

Superior Court of the State of California
In and For the County of Contra Costa

FILED
OCT 03 2022
K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By _____
S. Adernick, Deputy Clerk

The People of the State of California,
Plaintiff

No. 05-152003-0

Order Granting:

- Motion for New Trial Pursuant to Pen. Code § 745 of the Racial Justice Act

Order Dismissing:

- Motion to Strike Firearm Enhancements (Senate Bill 620) &
- Motion to Strike Gang Enhancements (Senate Bill 333)

v.

Gary Bryant Jr. & Diallo Jackson
Defendants

For the reasons that follow, the court grants Mr. Bryant's and Mr. Jackson's motion for new trial pursuant to Pen. Code¹ § 745 of the Racial Justice Act.

I. Procedural Background

On February 28, 2017, Gary Bryant was convicted by a jury of the first degree murder of Kenneth Cooper in violation of murder, § 187(a) (count 1); assault with a semiautomatic firearm, § 245 (b) (count 2); discharging a firearm at an occupied vehicle, § 246 (count 3); and possession of a firearm by a felon, § 29800(a)(1) (count 4.) Co-defendant Diallo Jackson was convicted of first degree murder of Kenneth Cooper in violation of Pen. Code § 187(a) (count 1); discharging a firearm at an occupied vehicle, § 246 (count 3); and possession of a firearm by a felon, § 29800(a)(1) (count 5.) As to counts 1 to 3, the jury found true that the crimes were committed for the benefit of a criminal street gang, § 186.22 (b)(1)(C)) as well as being a principal who personally used a firearm § 12022.53 (b) & (e)(1), and that

¹ Reference to Statute is to the Penal Code unless otherwise indicated.

both defendants personally discharged a firearm, § 12022.53 (c)) to count 1.

On July 21, 2017, Mr. Bryant was sentenced to 53 years to life in prison. Jackson was sentenced to 50 years to life in prison.

On September 27, 2019, the First District Court of Appeal in *People v. Bryant* (2019) 40 Cal. App. 5th 525, 528, 529 affirmed the convictions but remanded the case for the court to exercise its discretion on whether to strike the firearm enhancements under Senate Bill 620 as well as instructing Mr. Bryant to file a petition in this court for relief under S.B. 1437 (§ 1170.95.)

On February 2, 2020, Mr. Bryant filed a petition for resentencing pursuant to § 1170.95. The People filed a response to Mr. Bryant's petition on March 30, 2020. On April 16, 2020 Mr. Bryant, through counsel, filed a reply. On May 5, 2020, the defendant filed a supplemental reply brief.

On September 9, 2020, Jackson filed a petition for resentencing pursuant to § 1170.95. The People filed a response to Jackson's petition on September 16, 2020.

On October 16, 2020, the court issued an order to show cause as to both Mr. Bryant and Mr. Jackson.

On December 4, 2020, the People filed a joint response to the order to show cause. On December 18, 2020, Mr. Bryant filed a reply to the order to show cause. Mr. Jackson did not file a reply to the order to show cause but on May 27, 2021, Mr. Jackson filed a motion to join Mr. Bryant's petition for resentencing.

On June 7, 2021, Mr. Bryant filed a motion for retrial under Penal Code § 745 (Racial Justice Act.) On June 9, 2021, Mr. Jackson filed a motion to join. On June 30, 2021, the People filed a response. On July 9, 2021, the court determined the defendant had made a prima facie case for relief and the matter proceeded to an evidentiary hearing.

On October 1, 2021, the court heard the testimony of Ms. Mary Bowman, expert in prosecutorial rhetoric and implicit bias.

On December 3, 2021, the court heard the testimony of Ms. Andrea Dennis, expert in rap lyrics. On February 25, 2022, the court heard the testimony of Ms. Tess Andrea, graduate law clerk, Alternate Public Defender's Office, as well as Ms. Charis Kubrin, an expert in rap music including content analysis, bias, and stereotypes. On March 11, 2022, the cross-examination of Ms. Kubrin was completed.

On March 11, 2022, the court requested the parties to provide the court with the name or names of experts that would be able to evaluate the evidence that has been provided to the court and to contextualize it for the court.

On April 29, 2022, the parties appeared before the court to submit Mr. Jeffrey J. Rachlinski's curriculum vitae to the court for its consideration. The court, upon communication with Mr. Rachlinski determined that the cost to retain his services were prohibitive, and not within the parameters of the court's budget for experts.

On September 20, 2022, the parties appeared before the court to make oral arguments. The matter was taken under submission.

II. Claims

The defendants claim, whether purposefully or not, that the prosecutor and gang expert used racially discriminatory language at trial. Specifically, the prosecution during closing argument, used several racially coded phrases implicating stereotypes of African American men as criminals and having a propensity for serious violence. The defendants also claim that the prosecution repeated use of the n-word during examination of the gang expert at trial was racially discriminatory.

The defendants further assert that the use of Mr. Bryant and Mr. Jackson's rap lyrics as criminal evidence was racially discriminatory because it improperly introduced racially discriminatory language at trial. They contend that Officer Hoffman lacked any expertise in the conventions of rap music, and his opinion was based largely on racial stereotypes of African American men. His testimony that Mr. Bryant's and Mr. Jackson's lyrics were literal statements, in the face of ambiguous evidence, primed jurors' implicit bias regarding African American men as violent, and the jury's evaluation of Mr. Bryant's credibility was prejudiced to disbelieve his testimony.

The defendants request that the court find the convictions legally invalid and dismiss the gang enhancements, and order a new trial that must comply with the requirements of § 745 (a).

The prosecution contends that the defendants have failed to prove by a preponderance of the evidence that the prosecutor's use of slang was racially coded, or that the use of rap music videos violated § 745(a)(2). It further argues that the rap lyrics were not barred as they were relevant to proving the gang enhancement. The People's response does not address the use of racial epithets.

The court shall also address, under separate headings, the defendants' petition to strike the firearm enhancements (SB 620) and the gang enhancement (SB 333.)

III. Factual Background

The following facts are taken from the published decision by the Court of Appeal, First Appellate District, in *People v. Bryant* (2019) 40 Cal. App. 5th 525 (*Bryant*).²

William B. testified as a prosecution witness to the following facts: On July 8, 2014, Kenneth Cooper drove his car into the parking lot at Delta View Apartments in Antioch, California. F.H. got in the front passenger seat of Cooper's car, and William B., F.H.'s brother, and G.P. all got in the backseat of Cooper's car.

About a minute later, two people approached Cooper's car, one on the driver's side and one on the passenger's side. William B. had seen both men about an hour earlier by the laundry room of the Delta View complex.

William B. recognized one of the men, who approached the driver's side of Cooper's car, from having seen him twice before at the Delta View Apartments. William B. had trouble recognizing that person as Jackson in court, saying he looked "like his son," but had identified him previously from a photo lineup, telling police, "That's a face I can't really forget about."

William B. identified Bryant as the man who approached on the passenger's side where F.H. sat. As Bryant walked up, Cooper grabbed a nine-millimeter gun from the driver's door, cocked it so it was ready to fire, and stowed it under his shirt.

F.H. stepped out of the car. William B. saw Bryant hit F.H. and saw F.H. fall. As soon as F.H. was on the ground, Bryant asked Cooper, "What [are] you reaching for?" "Cooper pulled out his gun and both he and Bryant started shooting. William B. saw the second person who had approached Cooper's car point a gun, but did not see him shoot.

William B. heard about eight shots. The driver-side and passenger-side windows shattered and glass flew into the car.

² The court takes judicial notice of the underlying docket, and the published decision in *People v. Bryant* (2019) 40 Cal. App. 5th 525 (*Bryant*) affirming the judgment in the underlying docket by Division One of the First Appellate District as well as the unpublished version of the decision (Docket no. A152029). (See Cal. Evid. Code § 452; Cal. Rules of Court rule 8.111(b).)

Cooper drove off with the car door open, made a U-turn, and tried to drive away. Seeing they were about to crash, William B. reached over from the backseat to the driver's seat in an attempt to steer the vehicle, but it crashed into another car. After they crashed, William B. got out of the vehicle and checked on Cooper who was shaking and unresponsive. Cooper died from one of his gunshot wounds.

An expert in forensic pathology testified at trial that the direction of the fatal injury to Cooper's abdomen was consistent with a gun having been fired from the left side of his body.

People v. Bryant (2019) 40 Cal. App. 5th 525, 528, 529 (*Bryant*).

IV. Trial Record

The following is a select summary of the trial record that pertains only to those portions that are relevant for the purpose of defendants' claims under the Racial Justice Act. The evidence summarized below is focused on Officer Hoffman's testimony as a gang expert and Mr. Bryant's testimony as it related to the portions that contradicted that of Officer Hoffman's opinion. There is no dispute that Mr. Bryant Jr. and Mr. Jackson are African American men.

In summarizing the relevant portions of the record, and in making reference to the record during the course of the court's analysis, the court shall not repeat the explicit racial epithets that were originally used by defendants and repeated by the attorneys and the expert gang witness. Regardless of who originally used the terms and who repeated them during the trial, the court shall not compound the racial discriminatory nature of these terms by using them in the body of this order.

The racial epithets involved the use of the terms "nigga" and "nigger". This shall be the only time these two words are reported in this decision, and is only done so as to decode the court's future reference to such terms in the body of this decision. In place of the actual racial epithet that was used, the court shall substitute it with "n-word (a)" or "n-word (er)" for distinction.

Trial Testimony of Officer Hoffman, Gang Expert

Antioch Police Officer Rick Hoffman testified as a gang expert during the trial and covered, in detail, his qualifications as an expert in gangs. Officer Hoffman previously qualified as an expert in gangs approximately a dozen times and received extensive formal and informal training. (RT 1047-1048.)

Officer Hoffman's informal gang training included speaking to 50-100 other police officers on the topic of gangs and gang activities. (RT 1044.) He had spoken to several dozen officers who have responded to gang crimes. (RT 1044.) He had spoken to several dozen civilians about gang activity. (RT 1044-1045.) He had spoken to victims of gang crimes over fifty times and has participated in community outreach (RT 1045-1047.) He had spoken to hundreds of gang members about gang activities. (RT 1045-1046.) He had previously debriefed a half dozen gang members and spoken to other officers who had debriefed gang members. (RT 1046.)

Officer Hoffman's formal training included 140-150 hours of training in gang investigations. Officer Hoffman previously attended 3 separate gang conferences. (RT 1046.) Not only had Officer Hoffman been formally trained in criminal street gangs, he had trained other officers in gang investigations on several occasions. (RT 1047.) In addition to training police officers, Officer Hoffman provided gang training to probation officers. (RT 1047-1048.)

Officer Hoffman testified as to his specific qualifications and expertise in regard to the Broad Day criminal street gang. Officer Hoffman investigated 50-100 cases involving Broad Day. (RT 1048.) He had spoken to Broad Day gang members 4 to 5 times regarding Broad Day's activities. (RT 1048.) Officer Hoffman was familiar with Broad Day's rival, the Broad Day Killers, and investigated approximately 50 cases involving Broad Day Killers. (RT 1049.) Officer Hoffman investigated over 50 gang crimes involving related gangs, such as Lo Mob and All About Money Jack Boys (RT 1049-1050.) Officer Hoffman had spoken to 5-6 gang experts regarding Broad Day, and had testified as an expert in Broad Day 6-7 times prior to testifying at trial. (RT 1050-1051.)

After testifying to his qualifications, Officer Hoffman testified to the importance of loyalty, reputation, respect, the "code of silence," and "putting in work" as it pertains to criminal street gangs. (RT 1058-1063.)

Officer Hoffman testified to the origins of the Broad Day gang. (RT 1063.) In the city of Pittsburg there is an area of residential houses referred to as the El Pueblo Housing Projects. (RT 1063.) This portion of Pittsburg was commonly referred to as, "The Lo." (RT 1063.) A gang started in the El Pueblo Housing Projects that was known as, "Lo Mob." (RT 1063-1064.) Over time, many Lo Mob gang members migrated from the city of Pittsburg to the Sycamore Drive area in the city of Antioch, and referred to themselves as "Broad Day." (RT 1064.) In 2009, at or near the time when Lo Mob/Broad Day migrated to the Sycamore area of Antioch, another criminal street gang, known as the "All About Money" Jack Boys [aka AAM Jackboys] occupied that portion of Antioch. (RT 1065.) Once Broad Day migrated to Antioch, the AAM Jack Boys gang merged into the Broad Day gang, and many AAM Jack Boys became Broad Day gang members. (RT 1068.)

The Broad Day gang called themselves, "Broad Day" because they were willing to commit violent crimes in "broad day." (RT 1071-1072.) One of Broad Day's members was shot, and some of Broad Day's members went to do a retaliation shooting, and they did this retaliation in broad daylight. (RT 1071.) As they bragged about doing this shooting in broad daylight, they took to the name and began to call themselves Broad Day for the specific purpose of showing others that they were willing to commit violent acts in broad daylight. (RT 1071.)

Following the move to Antioch, Broad Day considered the Sycamore area of Antioch their "turf," and had an approximate membership of about 15-20 members. (RT 1068-1069; 1072-1073.) Broad Day used a common hand signal where the index finger and thumb would form a circle, to form the shape of a "b." (RT 1072.) On cross-examination Officer Hoffman conceded that the "b" sign can also mean the No. 3, a-okay symbol, and it is not only gang members that make that hand sign. (RT 1279.) Officer Hoffman testified Broad Day gang members would also form their fingers/thumb in the shape of an "L," as a reference to "Lo mob," which was one of their gangs of origin. (RT 1072.)

Officer Hoffman testified that robberies, shootings and assaults were the primary activities of the Broad Day gang. (RT 1073.) Broad Day benefits from violence as a gang as a whole when violent acts are committed and by individual members given extra respect for committing violent acts (RT 1073.) Broad Day members put in work, meaning commit acts of violence for those purposes. (RT 1073.)

Officer Hoffman testified in regards to both defendants' prior police contacts as it pertained to their involvement in the Broad Day/Lo Mob gang. On April 9, 2013, police observed defendant Mr. Jackson and Broad Day gang member Larry White, and attempted to contact them. Both Larry White and Jackson fled from police. (RT 1262-1263.)

On February 25th, 2006, prior to the formation of Broad Day, Lo Mob members Mr. Bryant, defendant; Richie Asidanya; and Demarus Whitner (all of whom subsequently became Broad Day gang members) were inside a vehicle and contacted by the police. All three individuals fled from police, but a gun was recovered at the scene. (R.T 1262.)

In 2014, prior to the murder of Kenneth Cooper, numerous Broad Day members were seen at the Delta View Apartments, which is the location where the murder occurred. The Broad Day members seen at the Delta View apartment included Mr. Jackson, defendant, and Demarcus Whitner (RT 1075.)

During the trial, numerous prior convictions were introduced into evidence as predicate gang offenses. People's Exhibit 151 was Mr. Jackson's prior conviction for the crime of possession of a firearm with a gang enhancement. (RT 1075-1076.) The prior conviction indicated that Mr. Jackson was an active member of the gang, AAM Jack Boys, and as a condition of probation, he was not to be associated with gang members. (R.T 1075-1076.)

People's Exhibit 150 was introduced at trial as an additional predicate offense. (RT 1082.) Exhibit 150 was a prior robbery conviction against Larry White. The predicate conviction included gang terms, which barred Larry White from associating with AAM Jack Boys members, and specifically barred association with Mr. Jackson. (RT 1082-1084.) "Dolla" was Mr. Jackson's moniker. (RT 1077.) Officer Hoffman testified that, in his opinion, Larry White was a Broad Day gang member. (RT 1084.)

Numerous exhibits from Facebook pages and videos were introduced through the testimony of Officer Hoffman.

Exhibit 154 was a photo that depicted Mr. Bryant displaying the LoMob gang sign "L". (RT 1212-1213.) Officer Hoffman opined that Lo Mob members use that hand sign, and it is primarily used by Lo Mob gang members, but there may be someone who grew up in El Pueblo who uses it that may not be a member of Lo Mob. (RT 1289.)

Exhibit 156 was a photo that depicted Larry White and Demarcus Whitner (RT 1078.)

Exhibit 157 depicted a number of Broad Day gang members, including Mr. Larry Goines, Corey Richardson, Demarcus Whitner, Larry White, Richie Asidanya, and Willie Richardson. (RT 1078-1081.)

Exhibit 160 was a photo from Mr. Bryant's Facebook page, from which the prosecutor read to Officer Hoffman: "I'm solo. That's why I ride solo. Waiting for one of you suckas to trip so I can lay a demo. And I'm still rep'ing this real shit. B's up. You suckas come out and play. I'm hollerin' fuck [n-word (a)] from my hood. You [n-word (a)] ain't got it. But like Master P, y'all [n-word (a)] soft Lo Mob." (RT 1263.) The prosecutor asked "So "laying a demo," what does that mean?" and Officer Hoffman answered that "Laying a demo is a slang term for committing a shooting." (RT 1264.) The prosecutor asked "Could it also be creating a mixtape?" and Officer Hoffman answered "Yes. Depending on the context, yes." (RT 1264.) The prosecutor then asked "the last words, "Lo Mob," is that relevant to you as far as your opinion goes?" (RT 1264.) Officer Hoffman responded in the affirmative "because that's his representation of his affiliation with the gang Lo Mob." (RT 1264.)

On cross-examination, Officer Hoffman elaborated the basis of his interpretation of the term "lay a demo" as being based on numerous investigations that he had done, listening to conversations of gang members, watching surveillance videos of gang members using that terminology, with other investigations. (RT 1273.) He had heard and seen it used by gang members in the context of shooting other people. (RT 1273.) As well, he had spoken to many different gang members that had used that terminology during interviews when referencing a shooting. (RT 1273.) He further explained that gang members or people committing shootings will say they are going to "lay a demo" or "do a skit," which refers to "shooting somebody." (RT 1274.)

Exhibit 161 depicted Mr. Bryant with Broad Day gang member Corey Richardson (RT 1215) and Exhibits 163, 164, and 165 were photographs of Mr. Bryant displaying the Broad Day gang sign of the "b". (RT 1218.)

Exhibit 162 was a photo of defendant Mr. Bryant and Mr. Jackson together; Mr. Bryant wore a red hat and displayed the Broad Day "b" sign. (RT 1210-1211.)

Exhibit 166 depicted Mr. Jackson displaying the Broad Day gang sign "b" (RT 1218.)

Exhibit 172 was a video that was played for the jury. (RT 1219.) In the video, defendant Mr. Bryant displayed the "b" hand sign. Mr. Bryant stated, "You know it's in the broadday [sic] camp [n-word (a)]" (RT 1220.) The prosecutor asked Officer Hoffman "did you see him displaying "b" sign" and Officer Hoffman responded that he did. (RT 1221.) The prosecutor asked Officer Hoffman if he heard Mr. Bryant say "you know it's in the Broad Day camp [n-word (a)]" (RT 1221.) Officer Hoffman testified that this was important as a basis for his opinion because "you have Gary Bryant displaying on social media, verbally displaying or showing his affiliation with Broad [D]ay criminal street gang and throwing up hand signs." (RT 1222.)

Officer Hoffman testified, on direct examination, that during the video, marked as Exhibit 172, the phrase, "Pueb-loaded" was used. Officer Hoffman testified that the phrase referred to being people from El Pueblo being armed, but also admitted the phrase could also refer to a rapper named "Gallo Pueb-loaded." (RT 1221-1222) The mixed tape was labelled this. (RT 1294.)

Exhibit 171 was a video called, "Broad Day Dolla," in which Mr. Jackson is part of a music video that specifically mentions the Broad Day gang on numerous occasions. During the video there is a reference to "selling candy." Officer Hoffman testified that this phrase referred to selling drugs. (RT 1222-1223.) During the same video, the phrase, "add a fucking murder to my nine" was used. Officer Hoffman explained to the jury that this referred to murdering someone with a 9 millimeter firearm. (R.T 1223-1224.) Officer Hoffman continued to explain numerous relevant

phrases used such as, "Did time in the slammer," (incarcerated) (RT 1224); "rollers," (law enforcement) (RT1224); "I've got goons everywhere. Bitch. We can go to war." (bragging about having fellow gang members in places to go to war with rivals) (RT 1226). Officer Hoffman was asked about the meaning behind "empty the whole clip," "BDK," "We're going to slide today," "fuck with the gang, get your melon split," "squeeze until face is missing." (RT 1228-1236.) He testified that "fucking with the gang, get your fucking melon split" was said to be "a warning to a rival that anybody who messes with the Broad Day gang will get...their head split open." (RT 1230.)

A second video called "Broad Day Party" in exhibit 171, was played where Mr. Jackson states, "Fuck Randell." (RT 1229.) Officer Hoffman explained to the jury that a person named "Randall Wilson" is the leader of Broad Day's rival, Broad Day Killers. (RT 1230.) In addition, in the same video, the following statement is made, "man, we're going to empty the whole clip." (RT 1230.) Officer Hoffman explained to the jury that man-man was another leader in the rival Broad Day Killers gang. In the same video where defendant Mr. Jackson references murdering people, he states, "like every day Pueb-loaded." "Pueb-loaded" is the same phrase used in a video including defendant Mr. Bryant, People's exhibit #172 (R.T 1233; RT 1222.)

In the same video (Exhibit 171, Broad Day Party), Officer Hoffman explains the lyric "threw a couple pops out and a drive-by shift" signified "mocking their rivals, saying that their rivals are scared, and when they do shoot at Broad Day, they hide and shoot quickly." (RT 1233-1234.) "You know we're going to slide today," meant, according to Officer Hoffman, "taking action against some of those rivals or gang's rivals." (RT 1334.) He testified that "geeked up" is "being armed with firearms" but he conceded it can mean getting high. (RT 1234, 1294.) And, "We're going to slide today" was interpreted as "violent action, committing a violent offense against someone's rivals." (RT 1324.)

In the same video (Exhibit 171, Broad Day Party), Mr. Jackson says "everything I do is Broad Day [n-word (er)]" (RT 1221-22.) The prosecutor quoted Mr. Jackson's statement asking "and about the phrase, "everything I do Broad Day [n-word (er)]", and Officer Hoffman explained that this phrase meant that everything Mr. Jackson does in his life revolves around the Broad Day gang. (RT 1232.) In the same video (Exhibit 171, Broad Day Party), Mr. Jackson said ""Stop them all snitching, they're going to find their ass fishing (RT 1235) and Officer Hoffman interpreted it to mean "a threat that they'll kill somebody and throw their body in the river or some type of body of water." (RT 1235.)

While testifying regarding People's Exhibit 171, the prosecution asked Officer Hoffman what Mr. Jackson was referencing, "check them papers [n-word (a)]" (RT 1235.) The prosecution used Mr. Jackson's direct quote, and asked Officer Hoffman the meaning behind that statement. Officer Hoffman testified that it referred to a person being accused of being a snitch, that is, checking their paperwork or police

report to confirm they actually snitched. (RT 1235-1236.)

Officer Hoffman opined that Mr. Bryant and Mr. Jackson were members of the Broad Day gang. (RT 1262.) Mr. Bryant was a Lo Mob member who eventually did become a Broad Day member. (RT 1278.) Officer Hoffman responded in the affirmative that the following hypothetical incident was gang motivated based on the following factual assumptions "there's a vehicle that's occupied with one adult driver in the driver's seat and a series of juveniles in the car...vehicle is approached by two known Broad Day gang members. ...they're approached in broad day....there's a vehicle that's occupied with one adult driver in the driver's seat and a series of juveniles in the car...the vehicle is approached by two known Broad Day gang members. (RT 1265.)

Officer Hoffman opined that it would benefit the gang in the sense that you have two gang members working together in association with one another to commit this crime. (RT1265.) They are acting with one another to provide backup for each other. They are going to commit this crime in broad daylight in conjunction with their name, Broad Day. They are not afraid to commit violent crimes in broad daylight and then decide to eventually kill the victim. (RT 1265, 1266.)

Officer Hoffman opined that this hypothetical act would bring more fear in the community and the individuals involved. (RT 1267.) He opined that this would affect witnesses potentially coming forward based on this hypothetical. (RT 1267.) The hypothetical would benefit each particular gang member by raising their status in the sense that it proves to not only their gang but to other gang members from other gangs and members of the community who are aware of the crime, that these two particular gang members are not afraid to commit these types of crimes and commit acts of violence against others. (RT 1267.) They are willing to put in work and they're willing to support other Broad Day members committing crimes. (RT 1267.)

On cross-examination, Officer Hoffman conceded that rap music has violent imagery; is a very popular art form in our society; that many artists have made millions selling records with lyrics that talk about gang, murder, violent acts; many of those individuals came from the project and low income childhoods and got out through rap; and millionaire rappers include lyrics and imagery of violence and crime in their music that is not necessarily true (RT 1292.) Officer Hoffman acknowledged that there is an element of boasting that is involved in rap lyrics; an element of taunting other artists; of describing life on the streets that an individual singer did not necessarily actually experience themselves; and that Broad Day is a term that can be found in all sorts of rap music. (RT 1289-1290.) He had checked YouTube and found many references including a YouTube channel called "Broad Day Gang" where Corey Richardson regularly uploads music videos and rap songs. (RT 1290.) He acknowledged that you could find rap albums with the same type of imagery as shown in the exhibits. (RT 1304.) Officer Hoffman conceded that some very famous rap

artists have used the term Broad Day including Soulja Boy (RT 1293.)

Trial Testimony of Gary Bryant

Gary Bryant Jr. is an African American man who grew up in Pittsburg, California. (RT 1465.) He was raised in a low income housing project called El Pueblo, nicknamed "the Lo." (RT 1465-1468.) Mr. Bryant's family was poor and struggled to make ends meet. (RT 1465.) Mr. Bryant admitted that he had sold drugs for most of his life. (RT 1474.) He testified that he was not a gang member and had no gang affiliation. (RT 1470.) Mr. Bryant had no history of committing robbery or any violent crimes. (RT 1470.)

Mr. Bryant testified that he spent his time making music with friends, connecting with his son, and selling marijuana to make ends meet. (RT 1480.) Mr. Bryant has recorded fifty to sixty rap songs. (RT 1480.) He collaborated with various local artists, including local neighborhood amateur musical groups "Pueblo," "Family Pack," "Heavy Grams" and "Broad Day" (RT 1528.)

Mr. Bryant denied being a member of any gang. (RT 1527.) Mr. Bryant explained that "Lo Mob" references the El Pueblo neighborhood and housing projects in Pittsburg and is commonly used by residents as a term of pride and perseverance. (RT 1526 ["It represents the area where me and several other people grew up through certain struggles...a place that we're not ashamed of that builds a better character...that we [express through the music].])

Mr. Bryant explained "Lo" stands for loved ones lost to death or incarceration (RT 1526.) The "L" symbolizes the struggle they came through and for the loved ones that they have lost to other situations. (RT 1586.)

"Mob" stands for "My Other Brother" a term of endearment representing shared hardships among community members, such as parents addicted to drugs. (RT 1526, 1586.) Mr. Bryant did not use "mob" as in criminal gang, but as in "group." (RT 527.) Many popular rap groups have used "mob" in this way. (RT 1527.)

As to the phrase "Broad Day," when Mr. Bryant was released from prison "Broad Day" was trending in the music scene and used to mean "shine bright as the sun, the peak of the day, Broad Day." (RT 1528.) He denied that he was a member of a gang Broad Day. (RT 1529.)

In using the phrase in his music, as well as the "B" hand symbol, Mr. Bryant meant to represent positivity and survival. (RT 1528.) He also explained that there was a local music label that used the name "Broad Day." (RT 1678.) Several famous rap artists, such as Notorious B.I.G., Tupac, Soulja Boy, Jay-Z and LL Cool J have used "Broad Day" in their music. (RT 1529.)

Mr. Bryant explained that "geeked up" meant to get high on ecstasy. (RT 1529.) He denied that it referred to guns. (RT 1533, 1534.)

In reference to Exhibit 19, Mr. Bryant testified "Pueb-loaded" doesn't mean a gun and "gang, bang, bang" has nothing to do with a gang. (RT 1592.)

In reference to Exhibit 172, Mr. Bryant expounded on the history of "dis" tracks, a type of rap song integral to hip hop in which one artist antagonizes another for the sake of drama. (RT1531.) He described it as "taunting for other artists to come out and make their music. Because right now in the urban culture 'dis' music and different groups going at each other, it's been popular." (RT 1530.) When he said "Broad Day Camp" in this context he is giving recognition to other artists that he has worked with. (RT 1531, 1533.) Mr. Bryant explained that when he says "it's the Broad Day Camp or Family Pack, Pueb-loaded", it is just a reference of the group of people that does music, or a dis song or a track that expresses the life of things that he has seen, experienced or been through or heard about. (RT 1674, 1675.)

Mr. Bryant explained that "If I hear artists around the area that's popular or he's getting a lot of views, I might make a 'dis' track dissing his songs, talking trash about him or say anything. I could even say something violent in a track, but it necessarily isn't the truth behind what's happening." (RT 1530.) He described how dis music has happened for years - Tupac did it to Biggie Smalls; NAS and Jay-Z did it for a couple of years. (RT 1530.)

When asked about Exhibit 172, he said the aggressive tone depicted in some of his music videos is customary to a dis track and is in no way indicative of real threats but is a way to taunt the other artist. (RT 1531-1532 ["It's just an image, that's all it is...Most people act like that. You'll see them later on that day, they'll probably be out watering the garden or something".]) Rap greats such as Nas, Jay Z., Tupac and Notorious B.I.G. saw their careers skyrocket following particularly artful dis songs. (RT 1531.) He explained. "I could even say something violent in a track, but it necessarily isn't the truth behind what's happening." (RT 1531.)

As to Exhibit 172, Mr. Bryant testified that "pueblo-loaded" meant to be intoxicated in his neighborhood. (RT1539.) His friend Ghalo had a mixed tape called Pueb-loaded." [RT 1541.)

On cross-examination, as to Exhibit 172, Mr. Bryant said he had a bright smile on his face and there's nothing aggressive or anything about that, that it was just a form of taunting and the symbol "B" stands for music, to shine as bright as the Broad Day. (RT 1593, 1594.)

Mr. Bryant testified that he had written about violence and crimes that he didn't actually commit. (RT 1540.) Mr. Bryant testified that rap music comes out of his community where there is rap about crimes and things that they've seen while growing up. (RT 1541.) He asserted that there is never anything that reflects off our actual actions, that it is "just...art of storytelling." (RT 1540.)

In reference to Exhibit 154, Mr. Bryant testified the photo was taken in 2012 when he had come out of prison, and he's making a hand reference to The Lo where he's inside the projects, where he and several friends came through their struggles and difficulties together. (RT 1550.)

In reference to Exhibit 160, as to the lyrics "I'm soo Lo that's why I ride solo waiting for one of u suckaz to trip so I can lay a demo", Mr. Bryant said this did not have to do with shooting somebody. (RT 1558.) As to the reference "lay a demo", Mr. Bryant testified that it meant to make a snippet of a rap song. (RT 1535.) Defense counsel asked what he meant when he said "Im still reppin this real shit bzzzzz up you suckaz come out and play hollin fuck [n-word (a)] from my hood you [n-word (a)] ain't bout it bout it like Master P yall [n-word (a)] soft lo mob" and Mr. Bryant explained he was referencing another artist that's made multimillions, and he actually comes up out of the city of Richmond, Master P., the Crescent. (RT 1559.)

As to exhibit 160, Mr. Bryant explained it was about saying he's like Master P, that he's going to do really well and be very famous and the reference to "Lo Mob" was to where he comes from, the struggle that he's trying to get out of. "I'm finna make it out of this area fortunately to hopefully make enough money to support my family in a better way." (RT 1559-1560.)

Mr. Bryant denied it had anything to do with violence or gang activity. (RT 1560.) He denied having any involvement in gang activity in July 2014. (RT 1564.)

In reference to Exhibit 161, Mr. Bryant explained that they were having a get together for a birthday party, they were drinking, partying and he had a blunt in his hand, and he was making a "b" with his hand. (RT 1551.)

In reference to Exhibit 162, Mr. Bryant described it as a barbecue at a Pittsburg park in 2014 where several people had gathered. (RT 1551.) Mr. Bryant acknowledged that Mr. Jackson was in the photo but denied he was throwing up a "b" sign (RT 1582) and denied talking to Mr. Jackson about the Broad Day sign. (RT 1582.)

In reference to Exhibit 163, Mr. Bryant said he was making the "b" sign and he is in the music Lab studio. (RT 1553.) Mr. Bryant said he was with Ghalo and they were getting ready to shoot a video shoot called "My [N-word (a)]," which was a remix of a big rapper's song. (RT 1553.)

In reference to Exhibit 164, Mr. Bryant testified he is throwing up a "b" for his last name. (RT 1554.)

In reference to Exhibit 165, Mr. Bryant is at another party after he got out of prison, and is showing sign "b", but said he was only having fun and it was not a Broad Day gang sign. (RT 1554.)

In reference to Exhibit 167, Mr. Bryant describes the photo, with two men who had guns, as showing all of them getting high, partying, and drinking alcohol. (RT 1556.) He acknowledged they were showing "b" signs. (RT 1585.)

In reference to Exhibit 190, another Facebook post, Mr. Bryant shared song lyrics, writing "Damn I miss her...never know what you got till it's gone.. Well I guess I'm get back in the lab and make another slap for the album...free my lil buzzing Tac...Free Tae Free Tae...Lo Mob...in his momma's voice." (RT 1587-1592.) Mr. Bryant explained that the song had been written in the voice of his aunt, who had gone through similar hardships as him growing up, hence the use of the word "mob." (RT 1588.)

On cross-examination, in reference to Exhibit 188, the prosecutor asked Mr. Bryant what, "I love [n-word (a)] that bump their gums about this my spot" meant and Mr. Bryant stated that this was referencing a "dis" song between him and another individual. (RT 1588-1591.) It indicated that he was claiming his friends were more lyrically talented. (RT 1588-1591.) Mr. Bryant explained that the reference to "0783" was El Pueblo spelled in numbers (RT 1589.) The post said "You're not ready for me nor the gang", Mr. Bryant said the word "gang" was slang for "group" and "the fellas". (RT 1590.) He was boasting that he was better. (RT 1590.) It was meant for a person that did a "dis" song, and he told them, like, you're not ready for me or anybody lyrically in my gang, in a reference to the fellas that are around that are doing music. (RT 1591.)

V. Evidence Introduced at Evidentiary Hearing Pen. Code § 745

Mary Bowman

Mary Bowman was qualified as an expert in implicit bias and legal rhetoric.

Defining Terms

Ms. Bowman defined "implicit bias" as reliant on the effect of stereotypes and association between groups and traits, that operate at an unconscious level and affect decision making even though not consciously endorsed. A "stereotype" is the foundation of implicit biases; it was defined as association between groups and particular traits or characteristics between black men and violence, dishonesty and

athleticism. She further described the terms "in-group" and "out-group" social science research shows that people show in-group favoritism in our judgment and evaluations about motive and ambiguous evidence with those we share a social category with, but we do not give such favorable judgment to an out-group. She testified that memory is affected when information is congruent with a stereotype, such as a stereotypical association between African American and dishonesty, things that fit that stereotype are easier to remember. Ms. Bowman described "othering" as a form of rhetoric that reinforces certain connections and is the result of out-group bias.

"Priming" was defined as necessary to activate implicit bias. For stereotypes to affect a person's decision making and thinking from implicit bias, the person needs to be exposed to stimuli that activates the category of stereotype - it could be rhetoric, verbal remarks or images. "Repetition" is a commonly taught technique for priming. The more exposure to the stimuli, the more repetition, the more it facilitates subconscious judgment. "Dehumanization", which is part of implicit bias, involves using rhetoric that takes away a person's humanity, and does not give the person the full measure of dignity or result in treating another person with respect.

Ms. Bowman testified that rhetoric is racist, even if not intended, not because it uses explicitly racist language but because it can trigger implicit racialized connotations, associations and stereotypes; that is, the effect on the listener triggers stereotypes by the use of "racially coded language" such as "super-predator" or "welfare queen". The rhetoric can color a person's judgment and assigned motives. Social studies showed that implicit bias can affect interpretations of ambiguous evidence when evidence invokes racial stereotypes, because viewers interpret the evidence with hostility.

Claim That Prosecutor's Use of Rhetorical Techniques Primed Jury & Triggered Implicit Bias

Ms. Bowman testified that the prosecutor's cross-examination of Mr. Bryant primed the jury and could have triggered implicit bias by using slang and linking it to the African American race and violence. Examples included referring to the "street name" of Demarcus Whitner as "Demo" and not his legal name. (RT 1569.) Mr. Bryant had never used the name "Demo" when referring to Mr. Whitner, rather the prosecutor, on his own, on seven occasions used this name with respect to a 2004 incident involving Mr. Bryant and Mr. Whitner where a person had been killed. Ms. Bowman opined that the use of "Demo" invoked implicit bias by using rhetoric that was inherently dehumanizing and showed a lower status of respect to Mr. Whitner, and connected it to a prior incident of violence, thus making it easier to accept a stereotype of African Americans as violent.

Ms. Bowman conceded on cross-examination, that use of nicknames can be, but are not necessarily dehumanizing, and is not inherently linked to race. However, the use of the nickname in the context of this case was linked to race and violence. She testified that the perception was likely to be racialized. Ms. Bowman conceded that there was no evidence that "Demo" was African American other than that he was referenced as family and linked to the 2004 incident that involved violence. Regardless of whether Demo was white or black, the lack of respect for "Demo" and making an association of the defendant to violence, invoked the implicit bias. The fact that Demo was linked to violence led her to opine that the totality of the circumstances invoked racial stereotypes.

Another example cited by Ms. Bowman was the prosecutor's use of the phrase drug dealing on the "down-low". (RT 1628.) She testified that this was a slang term that was racialized and emerged in the 1990's from the African American community. It referred to black men engaging in homosexuality. She opined that the prosecutor introduced the term as a rhetorical term to mean "in secret" and connotes dishonesty; when used in combination with drug dealing and a term that originated from the African American community, it links dishonesty with criminal activity, and therefore has a racialized connotation that activates stereotypes.

On cross-examination, Ms. Bowman cited to dictionary.com's definition of "down-low" as talking about the term meaning homosexuality in 2000 with respect to urban black men. Ms. Bowman conceded that there was no data on the percentage of people who had been exposed to "down-low" as a term. Ms. Bowman explained that neither the prosecutor nor the jury has to make any explicit mental connection with the word because implicit triggering is unconscious. Ms. Bowman conceded that there is no way to determine how many people would interpret that term that way and therefore she had no idea whether that term would have had an effect on the 12 jurors, but she cautioned that based on social research it suggests that implicit bias occurs when the jury is primed for implicit bias.

Ms. Bowman opined that the use of the terms "drug rip", "dime-out", and "pistol whip" are coded language that triggers out-group bias as these terms are not used by members of the jury in casual conversation. Instead they are terms that in the context in which they are used, connected to violence, dishonesty or criminality in a way that is then likely to activate the racialized stereotypes. When the prosecutor initiates this type of language it plays into less respect and dehumanization; the terms reinforce stereotypes, the associations operate as lenses through which people evaluate information at a subconscious implicit level.

Ms. Bowman testified that the prosecutor's use of the term "drug rip", used five times, constituted a concentrated repetition in connection to a 2004 prior act of violence. (RT 1944.) Ms. Bowman opined that it contributed to implicit bias and created an association with stereotypes of black criminality. She conceded on cross-

examination that there was no data showing the term triggers racial bias but she explained that numerous studies allow her to draw this inference. Ms. Bowman relied on broad implicit bias research to support the inference even though she had not spoken to this specific jury about their thought process.

The use of the term "dime out" a friend (RT 1945) was made twice by the prosecutor, with respect to Mr. Bryant in order to invoke dishonesty; that is, Mr. Bryant did not want to tell the truth to the officer. It invoked the stereotype of dishonesty and an explanation for lying. It was a coded language that accomplished "othering." Ms. Bowman opined that it contributed to implicit bias.

The term "pistol whip" was used twenty-nine times by the prosecutor in closing in the context of Mr. Bryant's interaction with the victim, Frankie. Ms. Bowman opined that it contributed to implicit bias. The use of "pistol whip" was a visual image, more powerful and dramatic than the description Frankie had given of his interaction with Mr. Bryant. It was implicitly racialized by emphasizing the association between African Americans and violence. Ms. Bowman opined that the use of the term on twenty-nine occasions amounted to very strong repetition associated with violence and therefore implicitly racialized this term and triggered "othering" out-group implicit bias.

On cross-examination, Ms. Bowman testified that the term "pistol whip" likely activates the stereotypical association between black men and violence. She conceded that there was no statistical or scientific evidence that the term triggers stereotypical implicit bias but explained that the context in which such a term is used matters, where the defendant is a black man who used a weapon to strike a fourteen-year-old, supported her opinion. She also conceded that she did not know if the jurors actually experienced implicit bias. But she relied on evidence about the research and the numerous studies on implicit bias, and the way those studies are designed, which made her draw the inference that was the basis of her opinion.

Ms. Bowman testified that the testimony of the defendant as a black man who used a weapon to strike a fourteen-year-old, does not trigger othering or out-group bias. She explained that the words do not reference violence or dishonesty and are not going to trigger implicit bias.

Ms. Bowman did concede that she did not have any specific evidence on jurors' thought processes or research on "pistol whip" but explained that numerous studies allow her to draw this inference. She explained that conscious decision making (explicit bias) would have been uncovered by talking with the jurors, but not implicit bias. Therefore, there is no study design with "pistol whip" or "drug rip" that demonstrates these are racially coded terms. Ms. Bowman conceded that she had no evidence these terms caused implicit bias. However, she testified that social science research robustly shows that there is a mental cognitive process that is triggering the stereotype and the inference from the research as applied to the particular context

allows you to move from social science research into applied application to other circumstances.

Ms. Bowman opined that the prosecutor's initiation of the slang words played into dehumanizing and lack of respect shown to Mr. Bryant and the effect reinforced the categories that people evaluate information at a subconscious level.

Ms. Bowman testified that group decision making is improved by diversity. Juries take more time to discuss evidence more carefully when people of color are present and this affects white jurors. Ms. Bowman opined that the impact of "othering" in this case with no black jurors, effected how stereotypes are received and therefore it is less likely jurors would be careful to not rely on a set of stereotypes, thus making it more likely implicit bias arose and they were more susceptible to othering and priming with such rhetoric.

Expert Opinion that Prosecutor's Use of Rhetorical Techniques Evidenced Bias

Ms. Bowman opined that the prosecutor's use of rhetorical techniques evidenced bias against the defendants because of their African American race, whether or not purposeful. The likely effect on people hearing the stereotypes is that they are more susceptible to implicit bias and activation of implicit stereotypes. Ms. Bowman conceded that she had not interviewed any of the jurors but that her opinion was based on how implicit bias works. She opined that racist rhetoric is based on the effects it causes. Prosecutors, defense counsel, jurors are not conscious of their bias. Therefore the court can now look to the record to evaluate the effect and significance of the use of coded language that triggers implicit bias.

Ms. Bowman opined that the rhetoric used by the prosecutor - nicknames, drug rip, downlow, pistol whip - triggered racial stereotypical association, and in the context of the case, plus the exclusion of black jurors, invoked implicit bias.

Andrea I. Dennis

Andrea I. Dennis is an attorney licensed in Maryland (active) and the District of Columbia. She is Associate Dean of the Faculty Development and Chair of Law at the University of Georgia School of law. She teaches criminal law and evidence. She published an article in 2007 *Poetic (In) justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*. (31 Colum. J.L & Arts). Her academic research and writing in the area of rap history, culture, and use in criminal courts has been cited in *People v. Coneal* (2019) 41 Cal. App. 5th 951 for support of the proposition that there is a discrepancy between the use of rap lyrics and the use of lyrics of other musical genres in criminal prosecutions.

Ms. Dennis was qualified as an expert in the history, culture, and artistic conventions of rap music as well as the use of rap in criminal prosecutions. She was also admitted as an expert in racial bias in the legal system.

Conventions in Rap Music

Based on her research and expertise in this area, she opined that there is a fundamental connection between rap and African American culture. Rap music emerged in the late 1970s in the South Bronx, New York. It was a creation of black and brown youth aimed at focusing on the devastating circumstances relating to social, legal, and economic matters. It is part of a long standing tradition of black literary and musical expression in America. In particular, the music and videos rely on black culture and representations of black neighborhoods, black language and of black experience.

Ms. Dennis testified that rap is a form of artistic expression that has common artistic conventions that included "hyperlocalization." This refers to the common expression of artists in their lyrics in terms of representation of their neighborhood and with whom they associate. She explained that hyperlocalization in rap music is not limited to rap artists who are gang members but rather it is something important to many artists.

Ms. Dennis discussed the convention of personal and collective knowledge. She explained that artists in using the first person in their lyrics might be referring to their own experiences in creating an artistic expression; and equally as possible, they might be referring to information or experiences they learn from other individuals; or to rumors in the community. Specifically, that it is part of the black literary tradition to tell stories and to do so in the first-person narrative, even if it is not the individual's personal experience.

Ms. Dennis defined the use of metaphor as use of terms in a way that is representative of another concept. It is quite common in rap music, for example, the microphone is represented by a firearm or vice-versa.

Ms. Dennis explained that the term "dis track" refers to a particular song, which is dissing or disrespecting another individual or another circumstance. Braggadocio, hyperbole, and metaphor, those would be quite common in diss tracks or battle raps. Again, the idea being not literal violence, not actual violence, but verbal superiority, verbally battling.

Gangster Rap

Ms. Dennis described the popularization and commercial success of 1980's gangster rap with violent lyrics that had come from representing what was going on

in their community, where there was high crime in their neighborhoods, and significant gang activity. For amateur rap artists, to gain notoriety, popularity, and financial benefit they mirror or mimic violent lyrics and the gangsta rap style. She indicated that it is common for amateur rappers to mimic very popular rap artists.

Between 2007 and 2017, Ms. Dennis has been identifying cases that use rap lyrics as evidence of guilt in criminal prosecutions across the country. She determined that gangsta rap music and lyrics are used in criminal prosecutions. She defined gangsta rap as songs with violent themes, characters, and terms, particularly related to gangs or gang activity. In her research she found no instances of other fictional musical art forms authored by defendants (country music, heavy metal, opera, which have a societal connection to whiteness) used as evidence of guilt in criminal cases. Ms. Dennis testified that the predominant race of the defendants in these cases she had studied was black men.

Misrepresentation of Rap Lyrics as Literal

Ms. Dennis opined that because of these artistic conventions of rap music it is not appropriate to literally interpret rap lyrics in all cases. She emphasized context is significant in trying to understand what the artist is conveying, what particular terms mean, what particular themes mean, the relevance of a particular character. Ms. Dennis further opined that rap music is often misrepresented in criminal trials because the lyrics are interpreted literally without an understanding of the artistic devices that undergird the creation of rap music; that they are misinterpreted to be autobiographical references for a defendant-author.

On cross-examination, however, she conceded that some rap lyrics can be treated as true. But she also conceded that, based on the last 15 years of her expertise, she could not say with certainty if any rap lyrics she has ever encountered in criminal cases were either true or false. She also restated her opinion that rap lyrics should not be unequivocally treated as autobiographical and literal; that lyrics should be understood in context and from that analysis, it may be that lyrics may or may not be a reflection of reality. She was not offering a definitive opinion on any particular set of lyrics, but was simply asking for careful scrutiny.

Officer Hoffman's Alleged Analytical Errors

Ms. Dennis explained on her direct testimony that the literal interpretation of rap lyrics in a criminal prosecution relies on racist stereotypes of black men as violent by making the assumption that in the rap song defendants are writing about only what has actually happened to them, their lyrics are autobiographical, and that, in this particular context, their violent lyrics or their lyrics that represent criminal behavior are depictions of matters they have actually been involved in, experienced

or committed without any reference to artistry or the possibility of varying interpretations.

Ms. Dennis had reviewed the testimony of police officer Rick Hoffman as well as the rap lyrics and videos. She opined that Mr. Hoffman was not qualified to interpret lyrics. He lacked any training in discourse analysis, musical analysis, popular culture, cultural studies, and vernacular English. She testified that Officer Hoffman had analytical errors in his interpretation of rap lyrics including a failure to recognize or examine the possibility of multiple meanings of terms; a failure to understand or acknowledge that terms should not necessarily be interpreted literally; and a failure to recognize that stories that are being told or depicted are being represented in songs may or may not be the personal experiences of the author.

Ms. Dennis opined that these errors and failures relate to implicit bias and negative stereotypes because they relate to assumptions about how we interpret and understand this particular black musical art form and form of expression. She believed they essentially rely on the notion that there cannot be any sophistication, complexity, or artistry in the lyrics. She believed they rely on assumptions about language and word choices by young black defendants and that these are essentially personal interpretations of what must be meant by particular terms or phrases or wording.

Defendants' Case & Interpretation of Lyrics

Ms. Dennis was questioned about the term "lay a demo" as Officer Hoffman had testified that "lay a demo," D-E-M-O, means to commit a shooting. Ms. Dennis opined that it means an artist creating a musical track that exemplifies their particular skills or abilities in order to demonstrate for the listener how good an artist the individual is. She did not agree with his statement "lay a demo" meant to commit a shooting and that his interpretation of this vague and ambiguous lyric to mean acts of violence was based in racial bias. The basis for her opinion was that Officer Hoffman did not appear to have grappled with the possibility that "demo" could mean something entirely different and he appeared to be assuming what a young black man charged with an offense would be saying in the present case. She opined that Officer Hoffman was interpreting the lyrics in a way that is consistent with the allegations rather than a nonviolent, non-criminal interpretation.

Ms. Dennis was questioned about a term "slipping in the fucking battlefield." Officer Hoffman testified that "Can't get stop slipping in the fucking battlefield" as well as "I've got goons everywhere, bitch, we can go to war," meant that the rapper was a gang member who is willing to commit acts of violence against his rivals. Ms. Dennis opined that Officer Hoffman's interpretation was based in racial prejudice against African Americans because it was based on an assumption that those terms should be understood in one particular way rather than understanding the terms in an artistic context of metaphor and imagery, including violent metaphors and violent imagery.

These are quite common in rap music and commonly used by some artists not to indicate literal violence or actual real-world violence, but metaphorically. Because the assumption seems to be unsupported, and there is no explanation for why there would be this particular violent interpretation, she believed that the interpretation is based on stereotypes of black men as violent.

Ms. Dennis was questioned about the terms "gang" and "mob." Officer Hoffman testified regarding Mr. Bryant's use of the words "gang" and "mob" in rap lyrics and Facebook posts as being literal admissions to being in a gang. Ms. Dennis did not agree with this interpretation and found it too simplistic and having failed to consider other possibilities. She opined that there is a common phenomena in rap culture and rap music of using the terms "gang" or "mob" to represent someone's group of friends or home neighborhood without describing that group as a criminal street gang. She offered a definition of these terms in a nonliteral sense; that is, that many individuals think of a gang as not necessarily involved in criminal activities but may be simply a group of individuals who are familiar or acquainted with each other.

Ms. Dennis opined that the use of the term "broad day" in rap lyrics is not necessarily a confession to being a gang member. She explained that the term has been used by other artists and in other songs to connote events or activities or experiences or life happening in daylight, in sunshine, as a metaphor.

Ms. Dennis was of the opinion that Officer Hoffman, based on his testimony in interpreting rap lyrics, evidenced bias towards the defendants because of their African American race. Based on her research, she had come to conclude that the use of rap lyrics in criminal cases relied upon either express or implicit bias regarding young black men. The reference to lyrics creates in the minds of listeners and decision-makers a connection to young black men, which then draws upon either express or implicit bias with respect to young black men being hyper-violent, criminal, and generally inferior. Ms. Dennis explained that this was true regardless of whether or not the individual, here Officer Hoffman, was aware of these biases or not.

On cross-examination, she adopted her statement from her declaration that, on account of the prosecution's use of defendant-authored rap music lyrics and videos, it was her opinion that Mr. Bryant's convictions were predicated on racially coded and discriminatory language. In particular, the jurors likely founded their decision on this evidence in reaching their verdicts. Ms. Dennis could not say what percentage of the verdict was based on this evidence. She had not interviewed any of the jurors. She also conceded that the convictions in this matter were predicated upon the eyewitnesses to the robbery and murder.

Prosecutorial Manual

Ms. Dennis explained how stereotypes of black men as violent and intellectually inferior related to the presentation of rap lyrics in criminal prosecutions. She cited a prosecutorial training manual from the early 2000s, which essentially represented that through the introduction of lyrical evidence and other forms of evidence, the prosecutor could show the real defendant as a criminal wearing a durag and throwing gang signs.

On cross-examination, however, she acknowledged that the manual was authored by a Los Angeles County district attorney working for the American Prosecutors Research Institute, and published by the Department of Justice in 2004. She conceded that she had no evidence that the prosecutor in this case ever received training about using rap music in gang prosecutions. When asked where the manual expressly or directly references black defendants, Ms. Dennis explained that the "real defendant is a criminal wearing a durag," is a reference to black culture, black fashion commonly associated with black men. When asked whether other ethnicities wear durags, she had presumed that possibly some person of another race or ethnicity might wear what would be understood to be a durag, but it is a commonly associated item with black men.

Charis Kubrin

Professor Charis Kubrin was qualified as an expert witness in rap music, including content analysis, bias and stereotypes.

Research Study 2016 - "The Threatening Nature of Rap Music"

Ms. Kubrin testified to the methods and results in her 2016 study that were published in an article entitled "*The Threatening Nature of Rap Music*" (Psychology, Public Policy, and Law, 2016, vol. 22.) In that study, participants were randomly assigned to two groups; one was told that the lyrics come from a rap song and the other that they came from a country music song. After reading the lyrics and randomly being assigned to the rap or country experimental conditions, respondents were then asked to make evaluative statements of the lyrics based on their impressions of the lyrics based on how threatening they perceived these lyrics; how dangerous they appear to be; whether they should be regulated; whether they were literal; and did they think these lyrics actually happened.

Ms. Kubrin testified that the thesis of the 2016 study was to take a theory that had been advanced by a man named Elijah Anderson called the "Street Code Thesis" to determine if the themes in that theory were visible in rap music lyrics. She did this through a content analysis of 432 rap music songs as to whether themes around violence and glorification of guns were in the lyrics. The 2016 study related to

perceptions regarding the participants' feelings about the lyrics themselves.

After collecting the data and running the analysis, she found that respondents who believed they were reading rap music lyrics evaluated them more negatively than respondents who believed they were evaluating country music lyrics even though the lyrics were identical. On cross-examination, Ms. Kubrin testified that the results of the 2016 study were that literality was perceived more likely with rap than the other genres and given that most rap music is not literal, that involves a misinterpretation.

Research Study 2018 - "Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments"

Ms. Kubrin testified as to the methods and results of the 2018 study she conducted, and that were published in an article entitled, "*Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*" (Journal of Experimental Criminology). The 2018 study was an explicit test to isolate the impact of racial bias by assessing the impact of the songwriter's race, on character judgments and, in so doing, explore the connections between negative rap stereotypes and anti-black stereotypes. Participants were given either a rap, country or heavy metal identified genre but all had the same lyrics.

Participants were told that the artist was white, black or they were not given the race of the artist. She then had participants evaluate the artists of the lyrics including how creative they think the artist was; how intelligent they think the artist was; did they think they could be a member of a gang; and did the artist likely have a criminal past. Participants evaluated the lyrics negatively regardless of whether the rapper was identified as African American or white. No differences in judgments were detected between the white and black songwriters. On cross-examination, Ms. Kubrin conceded that in a criminal jury trial the jurors know the race of the songwriter if lyrics are introduced and she also confirmed that when the study participants knew the race of the songwriter, there was no difference between how black and white songwriters were judged or their lyrics.

The participants in the no-race condition were asked to put down what they thought was the most likely race of the individual artist. The data revealed that over 80 percent of people in the no-race conditions when assigned to the rap condition, assumed that the artist was African American. Conversely, when assigned to a no-race condition but told they were country lyrics or heavy metal, the majority felt that they were likely to be white artists.

Ms. Kubrin found that writers of violent rap lyrics were perceived more negatively than writers who penned identical country and heavy metal lyrics. Participants who inferred the songwriter was black, judged him more negatively in terms of criminal propensity, being involved in a gang, and other negative

characteristics than participants who inferred he was white.

On cross-examination, Ms. Kubrin emphasized that the point and focus of the 2018 study was to determine explicit versus implicit bias in that context. Therefore, when the artist was not identified in terms of race or ethnicity, she was curious to see whether subjects were more likely to assume the rap lyric artist was African American and whether in the heavy metal and country conditions they were more likely to assume that the artist was white. She emphasized that the study was also interested in what evaluations people gave under those conditions.

Social Desirability Bias

Ms. Kubrin testified that when subjects were given the genre of rap and given race information, their negative views about the lyricist were fairly similar for white and black artists but when they were not given race data, there was an extremely high rate of assuming the rap lyricist was African American and a high level of negative judgments about that lyricist being a criminal and a gang member.

The findings when it was a rap lyric with no race information, that they assumed that the artist was African American and also evaluated the artist more negatively versus when they assumed in the rock or country condition that the artist was white and evaluated the artist much less negatively, suggest that social desirability could be an explanation for the previous findings and raise the possibility that rap and race are intertwined but their effects are more implicit than explicit.

Ms. Kubrin testified that in the 2018 study it was not possible to necessarily isolate race in an experimental condition because of social desirability bias. She described it as a very common thing that happens in social psychological research, where individuals involved in these experiments did not want to appear racist, sexist or ageist or any other thing that is viewed negatively within society. And so if they are primed (often) that a study could be tapping into these sorts of racist things such as the study that tells them what race the rapper was, the reaction is often to go in the opposite direction so as not to appear explicitly biased in how you respond regarding race.

Ms. Kubrin hypothesized that the reason participants in the race-identified groups evaluated the lyrics negatively regardless of whether the rapper was identified as African American or white was due in part to social desirability bias, which is when individuals are afraid to reveal their potential racial biases for fear of essentially revealing concerns about race or identifying true feelings re: race. But in the no-race identification groups, which asked people to make assumptions about the race of the artist, she could see how those assumptions correlate with their perceived character of the artist and she was able to determine that race and rap are implicitly connected.

On redirect, Ms. Kubrin explained social desirability bias occurs when you are asking people to evaluate things and they are very concerned that their evaluations appear legitimate and correct. She testified that nobody wants to appear that they have racial, gender, or ethnic bias. Therefore, when race is made very clear, as was done in the first two conditions of the 2018 study, where we had a photograph of a white person, the artist, or an African American person, the artist, and questioned whether people's evaluation of the lyrics might be tempered because they know the race of the artist and did not want to appear as though they favored or saw one race differently from the other. According to the literature, that would be more negative and stereotypical in terms of threatening and dangerous for African Americans versus whites.

Ms. Kubrin on cross-examination further testified that the fact that when the participants knew the race of the lyricist, whether it was white or black, they assessed them identically in terms of negative assessment, that while the results are consistent with social desirability bias, she could not prove that they reflect social desirability bias. She acknowledged that the published article stated "It is unclear, however, whether these unexpected race effects are the product of a social desirability bias among respondents. In other words, a tendency to answer questions in a manner viewed favorably by others."

Ms. Kubrin on cross-examination testified that she thinks that social desirability bias is a rational, reasonable expectation for making sense of the findings across the two studies. But the language of social science requires her to not say anything with absolute certainty because statistics do not allow you to do that.

Collective Findings

Ms. Kubrin testified on direct-examination that in her opinion, looking at both the 2016 and 2018 studies collectively in terms of the findings, consideration of race has an impact implicitly and indirectly. Ms. Kubrin testified that when subjects were given the genre of rap and given race information, their negative views about the lyricist were fairly similar for white and black artists but when they were not given race data, there was an extremely high rate of assuming the rap lyricist was African American and a high level of negative judgments about that lyricist being criminal and a gang member. The conclusion was that rap and African Americans go hand in hand, and that, collectively, those together are likely to produce negative evaluations of artists who write rap lyrics.

Ms. Kubrin testified that there were implicit associations of rap music and blackness based on the finding that those who thought that the rapper was African American evaluated them significantly more negatively, particularly with respect to being involved in a gang and engaging in crimes.

Ms. Kubrin, on cross-examination, attempted to reconcile the two studies by explaining that in the previous 2016 study, it was possible that the salience of race resulted in participants applying the stereotype to their evaluation of lyrics, but in 2018 participants may have avoided making judgments about the songwriter that could appear racially biased, a concern that may not have extended as a judgment about the lyrics.

On cross-examination, Ms. Kubrin did not agree with the prosecutor's characterization of her collective findings. She did not agree that her actual finding was that participants, knowing whether someone was white or black and making rap lyrics, did not tie their perception of character of the person making the lyrics to race but just to the rap lyric. Ms. Kubrin asserted that because rap and race are so clearly intertwined, as with 81 percent of people that evaluated rap lyrics assumed at that time songwriter was African American and over 90 percent that evaluated country and rock music, in particular heavy metal, assumed that the artist was white, that she opined that it is almost impossible to separate out rap and race in a clean way that it would allow us to identify independent race effects.

Ms. Kubrin (on redirect) testified that the research shows that race does not necessarily have an independent unique effect but that rap and race together are likely to elicit negative stereotypes that could be potentially harmful. These are implicit biases. It was for this reason that Ms. Kubrin believed that knowing the race of a defendant on trial in a criminal court did not render irrelevant the research on those implicit negative associations of race and rap. Ms. Kubrin also emphasized (on cross-examination) that, while she could not testify that there is an independent race effect, what the second set of findings in 2018 show is that rap and race likely interact in terms of implicit assumptions that then could generate negative evaluations.

Ms. Kubrin (on recross) again acknowledged that there is no direct independent effect of race, but she defined how that connection was implicit. She explained that the connection of rap to race was implicit based on the fact that when the race was unknown, subjects were asked what they thought the artists' race was, and over 80 percent in the rap condition thought that the artist was black, and over 90 percent in the other condition thought the artist was white; coupled with those who thought the artist was black in the rap condition evaluated him as much less intelligent, more likely to engage in a crime, more likely to be part of a gang, relative to those guessed to be whites in the rock condition and country condition, where they were evaluated more positively, which means more intelligent, less likely to be in a gang. Ms. Kubrin explained that it was their evaluation of the lyrics, that they had assumed were by an African American artist, as more negative that reflected the implicit bias. But by asking people to make assumptions about the race of the artist and seeing how those assumptions correlate with their perceived character of the artist, she was able to determine that race and rap are implicitly connected.

Rap Music as Art Form

Ms. Kubrin testified that rap is a black art form that has ties to a long history of African American culture and black creative expression. Rap is essentially an outgrowth of the black tradition of what's called storytelling and signifying. Signifying is a verbal competition that contains a lot of wordplay, including metaphors and similes.

Person Perception Theory & Stereotypes

Ms. Kubrin testified that person perception theory is a cognitive process that explains how individuals form impressions of others, including, for example, how a juror might form an impression of a defendant. It describes impressions formed often by our preexisting beliefs about the social world and a key component of the preexisting beliefs relates to stereotypes. Instead of looking at individual characteristics of people, people rely on aggregate social characteristics, whether it is race, gender, ethnicity, or age, to help form impressions that we have about people. This stereotyping can occur consciously and unconsciously.

Racial Stereotypes

Ms. Kubrin testified that specific stereotypes regarding black males are most commonly invoked by societal perception of rap music. Young African American men are most often stereotyped as threatening and dangerous. People use racial stereotypes to evaluate ambiguous information.

Rap Music Subject to Misinterpretation

Ms. Kubrin testified that wordplay at the heart of rap music is often ambiguous and it is for this reason that rap music is more susceptible to misinterpretation than other genres. Ms. Kubrin testified that there are common misinterpretations of rap lyrics in terms of literal interpretation of violent lyrics and violent interpretation of ambiguous lyrics. Ms. Kubrin testified that people make assumptions based on the lyrics that they are true when, in fact, they are metaphors, or boastful tales of things that rappers want to rap about though they are not true.

On cross-examination, Ms. Kubrin qualified her opinion that she meant the vast majority of rap music should not be treated literally. Ms. Kubrin indicated that over 50 percent of rap music is not literal, but could not give any percentage of how much rap music is true except to say it was a small percentage. On cross-examination, Ms. Kubrin conceded that in some cases rappers are portraying what actually has happened in the past. Ms. Kubrin conceded that she was not in a position to say, in any situation, whether a rapper's or a lyricist's lyrics are literally true or not. In general, whether any particular rap lyric should be interpreted as literal or false is not something for which Ms. Kubrin could provide an opinion.

Rap Conventions & Gangster Rap

Ms. Kubrin testified that rap music should never be treated literally because it is a form of artistic expression. The vast majority of rappers are relying on conventions, including hyperbole and exaggeration, with some subgenres of rap music, relying on violence as the currency to commercial success. Ms. Kubrin testified that in the 1990's, what was then called "gangster rap", the lyrics were gritty themes of violence meant to both reflect conditions in communities as well as to craft unbelievable tales that were intended to shock listeners and portray the rapper as the best, most dangerous, threatening rapper.

Defendants' Case & Interpretation of Lyrics

Ms. Kubrin reviewed the rap videos and their associated transcripts in trial Exhibit 171A, Exhibit 171B, Exhibit 172A and Exhibit 430A. Based on her review of the rap music and lyrics used as evidence against Mr. Bryant and Mr. Jackson, in this case, she offered the opinion that their music and lyrics were consistent with the violent content of commercially successful gangsta rap lyrics, including describing violent scenarios, issuing threats of violence, glorifying firearms, about the local neighborhood, the community, that she has evaluated in her previous studies.

Ms. Kubrin testified that some of the songs that she reviewed could be considered dis tracks, particularly 171A or 171B which is also found in commercially successful music.

Ms. Kubrin testified that "We can go to war" cannot be taken literally in rap lyrics because the lyrics are not meant to be literal. The phrase is used in many different contexts in terms of going to war, battle rap, being more superior as a rapper. Ms. Kubrin testified that battle rap means when rappers compete against each other. There are all sorts of conventions around battle rap involving threats, violence and trash-talk, that is, claiming you are the best and showing through your prowess as a rapper how skilled and dangerous you are, that you own the microphone.

Ms. Kubrin testified that a "dis track" serves a similar purpose; however, the goal is to create a battle between rappers that can draw attention to the rappers. In this context, rappers get to flex or show off their rap skills as they take down another rapper, not literally but figuratively.

Ms. Kubrin testified that if in rap lyrics a musician states the name of a particular gang, it does not necessarily mean that the rap artist is a member of that gang because it cannot be taken literally. Ms. Kubrin further testified that rappers are often dropping gang affiliation names in the community because there is a long history of a connection between gangs in the community and rappers in that many rappers

are former members of gangs. Many rappers have left gang life and are describing what happened in the past but she testified that it does not mean it's happening currently.

Ms. Kubrin also testified that many rappers are describing what they see in their community around gang violence and because many of their listeners are gang members, and the rappers will drop a line or reference a gang or even put up a sign as a nod to that gang, knowing that that gang might be listening to their music. But she emphasized that, however, those references do not necessarily mean that this individual rapper is in a gang.

Ms. Kubrin testified that "lay a demo" is quite a common phrase to rap music, that means making a hit, a song, a track, making music essentially. In the vast majority of the time, laying a demo means making music. Ms. Kubrin testified that Detective Hoffman's testimony of the term "lay a demo" to mean to commit a shooting was absolutely incorrect and that it means to make a record, make a track.

Ms. Kubrin, when told that Officer Hoffman testified that "geeked up", means armed with firearms, she testified that that was unlikely. Instead, she explained that it can most commonly mean being under the influence of drugs or alcohol, being very excited, very hyped up. It often means very drunk or high.

Ms. Kubrin testified that the use of the terms "mob" or "gang" in rap lyrics cannot be interpreted that the person is literally referencing a criminal street gang. She testified that "gang" in the broadest sense, means "my crew, my posse, my people, my fellas..." and there is a long history of rap groups evoking language that harkens to gangs, whether it is posse or crew. To illustrate, Ms. Kubrin cited Three 6 Mafia or the Lynch Mob, Mobb Deep, Westside Connection, 5th Ward Boyz, Southside Playas and Goodie Mob, Wu-Tang Clan.

Ms. Kubrin, on cross-examination, acknowledged that "gang" and "mob" can be used literally in rap music. Ms. Kubrin further conceded that in the present case, there were examples of gangs with rappers or rappers that were in a gang, but that the general rule was that rappers employ gang terminology frequently in ways that are common to the genre, and not in terms of gang affiliation or membership among rappers. But she was unable to give any percentage as to how often rappers used the terms in a figurative, as opposed to literal, sense.

When pressed in cross-examination as to how she makes a determination in rap lyrics analysis as to whether somebody is being literal or figurative when they use the phrase "gang" or "mob", Ms. Kubrin shifted her answer to point out that the focus of the analyses she had done was less about the accuracy and literality of what rappers are saying. This was because the conventions about rap music involve hyperbole, exaggerated metaphor, inverted meaning, rendering what rappers say as

not necessarily literal. She conceded that her work has never focused on determining literality of rap lyrics. She had never analyzed any of the material to see if it had truth in content in terms of relating a historical or a perceived event by the rap lyricist.

Ms. Kubrin confirmed on cross-examination that hyperlocalization in rap lyrics can sometimes include reference to specific places where the rapper is from and specific slang terms have different meanings in different areas, even from neighborhood to neighborhood. She conceded that she was not an expert in City of Antioch slang terms and did not know specifically what types of slang terms the members or associates of the Broad Day gang in the city of Antioch use and did not know how members of the Broad Day gang in Antioch use the phrase "geeked up" or "lay a demo".

Ms. Kubrin for the purposes of her testimony did not factor in that Mr. Bryant had a prior conviction before this murder trial wherein he admitted gang membership. When asked whether it would help her assess the literality of Mr. Bryant's later statements claiming gang membership, she testified that it was not for her to make the decision as to whether he is in a gang or not in a gang, did a crime, did not do a crime.

Ms. Kubrin also conceded that if Detective Hoffman is a rap expert, then there was a good chance that his interpretation of those phrases could be a hundred percent accurate. However, she was of the opinion that it was a prerequisite to some degree to have expert knowledge about rap music in order to interpret them in a criminal trial because of the misunderstandings that easily come with the use of rap lyrics and interpretation of rap lyrics.

Officer Hoffman's Alleged Analytical Errors

Ms. Kubrin testified that based on her study of rap music, she believed "quite possibly" that there were errors in Officer Hoffman's analysis because he had taken the rap lyrics literally. Ms. Kubrin testified that literal interpretation of rap lyrics introduces racial stereotyping into trial because not only is it based on erroneous assumptions, but the ambiguity of the lyrics cause them to be interpreted in ways that could be potentially problematic because they reinforce stereotypes about young men of color who are rappers, as threatening and dangerous.

Ms. Kubrin testified that stereotyping or implicit racial bias comes into play by treating the lyrics as literal statements. Applying stereotypes about the defendants combined with some stereotypes about rap music, led her to believe that the literal presentation of violent rap lyrics in Mr. Bryant and Mr. Jackson's trial could have invoked implicit bias and racially discriminatory stereotypes.

Tess Andrea

Ms. Andrea was a graduate law clerk in the Alternate Defender's Office, and office under the auspices of the Contra Costa Public Defender. She had been trained extensively on the legal research database Westlaw throughout law school and used it as part of various jobs as a law student, particularly working in criminal defense.

In August 2021, Ms. Andrea conducted an exhaustive search of the Westlaw database to locate all cases in which the Contra Costa District Attorney's Office presented music lyrics, of any genre, as evidence of guilt in criminal trials. She searched for both published and unpublished cases by entering the term "lyric" into the search bar. She then filtered those cases for criminal cases in the First District, which would cover Contra Costa County. She excised all of the cases that did not involve introduction of lyrics in a criminal defense involving probation, or First Amendment issues. There remained thirteen cases where the Contra Costa District Attorney's Office presented rap lyrics as evidence of guilt. Ten of defendants in these cases were identified as black defendants, and three of them were non-black, Latino. The lyrics were used at trial against the 10 black defendants as primary evidence of guilt, that is for the truth of what the lyrics meant as direct evidence of guilt.

Ms. Andrea did not locate any cases in which lyrics of any other genre were used by the prosecution as evidence of guilt at a trial in Contra Costa County with a white defendant. Exhibit A was introduced into evidence, which was a list done in alphabetical order of the cases Ms. Andrea found where lyrics were introduced in a criminal trial from Contra Costa County.

On cross-examination, Ms. Andrea acknowledged that her search would not have located those trials in Contra Costa County where rap lyrics or lyrics of any sort were used by "white gangsters" where for whatever reason, the Court of Appeals did not mention the issue. She had no idea how many cases there are or the ethnicity involved in those cases where rap lyrics or lyrics of any sort were introduced in Contra Costa County and it simply did not come up in the appeal. She did not know how many times lyrics get used in a trial but then not mentioned in an appellate opinion. Nor did she have a way to know of all of the cases in which rap lyrics or lyrics are used and the case results in a conviction, how many times in those cases a reference to rap did not appear in appellate opinions.

When asked about the specific cases referenced in Ms. Andrea's research where rap lyrics were used against black defendants, Ms. Andrea could not recall the specific facts of the case *People v. Joseph Blacknell* or how the rap lyrics from Mr. Blacknell were used as primary evidence of his guilt. Nor could she recall how the rap lyrics were used as primary evidence in *People v. Darryl Daniels*. She also conceded that she determined that rap lyrics were used as primary evidence of guilt in these cases through the appellate court's discussion of the use of the evidence but she

could not specifically recall if the cases used the term "primary evidence of the defendant's guilt". In the cases that she had cited, she could not with specifics relate what way any of the lyrics used formed primary evidence of guilt.

VI. Discussion

Defendants seek the dismissal of all gang enhancements, reduction of Count One from murder to attempted robbery and, or a remedy pursuant to § 745 (e)(1)(A) of a mistrial requiring the Court to vacate the guilty verdicts and grant a new trial free from racial bias. Defendants claim that the use of rap lyrics as criminal evidence evoked widely held implicit biases regarding African American men and was highly prejudicial, and the use of racially coded slang by the prosecutor primed the jury for outgroup implicit bias.

The court, having reviewed the trial record and additional evidence introduced at the hearing, as well as the parties' briefs, concludes that the defendants have discharged their burden of showing by a preponderance of evidence that the prosecution violated the Racial Justice Act.

The court shall order a new trial for the reasons that follow.

A. Racial Justice Act

Penal Code § 745

Pen. Code § 745(a) provides "The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:...(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect."

Pen. Code § 745(h)(3) provides that "racially discriminatory language" means "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where

the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.”

Pen. Code § 745 (e) provides that “Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list:… (2) (A) When a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.”

Effective Date of Racial Justice Act

In the present case, the court concludes that § 745 applies to the present case even though the defendants were originally sentenced prior to January 1, 2021. Section 745(j) specifies that § 745 “applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.” The entry of judgment occurred when the defendants were sentenced July 21, 2017. Then on September 27, 2019, the First District Court of Appeal in *People v. Bryant* (2019) 40 Cal. App. 5th 525, 528, 529 affirmed the convictions but remanded the case to the trial court to exercise its discretion on whether to strike the firearm enhancements under Senate Bill 620.

Strictly speaking, because defendants’ remand for resentencing was pending before the trial court on January 1, 2021 (§ 745’s effective date), the court proceeded with defendants’ motion for a new trial under § 745, which was filed on June 5, 2021. For this reason, the court finds that judgment in defendants’ case had not been entered prior to January 1, 2021 and § 745 was applicable prospectively to defendants’ case. (§ 745 (j) [“This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021”]; *People v. Mendoza* (2009) 171 Cal. App. 4th 1142, 1150 [in a criminal case, judgment is rendered when the trial court orally pronounces sentence; *In re Phillips* (1941) 17 Cal.2d 55, 58 [there is no judgment of conviction without a sentence]; *People v. Parilla* (2020) 50 Cal.App.5th 244, 247 [original sentence was vacated and sentence was no longer final, and because Proposition 57’s primary ameliorative effect was on a juvenile offender’s sentence, the court concluded that the measure applied to preclude imposition of sentence on the appellant as an adult], rev. granted by *People v. Padilla*, S263375.)

As such, the alleged violations under the Racial Justice Act are properly before the Court.

Intent of Racial Justice Act

The court's review of the trial record was informed by the purpose for which the Racial Justice Act was enacted. The Racial Justice Act acknowledges and seeks to remedy the impact of race in the justice system. The legislature enacted the Racial Justice Act in recognition that discrimination in the criminal justice system based on racial bias has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. Instances of racial bias have been documented in many forms. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice" (*Rose v. Mitchell* (1979) 443 U.S. 545, 556 (quoting *Ballard v. United States* (1946) 329 U.S. 187, 195.) The United States Supreme Court has also recognized "the impact of...evidence [of racial bias] cannot be measured simply by how much airtime it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." (*Buck v. Davis* (2017) 137 S. Ct. 759, 777.)

Instances of racial bias have been documented in several forms. (*United States v. Shah* (9th Cir. 2019) 768 Fed. 4 Appendix 637, 640 [expert testimony, and arguments in criminal trials based on expert's racist testimony that people of Indian descent are predisposed to commit bribery]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 924-25 (en banc), id. at 939-40 (Graber, J., 8 dissenting) [racial animus evidenced where the defendant's own attorney shows racial bias by routinely using racist language and "harbor[ed] deep and utter contempt" for the defendant's racial group]; *People v. Williams* (2013) 56 Cal. 4th 630, 652, 700 (Liu, J., concurring)) [Rulings by trial judges who make racially biased comments during jury selection have been documented as well. *Peek v. State* (1986) 488 So. 2d 52 (Fla.) [court recognized the inappropriateness of the trial judge saying that "since the [n-word] are here, maybe we can go ahead with the sentencing phase," the court of appeal declined to reverse the conviction on these grounds but did reverse on other grounds].)

The Racial Justice Act seeks to redress racially discriminatory language arising at trial whether or not purposeful. Prior to the enactment of the Racial Justice Act, California appellate courts had upheld convictions notwithstanding the racially coded language and stereotyping used to describe a defendant. Pen. Code § 745(a)(2) now explicitly forbids language likening a defendant to an animal. (§ 745(a)(2) [cannot refer to the defendant as an "animal"]; *People v. Powell* (2018) 6 Cal.5th 136, 182-83 [convictions upheld where prosecutors comments comparing him to a Bengal tiger notwithstanding the claim that it constituted a "thinly-veiled racist allusion" that dehumanized him and thus constituted an improper argument regarding his future dangerousness]; *People v. Brady* (2010) 50 Cal.4th 547, 585 [conviction upheld notwithstanding defendant's argument that the prosecutor's use

of the "Bengal tiger" metaphor was a thinly veiled racist allusion to his Vietnamese heritage]; *People v. Duncan* (1991) 53 Cal.3d 955, 976–977 [Defendant (who was "black") contended the prosecutor's closing argument metaphor had racial overtones - the defendant sitting in court in a suit was compared to visiting a zoo where there are Bengal tigers behind bars, as was seeing defendant with knife on the street being similar to seeing a tiger in its natural habitat; held, conviction was upheld notwithstanding the dehumanizing nature of the argument]; *People v. Thompson*, 2022 Cal. App. LEXIS 777 [Prosecutor's reference that "there is a fable about the frog and the scorpion. It stresses the scorpion will sting, no matter what, because that is in its nature; held, the prosecutor did not commit reversible error during his discussion of motive in jury voir dire notwithstanding that the partial reference to the fable was alleged to have been racially discriminatory use of the fable that "continues a long history of [B]lack defendants being dehumanized by animal imagery.".)]

Finally, legal precedent shows that proof of purposeful discrimination has often been required, but difficult to establish. (*People v. Bryant* (2019) 40 Cal.App.5th 525, 544 ["requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context."]; Cal. Assent. Bill No. 2542. Stats. 2020, Legislative Counsel sec. 2(c) ["...when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish."].) In response, the legislature has made clear that convictions cannot be upheld even when the prosecutor's use of racially discriminatory language is not purposeful. This includes evidence of implicit and unconscious bias. Section 745 (a)(2) recognizes the prejudicial impact of racially discriminatory language on criminal trials regardless of the speaker's intent, by explicitly not requiring proof of discriminatory purpose to establish a violation of the Act. (Cal. Assent. Bill No. 2542. Stats. 2020, Legislative Counsel § 2(g) ["...all persons possess implicit biases..."], § 2(g) ["...Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias..."].)

That a conviction can no longer be upheld where there is evidence the prosecution relied upon racially explicit or coded language, whether intended or not, compels the court to now examine the words used or testimony introduced, in order to determine whether there has been a violation of § 745(a)(2) based on a preponderance of evidence. If a violation is shown, then prejudice to the defendant has been demonstrated without the need for any further examination of the record to determine as to what, if any, degree of prejudice was shown. (Compare *People v. Powell* (2018) 6 Cal.5th 136, 182, 183 ["On the record before us, it appears the prosecutor's argument that defendant was an animal was intended merely to note that defendant's docile behavior in the courtroom was not irreconcilable with his violent conduct in less controlled circumstances]; *People v. Duncan* (1991) 53 Cal.3d 955, 976–977 [finding no prejudicial misconduct where the prosecutor used the Bengal tiger analogy only to remind the jury of the circumstances of the offense, including the brutality of the murder, and cautioning the jury against judging

defendant solely based upon his calm demeanor in the courtroom]; *People v. Brady* (2010) 50 Cal.4th 547, 585 [holding that prosecutor's argument that defendant was a Bengal tiger was intended merely to note that defendant's docile behavior in the courtroom which could not be reconciled with his violent conduct in less controlled circumstances].)

Furthermore, a defendant is not precluded from raising a claim under § 745(a)(2) if the defendant had earlier failed to object at the time of trial. For the purpose of those trials, such as the one at hand, which occurred before the enactment of the Racial Justice Act, a failure by the prosecution or defense counsel, to recognize racially charged language on the record or a defendant's failure to object to use of that language, is not a bar to seeking a remedy under the Racial Justice Act.

Burden of Proof - § 745 (c)(2)

The court is applying the preponderance of evidence standard, which remains "more likely than not." (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 319; compare *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 (*Haworth*) [applying heavier burden of "clearly establish the appearance of bias" in determining arbitrator's bias].) Therefore, in the present case, the defendants must prove that it was more likely than not that racially discriminatory language, as perceived by the objective observer, was used by the deputy district attorney when he used rhetorical terms throughout the trial; when the prosecutor, defense attorney and expert witness all repeated the racial epithets during questioning and giving testimony; and when the expert witness defined terms used in the defendants' rap lyrics. (§ 745(a)(2).) Similarly, the defendants must prove that it was more likely than not that the state otherwise exhibited bias based on defendants' race, whether purposeful or not, by introducing defendants' rap lyrics. (§ 745(a)(2).)

Assessment of Experts' Testimony

The defendant introduced the testimony of three experts - Mary Bowman, expert in implicit bias and legal rhetoric; Andrea I. Dennis, expert in the history, culture, and artistic conventions of rap music as well as the use of rap in criminal prosecutions, and as an expert in racial bias in the legal system; and Charis Kubrin, an expert witness in rap music, including content analysis, bias and stereotypes.

In their closing argument, the People urged the court to disregard the testimony of these experts. The People contend that there was no actual evidence of implicit bias based on either the language used by the Deputy District Attorney at trial, and, or that of the testimony of the gang expert, Detective Hoffman. (DDA Closing Brief p.2.) In particular, the People reasoned that because the defense social science experts based their opinions in part on the likely effect on the jurors of the language used, and because none of the experts spoke with any of the jurors, that there was

no actual measurable evidence to support their opinions as to triggering of implicit bias amongst the jurors. (DDA Closing Brief p.8.)

The court observes that the People did not call an expert of their own to counter or challenge the testimony of the defense experts. The People's failure leaves the court with a record based on unrefuted expert opinion. Without an opposing expert to interpret and, or counter the underpinnings of the defense experts' opinions, the court is left to evaluate the defendant's experts' opinions and the foundation for those opinions based on the record before it. While the court recognizes that the experts for the defense provided favorable testimony for their cause, this, without more, does not provide grounds for the court to conclude that the defense experts were biased. The People's decision to not call an opposing expert is not being criticized by the court. Rather, the court is merely acknowledging the parameters of the record that it must now base its decision upon.

The court further observes that each defense expert had published articles related to the subject of their expertise. Ms. Bowman published *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case Western L.Rev. 39, 50. Ms. Dennis published *Poetic (In) justice? Rap Music Lyrics as Art, Life, and Criminal Evidence* (2007) 31 Colum. J.L. & Arts. Ms. Kubrin published *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music* (2005) Social Problems, Vol. 52; *The Threatening Nature of Rap Music* (2016) Psychology, Public Policy, and Law, vol. 22); "Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments" (2018) Journal of Experimental Criminology.

Prior to the hearing, the defense lodged over 1000 pages of various articles with the court, including those of the named experts, when the court had requested copies of those cited in the defense brief. There was no dispute that the defense experts could formulate their expert opinions concerning the impact of race and implicit bias in criminal prosecutions based on social studies referenced in their published articles. (*Miranda v. Bomet Construction Co., Inc.* (2010) 187 Cal. App. 4th 1326, 1344.) It is well known that experts can rely upon hearsay in forming an opinion and can state the basis for the opinion. (Evid. Code §§ 801 (b), 802.) For this reason, the above-noted articles are admitted into evidence. The People did not provide any material to contradict or challenge the defense-submitted articles.

However, other than Ms. Kubrin, none of the defendants' experts referenced specific research studies as the factual basis upon which they rendered their opinion. Ms. Kubrin's published articles from 2016 and 2018 were extensively referred to during her examination. When context was needed to understand the basis for the experts' opinion, excerpts of the published material were referred to in the course of Ms. Kubrin's examination. Given that the court lacked the expertise, such additional material was expected to be helpful. Therefore, the court has reviewed Ms. Kubrin's

articles for the purpose of providing guiding insight into the studies' procedure, methodology and results.

Having reviewed the record of the testimony of all expert witnesses, the court concludes that, while the court is uncertain of the universality of the findings, there was no evidence provided in contravention of the opinions furnished to the court. The court does not find the experts' conclusions entirely lacking. The court relied upon the opinions of the defense experts where there was sufficient foundation to support those opinions.

B. Racially Discriminatory Language Used By Attorneys and Expert (§ 745(a)(2), § 745(h)(3))

Defendants have raised a number of claims that focus on the language used by the prosecutor and the gang expert at trial. The court concludes that the defendants have shown by a preponderance of evidence that it is more likely than not that racially discriminatory language was used during the trial in violation of § 745(a)(2) by the prosecutor's repeated use of racially coded rhetoric; and the repeated use of the explicit racial epithet (n-word) by the prosecutor, Mr. Bryant's defense counsel and gang experts in their questions.

The court, however, does not find that the definition of select terms used in the defendants' rap lyrics, provided by expert witness, Officer Hoffman, constituted the use of discriminatory language because the terms were relevant to proving defendant's gang affiliation. (§ 745(a)(2), § 745(h)(3).)

(1) *Use of Racially Coded Rhetoric by Prosecutor Constituted the Use of Racially discriminatory Language in violation of § 745(a)(2), § 745(h)(3)*

In the present case, the defendants allege that the prosecution used several racially coded slang words and "dog whistle" phrases implicating discriminatory stereotypes of African American men as having a propensity for serious violence in violation of § 745(a)(2). (Def. Brief p. 22:1-3) The term "dog-whistle racism" has been defined as the use of code words and themes which "activate conscious or subconscious racist concepts and frames." (See *Lloyd v. Holder*, 2013 U.S. Dist. LEXIS 178456, 2013 WL 6667531, at *9 (S.D.N.Y. Dec. 17, 2013).) The slang terms used by the prosecutor included "pistol whip", "drug rip", "down-low" as well as using nicknames. At no point did Mr. Bryant use any of these phrases himself. Each of these slang phrases were introduced into trial in the first instance by the prosecutor.

The defendants contend the prosecutor's use of these racially coded slang terms, that are closely associated with African American language and stereotypes,

"primed" the jury for implicit bias with the result of evoking racial bias; namely, that African American men, like the defendants, are dishonest and violent. (Def. Brief p. 16:15-16.) The effect created an implicit bias that ensured the non-African American people perceived African American defendants as more capable of violence and culpability. (Def. Brief p. 23:12-14.)

The court shall address each term and phrase used by the deputy district attorney individually. But before addressing the specific terms used, the court shall consider the standard by which to measure the language used. Pen. Code § 745(h)(3) defines "Racially discriminatory language" to mean "language that, to an objective observer, explicitly or implicitly appeals to racial bias...". No definition is provided in the statute and therefore the court must resort to defining the term as it has been interpreted in the case law.

For the purpose of § 745, the court adopts the objective test in defining the "objective observer" as defined in the context of proving judicial bias. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 (*Haworth*) [applying objective standard in determining arbitrator's bias].) The question here is how an objective, reasonable person would view the speaker's use of words during the trial. "The 'objective test'...focuses on a reasonable person's perception of bias and does not require actual bias." (*Haworth*, 50 Cal.4th at p. 385.)

Accordingly, the court is not concerned with the subjective question of whether the speaker actually intended to use racially discriminatory language, but whether an objective, reasonable person aware of the facts reasonably could conclude that the speaker was using racially discriminatory language as defined in § 745(h)(3). (*Haworth, supra*, 50 Cal.4th at pp. 385–386.) The reasonable person under this objective test "is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.'" [Citations omitted.] "[T]he partisan litigant emotionally involved in the controversy...is not the *disinterested objective observer* whose doubts...provide the governing standard." [Citations omitted, original emphasis.] (*Id.*)

Therefore, in the present case, the court has considered the defendants' expert witnesses' opinions and interpretations of the record in its determination of how an objective observer, familiar with the facts of the case and how the alleged racially discriminatory language was used, would view the language used in this case. (*Inquiry Concerning Bailey* (2019) 6 Cal. 5th Supp. 24, 62 [standard for prejudicial conduct by judge, assumes that an objective observer is familiar with the facts]; *Doan v. Commission on Judicial Performance* (1995) 11 Cal. 4th 294, 324 [same]; *Inquiry Concerning Van Voorhis* (2003) 48 Cal. 4th Supp. 257, 266 [same].)

Pistol Whipped

The court finds that the prosecutor's use of the term "pistol whip" on twenty-nine occasions in closing arguments and in reference to Mr. Bryant's interaction with the victim, Frankie Hernandez, primed the jury's implicit bias against African Americans. The record indicates that the defendant, an African American man, used a weapon to strike a fourteen year old. Yet the use of the term "pistol whip" constituted a visual violent image, more graphic than the description given by the victim.

The court relied upon the testimony of Ms. Bowman, an expert on implicit bias, who offered her expert opinion that use of the term "pistol whipped" likely activated the stereotypical association between African American men and violence. This triggered implicit bias against African American men. The more exposure to the stimuli, the more repetition, the more it facilitates subconscious judgment. Ms. Bowman opined that use of the term "pistol whipped" amounted to very strong repetition associated with violence and therefore implicitly racialized the term by emphasizing the association between African Americans and violence.

Ms. Bowman conceded there was no statistical or scientific evidence that the term itself triggers stereotypical implicit bias and that she did not have any specific evidence on jurors' thought process or research on the term "pistol whip." Ms. Bowman explained that numerous studies allowed her to draw this inference; that social science research shows the decision making process involved with implicit racial bias and how such research may be used in certain contexts. Though Ms. Bowman did not specify what social studies she relied upon, the court accepted Ms. Bowman's expert opinion that the term "pistol whipped" likely triggered implicit bias in the process of the jurors decision making.

Based on the testimony of Ms. Bowman, the defendants have proven by a preponderance of evidence that an "objective observer" could conclude the use of the term "pistol whip" was racially coded language. The court has looked to the record to evaluate the effect and significance of the use of coded language to determine if it could trigger implicit bias. In the present case, using the phrases, "pistol whipped" could under the circumstance of this case, support a claim of racial discrimination. The court finds no evidence of any purposeful intent to discriminate on the part of the prosecutor.

Based on the testimony of Ms. Bowman, the defendants have proven by a preponderance of evidence that an objective observer could conclude the use of the term "pistol whip" was racially coded language and evoked racial stereotypes of African American men as more likely to engage in acts of violence. Racially discriminatory language" means language that, to an objective observer...implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded

language..." (§ 745(2)(a).) According to Ms. Bowman, the term activated subconscious stereotypes of African American men as violent. When used in the context of the present case, it served to prime the jury and activate their implicit bias against African American men that they are more violent. The likely effect on people hearing the stereotypes is that they are more susceptible to implicit bias and activation of implicit stereotypes against the defendants who are African American men. (§ 745(a)(2).)

Drug Rip

The prosecutor also repeatedly referred to the term "drug rip". This related to a 2004 incident in which Mr. Bryant's friend died in his arms after the friend attempted to steal drugs from another person. (RT 1944:8-27.) Ms. Bowman testified that the prosecutor's use of the term "drug rip", used five times, constituted a concentrated repetition in connection to a prior act of violence. (RT 1944.) Like the use of the term "pistol whip", the repetitive use of the term "drug rip" in connection to the murder of Mr. Bryant's friend implicitly racialized the term by emphasizing the association between African Americans and violence. She concluded that, regardless of the intent of the prosecutor, this technique evidenced bias against the defendants because of their African American race.

Although Ms. Bowman conceded on cross-examination that there was no data showing that the term triggers racial bias, she explained that numerous studies allowed her to draw this inference. Notwithstanding that she did not specify what those studies were, Ms. Bowman was entitled to rely on broad implicit bias research as a foundation for her opinion. Accordingly, the court concludes for the same reasons detailed concerning the use of the term "pistol whipped", that defendant has shown by a preponderance of evidence that the term "drug rip" as used in the context of the case, evoked racial stereotypes of African American men as more likely to engage in acts of violence. Based on the testimony of Ms. Bowman, an "objective observer" could conclude the use of the term "drug rip" was racially coded language and evoked racial stereotypes of African American men as more likely to engage in acts of violence in violation of 745(a)(2).

Mean Mugged

In the defendants' brief, it was alleged that in describing the underlying incident, the prosecutor described that Mr. Bryant "mean mugged" Frankie Hernandez. (RT 1930:23-24; 1950:5-7; 1964:13-25.) Defendants contend that "Mean-mugging" describes when a person gives another person a bad look, and is "credited to Black slang in the early 2000s" and most commonly used in African American Vernacular English. (Mean-mugging, Dictionary.com <<https://www.dictionary.com/conic>> slang;mean-mugging/> fas of May 27, 2021].)

There was no evidence elicited from any of the defense experts as to the implication of using the term "mean mugged" and therefore the court has not taken it into consideration in its assessment of the record.

Down-Low

The prosecutor used the phrase "down-low" as a reference to drug dealing. (RT 1628.) Ms. Bowman testified that this was a slang term that was racialized and emerged in the 1990's from the African American community. It referred to African American men engaging in homosexuality. She also opined that the prosecutor introduced it as a rhetorical term that has the effect of activating the stereotype to mean "in secret" and connotes dishonesty and criminal activity, which in turn racialized the term. She concluded that this technique evidenced bias against the defendants because of their African American race.

Based on the testimony of Ms. Bowman, the court concludes that the defendant has not proven by a preponderance of evidence that an "objective observer" could conclude the use of the term "down low" was racially coded language in violation of § 745(a)(2). Ms. Bowman conceded that there was no data on the percentage of people exposed to "down-low" as a term. Ms. Bowman conceded that there is no way to determine how many people would interpret that term as related to either secrecy or homosexuality. She had no idea whether that term would have had an effect on the 12 jurors, although she cautioned that based on social research, it suggests that implicit bias occurs when the jury is primed for such bias.

The court finds that Ms. Bowman's expert testimony on the use of the term "down low", unlike the term "pistol whip" and "drug rip", was not sufficient to establish that the word was racially discriminatory. There was not sufficient foundation to connect the term to activating subconscious stereotypes of African American men as violent or dishonest.

Dime Out

The use of the term "dime out" was made twice with respect to Mr. Bryant. Ms. Bowman testified that the term was used to invoke dishonesty, to lie to officers to not "dime out" friends. She opined that the term when used in the context of the trial is connected to violence, dishonesty or criminality which is likely to activate racialized stereotypes. She concluded that this technique evidenced bias against the defendants because of their African American race.

But there was no foundational evidence elicited to support this inference. Once again, the court finds that Ms. Bowman's expert testimony on the use of the term "dime out", unlike the term "pistol whip" and "drug rip", was not sufficient to establish that the word was racially discriminatory.

Demo - Nickname

Demarcus Whitner and Mr. Bryant were involved in a 2004 incident where a person had been killed and which therefore involved violence. On several occasions the prosecutor referred to Mr. Whitner as "Demo", and not by his legal name (RT 1569). Ms. Bowman opined that the use of "Demo" was dehumanizing and showed a lower status of respect to Mr. Whitner, thus making it easier to accept a stereotype of African Americans as violent.

The court recognizes that there was evidence from Ms. Bowman that the effect of the use of the nickname as being racialized depended on the context in which it was used and was conditioned on the person being an African American. According to Ms. Bowman, unless Demo was white, the term accorded him less respect. But Ms. Bowman conceded that there was no evidence that "Demo" was African American other than that he was referenced as "family" and linked to the 2004 incident that involved violence. Because there was no evidence that Mr. Whitner was African American, there was no foundation to support Ms. Bowman's opinion that the use of the nickname was racialized and dehumanizing. In the absence of evidence as to Mr. Whitner's race, that "Demo" was linked to violence does not, without more, support Ms. Bowman's opinion that the totality of the circumstances invoked racial stereotypes by use of such a name.

Drawing the line between facially race-neutral statements and racially charged code words is difficult. The court recognizes that certain facially non-discriminatory terms can invoke racist concepts that are already planted in the public consciousness. While some language is unmistakably reflective of the presence of race or other bias, in many other cases meaning is context-dependent. It is not enough, however, to state that meaning is context-dependent. The court must actually examine the statement, and in some cases its historical usage, in addition to the context in which it is used (*see Ash v Tyson Foods, Inc.* (2006) 546 US 454, 456, 126 S Ct 1195, 163 L Ed 2d 1053) ["(A) speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage"].

In conclusion, the court finds no evidence of any purposeful intent to discriminate on the part of the prosecutor. But in the totality of repeatedly using the rhetorical terms "pistol whipped," and "drug rip", it was more likely than not that these terms activated a racial stereotype. Under the circumstance of this case, and the parameters of § 745, this supports a claim of racial discrimination in violation of § 745(a)(2) where to an objective observer, it implicitly appealed to racial bias, including, the use of racially coded language. (§ 745(2)(a).)

(2) *Use of Racial Epithet by Attorneys and Gang Expert Involved Use of Racially Discriminatory Language in Violation of § 745(a)(2), § 745(h)(3)*

The defendants assert that the prosecution's use of defendants' rap lyrics introduced racial epithets into the courtroom. (Def. Brief p. 8:4-9.) Irrespective of the attorneys' and gang expert's intent, the use of racially charged phrases like the n-word constituted racially discriminatory language that was not relevant to the proceedings.

Before examining the attorneys' and expert's use of the racial epithets, the court must first examine how the defendants themselves had used the terms as part of discerning how an objective observer would perceive the use of the racial epithet by others. Mr. Bryant's and Mr. Jackson's rap lyrics included the use of the n-word. (Ex. 172 Mr. Bryant's rap lyrics ["You know it's in the broadday camp [n-word (a)]"]; Ex. 160 ["You sucka's come out and play. I hollerin' fuck [n-word (a)] from my hood. You [n-word (a)] ain't got it. But like master P, Ya'll [n-word (a)] soft Lo Mob."]; Exhibit 188 (Mr. Bryant's post) ["I love [n-word (a)] that bump their gums about this my spot".]) As well, Mr. Jackson's rap lyrics included the use of the n-word. (Ex. 171 Mr. Jackson's rap lyrics ["Everything I do broadday [n-word (er)]", and "check them papers [n-word (a)].".])

The use of these racial epithets were considered by the court in *Daniel v. Wayans* (2017) 8 Cal. App. 5th 367, 390. As to the n-word (er) the court concluded "[i]t is beyond question that the use of the word "[n-word (er)]" is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, ... a word expressive of racial hatred and bigotry....' "it is now considered to be 'particularly abusive and insulting ... as it pertains to the American Negro." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn. 4.)

The court in *Daniel v. Wayans*, supra, 8 Cal. App. 5th at 391 further observed that "[today,] when African Americans are speaking to each other, "[n-word(er)]" and especially its more genial cousin, '[n-word(a)]' can be an affectionate greeting, a compliment, or a term of respect." (citation omitted.) The court continued to observe that "[c]urrently, some people insist upon distinguishing [n-word(er)]—which they see as exclusively an insult—from [n-word(a)], which they view as a term capable of signaling a friendly salutation."

"The key fact for our purposes here is that, in contemporary usage, n-word (a) is not an unambiguous racial epithet, but a term which can have a number of different meanings when used by different people in different contexts. The highly ambiguous/context-specific nature of the term [n-word (a)] is captured by Dictionary.com: "[N-word (a)] is used mainly among African Americans, but also among other minorities and ethnicities, in a neutral or familiar way and as a friendly term of address. It is also common in rap music. However, [n-word (a)] is taken to be extremely offensive when used by outsiders. Many people consider this word to be

equally as offensive as [n-word (er)]" <http://www.dictionary.com/browse/> Feb. 9, 2017])." (*Daniel v. Wayans, supra*, 8 Cal. App. 5th at p. 391, ft. 7.)

In the present case, the court finds that the defendants' own use of the n-word in their rap lyrics, would not reasonably cause a person aware of the facts to conclude the language explicitly or implicitly appealed to racial bias. (§ 745(h)(3).) The n-words as used by defendants, themselves African Americans, in the context of rap songs, did not constitute racially discriminatory language. (*Daniel v. Wayans, supra*, 8 Cal. App. 5th at p. 391, ft. 7 ["N-word (a)] is used mainly among African Americans, but also among other minorities and ethnicities, in a neutral or familiar way and as a friendly term of address. It is also common in rap music..."]; *People v. Quartermain* (1997) 16 Cal. 4th 600 ["[t]he unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant."].)

The same cannot be said for the attorneys' and the gang expert's, none of whom were African Americans, adoption and repetition of the defendants' use of the n-word during questioning of witnesses. To this end, the court recognizes that under no circumstances may a prosecutor do through the back door what cannot be done through the front; that is, the prosecutor may not adopt racial epithets used by a defendant under the guise that defendant merely used offensive language as part of his rap music, but then use at the risk of triggering implicit bias in the jury. (*Daniel v. Wayans, supra*, 8 Cal. App. 5th at p. 391, ft. 7 (emphasis added).) ["... [n-word (a)] is taken to be extremely offensive when used by outsiders..."]; *People v. Quartermain* (1997) 16 Cal. 4th 600, 628-629 [reviewing record to determine extent to which prosecutor relied on defendant's use of racial epithet in follow-up questions or otherwise focus attention on them; holding, prosecutor made only a passing reference in the guilt phase closing argument to the epithets as evidence of defendant's duplicitous nature, and "there is no reason to believe that the jury here reacted to defendant's racial epithets by convicting him for what he called [the victim], rather than for what he did to [the victim]. For the same reason, the admission of the epithets was not so prejudicial that it denied the defendant a fair trial in violation of his right to due process."].)

In the present case, the prosecution "used"³ the racial epithets in posing questions to the gang expert to lay a foundation for the expert's opinion on the defendants' membership to the Broad Day gang. In questioning Officer Hoffman the prosecutor repeated defendants' lyrics which included the n-word. (Exhibit 172, RT 1221 ["Q: And did you hear him [Bryant] say: "You know it's in the Broadday camp

³ "Webster's defines "to use" as "to convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 154 (6th ed. 1990). (*Smith v. United States* (1993), 508 U.S. 223, 229 [defining the term "use"].)

[n-word (a)]?"]; Exhibit 171, RT 1235 ["Q: [Jackson says] "check them papers, [n-word (a)] what is that in reference to?"].)

In answering the prosecution's questioning, Officer Hoffman, the gang expert, used the n-word in his response to the prosecutor's questions. (Exhibit 160, RT 1264 Officer Hoffman, at the prosecutor's request, reading Mr. Bryant's October 28, 2013 Facebook post "'And I'm still rep'ing this real shit....hollerin' fuck [n-word (a)] as from my hood. You [n-word (a)] as ain't got it. But like Master P. y'all [n-word (a)] as soft...".)

The court further notes that defense counsel for Mr. Bryant used the n-word when he directly asked Mr. Bryant what he meant when he said "Im still reppin this real shit bzzzzz up you suckaz come out and play hollin fuck [n-word (a)] from my hood you [n-word (a)] ain't bout it bout it like Master P yall [n-word (a)] soft'..... lo mob". (Exhibit 160, RT 1559.) The prosecutor similarly used the n-word when directly speaking to Mr. Bryant during cross-examination. (Exhibit 188, RT 1588 ["I love [n-word (a)] that bump their gums about this my spot,' what are you talking about?"].)

Neither attorneys, nor the gang expert used the n-word as a means to explicitly appeal to racial bias by using such racially charged language. (§ 745(h)(3).) The court in no way ascribes racist intent or purposeful racial discrimination on the part of the prosecutor, gang expert or defense attorney in having used the n-word in posing or answering questions. There was no purposeful intent to appeal to racial bias in its use. But § 745(a)(2) does not call for purposeful racial discrimination. It only requires proof that an objective, reasonable person aware of the facts reasonably could conclude that the prosecutor "used racially discriminatory language" that "implicitly appealed to racial bias", and which included the "racially charged" n-word that referenced the defendants', an African American man's, ethnicity. (§ 745(h)(3) ["Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged...language..."].)

The court finds that defendants have proven by a preponderance of evidence that an objective observer could conclude that the attorneys' and gang expert's adopting and repeating the use of the "n-word" was racially discriminatory language that was dehumanizing in its reference to the African American race. (§ 745(2)(a).) Ms. Bowman was asked to explain how implicit bias concepts enter the criminal trial, and her response was "...hopefully, in most cases, they don't enter a process through explicit racialized language... where [terms] like the "N" word were used in the trial." (RT 16, 10/1/21.) It is well recognized that the n-word is a racially charged term and is a derogatory reference to African Americans. The defendants were both African Americans. (§ 745(h)(3).) The use of the word n-word (a) and n-word (er) has been determined to be highly offensive. (*Daniel v. Wayans* (2017) 8 Cal. App. 5th 367, 391, ft. 7; *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) [n-word (er)] is

highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination...a word expressive of racial hatred and bigotry".].)

The court finds that the use of the racial epithet by the attorneys and gang expert more than likely resulted in priming the jury's implicit racial bias against African Americans. Ms. Bowman defined "priming" as necessary to activate implicit bias. Dehumanization, which is part of implicit bias, involves using racialized language that takes away a person's humanity, and results in not treating another person with respect. For stereotypes to affect a person's implicit bias, the person needs to be exposed to stimuli that activates the category of stereotype. The more exposure to the triggering stimuli, the more repetition, the more it facilitates subconscious judgment.

Accordingly, the defendant has proven that it is more likely than not that an objective observer, could reasonably conclude the n-word when used by the prosecution, the gang expert as well as defense counsel during defendant's trial constituted racially discriminatory language within the meaning of § 745(h)(3).

(3) *Definition of Select Terms Used in the Defendants' Rap Lyrics, by Expert Witness, Officer Hoffman, Did not Constitute Use of Discriminatory Language Because the Terms were Relevant to Proving Defendant's Gang Affiliation § 745(a)(2), § 745(h)(3)*

Under this claim, the defendant attacks Officer Hoffman's expertise as well as asserting that his literal interpretations of defendants' lyrics amounted to a misrepresentation of the terms or lyrics. The defendants claim that the select language used by Officer Hoffman was discriminatory because it involved implicit bias and engaged in negative stereotypes of African American rappers.

In terms of language used, the court under § 745(a)(2), in part, is concerned with whether the expert, Officer Hoffman, used "discriminatory language", whether purposeful or not, in his definitions of the terms reported in the defendants' rap lyrics. For the reasons that follow, the court does not find such interpretations constituted a violation of § 745(a)(2) because the language used by Officer Hoffman in his interpretations, as they related to the terms used in the lyrics, were relevant to proving the defendants' gang affiliation.

To this extent, Officer Hoffman's testimony did not violate § 745(a)(2), §745(3)(h). [§ 745(a)(2) ["During the defendant's trial, in court and during the proceedings, ..., an attorney in the case,...or expert...used discriminatory language...whether purposeful or not"]; § 745(h)(3) ["Racially discriminatory

language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged...language..."].)

The court shall address defendants' individual claims under this section.

Officer Hoffman's Expertise

The defendants claim that Officer Hoffman lacked necessary training, knowledge or expertise on the interpretation of rap music. Defense expert, Ms. Dennis offered the opinion that he lacked any training in discourse analysis, musical analysis, popular culture, cultural studies, and vernacular English. Similarly, defense expert Ms. Kubrin was of the opinion that it was a prerequisite to some degree to have expert knowledge about rap music in order to interpret rap lyrics in a criminal trial because of the misunderstandings that easily come with the use of rap lyrics and interpretation of rap lyrics. Ms. Kubrin, however, conceded the legitimacy of Officer Hoffman's expertise as a gang expert.

Based on the record before the court, it is satisfied that Officer Hoffman was qualified based on his knowledge of gang language, structure and activities of the Broad Day gang, to provide important context about the rap lyrics in question. Officer Hoffman was qualified to give expert testimony on criminal street gangs. His decoding of terms used in the rap lyrics derived from his expertise as a gang expert. He confirmed in voir dire that his expertise lay in "black gangs" of which included Broad Day and LoMob (RT 1052.) He had qualified 6 to 7 times as a gang expert in the Broad Day gang. (RT 1054.)

The frequency with which Officer Hoffman investigated alleged gang members had a direct bearing on his ability to properly define terms used by Mr. Bryant and Mr. Jackson in their rap lyrics. Hoffman was qualified as a gang expert, and to the extent he relied on his expertise to interpret the meaning of the language used on the rap lyrics, provided the foundation for his opinion. (Def. Brief p. 27-28.)

Officer Hoffman's Defining Terms in Lyrics as True

The defendants contend that Officer Hoffman's literal interpretation of gang lyrics were based on erroneous analytical errors. According to the defendant, Officer Hoffman exclusively testified that Mr. Bryant's and Mr. Jackson's lyrics were literal statements, recounting true events, with absolutely no mention of the poetic conventions and cultural context of rap. (Def. Brief p. 27-28.) Defendant asserts that Officer Hoffman's analysis is premised on inaccurate assumptions about rap music and resulted in the improper interpretation of the rap lyrics as literal, truthful confessions of criminal conduct, despite overwhelming evidence that rap relies on various artistic conventions.

Courts have cautioned against a literal reading of rap music lyrics "as statements of fact or actual intent." (*People v. Corneal* (2019) 41 Cal.App.5th 951, 968.) "In general, '[r]easonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are,' which means they 'are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.'" (*In re George T.* (2004) 33 Cal.4th 620, 636-637; *State v. Skinner* (2014) 218 N.J. 496, 521-522, 95 A.3d 236 (*Skinner*) ["One would not presume that Bob Marley, who wrote the well-known song "I Shot the Sheriff," actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story "The Tell-Tale Heart," simply because of their respective artistic endeavors on those subjects."].)

Both defense experts testified that because of the artistic conventions present in rap music it was not appropriate to literally interpret rap lyrics and that Officer Hoffman's opinion interpreting the defendants' rap lyrics was based on analytical errors that relied on negative racial stereotyping. For the reasons that follow the court does not find merit to this claim.

For context, Ms. Dennis and Ms. Kubrin described the popularization of 1980's gangster rap. Ms. Dennis testified that gangster rap had violent lyrics that came from representing what was going on in the artists' community where there was high crime in their neighborhoods, and significant gang activity. Ms. Kubrin similarly testified that in the '90s, what was then called "gangster", the lyrics were themes of violence meant to both reflect conditions in communities but also to craft unbelievable tales that were intended to shock listeners and portray the rapper as the best, most dangerous, threatening rapper. Ms. Dennis testified that for amateur rap artists, to gain notoriety, popularity, and financial benefit, they mirror or mimic violent lyrics and the gangsta rap style of very popular rap artists.

Ms. Dennis and Ms. Kubrin testified that rap lyrics are misrepresented at criminal trials based on the assumption that they are literal truth. Ms. Dennis criticized that practice of interpreting the lyrics literally as autobiographical representations of the defendant-author's reality without an understanding of the artistic devices that undergird the creation of rap music. Similarly, Ms. Kubrin testified that ambiguous wordplay in rap music including use of metaphors, or boastful tales, renders the lyrics susceptible to misinterpretation with common misinterpretations of rap lyrics in terms of being literal interpretations of violent ambiguous lyrics.

Both explained that rap music was part of a longstanding tradition of African American literary and musical expression in America. In particular, the music and videos rely on African American culture and representations of the African American neighborhoods, language and experience. Ms. Dennis testified to "hyperlocalization" as a common artistic convention in rap lyrics that involved the representation of their neighborhood, with whom they associate and was not limited to rap artists who are

gang members. Ms. Kubrin described that the vast majority of rappers are relying on conventions, including hyperbole and exaggeration, with some subgenres of rap music, relying on violence as the currency to commercial success.

Both Ms. Dennis and Ms. Kubrin opined that Officer Hoffman possibly had analytical errors in his interpretation of rap lyrics including a failure to recognize or examine the possibility of multiple meanings of potentially ambiguous terms; a failure to understand or acknowledge that terms should not necessarily be interpreted literally; and a failure to recognize that stories that are being told or depictions that are being represented in songs may or may not be the personal experiences of the author.

In the present case, however, Officer Hoffman in fact conceded that there is a cultural context within which rap music has developed. Officer Hoffman acknowledged that rap music has violent imagery and it is a very popular art form in our society; that many artists have made millions selling records with lyrics that talk about gangs, murder, and violent acts; many of those individuals came from the projects, came from low income childhood and got out through rap; and those people are now millionaire rappers who included lyrics and imagery of violence, of crime in their music that is not necessarily true (RT 1292.) He acknowledged that you could definitely find rap albums with the same type of imagery as shown in the People's exhibits. (RT 1304.)

Officer Hoffman himself acknowledged that there is an element of boasting that is involved in rap lyrics; an element of taunting other artists; and of describing life on the streets that the individual singer did not necessarily actually experience themselves. (RT 1289-1290.) The jury also heard repeatedly from Mr. Bryant who said what he raps about, even if it were threats, or had something violent in the track, that it was "just an image...I could even say something violent in a track, but it necessarily isn't the truth, behind what's happening." (RT 1551.)

Furthermore, both defense experts themselves conceded that rap lyrics can under certain circumstances be interpreted as literal truth. Notwithstanding Ms. Dennis' criticism of Officer Hoffman's literal interpretation and analysis of Mr. Bryant's and Mr. Jackson's rap lyrics, she conceded that she herself could not verify with certainty whether the lyrics, in any of the criminal cases and studies she had reviewed, were either true or false. (p. 51.) She also acknowledged that rap lyrics may or may not be a reflection of reality. Similarly, Ms. Kubrin conceded that she was not in a position to say, in any situation, whether a rapper's or a lyricist's lyrics were literally true or not. Whether any particular rap lyric should be interpreted as literal or false was not something Ms. Kubrin could provide an opinion on.

Therefore, in light of Officer Hoffman's recognition of the musical conventions of rap lyrics combined with the defense experts' concessions that rap lyrics may be

literally true, the court finds that there was no foundation for Ms. Dennis' and Ms. Kubrin's claims that Officer Hoffman committed analytical errors in his interpretation of the defendants' lyrics as relevant to proving his association with the Broad Day gang.

Accordingly, the court concludes that, whether Officer Hoffman's opinion that certain terms in defendants' rap lyrics were literally true, as opposed to reflecting the cultural context of rap lyrics, did not demonstrate that Officer Hoffman's interpretation of the lyrics racialized the music. Officer Hoffman acknowledged that there was an artistic convention of rap music, but based on his expertise as a gang expert, he was able to connect the language used in the defendants' rap lyrics to issues relevant in the trial; that is, that the defendants were members of the Broad Day gang and whose actions were for the benefit of the gang.

Officer Hoffman's Interpretation of the Terms Used in the Rap Lyrics Was Relevant to Proving Defendant's Gang Affiliation - § 745(a)(2)

The court shall individually address the defendant's challenges to Officer Hoffman's interpretation of the specific rap lyrics in each of the trial exhibits.

For the reasons that follow, the court finds that Officer Hoffman's testimony as it related to language used in his rap lyrics was relevant⁴ to prove the defendant's gang involvement under § 186.22(b). There is no violation under § 745(a)(2) where the person speaking is describing language used by another that is relevant to the case. There were many terms used in the defendants' rap lyrics that were relevant to show that defendants were members of the Broad Day gang and that defendants associated with a gang engaged in a pattern of criminal behavior (§ 745(a)(2) ["....This paragraph does not apply if the person speaking is describing language used by another that is *relevant* to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect."].)

Pursuant to § 186.22(b)(1), the defendant was charged with committing the offense "for the benefit of, at the direction of, and in association with a criminal street gang." Rap lyrics describing gang activities have repeatedly been found to be relevant and admissible in cases charging gang-related crimes. (*People v. Zepeda* (2008) 167 Cal. App. 4th 25, 35 [songs showed defendant's gang had motive and intent to kill rival gang members]; *People v. Olguin* (1994) 31 Cal. App. 4th 1355,

⁴ So long as evidence has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" it is "relevant." (Ev. Code § 210.) Relevant evidence under Ev. Code § 210 "comprehends both the probative value of evidence and its relationship to a matter which is provable in the action." (*People v. Hill* (1992) 3 Cal. App. 4th 16, 28-33, disapproved on another ground in *People v. Nesler* (1997) 16 Cal. 4th 561, 582, fn. 5.) The relationship of evidence to a provable matter is a question of materiality. (*Ibid.*) Evidence that does not relate to a matter in issue is immaterial. (*Ibid.*) "The trial court is 'vested with wide discretion in determining relevance under this standard.'" (*People v. Cain* (1995) 10 Cal.4th 1, 32.)

1372-1373 [rap lyrics were properly admitted when crime was allegedly gang-related because gang membership was "obviously important," and evidence tending to show it was "highly relevant"].)

However, for the reasons that follow, while Officer Hoffman's testimony as a gang expert interpreting the meaning of terms in the rap lyrics was relevant to proving defendants' gang involvement, the use of the racial epithet by the prosecutor and gang expert was not. There is nothing in the record to show that the racial epithet used by defendants and described by the prosecutor, defense attorney and gang expert was in any way relevant to laying the foundation for the gang expert's opinion that Mr. Bryant was a member of the Broad Day gang. Accordingly, defendant has shown it is more likely than not that an objective observer would find that the language used by the prosecutor and gang expert, as it related to the racial epithet, was racially discriminatory in violation of § 745(a)(2).

The court acknowledges that at the time that this order was issued, Assembly Bill 2799 was signed by Governor Gavin Newsom after receiving unanimous approval in the Senate and Assembly. The Bill aims to limit the use of rap lyrics in criminal proceedings and adds § 352.2 to the Evidence Code. The legislature intends to "provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant," according to the Legislative Counsel's Digest text of the Bill (Sec. 1(b), AB 2799.) It limits the admissibility of creative expression, including song lyrics, and requires courts to consider specific factors when admitting that evidence in criminal cases, in particular a consideration that there is "the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings." (Sec. 2, AB 2799, Sec. 352.2(a).)

While the Bill was not in effect at the time of this decision, the court has considered the principles enunciated therein and in the subsequent section of this order (See Section (C)), the court addresses the fact Officer Hoffman's interpretation of the specific rap lyrics, though relevant, more likely than not exhibited implicit bias and had a discriminatory impact in violation of § 745(a)(2).

Exhibit 172: "You know it's in the Broad Day camp [n-word (a)]"

The prosecution relied on Exhibit 172 and the testimony of gang expert, Officer Hoffman, to prove that Broad Day gang was a criminal street gang and that defendants' actions in connection to the murder were in association and, or for the benefit of the Broad Day gang (§ 186.22(b).)

Exhibit 172 included a short video of defendant Mr. Bryant. Mr. Bryant's actions and lyrics in the video included him making the "b" symbol in his hand and stating,

"You know it's in the Broad day camp [n-word (a)]." (RT 1220.) After playing the clip for the jury, the prosecutor asked Officer Hoffman "did you see him displaying "b" sign" and Officer Hoffman responded that he did. (RT 1221.) The prosecutor then asked Officer Hoffman if he heard Mr. Bryant say "you know it's in the Broad Day camp [n-word (a)]" (RT 1221). Officer Hoffman testified that this was important as a basis for his opinion because "you have Gary Bryant displaying on social media, verbally displaying or showing his affiliation with Broad Day criminal street gang and throwing up hand signs." (RT 1222.)

The court finds that Officer Hoffman's gang evidence was relevant and admissible to prove the elements of alleged gang enhancements (§ 186.22(b); *People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*); *People v. Gutierrez* (2009) 45 Cal.4th 789, 820 (*Gutierrez*). The People are generally entitled to introduce evidence of a defendant's gang affiliation and activity if it is relevant to the charged offense. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655 (*McKinnon*).) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).)

Specifically, relevant evidence from Officer Hoffman included testimony that the "Broad Day" gang was named that because they were willing to commit violent crimes in "broad day." (RT 1071 - 1072.) Broad Day gang was a combination of members of "Lo mob", a gang in the El Pueblo Housing Projects Pittsburg (RT 1063-1064) that over time migrated from the city of Antioch to become "Broad Day" gang. (RT 1064.) Officer Hoffman testified, on direct examination, that during the video marked as People's Exhibit 172, the phrase, "Pueb-loaded" was used. Officer Hoffman testified that the phrase referred to being people from El Pueblo being armed, but also admitted the phrase could also refer to a rapper named "Gallo Pueb-loaded" [RT 1221-1222, 1294.)

Officer Hoffman's testimony as to the relevance of Mr. Bryant's use of the "b", the meaning of the term "Pueb-loaded" and the statement "you know it's in the Broad Day camp..." (RT 1221) were clearly relevant to laying the foundation for his opinion that Mr. Bryant was showing on social media, verbally and demonstrably, his affiliation with the Broad Day criminal street gang. (RT 1222.) The case law supports this conclusion. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373 overruled on another ground in *People v. Cromer* (2001) 24 Cal.4th 889 [lyrics demonstrated defendant's membership in Southside gang, his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing]; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 32, 35 [rap lyrics were probative of defendant's state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it].) Therefore, questioning Officer Hoffman about defendant displaying the "b" sign in

Exhibit 172 was relevant to support his opinion that Mr. Bryant was a member of the Broad Day gang whose members used a common hand signal where the index finger and thumb would form a circle, to form the shape of a "b." (RT 1072, 1222.)

The defense criticized Officer Hoffman's testimony for failing to recognize the artistic use of the term Broad Day. Ms. Dennis testified at the hearing on the motion for a new trial, that the use of the term "Broad Day" was not necessarily a confession to being a gang member. She offered the opinion that the term has been used by other artists to connote metaphorical experiences in life as happening in the daylight and sunshine. This is consistent with Mr. Bryant's trial testimony, wherein he testified that "Broad Day" was a reference to a popular music term that he used in his music to represent positivity (RT 1528), was also local music label that used the name "Broad Day" (RT 1678) and identified that the term has been used by several famous rap artists, such as Notorious B.I.G., Tupac, Souija Boy, Jay-Z and LI.Cool J. (RT 1529.)

The court notes, however, that Officer Hoffman did in fact acknowledge at trial that he had found references on a YouTube channel called "Broad Day Gang" where Corey Richardson regularly uploads music videos and rap songs. (RT 1290.) Officer Hoffman had also conceded that some very famous rap artists have used the term Broad Day including Soulja Boy. (RT 1293.)

Similarly, the defense criticized Officer Hoffman's testimony as having wrongly interpreted the lyrics literally. Defense expert Ms. Kubrin testified that if in rap lyrics a musician states the name of a particular gang, it does not necessarily mean that the rap artist is a member of that gang because rappers are often dropping gang affiliation names in the community where there is a long history of a connection between gangs in the community; many rappers are former members of gangs; and rappers will drop a line or reference a gang or even put up a sign as a nod to that gang, knowing that that gang might be listening to their music.

The court, however, is disinclined to place any weight on this portion of Ms. Kubrin's testimony given that she acknowledged she had not been informed, prior to testifying, that Mr. Bryant had a prior conviction based on his association with the Broad Day gang. As a result, the fact that Mr. Bryant had thrown up a "b" sign and used the term "Broad Day" is consistent with the fact that he was a member of the Broad Day gang, and not merely flattering the gang by mentioning them as Ms. Kubrin had suggested.

Accordingly, the court concludes that based on Officer Hoffman's expertise as a gang expert, it finds that the term "Broad Day" as it appeared in the video (Exhibit 172) demonstrated Mr. Bryant's affiliation with the Broad Day gang. Having found Officer Hoffman to be qualified as an expert in the Broad Day gang, and that there were no analytical errors in the method by which he interpreted the terms, the court is inclined to find that his interpretation of the term "Broad Day" was relevant to the

charged crime, and is disinclined to give any weight to Ms. Dennis's and Ms. Kubrin's contrary opinions. The court finds that Officer Hoffman's interpretation of those select terms in Exhibit 172 did not constitute a violation of Pen. Code § 745(a)(2).

This is consistent with the treatment of Ms. Dennis's expert opinion, in other jurisdictions wherein her opinion has been referenced but then distinguished on the basis that rap lyrics remain admissible if relevant to the charged crime. (*Holmes v. State* (2013) 129 Nev. 567, 306 P.3d 415, 419 ["We recognize, as did the district court, that defendant-authored rap lyrics "may employ metaphor, exaggeration, and other artistic devices," Dennis, *supra*, at 14, and can involve "abstract representations of events or ubiquitous storylines." *Id.* at 26. But these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged."]; *see also United States v. Stuckey*, 253 F. Appendix 468, 482 (6th Cir. 2007) ["Stuckey's lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused Stuckey of doing [to the victim] in this case"; thus, the district court did not abuse its discretion in deeming the lyrics relevant and admissible]; *Commonwealth v. Talbert* (2015) 129 A.3d 536, 540 ["To expect rap lyrics, which are a form of artistic expression, to communicate a criminal event in precise detail would be wholly unreasonable" but held that rap video statement by defendant "Running and running the Badlands like an Afghan Choppers on deck, slide up in the caravan Hit up ya legs, turn that [n-word (a)] into half a man, Things get hot and I slide down to Maryland Where a [n-word (a)] get a bean for half a grand" was relevant to show his involvement in the murders]; *Commonwealth v. Flamer* (2012) 53 A.3d 82, 89 [the trial court abused its discretion by finding defendant's rap lyrics to be irrelevant and prejudicial, where lyrics about people "keeping their mouths shut," sending friends to kill for him, and "popping shells" in people that "run their mouth" had a tendency to show a conspiratorial agreement].)

Notwithstanding the relevance of Officer Hoffman's opinion as to the meaning of "Broad Day" and display of a "B" hand sign as these appeared in the video in Exhibit 172 (RT 1221-22), the court concludes there was no mention or interpretive relevance to the racial epithet Mr. Bryant used in the rap lyrics in Exhibit 172. Nowhere in the testimony of Officer Hoffman as to Exhibit 172 does he ever reference the use of the racial epithet as being a relevant form of symbolic gang terminology or a phraseology associated with the Broad Day gang.

It is clear the inclusion of the offensive term in posing the question to Officer Hoffman was not material to laying the foundation for his opinion. The officer's response was limited to explaining the meaning of the terms "you know it's in the Broad Day camp...." (RT 1221.) There was never any mention that the use of the racial epithet in the defendant's lyrics was relevant to forming the basis for any criminal intent, taunt or violent threat by Mr. Bryant. (RT 1531.) While the terms used

in Exhibit 172 were relevant to show that defendants were members of the Broad Day gang and that defendants associated with a gang engaged in a pattern of criminal behavior, there was nothing in the record from which to infer that the racial epithet, even if used by defendants themselves in their rap lyrics, had any tendency to prove or disprove any disputed fact that was of consequence to proving intent or motive for the murder, or to prove the gang enhancement.

Because there was no relevance for the use of the racial epithet in Exhibit 172, the court finds that the prosecution's reference to it cannot be exempted from a violation of § 745(a)(2).

Exhibit 160 – "I'm hollerin' fuck [n-word (a)] from my hood. You [n-word (a)] ain't got it. But like Master P, y'all [n-word (a)] soft Lo Mob"

The prosecutor read to Officer Hoffman from Mr. Bryant's Facebook page, Exhibit 160, which stated "I'm solo. That's why I ride solo. Waiting for one of you suckas to trip so I can lay a demo. And I'm still rep'ing this real shit. B's up. You suckas come out and play. I'm hollerin' fuck [n-word (a)] from my hood. You [n-word (a)] ain't got it. But like Master P, y'all [n-word (a)] soft Lo Mob." (RT 1263.) The prosecutor asked what "laying a demo" meant and Officer Hoffman explained it was a slang term for committing a shooting. (RT 1264.) He had heard and seen it used by gang members in the context of shooting other people. (RT 1273.)

The prosecutor then asked Officer Hoffman if the last words, "Lo Mob" were relevant to his opinion, to which he responded in the affirmative "because that's his [Bryant's] representation of his affiliation with the gang Lo Mob." (RT 1264.) Officer Hoffman had earlier testified that over time, many Lo Mob gang members migrated from Pittsburg to the Sycamore Drive area in the city of Antioch, and referred to themselves as "Broad Day." (RT 1064.)

Defendant challenges Officer Hoffman's interpretation, through the testimony of its expert, Ms. Dennis, to assert that "lay a demo" means that the artist is creating a musical track that exemplifies the artist's skills. She did not agree with Officer Hoffman's interpretation that it meant to commit a shooting. The basis for her opinion was that "Officer Hoffman does not appear to have grappled with the possibility that demo could mean something entirely different... [and] [h]e appears to be just drawing assumptions about what a young black man charged with an offense would be saying here...he is interpreting the lyrics in a way that are completely consistent with the allegations rather than a nonviolent, non-criminal interpretation." (RT 43, 2/25/22.)

The court concludes that there is nothing in the record from which to find that Officer Hoffman's interpretation of the term "demo" was unfounded. Rather, on cross-examination, Officer Hoffman thoroughly explained the basis of his interpretation of the term from the perspective of a gang expert. His interpretation was from numerous

Investigations that he had done, listening to conversations of gang members, watching surveillance videos of gang members using that terminology, with other investigations not related to this one. (RT 1273.) Officer Hoffman had heard and seen the term "Demo" used by gang members in the context of shooting other people. (RT 1273.) As well, he had spoken to many different gang members during interviews when Officer Hoffman used that terminology when referencing a shooting. (RT 1273.) He further explained that gang members or people committing shootings will say they're going to "lay a demo" or "do a skit," which they refer to the same thing, shooting somebody." (RT 1274.) The court observes that the contextual use of the term supports his opinion. In reference to Exhibit 160 the lyrics are "I'm soo Lo that's why I ride solo waiting for one of u suckaz to trip so I can lay a demo". The court finds that it could reasonably be inferred that this refers to rivals being in gang territory, where they are vulnerable to getting shot.

The defense expert, Ms. Dennis also disagreed with Officer Hoffman's interpretation of the terms "Mob" and "gang". Officer Hoffman's interpretation of Mr. Bryant's use of "Mob" was that it indicated Mr. Bryant's affiliation with the "Lo Mob" gang. (RT 1264.) Ms. Dennis opined that there is a common phenomena in rap culture and rap music of using the terms "gang" or "mob" to represent someone's group of friends or their – their home neighborhood – without describing that group as a criminal street gang. She offered a definition of these terms in a nonliteral sense; that is, that many individuals think of a gang as not necessarily involved in criminal activities but may be simply a group of individuals who are familiar or acquainted with each other.

In support of Ms. Dennis's opinion, defendants cite to Mr. Bryant's testimony that "Pueblo" referred to his neighborhood and housing projects in Pittsburg and is commonly used by residents as a term of pride and perseverance. (RT 1526 ["It represents the area where me and several other people (sic) grew up through certain struggles, a place that we were not ashamed of, that builds a better character that we (sic) express through the art of music"].) Mr. Bryant also testified that "Lo" stands for loved ones lost to death or incarceration and "Mob" stands for "My other Brother" a term of endearment representing shared hardships among community members, such as parents addicted to drugs (RT 1526). Mr. Bryant denied that "mob" meant a criminal gang, but meant it as in a "group." (8 RT 1527.) And several popular hip-hop groups had used it in the same manner as Mr. Bryant's use. The reference to "Lo Mob" was to where he comes from. (RT 1559-1560.)

For the same reasons expressed above as to exhibit 172, the court finds that Officer Hoffman's interpretations were reliable and did not involve any analytical errors. Officer Hoffman's testimony was well founded in his expertise as a gang expert. He detailed the origin of his understanding of the phrase "lay a demo" and was fully qualified to give expert testimony as to the meaning of "Lo Mob" as a gang expert in the Broad Day gang. (RT 1054.) Accordingly, the defendant has failed to

establish that Officer Hoffman's interpretations of the identified terms in Exhibit 160, as a gang expert, were unfounded, or that they constituted a violation of Pen. Code § 745(a)(2).

However, as was the case with Exhibit 172, there were no questions asked, or explanations offered as to the relevance of the racial epithet that appeared in the Facebook posting in Exhibit 160. There was no evidence it was material to Officer Hoffman's expert opinion that Mr. Bryant was a member of the Broad Day gang. Nor did Mr. Bryant testify as to the materiality, if any, of its inclusion in the lyrics. Mr. Bryant's testimony, like Officer Hoffman's, was limited to addressing the other discrete phrases that appeared in the post. (RT 1535 ("lay a demo"); RT 1559-1560 ("LoMob").)

As discussed above under Exhibit 172, based on the testimony of Officer Hoffman, it is clear the inclusion of the racial epithet in posing the question to Officer Hoffman about exhibit 160, was not material to laying the foundation for his opinion. The officer's response was limited to explaining the meaning of the terms "lay a demo" and "Lo Mob." Because there was no relevance for the use of the racial epithet in this context (Exhibit 160), the court finds that the prosecution's reference to it cannot be exempted from a violation of § 745(a)(2).

Exhibit 188 – "I love [n-word (a)] that bump their gums about this my spot" & "You're not ready for me nor the gang."

The defense asserts that Officer Hoffman failed to consider the lyrical technique of creating a diss track and that the term "gang" did not literally mean a criminal street gang. In one portion of Mr. Bryant's Facebook post (Exhibit 188), the prosecutor asked Mr. Bryant on cross-examination what, "I love [n-word (a)] that bump their gums about this my spot" meant and Mr. Bryant stated that this was referencing a "dis" song between him and another individual. (RT 1588-1591.) Mr. Bryant explained that he and his friends were more lyrically talented. (RT 1588- 1591.) On direct examination, Mr. Bryant had expounded on the history of "dis" tracks, a type of rap song integral to hip hop in which one artist antagonizes another for the sake of drama. (RT 1531.)

In the same post, Mr. Bryant also states "You're not ready for me nor the gang." (Exhibit 188.) Mr. Bryant denied the use of the word "gang" to mean a gang, and explained it was slang for "group" and "the fellas". (RT 1590.) He was boasting that he was better. (RT 1590.) It was meant for a person that did a "dis" song, and he was telling them you are not ready for me lyrically in my gang, in a reference to the "fellas that's around that are doing music." (RT 1591.)

The court also considered the opinion of defense expert, Ms. Kubrin, who did not agree that the term "gang" when used in rap lyrics literally referenced a criminal

street gang. She testified that "gang" in the broadest sense, means my crew, my posse, my people, my fellas. She explained that there is a long history of rap groups evoking language that harkens to gangs, whether it is posse or crew. To illustrate, Ms. Kubrin cited Three 6 Mafia or the Lynch Mob, Mobb Deep, Westside Connection, 5th Ward Boyz, Southside Playas and Goodie Mob, Wu-Tang Clan. But the court also notes that Ms. Kubrin acknowledged that the use of the terms "mob" or "gang" in rap lyrics can be used literally.

The court finds that, while the prosecutor's line of questioning concerning the use of the term "gang" in Exhibit 188 was relevant to ascertaining Mr. Bryant's gang involvement, the court can discern no relevance for repeating the racial epithet used by Mr. Bryant in Exhibit 188. For the same reasons already discussed above as to exhibits 172 and 160, it is clear the inclusion of the offensive term in posing the question to Mr. Bryant was not material to the defendant's explanation for the posting. Because there was no relevance for the use of the racial epithet in this context (Exhibit 188), the court finds that the prosecution's reference to it is not exempted from a violation of § 745(a)(2).

Exhibit 171 - "everything I do Broad Day [n-word (er)]" & "check them papers [n-word (a)]."

The People's Exhibit 171 depicted an approximate four minute long music video featuring defendant Mr. Jackson. There were two videos played: Broad Day Dolla and Broad Day Party. The contested portion occurred in the Broad Day Party video. The video was played for the jury, and gang expert Officer Hoffman was asked multiple questions about the meaning and relevance of numerous statements made in the video.

The first video was called "Broad Day Dolla" Mr. Jackson makes reference to terminology Officer Hoffman interpreted: "selling candy" (selling drugs, RT 1222-1223); "add a fucking murder to my nine" (murdering someone with a 9 millimeter firearm, RT 1223-1224); "Did time in the slammer," (Incarcerated, RT 1224); "rollers," (law enforcement, RT 1224); Can't get stop slipping in the fucking battlefield" (RT 1225) and "I've got goons everywhere. Bitch. We can go to war" (bragging about having fellow gang members in places to go to war with rivals.) (RT 1226.)

At the hearing on the motion for a new trial, the defense contested Officer Hoffman's interpretation of the phrases "slipping in the fucking battlefield" as well as "I've got goons everywhere, bitch, we can go to war." Officer Hoffman's interpretation was that the rapper was a gang member who is willing to commit acts of violence against his rivals. Ms. Dennis opined that such an interpretation by Officer Hoffman was based in racial prejudice against African Americans because it lacked an understanding of the use of the terms and the phrases in an artistic context of violent metaphors and imagery. She opined that because the assumption of violence seems to be unsupported, and there was no explanation for why there would be this

particular violent interpretation, she believed that the interpretation was based on stereotypes of African American men as violent.

For reasons already stated above under the analysis of Exhibit 172, the court finds that Officer Hoffman was qualified to give testimony as a gang expert in the Broad Day gang as it appeared in the "Broad Day Dolla" video. The video repeatedly mentioned Broad Day and given Officer Hoffman's well founded opinion that the term Broad Day was a reference to Broad Day gang, the court does not find support for Ms. Dennis's opinion that Officer Hoffman opinion was based on racial stereotypes of African American men as violent. Officer Hoffman had opined that Mr. Jackson was a member of the Broad Day gang, and within that context, such a phrase meant the rapper was a gang member who is willing to commit acts of violence against his rivals.

In the second video, Broad Day Party, Officer Hoffman explains various terms used by Mr. Jackson. Officer Hoffman testified that Mr. Jackson's use of the phrase "everything I do Broad Day" meant everything he does, or his life revolves around the Broad Day criminal street gang. (Exhibit 171, RT 1232.) Various terms were explained: "Fuck Randell" (leader of Broad Day's rival, Broad Day Killers, RT 1229, 1230); "man man, we're going to empty the whole clip" (man-man was another leader in the rival Broad Day Killers gang, RT 1230); "BDK" (Broadday Killer); "squeeze until face is missing" (destroy someone's face, RT 1228 1236); "fuck with the gang, get your melon split" (warning to a rival that anybody who messes with the Broad Day gang will get their head split open, RT 1230); "like every day Pueb-loaded" (shooting people, RT 1222, 1233); "threw a couple pops out and a drive-by shift" (mocking their rivals, saying that their rivals are scared, and when they do shoot at Broad Day, they hide and shoot quickly, RT 1233-1234); "You know we're going to slide today" (taking action against some of those rivals or gang's rivals, violent action, committing a violent offense against someone's rivals, RT 1324, RT 1334); "geeked up" (being armed with firearms, RT 1234, 1294) and "Stop them all snitching, they're going to find their ass fishing (a threat that they will kill somebody and throw their body in the river or some type of body of water.)" (RT 1235.)

The defense only contested Officer Hoffman's interpretation of the term "geeked up" as being a reference to being armed with firearms. (RT 1234, 1294.) Defense expert, Ms. Kubrin, testified that "geeked up" meant being under the influence of drugs or alcohol, and being excited or hyped up. Ms. Kubrin, however, also conceded that she was not an expert in the City of Antioch slang terms and did not know specifically what types of slang terms the members or associates of the Broad Day gang in the city of Antioch use and did not know how members of the Broad Day gang in Antioch use the phrase "geeked up" or "lay a demo". Ms. Kubrin conceded that if Detective Hoffman is a rap expert, then there was a good chance that his interpretation of those phrases could be a hundred percent accurate. Therefore the court finds that Officer Hoffman's interpretation of the term was not unfounded and was well within his realm of expertise.

For the reasons detailed above under the discussion of the term Broad Day in exhibit 172, the court finds Officer Hoffman's interpretation of these terms were relevant to the charged crime. Because the crime was alleged to be gang related, gang membership was obviously important, and evidence tending to show it was highly relevant. The court finds that Officer Hoffman's interpretation of those select terms in Exhibit 171 did not constitute a violation of Pen. Code § 745(a)(2).

This notwithstanding, the prosecutor quoted Mr. Jackson's statement asking Officer Hoffman about the phrase, "everything I do Broad Day [n-word (er)]" (RT 1231, 1232) and Officer Hoffman explained that this phrase meant that everything Mr. Jackson does in his life revolves around the Broad Day gang. (RT 1232.) The prosecution also asked Officer Hoffman what Mr. Jackson was referencing when he said "check them papers [n-word (a)]." (RT 1235.) The prosecution used the defendant's direct quote, and asked Officer Hoffman the meaning behind that statement. Officer Hoffman testified that it referred to a person being accused of being a snitch, that is, checking their paperwork or police report to confirm they actually snitched. (RT 1235-1236.)

It is clear that the inclusion of the racial epithet in posing the question to Officer Hoffman about exhibit 171, was not material to laying the foundation for his opinion. The officer's response was limited to explaining the meaning of the terms "everything I do Broad Day..." and "check them papers..." Because there was no relevance for the use of the racial epithet in this context (Exhibit 171), the court finds that the prosecution's reference to it cannot be exempted from a violation of § 745(a)(2).

In conclusion, while much of Officer Hoffman's testimony interpreting the various terms used in the defendants' rap lyrics was relevant to proving the gang enhancement, repeating the racial epithet used in Exhibits 172, 160, 188, and 171, was not relevant to proving the defendants were members of the gang under § 186.22(b). Its use cannot be exempted as relevant to the case. (§ 745(a)(2).

(C) The Use of Rap Lyrics and Videos Exhibited Implicit Bias Toward Defendants in Violation of § 745(a)(2)

Notwithstanding the court's finding that the language used by Officer Hoffman in interpreting the rap lyrics was not discriminatory because it was relevant to proving defendants' gang membership, the court concludes that the use of such relevant evidence more likely than not exhibited implicit bias and had a discriminatory impact in violation of § 745(a)(2). The findings in this ruling are specific to the circumstances of the present case. Based on the uncontradicted testimony of Ms. Kubrin, Ms. Bowman and Ms. Dennis, and because the trial court did not have the opportunity to assess the proposed rap lyrics for the implications of implicit bias before it was submitted to the jury, the court is now compelled to undertake heightened scrutiny in

its review of the record as well as the defense expert's testimony.

Based on the testimony of Ms. Kubrin, the court concludes that the use of defendants' rap lyrics and videos at their criminal trial, though not done to purposefully invoke racial bias, more likely than not triggered the jury's implicit racial bias against African American men and was in violation of § 745(a)(2).

The relevancy exception to the use of discriminatory language under § 745(a)(2) does not apply when an attorney or expert "otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745(a)(2).) The "relevancy" exception only applies to the use of discriminatory *language*⁵. Nor did the legislature afford an exception to explicit bias under § 742(a)(1)⁶. There is no exception under § 745(a)(1) to proving a violation when there is evidence of explicit bias exhibited by an attorney or expert involved in the case. Under either provision, an attorney or expert involved in the case that engages in implicit or express bias will be found to have violated the Act notwithstanding that the "language" used was "relevant to the case."

The danger in finding the language used by Officer Hoffman as "relevant to the case", without considering the racially discriminatory impact such evidence could have had on the jury, would be to undermine the purpose of the Act. The intent of the Legislature is "to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias." (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2(i).) It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. (*Id.*)

Furthermore, § 745 (a)(2) allows the court to look back at the language that was actually used at trial and the *impact* of that language even if such language was "relevant to the case". This is a very different question than a court ruling ahead of time what general evidence will or will not be admitted at trial. The Racial Justice Act did not yet exist at the time of trial, the language and conduct at issue was not

⁵ A violation under § 742(a)(2) is established if it is shown that "[d]uring the defendant's trial, in court and during the proceedings,...an attorney in the case..., an expert witness,...used racially discriminatory language about the defendant's race, ethnicity, or national origin... whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect."

⁶ That section provides that "[a] violation is established if the defendant proves, by a preponderance of the evidence, any of the following: The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror *exhibited bias* or animus towards the defendant because of the defendant's race, ethnicity, or national origin".)

legislatively prohibited at the time, and the court did not weigh that evidence under the new standards.

The legislature made clear that prior existing laws were ineffective in addressing racial bias. (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2(c).) It also cited the present case as evidence of the ineffectiveness of the existing legal framework. (*Id.* (c) ["Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish. For example, one justice on the California Court of Appeals recently observed the legal standards for preventing racial bias in jury selection are ineffective, observing that 'requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context.' (*Bryant*, 40 Cal.App.5th 525 (Humes, J., concurring))."]) Therefore, it cannot be assumed that the rap videos and lyrics would have been admitted at trial if § 745 had been in effect at the time.

None of the pre-RJA cases considered whether the manner in which a gang expert's testimony was used in relation to the rap lyrics would more likely than not constitute implicit racial bias against the defendant because of his race. The People are generally entitled to introduce evidence of a defendant's gang affiliation and activity if it is relevant to the charged offense. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655 (*McKinnon*)). "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*)). Even when it is relevant, however, "courts should carefully scrutinize evidence of a defendant's gang membership because such evidence 'creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.'" (*People v. Melendez* (2016) 2 Cal.5th 1, 28–29; see *People v. Williams* (1997) 16 Cal.4th 153, 193.)

Under the pre-RJA framework, a defendant's fundamental right to a fair trial⁷ was protected under Ev. Code § 352 which involved assessing "whether evidence, including gang evidence, [was] relevant, not unduly prejudicial and thus admissible, [which] rest[ed] within the discretion of the trial court." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225.) The earlier cases only address the prejudicial effect of rap lyrics as reflecting a generally violent attitude on the part of the defendant and

⁷ A defendant's due process right to a fundamentally fair trial is protected by weighing prejudice against probative value under Evidence Code § 352. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 ["[A] careful weighing of prejudice against probative value under [Evidence Code section 352] is [still] essential to protect a defendant's due process right to a fundamentally fair trial." (emphasis added)]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334; *People v. Falsetta* (1999) 21 Cal.4th 903, 919–920 [section 352 as providing a realistic safeguard from due process violations]; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.)

raising emotional bias against the defendant as an individual⁸. (*Olguin, supra*, 31 Cal.App.4th at p. 1373 ["[T]he mere fact the lyrics might be interpreted as reflective of a generally violent attitude could not be said 'substantially' to outweigh their considerable probative value."]; *Zepeda, supra*, 167 Cal.App.4th at p. 35 ["The language and substance of the [rap] lyrics, although graphic, did not rise to the level of evoking an *emotional bias against the defendant as an individual* apart from what the facts proved." (emphasis added).])

But the question of probative value versus prejudice is not the same question as whether language used at trial appealed to jurors' implicit biases against African American defendants. For the purpose of the § 745(a)(2) analysis, where there is gang evidence that was relevant to proving the defendant's gang involvement, and there is also evidence showing it is more likely than not that the use of rap lyrics and videos primed the jury for implicit racial bias based on stereotypes of African American men as violent, then the court remains compelled under § 745(a)(2) to ensure that defendant received a fundamentally fair trial. This is consistent with the intent of the legislature which declared that "[t]here is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised." (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2(h).)

Therefore, under this claim, the court is concerned not with the language used by the prosecution but with determining whether the prosecution and its use of Officer Hoffman's expert evidence "otherwise exhibited bias or animus towards the defendant because of the defendant's race..." (§ 745(a)(2).) The defendant claims that the use of rap lyrics as criminal evidence primed the jury for racial bias based on stereotypes of African American men as violent. For the reasons that follow, the court agrees.

The expert testimony of Ms. Kubrin and Ms. Dennis supports the conclusion that, whether purposefully or not, the prosecution's use of rap lyrics as evidence of Mr. Bryant and Mr. Jackson's commission of the charged offense and gang membership, premised their convictions on racially discriminatory evidence. It likely primed the jurors implicit bias regarding negative character evaluations of African American men as rap artists and as being associated with criminal.

In 2016, Ms. Kubrin conducted a study related to perceptions regarding the subject's feelings about the rap lyrics themselves. The race of the artist was not

⁸ In *People v. Johnson* (2019) 32 Cal.App.5th 26, 60, 62 [evidence of rap song written by victim admissible as evidence of the defendant's motive to kill the victim, a trial court has wide latitude to admit evidence relevant to motive [citation] and lyrics did not fall outside this broad discretion.]; *People v. Coneal* (2019) 41 Cal.App.5th 951, 953-954 [trial court erred by admitting into evidence five rap videos featuring the defendant or members of the defendant's gang when the rap videos had minimal probative value that was substantially outweighed by the highly prejudicial nature of the violent, inflammatory lyrics]; *State v. Skinner* (2014) 218 N.J. 496, 499, 95 A.3d 236 [affirmed reversal of an attempted murder conviction because the trial court had admitted rap lyrics written by the defendant that were violent, profane, and disturbing, yet had little or no probative value as to any alleged motive or intent].)

identified. The same lyrics were identified as rap or country music. After collecting the data, and running the analysis, she found that respondents who believed they were reading rap music lyrics evaluated them more negatively than respondents who believed they were evaluating country music lyrics even though the lyrics were identical.

In her 2018 study, Ms. Kubrin had a group in which the race of the artist was identified as white and in others, identified the artist's race as black, and she added a control condition where in the third group, the race of the artist was not identified. The 2018 study was an explicit test to isolate the impact of race and to test for racial bias. It failed to document the role of race independent of rap lyrics because people evaluated the lyrics negatively regardless of whether the rapper was identified as African American or white. Ms. Kubrin hypothesized this to be due in part to what is called social desirability bias, which is when individuals are afraid to reveal their potential racial biases for fear of essentially revealing concerns about race or identifying true feelings of race.

Ms. Kubrin testified that the results of the 2018 study demonstrated that there was an implicit association of rap music and "blackness" because there was an implicit negative bias against African Americans who authored the rap lyrics, where respondents, assuming they were authored by African Americans, went on to evaluate such artists significantly more negatively, and with respect to being involved in a gang and engaging in crimes.

Ms. Kubrin explained that the connection of rap to race was implicit based on the fact that where the race was unknown, subjects were asked what they thought the artists' race was, and 81 percent thought that the rap artist was black, and over 90 percent in the other condition, country or heavy metal thought the artist was white. Those who assumed the artist was black in the rap condition evaluated those artists as much less intelligent, more likely to engage in a crime, more likely to be part of a gang, relative to those subjects who guessed the artists were white in the heavy metal and country music condition, who they evaluated more positively, which meant more intelligent, less likely to be in a gang. Ms. Kubrin explained that it was in the subjects' evaluation of the rap lyrics, and their assumption that they were written by an African American artist, and their consequent negative evaluation, that reflected their implicit bias. By asking people to make assumptions about the race of the artist and seeing how those assumptions correlate with their perceived negative characterization of the artist, Ms. Kubrin was able to determine that race and rap are implicitly connected.

The court finds this theory is consistent with the opinion of Ms. Dennis who testified that Officer Hoffman, based on his testimony in interpreting rap lyrics, evidenced implicit bias against the defendants because of their African American race. Based on her research, Ms. Dennis had come to conclude that the use of rap lyrics relied upon either express or implicit bias regarding young black men. The reference

to and resort to lyrics created in the minds of listeners, decision makers, a connection to young black men, which then, in turn, played into or drew upon either express or implicit bias with respect to young black men being hyper-violent and criminal, and generally inferior. Ms. Dennis explained that this is an effect of the admission of rap lyrics in criminal cases regardless of whether or not the individual, here Officer Hoffman, was aware of these biases, and whether the individual is intentionally relying upon biases or not.

Therefore, according to the results of Ms. Kubrin's 2018 study, exposing the jury in defendants' criminal case to rap lyrics, which contained violent imagery and which were written by African American men, created the risk that it would trigger the jury's implicit bias against rap music, which implicitly is linked to African American artists and result in negative character evaluations of such artists. Because both defendants were identified as the artists of the rap lyrics introduced at trial, there was a substantial risk that, like those participants in the 2018 study, the jury would engage in implicit bias against the defendants and evaluate them as less intelligent, more likely to engage in a crime, and more likely to be part of a gang.

The People emphasized at the evidentiary hearing that there was no difference between how participants in the 2018 study had assessed white or black rap lyricists. Both races were negatively assessed. Therefore, the People asserted to Ms. Kubrin, that the study showed that race did not have an explicit effect on the evaluation of the rap artists. But the court finds credible Ms. Kubrin's opinion that the reason for this was due to social desirability bias, in which explicit racial bias was masked by the participants who, knowing race was a factor in the 2018 study, did not want to appear racially prejudiced and therefore altered their assessment of the rap artists' to ensure the same negative assessment resulted for both white and African American artists so as not to appear explicitly biased in how they responded regarding race.

It is for this reason that Ms. Kubrin testified that her opinion on the harmful consequences of relying on rap lyrics, authored by the defendants at a criminal trial, was unchanged even when the jury was aware that the lyrics were written by the defendants, who were African American. Under the 2018 study findings, it was determined that African American race and rap are implicitly connected. The conclusion was that rap and African Americans go hand in hand, and that, collectively, those together are likely to produce negative evaluations of artists who write rap lyrics. Ms. Kubrin testified that there were implicit associations of rap music and blackness based on the finding that those who thought that the rapper was African American evaluated them significantly more negatively, particularly with respect to being involved in a gang and engaging in crimes.

Accordingly, under the specific circumstances of the case, it was more likely than not that the prosecution's use of defendants' rap lyrics constituted a violation of § 745(a)(2).

(D) Discriminatory Gang Prosecutions in Contra Costa County

Defendants claim that the prosecution's use of racially coded rap lyrics occurred as part of a larger context of discriminatory gang prosecutions in Contra Costa County that disproportionately target African American individuals. The defendants assert that this is "relevant to determining whether language is discriminatory." (§ 745 (h)(3).)

In August 2021, Ms. Tess Andrea conducted an exhaustive search of the Westlaw database to locate all cases in which the Contra Costa District Attorney's Office presented music lyrics, of any genre, as evidence of guilt in criminal trials. She searched for both published and unpublished cases by entering the term "lyric" into the search bar. She then filtered those cases for criminal cases in the First District, which would cover Contra Costa County. She identified thirteen cases where the Contra Costa District Attorney's Office presented rap lyrics as evidence of guilt. Ten of defendants in these cases were identified as black defendants, and three of them were non-black, Latino. She opined that the lyrics were used at trial against the black defendants as primary evidence of guilt, that is for the truth of what the lyrics meant as direct evidence of guilt.

A search of West Law located the following Contra Costa homicide trials in which the prosecution introduced defendant-authored rap lyrics as evidence of guilt. Of those cases, ten involved African American defendants. (*People v. Michael Ticklers* (June 28, 2019) 5-150921-5, nonpub. opn. [black defendant]; *People v. Gill Turner* (Sept. 30, 2015) 5-121877-5, nonpub. opn. [black, defendant]; *People, v. Joseph Blacknell* (Oct. 20, 2015) A135721, 5-110816-6, nonpub. opn. [black defendant]; *People v. McCutchen* (March 11, 2014) 5-100762-4, nonpub. opn. [black defendant]; *People v. Bruce Scott* (2011) A123988, 5-071131-7, nonpub. opn. [black defendant]; *People v. S. Lopez* (Sep. 29. 2010, A125716, 5-050628-7, nonpub. opn. [Latino defendant]; *People v. Lee Greer* (Feb. 24. 2009) A118801, 5-060810-9, nonpub. opn. [black defendant]; *People v. Darren Pratcher* (Jun. 30, 2009) 5-050344-1, nonpub. opn. [black defendant].)

The court is disinclined to place any weight on the results of Ms. Andrea's research in light of the fact that she acknowledged that she had no idea how many cases there were, or the ethnicity involved in those cases, where rap lyrics or lyrics of any sort were introduced in Contra Costa County but simply did not come up in the appellate record. When asked about the specific cases where rap lyrics were used against black defendants, Ms. Andrea could not recall the specific facts of the cases, or how the rap lyrics were used as primary evidence of his guilt. Nor could she recall how the rap lyrics were used as primary evidence.

Accordingly, the court does not find any evidence of a pattern of discriminatory gang prosecutions in Contra Costa County that disproportionately target African American individuals in violation of § 745 (a)(2), § 745(h)(3).)

VII. Senate Bill 620 - Remand From First District Court of Appeal

The First District Court of Appeal in *People v. Bryant* (2019) 40 Cal. App. 5th 525, 528, 529 remanded the case for the trial court to exercise its discretion on whether to strike Mr. Bryant's and Mr. Jackson's firearm enhancements under Senate Bill 620. As to counts 1 to 3, the jury found true that Mr. Bryant and Mr. Jackson being principals, personally used a firearm (§ 12022.53 (b) & (e)(1), and that both defendants personally discharged a firearm (§ 12022.53 (c)) to count 1.

On October 11, 2017, the Governor approved Senate Bill 620, which amended § 12022.53(h) and § 12022.5(c). The legislation went into effect on January 1, 2018. As relevant here, § 12022.53(h) empowers the trial court "in the Interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53(h).)

The court finds the issue on remand as to whether to strike Mr. Bryant's and Mr. Jackson's firearm enhancements under Senate Bill 620 to be moot in light of the court's decision to order a new trial.

VIII. Motion to Strike Gang Enhancement - Senate Bill 333

The defendants filed a motion to dismiss all gang enhancements on the grounds that (1) the amendments made by the STEP Forward Act of 2021 (effective January 1, 2022, A.B 333, Stats. 2021, ch. 669) to § 186.22 apply retroactively; (2) the prosecution did not prove that the shooting allegedly committed provided any benefit, other than reputational, to Broad Day; and (3) the prosecution did not prove Broad Day was an organized association.

On November 18, 2021, the STEP Forward Act of 2021 was signed into law, effective January 1, 2022. Section 186.22 (b)(1) states that "a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote further or assist in criminal conduct by gang members, shall...be punished as follows...." (§ 186.22 (b)(1).)

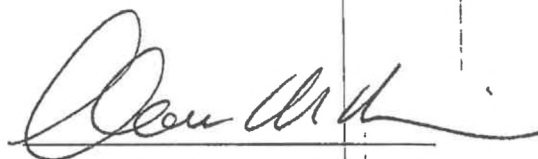
The most pertinent changes to § 186.22 fall under subsections (e), (f), and (g). First, the legislature added § 186.22 (e)(2) which prevents the prosecution from using the "currently charged offense" to "establish[] [a] pattern of gang activity." Second, the legislature strengthened the definition of a "criminal street gang to require proof of an "ongoing, organized association." (§ 186.22 (f).) Finally, the legislature narrowed the requirement to prove a person's specific intent to "benefit, promote,

The court finds, however, that the motion to dismiss the gang enhancements under Senate Bill 333 to be moot in light of the court's decision to order a new trial.

IX. Disposition

The court, having found that the defendants' convictions were obtained in violation of § 745(a), vacates the conviction and sentence, finding that it is legally invalid, and orders a new trial consistent with § 745(a). (§§ 745(e)(A)(2), (4).)

October 3, 2022



Judge Clare Maier
Superior Court of Contra Costa
County

cc: Evan Kuluk, Deputy Public Defender
Matthew O'Connor, Deputy Public Defender
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