defendants and a White victim. The defendants were charged with murder, robbery, and possession of stolen property, with the robbery-murder special circumstance alleged. One defendant saw his charges reduced to accessory to murder and received a six-year sentence. The district attorney dropped the special circumstance against the second defendant, who pled guilty to the murder charge and received a determinate sentence that

made him eligible for parole in 2022. Neither of these defendants received a death notice or death sentence. (*See* ¶ 2356, *ante*.)

Another factually similar case involved two Black defendants with a Black victim. The defendants were charged with murder during the course of a robbery, along with robbery and burglary, and with the robbery- and burglary-murder special circumstances. There was evidence the victim was tortured and killed with a coat hanger. Both defendants pled guilty to first degree murder and robbery and admitted to prior convictions. In exchange, the district attorney dropped the robbery and burglary counts and the special circumstances, despite evidence linking the defendants to at least one other murder case. Both defendants received determinate sentences. One was released in 2021. Again, neither of these defendants received a death notice or death sentence. (*See* ¶ 2357, *ante*.)

4. This Court Should Issue an Order to Show Cause and, Ultimately, Order an Evidentiary Hearing

Assuming, as this Court must at this stage, that the non-conclusory and well-supported facts presented here are true, (*see Finley*, *supra*, 95 Cal.App.5th at p. 23), they establish more than a mere possibility that Mr. Powell can prove his entitlement to relief, and thus make the "substantial" showing necessary for an evidentiary hearing. Whether the district attorney can prove that any race-neutral reasons explain the glaring race-based disparities is a question for resolution following an evidentiary hearing. (*See Mosby*, *supra*, 99 Cal.App.5th at p. 132.) Because Mr. Powell has presented a prima facie case, the Court should issue an order to show cause on this ground and, ultimately, order an evidentiary hearing.

E. Cumulative Proof Establishes a Violation of the RJA.

Under the RJA, "the evidence offered in support of [each] theory of violation . . . [is] corroborative of the evidence supporting [others]." (*Young*, *supra*, 79 Cal.App.5th at p. 164.) The Court must accordingly consider the evidence presented under each pathway, discussed above,

for their cumulative effect.

This analysis reveals that as damaging as the individual RJA violations in Mr. Powell's case were in isolation, they were overwhelming in concert. That is, the prosecutor's Bengal tiger analogy was particularly pernicious because the jury that heard it was demonstrably susceptible to racial bias. Mr. Powell's jury, which included five members who believed that non-White people were more prone to violence and criminality, also heard repeated depictions of young Black men as dangerous and predatory from attorneys for both sides. The repetition of this rhetoric, among individuals predisposed to believe it, would have powerfully impacted how the jury viewed Mr. Powell and the case evidence. And statistical data show that Mr. Powell's case was not anomalous—the Sacramento District Attorney's Office at the time of Mr. Powell's trial routinely valued White lives over Black ones. Assessing the evidence of bias in totality, it is clear that Mr. Powell's conviction and death sentence were rendered unsound by repeated instances of racial prejudice.

III. CONCLUSION

The Legislature enacted the RJA not only to provide relief to people *like* Carl Powell, who were subjected to unequal treatment in the criminal legal system on the basis of race—but also to provide relief to Mr. Powell specifically. The grievous injury Mr. Powell suffered in the form of racial prejudice throughout his trial must now be remedied. Mr. Powell was charged with a serious crime, but he is entitled to a criminal process free of racial prejudice. This Court should grant the relief requested, and, at a minimum, issue an order to show cause why the relief should not be granted.

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Dated: October 3, 2024

Respectfully submitted,

By: /s/ Avram D. Frey

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VERIFICATION

I, Avram Frey, declare as follows:

I am an attorney admitted to practice law in the State of California. I represent Petitioner Carl D. Powell, who is confined and restrained of his liberty at California State Prison—Sacramento, Represa, California. I am authorized to file this amendment to the petition for writ of habeas corpus on Mr. Powell's behalf. I make this verification because he is incarcerated in a county different from that of my law office and because the facts upon which the claims are based are more within my knowledge than his. I have read the petition and know the contents of the petition to be true.

The foregoing is true and correct and was executed under penalty of perjury on October 3, 2024, at San Francisco, California.

/s Avram D. Frey

Avram D. Frey

PROOF OF SERVICE BY MAIL

I, Kassie Dibble, declare as follows:

I am a resident of the County of Alameda, California. I am over the age of 18 years, and not a party to the within action; my business address is 39 Drumm Street, San Francisco, California 94111.

On October 4, 2024, I served a copy of the following documents:

1. AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS;
2. EXHIBITS IN SUPPORT OF AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

on the parties named below, by placing a true copy thereof enclosed in a sealed box, with postage thereon fully prepaid, with the United States Postal Service at Alameda, California, addressed as follows:

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California State Prison, Sacramento
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Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that this declaration was executed on October 4, 2024, at Alameda, California.

/s/ Kassie Dibble
Kassie Dibble