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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF ALAMEDA**

13 **THE PEOPLE OF THE STATE OF)**
14 **CALIFORNIA,)**

Docket: H10662

15 **PLAINTIFF/RESPONDENT,)**

PETITION FOR RELIEF

16 **v.)**

Dept.: 13

17 **FRANKLIN LYNCH,)**

Date: Dec. 13, 2024

Time: 9:00 a.m.

18 **DEFENDANT/PETITIONER,)**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. UNLAWFUL RESTRAINT 1

III. JURISDICTION..... 2

IV. JUDICIAL NOTICE AND INCORPORATION 2

V. PROCEDURAL HISTORY 2

VI. THE CLAIMS IN THIS PETITION ARE NOT BARRED..... 3

VII. SCOPE OF CLAIMS AND EVIDENTIARY BASIS 4

VIII. CLAIMS FOR RELIEF 5

A. Claim One: Racial Bias Pervaded Mr. Lynch’s Case..... 5

 i. The Racial Justice Act Provides Petitioners Like Mr. Lynch a Mechanism to Address Racial Bias in their Criminal Proceedings 6

 ii. Racial Bias in Jury Selection..... 7

 iii. Racial Bias in Guilt-Phase Proceedings 46

 iv. Racial Bias in Juror Deliberations at Guilt 53

B. Claim Two: Trial Counsel Failed to Develop Readily Available Exculpatory Evidence..... 54

IX. CONCLUSION..... 59

X. PRAYER FOR RELIEF..... 59

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

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Bennett v. Stirling, 842 F.3d 319 (4th Cir. 2016) 54

Buck v. Davis, 580 U.S. 100 (2017)..... 54

Ervin v. Davis, 12 F.4th 1102 (9th Cir. 2021) 12

Flowers v. Mississippi, 588 U.S. 284 (2019)..... passim

Foster v. Chatman, 578 U.S. 488 (2016)..... 9, 10

Haworth v. Superior Court, 50 Cal.4th 372 (2010)..... 48

Hovey v. Superior Court, 28 Cal. 3d 1 (1980)..... 20

In re Clark, 5 Cal. 4th 750 (1993) 3

In re Friend, 11 Cal. 5th 720 (2021)..... 2, 3, 4

In re Johnson, 62 Cal.2d 325 (1965) 60

In re Mason, 916 F.2d 384 (7th Cir. 1990)..... 48

In re Newbern, 53 Cal.2d 786 (1960) 60

In re Osslo, 51 Cal.2d 371 (1958)..... 60

In re Reno, 55 Cal. 4th 428 (2012) 2

In re Smiley, 66 Cal.2d 606 (1967)..... 60

In re William M., 3 Cal.3d 16 (1970)..... 60

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 7

Johnson v. Premo, 399 P.3d 431 (Or. 2017)..... 54

Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006)..... 31, 45

Miller-El v. Dretke, 545 U.S. 231 (2005) 9, 30, 46

Mitcham v. Davis, 103 F. Supp. 3d 1091 (N.D. Cal. 2015)..... 10, 29

1	<i>People v. Bryant</i> , 40 Cal. App. 5th 525 (2019).....	8
2	<i>People v. Ford</i> , 45 Cal. 3d 431 (1988)	5
3	<i>People v. Holmes, et al.</i> , 12 Cal.5th 719 (2022).....	31
4	<i>People v. Jackson</i> , 1 Cal. 5th 269 (2016)	20
5	<i>People v. Lewelling</i> , 216 Cal. App. 5th 273 (1st Dist. App. 2017)	5
6	<i>People v. Nadey</i> , 555 P.3d 961 (Cal. 2024).....	8, 25, 26, 31
7	<i>People v. Romero</i> , 8 Cal.4th 728 (1994).....	60
8	<i>People v. Superior Court (Jones)</i> , 12 Cal.5th 348 (2021)	10
9	<i>People v. Wheeler</i> , 22 Cal. 3d 258 (1978)	13, 28
10	<i>People v. Williams</i> , 56 Cal. 4th 630 (2013)	8
11	<i>People v. Willis</i> , 27 Cal. 4th 811 (2002).....	13
12	<i>People v. Wilson</i> , 16 Cal.5th 874 (2024)	6
13	<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	16
14	<i>Rose v. Mitchell</i> , 443 U.S. 545 (1979).....	54
15	<i>See Ervin v. Davis</i> , 12 F.4th 1102 (9th Cir. 2021).....	46
16	<i>Snyder v. Louisiana</i> , 552 U.S. 472 (2008).....	8, 9, 31, 45
17	<i>State v. Saintcalle</i> , 178 Wash. 2d 34 (2013).....	8
18	<i>State v. Zamora</i> , 512 P. 3d 512 (Wash. 2022)	49
19	<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1880).....	9
20	<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	54
21	<i>Swain v. Alabama</i> , 380 U.S. 202 (1965).....	9
22	<i>Turner v. Murray</i> , 476 U.S. 28 (1986).....	8
23	<i>United States v. Vasquez-Lopez</i> , 22 F.3d 900 (9th Cir. 1994).....	8
24	<i>Young v. Superior Court of Solano County</i> , 79 Cal.App.5th 138 (2022).....	7
25		
26		
27		
28		

Statutes

1	Cal. Penal Code § 1172.1.....	2
2	Cal. Penal Code § 1473.....	2, 4
3	Cal. Penal Code § 745.....	passim
4	Cal. Evid. Code § 452.....	2
5	Cal. Evid. Code § 955.....	5
6		
7	Other Authorities	
8	Alameda County District Attorney, Press Conference (July 16, 2024).....	6, 7
9	Ryan Patrick Alford, <i>Appellate Review of Racist Summations: Redeeming the Promise of</i>	
10	<i>Searching Analysis</i> , 11 Mich. J. Race & L. 325 (2006).....	51, 52
11	Assem. Bill No. 2542.....	passim
12	Stephanie Becker & Elizabeth Wolfe, <i>Prosecutors in Alameda County Death Penalty Cases May</i>	
13	<i>Have Acted Criminally During Trials, District Attorney Says</i> , CNN (June 25, 2024).....	26
14	Linda L. Berger & Kathryn M. Stanchi, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE	
15	SCIENCE 105 (2018)	17, 28
16	Mary Nicol Bowman, <i>Confronting Racist Prosecutorial Rhetoric at Trial</i> , 71 Case W. Rsrv. L.	
17	Rev. 39 (2020)	17, 49
18	Glenn Chapman, <i>A Passionate Foe of Killers Cedes the Stage</i> , Oakland Tribune (Oct. 7, 2004)	11
19	Jennifer Gonnerman, <i>An Investigation Into How Prosecutors Picked Death-Penalty Juries</i> , The	
20	New Yorker (Nov. 18, 2024).....	13
21	Patricia G. Devine & Sara M. Baker, <i>Measurement of Racial Stereotype Subtyping</i> , 17	
22	Personality & Soc. Psych. Bull. 44 (1991)	17
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24	26
25	Erik James Girvan, <i>On Using the Psychological Science of Implicit Bias to Advance Anti-</i>	
26	<i>Discrimination Law</i> , 26 Geo. Mason U. Civ. Rts. L. J. 1 (2015).....	19
27	Phillip Atiba Goff, et al., <i>Not Yet Human: Implicit Knowledge, Historical Dehumanization, and</i>	
28	<i>Contemporary Consequences</i> , 95 J. Per. & Soc. Psych. 292 (2008).....	49, 50
	David Hernandez, <i>Alameda County DA Backs Resentencing for Man on Death Row for</i>	
	<i>Toddler's Murder</i> , San Francisco Chronicle (Oct. 31, 2024).....	26
	Shana Heller, <i>Dehumanization and Implicit Bias: Why Courts Should Preclude References to</i>	
	<i>Animal Imagery</i> , 51 Crim. Law Bulletin 4 (Summer 2015).....	50

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Predator, Wikipedia 46

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Constitutional Provisions

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Cal. Const. art. I, § 15 2, 53

Cal. Const. art. I, § 16 2, 53

Cal. Const. art. I, § 17 2, 53

1	Cal. Const. art. I, §§ 7	53
2	Cal. Const. art. VI, § 11	2, 48
3	Cal. Const. art. VI	10
4	U.S. Const. amend. VI	10, 48, 53, 54
5	U.S. Const. amend. VIII.....	53, 54
6	U.S. Const. amend. XIV	10, 48, 53, 54
7		
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1 **I. INTRODUCTION**

2 Defendant/Petitioner Franklin Lynch, through undersigned counsel, hereby petitions this
3 Court for relief from his conviction and sentence. Although Mr. Lynch was recently resentenced
4 from death to life without the possibility of parole, due to the People’s use of racialized rhetoric
5 and practices, both his conviction and sentence remains infected with racial bias. Further, his
6 convictions’ reliability is undermined by trial counsel’s failure to test available forensic
7 evidence.

8 The racial bias in this case was repeatedly introduced by the prosecutor, Assistant District
9 Attorney James Anderson, who, from jury selection to closing arguments, injected his own
10 discriminatory views. His jury selection practices explicitly and dramatically disfavored Black
11 prospective jurors, who he repeatedly excluded on the basis of their race. Further, he used
12 denigrating language to describe Mr. Lynch such that the State has already conceded it required
13 sentencing relief, though his use of it was not limited to the penalty phase of Mr. Lynch’s trial.

14 Mr. Lynch has been incarcerated since the Reagan administration and, as highlighted
15 elsewhere, poses virtually no risk of recidivism.¹ Resp. to People’s Mot. at 37–40 (Oct. 17,
16 2024). He has not had a significant disciplinary issue this century, and he has gone out of his way
17 to involve himself in self-improvement and helping others, notwithstanding his lengthy time on
18 death row. *Id.* at 37–40 (Oct. 17, 2024); Supp. Br. at 1–35 (Oct. 23, 2024). Moreover, his
19 heretofore unaddressed history of trauma and fetal alcohol spectrum disorder provide powerful
20 mitigating evidence. Supp. Br. at 1–35 (Oct. 23, 2024). Mr. Lynch’s sound record while
21 incarcerated, his current medical condition, and the serious doubts about the reliability and
22 fairness of his conviction undermine any penological rationale for his continued confinement.

23 At a minimum, Mr. Lynch requires a new trial.

24 **II. UNLAWFUL RESTRAINT**

25 Mr. Lynch is unlawfully confined under a sentence of life without the possibility of
26 parole by the California Department of Corrections and Rehabilitation (CDCR) pursuant to
27

28 ¹ Even if Mr. Lynch did pose such a risk—which he does not—his recently updated medical records confirm that his arthritis confines him to a wheelchair. Ex. 14.

1 Alameda Superior Court’s judgment in *People v. Lynch*, H-10662. He is presently housed at the
2 California State Prison, Richard J. Donovan Correctional Facility in San Diego. The Warden
3 there is James Hill. The Secretary of CDCR is Jeff Macomber.

4 **III. JURISDICTION**

5 This Petition is filed under article VI, section 11 of the California Constitution and
6 California Penal Code sections 745(b) and 1473(e). Mr. Lynch’s sentence is illegal and violates
7 the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 7,
8 15, 16, and 17 of the California Constitution. It also violates the Racial Justice Act (RJA). Cal.
9 Pen. Code § 745(a).

10
11 The issues presented in the claims below could not have been considered in a prior
12 habeas petition. Any failure to have previously presented them is attributable either to the
13 State—by suppressing the basis for them—, their prior unavailability as a matter of law, or prior
14 counsel’s ineffectiveness in failing to raise them. *See In re Friend*, 11 Cal. 5th 720, 731, 736
15 (2021).

16 **IV. JUDICIAL NOTICE AND INCORPORATION**

17
18 Mr. Lynch incorporates by reference, and bases his claims upon, the full record in *People*
19 *v. Lynch*, H10662; *People v. Lynch*, S026408; *In re Lynch*, S158710; and *Lynch v. Davis*, 3:18-
20 cv-00044 (N.D. Cal.). Mr. Lynch requests that this Court take judicial notice of the record on
21 appeal and in the petitions filed in his cases. *See* Cal. Evid. Code § 452; *In re Reno*, 55 Cal. 4th
22 428, 444 (2012) (noting “petitioners may cite by reference prior briefing, petitions, appellate
23 transcripts, and opinions in the same case”).

24 **V. PROCEDURAL HISTORY**

25
26 Much of the procedural history is set forth in the People’s recent filing in this case.
27 Motion to Resentence Petitioner to Life Without the Possibility of Parole Pursuant to California
28 Penal Code Section 1172.1 or in the Alternative Stipulation to Relief Pursuant to Section 745

1 (“People’s Motion”) at 4–6 . The People’s Motion included a concession that certain comments
2 from the prosecutor in penalty phase arguments violated the RJA. People’s Motion at 13–15. The
3 People’s Motion was not contingent on Mr. Lynch waiving his rights to pursue further relief in
4 his case.

5
6 In response to the People’s Motion, Mr. Lynch sought a sentence less than life without
7 the possibility of parole. Resp. to People’s Mot. at 42. On October 24, this Court heard argument
8 on the People’s Motion and granted it, resentencing Mr. Lynch to life without the possibility of
9 parole.

10 VI. THE CLAIMS IN THIS PETITION ARE NOT BARRED

11 The Claims set forth below are not subject to a successiveness bar. California Penal Code
12 section 1473(e), which applies to habeas petitions under the RJA, provides, “A petition raising a
13 claim of this nature for the first time, or on the basis of new discovery provided by the state or
14 other new evidence that could not have been previously known by the petitioner with due
15 diligence, shall not be deemed a successive or abusive petition.” Further, a claim is not subject to
16 the successor bar if either of two conditions are met. First, a claim is not barred as successive if
17 the petitioner provides “adequate” justification for failing to present his or her claims in an
18 earlier petition. *In re Clark*, 5 Cal. 4th 750, 774–75 (1993). “Adequate justifications include the
19 inability to bring the claim earlier, as where the claim depends on newly available evidence or on
20 a change in the law that has been made retroactively applicable to final judgments.” *In re Friend*,
21 11 Cal. 5th 720, 728 (2021) (citing *Clark*, 5 Cal. 4th at 775). Additionally, “ineffective assistance
22 of prior [habeas] counsel may justify raising a claim in a subsequent petition.” *Id.* at 731 (citing
23 *Clark*, 5 Cal. 4th at 780).

24 Here, an adequate justification exists for each of the claims below. Claim One centers on
25 the recently disclosed notes of prosecutor James Anderson, and seeks relief based on the RJA,
26 which was only recently made retroactively applicable. As such, there are at least two adequate
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1 justifications for raising Claim One now. First, this is the first petition alleging claims under the
2 RJA in Mr. Lynch’s case, and second, Anderson’s notes, which provide a basis for the claim,
3 “could not have been previously known by the petitioner with due diligence.” Cal. Pen. Code §
4 1473(e).

5
6 Claim Two relates to trial counsel’s failure to conduct forensic testing on certain items of
7 exculpatory evidence. Prior state habeas corpus counsel failed to raise this claim despite
8 recognizing its merit, having raised a claim that the People’s failure to disclose the exculpatory
9 value of that evidence was a *Brady* violation. Pet. for Writ of Hab. Corpus, S158710 at 48–97.
10 No reasonable explanation can account for state habeas counsel’s failure to raise the claim about
11 trial counsel’s failure to test. And for the same reasons trial counsel was deficient for failing to
12 conduct the testing, *infra*, state habeas counsel was ineffective for failing to raise the related trial
13 counsel ineffectiveness claim. *See Friend*, 11 Cal. 4th at 780. Thus, there is also an adequate
14 basis for considering Claim Two.
15

16 VII. SCOPE OF CLAIMS AND EVIDENTIARY BASIS

17 Efforts to obtain the full factual basis for each of these claims—and other potential
18 claims—remains ongoing. Moreover, a reasonable opportunity for full factual investigation and
19 development through access to subpoena power and other means of discovery, to interview
20 material witnesses without interference from State actors, and an evidentiary hearing have not
21 yet been provided to Mr. Lynch. Nonetheless, the evidentiary bases that have been reasonably
22 obtainable and set forth below adequately support each claim and justify an issuance of an order
23 to show cause and relief.
24

25 The filing of this Petition does not constitute a waiver, express or implied, of any
26 applicable privilege or protection, including, but not limited to, the privilege against self-
27 incrimination, the attorney-client communication privilege, and the work-product protection. *See*
28

1 Cal. Evid. Code § 955; *Bittaker v. Woodford*, 331 F.3d 715, 722–23 (2003); *People v. Ford*, 45
2 Cal. 3d 431, 436 (1988).

3 **VIII. CLAIMS FOR RELIEF**

4 Mr. Lynch, who is Black, was convicted of victimizing white, elderly women based on
5 weak circumstantial evidence largely consisting of cross-racial eyewitness identifications, an
6 intrinsically problematic kind of evidence.² Indeed, the jury required over four days of liability
7 deliberation to return its guilty verdict. 32 RT 4258–77; see *People v. Lewelling*, 216 Cal. App.
8 5th 273, 299 (1st Dist. App. 2017) (jury deliberations for “the better part of four days” indicates
9 “close case”).

11 As described below, Mr. Lynch’s trial was unfair and unreliable, both because it was
12 poisoned with racial bias, primarily courtesy of disgraced prosecutor James Anderson, and due to
13 defense counsel’s failure to develop readily available exculpatory evidence. Mr. Lynch is entitled
14 to a new trial as a matter of state and federal law.

16 **A. Claim One: Racial Bias Pervaded Mr. Lynch’s Case**

17 The State has confessed to one instance of racial bias in Mr. Lynch’s case in the penalty
18 phase, resulting in resentencing relief. The State has conceded that when ADA Anderson,
19 referred to Mr. Lynch as a “human reptile,” the State violated the RJA. People’s Motion at 13.
20 That reference was a callback to the reptilian villain in the movie *Predator* (released in 1987), a
21 non-human monster Anderson repeatedly referenced in guilt- and penalty-phase opening and
22 closing statements.

23 However, these remarks are but the tip of the iceberg of the racial bias that infected Mr.
24 Lynch’s trial. From jury selection to the People’s opening guilt-phase statements through to its
25 closing arguments, the State injected racial animus into these proceedings. As the District
26 Attorney’s Office has been able to acknowledge belatedly in other cases, the “[r]acist imagery

27 ² Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial*
28 *Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821, 1822 n.8 (2003) (observing high error rate
of cross-racial identifications and collecting scientific literature regarding the same).

1 and stereotyping used by prosecutor James Anderson during the trial from opening statement to
2 the penalty phase essentially undermined the integrity of this conviction.” Alameda County
3 District Attorney, Press Conference (July 16, 2024), available at <http://tiny.cc/17vqzz> (attached
4 as Exhibit 15).

5 **i. The Racial Justice Act Provides Petitioners Like Mr. Lynch a Mechanism to**
6 **Address Racial Bias in their Criminal Proceedings**

7 The Legislature passed the Racial Justice Act in 2020 with a stated aim “to eliminate
8 racial bias from California’s criminal justice system” and “to ensure that race plays no role at all
9 in seeking or obtaining convictions or in sentencing.” *People v. Wilson*, 16 Cal.5th 874 (2024)
10 (citing Stats. 2020, ch. 317, § 2, subd. (i)). Seeking to address the failure of courts to remedy
11 racial bias, the Legislature departed from traditional jurisprudence in crafting the RJA. Assem.
12 Bill No. 2542 (Stats. 2020, ch. 317, § 2, subd. (c)). The legislation recognizes that “racial bias is
13 often insidious, and that purposeful discrimination is often masked and racial animus disguised.”
14 Assem. Bill No. 2542 (Stats. 2020, ch. 317, § 2, subd. (h)).

15 The RJA provides four pathways for a defendant to prove a violation under a
16 preponderance of the evidence standard. Cal. Pen. Code § 745(a)(1)-(4), (c)(2). First, a violation
17 will be found under the RJA when a trial actor (defined as attorneys in the case, experts, jurors,
18 judge or law enforcement officer) “exhibited bias or animus towards the defendant because of
19 the defendant’s race, ethnicity, or national origin.” Cal. Pen. Code § 745(a)(1). Additionally, the
20 RJA prohibits trial actors in the proceeding from “us[ing] racially discriminatory language about
21 the defendant’s race, ethnicity, or national origin, or otherwise exhibit[ing] bias or animus
22 towards the defendant because of the defendant’s race, ethnicity, or national origin, whether or
23 not purposeful.” Cal. Pen. Code § 745(a)(2). A defendant can also show a violation of the RJA
24 by showing, in charging and sentencing, disparities based on the defendant’s race, ethnicity, or
25 national origin in the county in which they were prosecuted. Cal. Pen. Code § 745(a)(3). Further,
26 an RJA violation is established upon a showing of sentencing disparities in the county in
27 question due to the victim’s race, ethnicity, or national origin. Cal. Pen. Code § 745(a)(4). Courts
28 applying the RJA have noted that all four subdivisions “are not isolated pathways to proving a

1 violation, but in a given case [...] may work in tandem.” *Young v. Superior Court of Solano*
2 *County*, 79 Cal.App.5th 138, 164 (2022).

3 The RJA was made retroactive to capital cases in 2023. Cal. Pen. Code § 745(j)(2);
4 Assembly Bill 256 (2022-2023 Reg. Sess.). In retroactive cases, a petitioner will prevail “unless
5 the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.”
6 Cal. Pen. Code § 745(k).

7 **ii. Racial Bias in Jury Selection³**

8 James Anderson tried Mr. Lynch in the fall of 1991 and spring of 1992. Anderson was
9 responsible, among other things, for the entirety of the People’s representation in jury selection.
10 As his recently disclosed jury selection notes in this case reveal, Anderson tracked the race of
11 Black—and only Black—prospective jurors, systematically rated Black venire members
12 unfavorably, crafted pretextual reasons to justify strikes, and, as revealed by the entirety of the
13 record, based his use of peremptory strikes on the race of the four Black prospective jurors he
14 struck. Ex. 1 (jury selection notes of James Anderson). His behavior in this case was consistent
15 with the actions he undertook in other cases, including his pattern of targeting Black women to
16 exclude from jury service. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (“gender,
17 like race, is an unconstitutional proxy for juror competence and impartiality”). While Anderson
18 refrained from striking certain Black venire members, who were then seated on Mr. Lynch’s jury
19 (*infra* at 31), his restraint with respect to those three individuals reflects the extremely pro-
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23 ³ The District Attorney’s Office has been in possession of this argument since this summer. They
24 have not yet conceded that Anderson discriminated on the basis of race in jury selection. Perhaps
25 after completing discovery related to these issues—including obtaining files and deposing former
26 members of the District Attorney’s Office—they will be in a position to confess error in this
27 specific case, in addition to acknowledging the “systemic” *Batson* violations and destruction of
28 related evidence that prompted the District Attorney to call for a Department of Justice
investigation into her own office. Alameda County District Attorney, Press Conference (July 16,
2024), available at <http://tiny.cc/17vqzz>. Thus, counsel for the People have indicated that they
would have no objection to amendment of this Petition in light of disclosures related to the
ongoing informal discovery process.

1 prosecution views they espoused and a calculus to avoid scrutiny for the discriminatory strikes
2 against the four venire members set forth herein. Indeed, the record in this case, as it has recently
3 developed via the disclosure of Anderson’s notes, reflect grave problems with the People’s use
4 of strikes. *Infra* at 27 (discussing *People v. Nadey*, 555 P.3d 961, 1030 (Cal. 2024) (Liu, J., &
5 Evans, J., dissenting from denial of stay to rehear Nadey’s direct appeal after a remand for
6 factual development concerning, inter alia, the notes at issue in Mr. Lynch’s case).

8 In its findings and declarations in support of the RJA, the Legislature specifically called
9 out racial bias in jury selection. Three of the four cases it cited to show that then-existing law
10 failed to sufficiently address discrimination in the criminal justice system, concerned allegations
11 of racial bias in jury selection. A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (c) (citing *State v.*
12 *Saintcalle*, 178 Wash. 2d 34, 35 (2013); *Turner v. Murray*, 476 U.S. 28, 35 (1986); and *People v.*
13 *Bryant*, 40 Cal. App. 5th 525, 543–49 (2019) (Humes, J., concurring)). According to the
14 Legislature, one of the reasons for this failure was that defendants often needed to prove
15 purposeful discrimination, a “nearly impossible” task. *Id.* The Legislature again pointed to
16 *Bryant*, a jury selection case, when it described how difficult it is to establish purposeful
17 discrimination and how existing standards fail to prevent racial bias. *Id.* The Legislature also
18 found that “[c]urrent legal precedent often results in courts sanctioning racism in criminal trials,”
19 including that “appellate courts must defer to the rulings of judges who make racially biased
20 comments during jury selection.” A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (d) (citing *People v.*
21 *Williams*, 56 Cal. 4th 630, 652 (2013)).

24 Since the watershed decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), “in the eyes of
25 the Constitution, one racially discriminatory peremptory strike is one too many” and requires a
26 new trial. *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019); *see also Snyder v. Louisiana*, 552
27 U.S. 472, 478 (2008) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)

1 (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory
2 purpose”). As discussed below (§ D), a comparative analysis of “prospective jurors who were
3 struck and not struck can be an important step in determining whether a [constitutional] violation
4 occurred.” *Id.* at 311 (citing *Snyder*, 552 U.S. at 483–84; *Miller-El v. Dretke*, 545 U.S. 231, 241
5 (2005)). In that analysis, attention to the whole record is warranted, but the prosecutor’s stated
6 reasons for a strike—and whether they pass muster—are salient. *See id.* at 314 (noting whether
7 prosecutor’s stated reasons were supported by the record).
8

9 At trial, Mr. Lynch’s counsel did not object to any of Anderson’s peremptory strikes and
10 thereby failed to make a record, pursuant to *Batson*, of the People’s proffers of purportedly race-
11 neutral rationale for each given strike and, in turn, the trial court’s evaluation of whether the
12 record established the prosecution’s “purposeful discrimination.” *Batson*, 476 U.S. at 98. But
13 extra-record evidence, including a prosecutor’s jury selection notes, may emerge long after the
14 trial to establish an Equal Protection Clause violation. *See Foster v. Chatman*, 578 U.S. 488, 499
15 (2016) (citing *Batson*, 476 U.S. 79) (granting relief on Equal Protection Clause violation
16 evidenced and litigated in state post-conviction); *Miller-El*, 545 U.S. at 240 (examining
17 information “beyond the case at hand” to determine whether the People’s proffered reasons for a
18 strike are false and thereby “raise an inference of purposeful discrimination”); *Swain v. Alabama*,
19 380 U.S. 202, 223 (1965) (ruling systematic racial exclusion across a county’s prosecutions
20 violates the Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (ruling
21 statutory exclusion of Black people from grand and petit jury service violates the Equal
22 Protection Clause). Further, pattern and practice established in various trials, too, may establish
23 such jury discrimination. *Flowers*, 588 U.S. at 305.
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26 Indeed, in other remarkably similar circumstances, courts have found that a prosecutor’s
27 notes are “not only relevant, but dispositive” in establishing a constitutional violation. *People v.*
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1 *Superior Court (Jones)*, 12 Cal.5th 348, 359 (2021) (citing *Foster*, 578 U.S. at 514); *see also*,
2 *e.g.*, *Mitcham v. Davis*, 103 F. Supp. 3d 1091, 1097 (N.D. Cal. 2015). Here, as in these cases,
3 “the prosecutor’s notes revealed a singular focus on the jurors’ race that ‘plainly demonstrate[d]”
4 a concerted effort to keep black prospective jurors off the jury.” *Jones*, 12 Cal.5th at 359
5 (quoting *Foster*, 578 U.S. at 514).

6
7 Although *Batson* provides an inquiry or “process” for establishing discrimination, it is
8 the discriminatory exclusion of jurors on the basis of race that violates the Constitution. *See*
9 *Foster*, 578 U.S. at 499; *Flowers*, 588 U.S. at 298. Here, Anderson repeatedly discriminated. His
10 notes manifest an unrelenting practice of denoting the race of Black prospective jurors—and
11 only the Black venire. He ranked Black prospective jurors substantially lower on his list than all
12 others. He preemptively crafted pretextual reasons to justify race-based strikes. He disparately
13 questioned Black prospective jurors during voir dire. He exercised preemptory strikes against
14 four Black prospective jurors, three of whom were women, because of their race and gender.
15 Each step of his system, documented by the chief of capital prosecutions in Alameda County,
16 infected Mr. Lynch’s trial with racial bias and represents the invidious discrimination which the
17 Constitution prohibits and which the Racial Justice Act was adopted to eliminate. *See* Cal. Pen.
18 Code § 745. These violations constituted structural error and violate state and federal law. *See*
19 U.S. Const. amends VI, XIV; Cal. Const. Art. VI; Cal. Pen. Code § 745.

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21
22 **a. James Anderson Prosecuted This Case**

23 ADA Anderson began working for the Alameda County District Attorney’s office in
24 1969. Ex. 2 at 8. From 1985 until his retirement in 2004, he prosecuted capital cases there and,
25 starting in “late ’91, early ’92,”—right at the time of Mr. Lynch’s trial—ascended to the “head of
26 the death penalty team.” *Id.* at 9.

1 Anderson cultivated a reputation as a man who made “prosecuting death penalty cases his
2 life’s work.” Dashka Slater, *The Death Squad*, East Bay Express (Sept. 25, 1992), reprinted in
3 Nina Rivkind et al., *Cases and Materials on the Death Penalty* 316–27 (3d ed. 2009), attached as
4 Ex. 3. In his office he curated “The Wall of Shame,” displaying the framed mug shot of each
5 person he prosecuted whom a jury sentenced to death. Glenn Chapman, *A Passionate Foe of*
6 *Killers Cedes the Stage*, Oakland Tribune (Oct. 7, 2004), attached as Ex. 4. Even his sports car’s
7 vanity license plate touted this identity, reading “190 PC, the penal code section defining the
8 kinds of murder that qualify for punishment by execution.” *Id.* He blithely regarded death
9 penalty litigation, remarking in 1992, “I always said I’d leave this job when it stopped being fun
10 . . . So far it’s still fun.” Ex. 3. He also considered his personal role on par with the Four
11 Evangelists: “That strong Catholic upbringing—thou shalt not kill, plunder, rape . . . that made a
12 big impression on me. It’s Matthew, Mark, Luke, John and me.” Ex. 4 at 1.

15 He did not hide his views of the people whose executions he sought. He called them
16 “subhumans.” Ex. 3 at 4. He labelled them “vermin, reptiles, hyenas or worse.” Ex. 4 at 2. And
17 he called the people he put on death row, the overwhelmingly Black men whose pictures he
18 proudly displayed on his office wall, “my boys.” Ex. 3 at 4. As very recent disclosures have
19 betrayed, Anderson’s racism has tainted these prosecutions—and, as set forth herein, none more
20 so than Mr. Lynch’s.

22 In courting controversy, Anderson believed he was untouchable. On the occasion of his
23 retirement he explained, “‘There was nothing we couldn’t get away with,’ Anderson said with a
24 mischievous smirk. ‘We cut a wide swathe through things, but we produced a lot of results . . .
25 You don’t know how much fun we had.’” Ex. 4 at 2 (quoting Anderson).

26 Anderson’s jury selection practices, revealed by his own notes, reflect ardent
27 discriminatory intent. Anderson exhibited racial bias both inside the court with his jury selection
28

1 practices, *see* Cal. Pen. Code § 745(a)(2), and outside the court with his endorsement of race-based
2 jury selection, including in his notations, *see* Cal. Pen. Code § 745(a)(1). Race was a major
3 consideration in Anderson’s jury selection strategy, and in this case, he was consciously biased
4 against jurors of the same race as Mr. Lynch. Across his cases, he singled out Black and Jewish
5 prospective jurors for exclusion and he was especially wary of seating Black women jurors.
6

7 In a case Anderson tried just a year before Mr. Lynch’s, the Ninth Circuit noted he made
8 “misrepresentations of the record” in attempting to justify striking Black prospective jurors.
9 *Ervin v. Davis*, 12 F.4th 1102, 1107 (9th Cir. 2021), attached as Ex. 5; *see Flowers*, 588 U.S. at
10 314 (“[W]hen considered with other evidence of discrimination, a series of factually inaccurate
11 explanations for striking black prospective jurors can be telling.”). In that case, Anderson struck
12 every single Black female juror, six of six. Ex. 9 at 7–8.
13

14 In 2004 to 2005, a controversy over excluding Jewish and Black prospective jurors
15 embroiled Alameda prosecutors in another capital case, this one tried in 1987. Ex. 6. Although
16 the Alameda County Superior Court ultimately concluded that such discrimination did not occur
17 in that case, Ex. 6, Anderson suggested otherwise in statements to the media. He claimed that
18 excluding Black and Jewish prospective jurors is “not a racist thing, but just common sense . . . It
19 is an axiom. It is not because of prejudice. Their politics are not going to be on your side.” Dean
20 E. Murphy, *Case Stirs Fight on Jews, Juries and Execution*, *New York Times* (Mar. 16, 2005),
21 attached as Ex. 7. That view was something Anderson internalized from advice he purportedly
22 had received from a judge. “When I was a young D.A., [the judge] would tell me, ‘If you have a
23 cop case, be careful of blacks on the jury, because they don’t like cops,’ Mr. Anderson said. I
24 heard him tell defense lawyers: ‘Be careful of Asians. They are very law-and-order oriented.’”
25 *Id.* Anderson believed it to be an established, “axiom[atic]” truth that as a group, Black and
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1 Jewish jurors held views that biased them against the State by sole virtue of their belonging to
2 that racial or ethnic group, and it was necessary to remove them on those bases. *See id.*

3 At this late date, Anderson newly avows he did not abide by the racial views that he had
4 publicly espoused as axiomatic. Jennifer Gonnerman, *An Investigation Into How Prosecutors*
5 *Picked Death-Penalty Juries*, The New Yorker (Nov. 18, 2024) attached as Ex. 15. As proof, he
6 points to irrelevant facts, such as a jury’s ability to return a life verdict for a Black defendant. *Id.*
7 He also claimed, erroneously, that recent resentencing decisions in his cases were only for Black
8 defendants. *Id.*

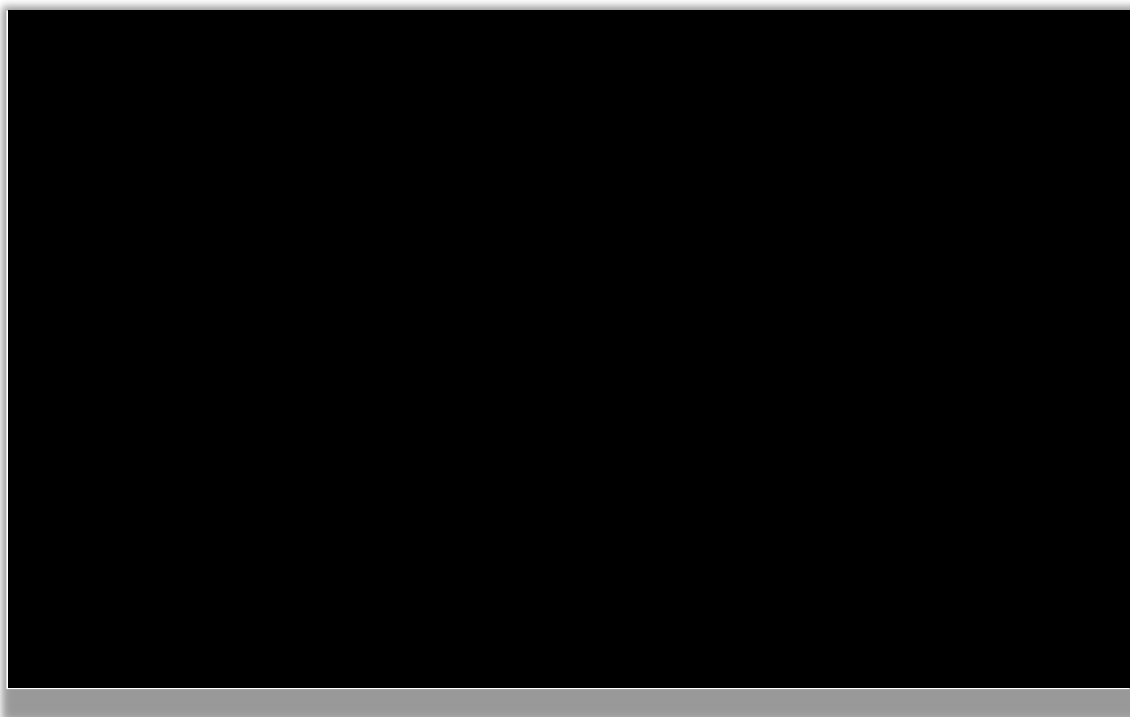
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10 Anderson’s public views further betray his improper reliance on “group bias” to prevent
11 Black prospective jurors from serving on capital juries, including Mr. Lynch’s, in contravention
12 of well-established law. The California Supreme Court has long held that a prosecutor cannot
13 “presume[] that certain jurors are biased merely because they are members of an identifiable
14 group distinguished on racial, religious, ethnic, or similar grounds” and seek to exclude them on
15 that basis. *People v. Wheeler*, 22 Cal. 3d 258, 276 (1978)), and holding modified by *People v.*
16 *Willis*, 27 Cal. 4th 811 (2002). The United States Supreme Court held the same: “the Equal
17 Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their
18 race or on the assumption that black jurors as a group will be unable impartially to consider the
19 State’s case against a black defendant.” *Batson*, 476 U.S. at 89. Removing jurors due to group
20 bias “upsets the demographic balance of the venire” and “frustrates the primary purpose of the
21 representative cross-section requirement.” *Wheeler*, 22 Cal.3d at 276.

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24 As discussed below, Anderson used this philosophy in striking Mr. Lynch’s jury. But
25 even outside of jury selection, Anderson’s behavior displayed his bias. In his closing arguments,
26 he referred to Mr. Lynch as a “human reptile,” 36 RT 4619; *see also infra*, reflecting his view
27 that Mr. Lynch was “subhuman,” Ex. 3, and manifesting his avowed practice of “labeling killers
28 as vermin, reptiles, hyenas or worse while telling jurors the defendants were cancers best cut

1 from the world,” Ex. 4 at 2. These racist remarks are probative of Anderson’s purpose when he
2 struck the four prospective Black prospective jurors at issue.
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1 **b. Anderson Systematically Noted the Race of Only Black Prospective Jurors**

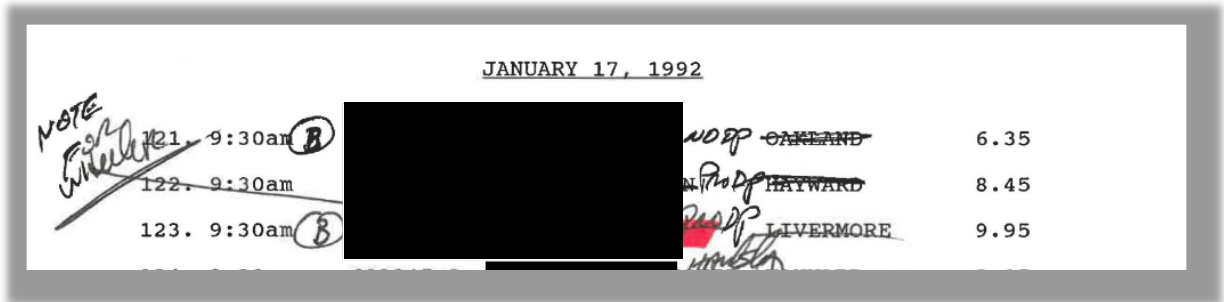
2 Anderson’s notes reflect a systematic fixation on the race of Black venire members—and
3 total disregard of the racial identity of non-Black prospective jurors. Next to the Black venire—
4 and their names only—he repeatedly denoted race, handwriting an encircled “B.” His disclosed
5 notes from Mr. Lynch’s jury selection included names of 167 potential jurors; 23 identified as
6 Black in their questionnaires. Next to each of these 23 individuals, Anderson wrote a “B” in a
7 circle, or drew a red dot. He never identified the race of non-Black prospective jurors in his
8 notes, despite the diverse composition of the venire. The prosecutor’s jury selection notes varied
9 in form—he separated prospective jurors into different lists and categories; some lists were
10 handwritten, then later typed and printed. But one thing remained constant: Anderson habitually
11 handwrote B’s and red dots next to each Black prospective juror.
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26 Ex. 1 at 4.

27 He sustained this practice over 17 separate days of jury selection.
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Ex. 1 at 9.

In addition to placing a “B” next to Black prospective jurors’ names, Anderson marked one juror as “1/2 B” Ex. 1 at 15. That juror had described himself in his questionnaire as “Mexican/Black.” 38 CT 10553 (*infra*, discussion of venire member [REDACTED]).



Ex. 1 at 15.

On a different day, Anderson separated Black prospective jurors from the rest of the venire by drawing a red dot. He again noted that prospective juror [REDACTED] was “1/2” Black:⁴



Ex. 1 at 5.

⁴ The reference to prospective juror [REDACTED]’s “fractional” Blackness harkens back to the racial categories which identified citizens’ Black heritage with fractional precision, for example, labelling those with “three-eighths to five-eighths black blood” as a mulatto, “one-fourth black blood” as a quadroon. Kim Parker, et al., “Chapter 1: Race and Multiracial Americans in the U.S. Census, Pew Research Center (June 11, 2015), available at: <http://tiny.cc/mvvnwzz>. See also *infra* at 44 (discussing *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896)).

1 In noting the race of Black prospective jurors, and never the race of any others, Anderson
2 showed that he viewed Black prospective jurors as a block, separate from the other individual
3 jurors. These explicit biases would also lead to his presumption towards excluding them from the
4 jury, as a group. In creating and implementing this system of separating out Black prospective
5 jurors from their non-Black peers, Anderson primed himself to constantly reinforce his dedicated
6 bias throughout jury selection, saturating his racialized decision-making in doubtless unconscious
7 ways too. This pervasive implicit bias is exactly what the RJA seeks to remedy.

9 Priming “involves presenting information in ways that trigger associations with other
10 ideas.” Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 Case W.
11 Rsrv. L. Rev. 39, 57 (2020). Negative attitudes like racial prejudice can be activated through
12 priming. *Id.* Research has long shown that simply noticing race can activate stereotypic
13 associations, which can then result in prejudicial behavior, even if unconscious. Patricia G. Devine
14 & Sara M. Baker, *Measurement of Racial Stereotype Subtyping*, 17 Personality & Soc. Psych. Bull.
15 44 (1991). Anderson’s unflagging practice of only noting the race of the Black venire trained his
16 conduct toward removing all Black prospective jurors, especially the women, whom he could get
17 away with striking without running afoul of *Wheeler* or *Batson*.

19 Research on priming demonstrates the “primacy effect,” which is “the tendency for the first
20 piece of information to shape understanding and memory of subsequent information.” Kathryn M.
21 Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to*
22 *Persuade the Reader*, 89 Or. L. Rev. 305, 346 (2010). “Once people have an impression or belief,
23 they are inclined to pay less attention to subsequent information, particularly information that
24 contradicts the impression.” Linda L. Berger & Kathryn M. Stanchi, *LEGAL PERSUASION: A*
25 *RHETORICAL APPROACH TO THE SCIENCE* 105, 118 (2018). Additionally, the recency of when the
26 priming information was presented significantly affects how the information is processed.
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1 Research shows that “[o]ur brains interpret new information by fitting it into existing categories,
2 particularly categories that have been recently accessed.” *Id.* “Priming is a way of influencing the
3 categories that are at the forefront of our brains.” *Id.* at 107.

4 Priming for race can also affect how people interpret ambiguous facts and remember facts.
5 Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the*
6 *Courtroom*, 2018 Mich. St. L. Rev. 1243, 1267–71 (2018); Justin D. Levinson, *Forgotten Racial*
7 *Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 350 (2007).
8 When Anderson identified the race of only the Black prospective jurors and included it in his notes,
9 he put race at the forefront of his thinking. He then went on to question and assess jurors, and
10 because of his recent and repetitive notations of the race of Black prospective jurors, was primed
11 to view Black prospective jurors differently from non-Black prospective jurors. If a juror gave an
12 ambiguous or neutral answer about their feelings on the death penalty, Anderson was likely primed
13 to interpret their answer in a way that aligned with his existing assumptions and stereotypes about
14 Black jurors. He was also likely primed to either believe or disbelieve their answers, depending on
15 the stereotypes he held associated with the juror’s race. And every time Anderson looked at his
16 notes, he would see the B’s and red dots next to their names.

17 In passing the RJA, the Legislature specifically found that “all persons possess implicit
18 bias, that these biases impact the criminal justice system, and that negative implicit biases tend to
19 disfavor people of color.” A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (g) Further, “[i]mplicit bias,
20 although often unintentional and unconscious, may inject racism and unfairness into proceedings
21 similar to intentional bias.” A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (i). This unfairness impacts
22 not only individual cases, but “the integrity of the judicial system.” *Id.*

23 Implicit bias is particularly likely to affect “judgments that are inherently difficult,
24 subjective or ambiguous” Erik James Girvan, *On Using the Psychological Science of Implicit*
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1 *Bias to Advance Anti-Discrimination Law*, 26 Geo. Mason U. Civ. Rts. L. J. 1, 33 (2015) (footnotes
2 omitted). Implicit bias also “translate[s] most readily into discriminatory behavior [] when people
3 have wide discretion in making quick decisions with little accountability.” Jerry Kang, et al.,
4 *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1142 (2012). Jury selection required these
5 exact kinds of subjective, discretionary, and quick judgments of Anderson, creating a scenario ripe
6 for implicit bias to operate.
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8 Of course, there is a far simpler understanding of Anderson’s conduct from the record now
9 before this Court. The newly available evidence from Anderson’s striking of Mr. Lynch’s jury,
10 when viewed with the totality of his pattern and practice and the wider public record and specific
11 record in this case, leaves little to the imagination as to Anderson’s explicit intent to eliminate as
12 many Black prospective jurors as he could get away with striking. However, as the foregoing
13 discussion submits, even an unduly charitable view of Anderson’s conduct manifests racialized
14 intent in violation of the federal and state authorities, dating to the first Reconstruction, that
15 foreclose such discrimination.
16

17 **c. Anderson Scored Potential Jurors on his Novel “Rambo Scale,” Noting the**
18 **Race of Only Black Prospective Jurors While Dramatically Raising or**
19 **Lowering Scores by Race**

20 As part of jury selection, Anderson used a rating system he deployed in his cases,
21 something he called a “Rambo scale.” 16 RT 2100. He placed jurors—and often asked jurors to
22 place themselves—on a scale of one to ten, with one being a “Mother Theresa[-]type
23 personality” and ten being the iconic Sylvester Stallone character and one-man killing machine,
24 John Rambo. *Id.* As with this scale, Anderson’s voir dire overwhelmingly emphasized jurors’
25 views on the death penalty.
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1 Although this case presented a number of complex factual issues, Anderson’s voir dire of
2 jurors almost exclusively focused on their views on capital punishment.⁵ Anderson repeatedly
3 described his ranking scale to prospective jurors. He would ask them to “[i]magine a scale of one
4 to ten.” 16 RT 2099. At the lower end of the scale “would be someone who hardly, if ever,
5 would impose the death penalty.” *Id.* He suggested such a person would “forgive every wrong
6 that’s been done,” did not believe people have “responsibility for their own acts,” and that there
7 is “good in everybody.” *Id.* On Anderson’s scale, such a person would be a “Mother Theresa[-
8]type personality.” *Id.*

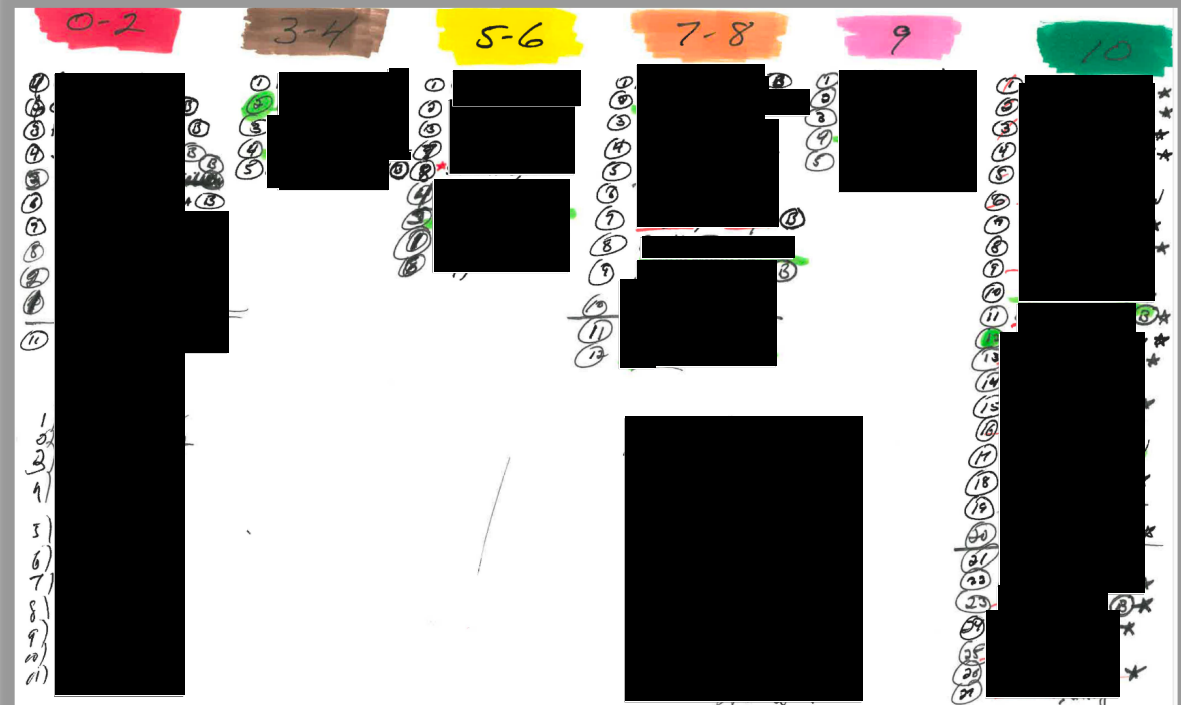
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10 At the other end of the spectrum, Anderson described someone who would readily return
11 a death sentence. As he put it, such a person “firmly believes in an eye for an eye, a tooth for a
12 tooth, right out of the Old Testament.” 16 RT 2100. A ten on his scale is a person who feels “if
13 you spit on the sidewalk,” that perpetrator might as well have “machine gunned you to death”
14 and “believes if you take a life, then the only fitting and proper just penalty is that you forfeit
15 your life.” 4 RT 396; 16 RT 2100. Such an individual on Anderson’s scale was personified by
16 “the Hollywood, tinseltown movie hero Rambo-type personality.” 16 RT 2100. Over and over,
17 Anderson explained this “dichotomy” to jurors and asked them to rate themselves on his scale.
18 *See, e.g.,* 16 RT 2100.

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21 What Mr. Lynch could not have known, until just months ago, was that Anderson had a
22 practice of keeping score for himself, and his scores mark an extreme racial divide. *See, infra*
23 (discussion of Anderson’s similar juror rankings in *People v. Ervin*). Anderson’s notes reflect his
24 own ranking of the jurors, where he frequently moved jurors higher or lower on the scale than
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27 ⁵ This is likely in part because the only part of voir dire that had ever been required to be
28 conducted individually and in sequestration is voir dire on “issues which involve death-
qualifying the jury.” *Hovey v. Superior Court*, 28 Cal. 3d 1, 80 (1980) superseded by statute as
stated in *People v. Jackson*, 1 Cal. 5th 269, 357 (2016).

1 how they had self-identified. In effect, Anderson created a list of jurors organized, in his view,
2 from least to most desirable. In Mr. Lynch’s case, nine of his ten peremptory challenges were
3 jurors he assigned either “0-2” or “3-4” rankings, and he neither struck nor sought to remove for
4 cause any juror he ranked a “9” or “10.”

5
6 Anderson first ranked them in handwritten notes, in categories 0-2, 3-4, 5-6, 7-8, 9, and
7 10. Again, next to the names of only the Black prospective jurors, he notated their race with a
8 handwritten “B” in a circle.



22 Ex. 1 at 4.

23 Anderson typed up his notes later, again ranking the jurors 0-2, 3-4, 5-6, 7-8, 9, or 10. He
24 continued singling out the Black prospective jurors, this time using a red dot to distinguish them
25 from the rest of the venire:
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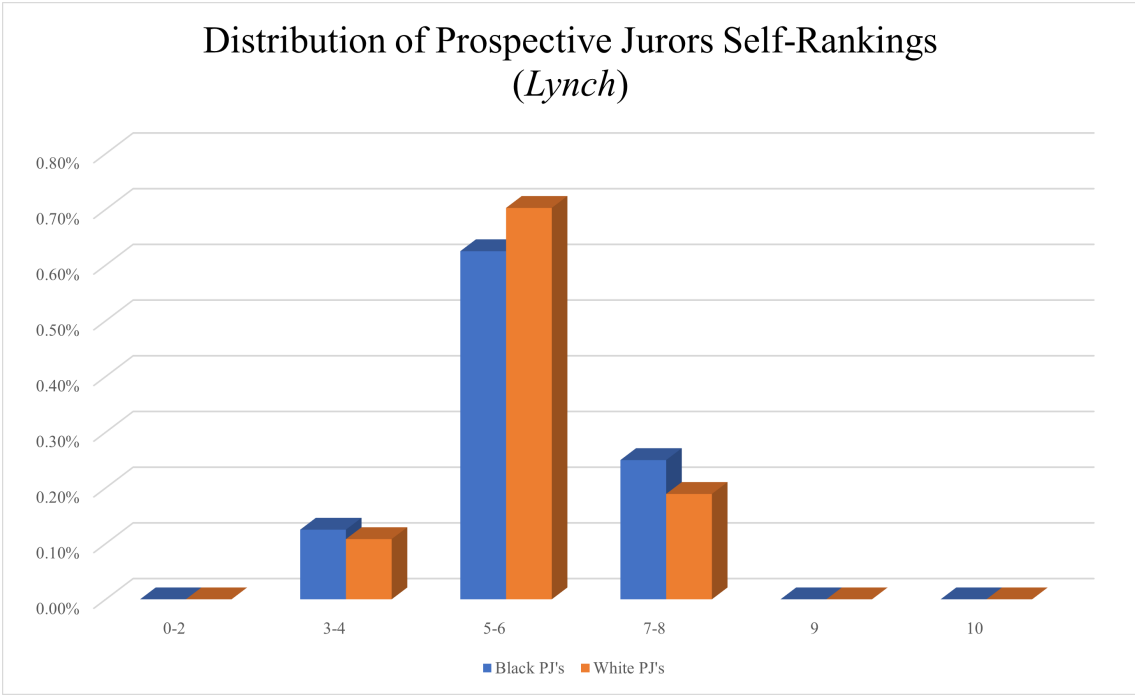
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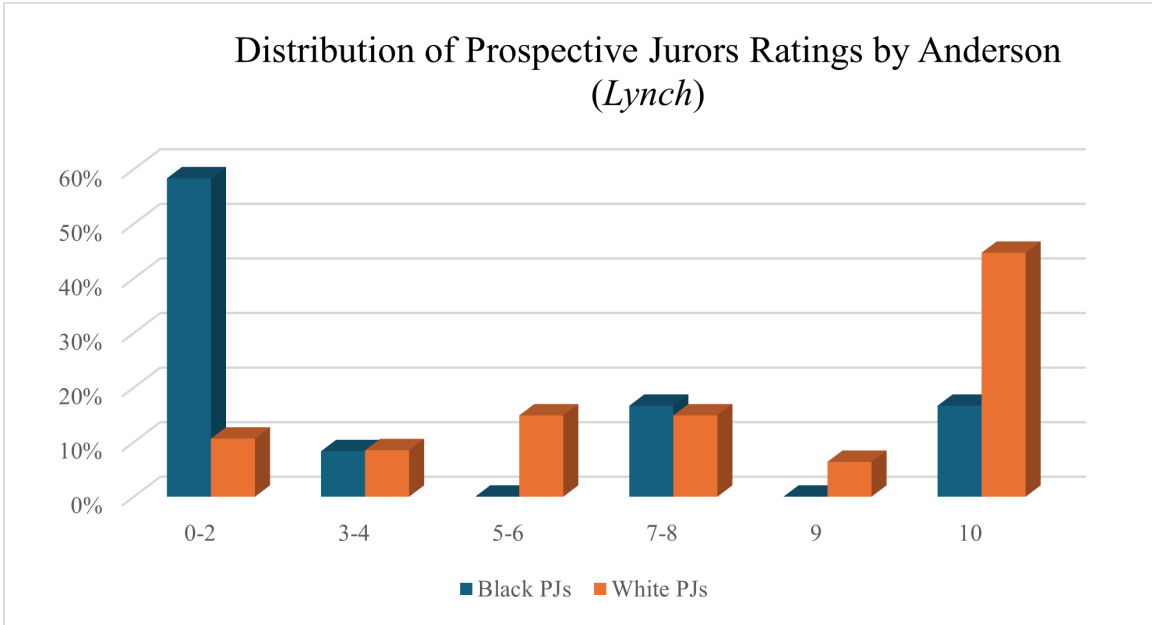
Ex. 1 at 5.

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As the charts below demonstrate, Anderson’s scoring of the prospective jurors marks a sharp racial divide, contrasted with how jurors ranked themselves. When asked to self-rank, the jurors largely ranked themselves down the middle:



But Anderson had a different view, stratifying them based on race:



1 Ex. 1 at 5. Under any view, Anderson’s ranking of prospective jurors’ desirability heavily
2 disfavored Black prospective jurors. The majority of Black prospective jurors under Anderson’s
3 rankings were in the lowest category, and the majority of individuals in Anderson’s lowest
4 category were Black. Specifically, Anderson placed 12 jurors at the bottom of his scale, 7 of
5 whom were Black, and 6 of whom were Black women.
6

7 This racial divide was a product of Anderson’s bias—not the jurors’ self-reported scores.
8 Anderson consistently disregarded and disbelieved Black prospective jurors’ answers and steeply
9 lowered their self-ranking, while crediting or raising that of white prospective jurors. Anderson
10 raised or left the same the self-reported score for 35 non-Black prospective jurors⁶ while
11 lowering it for only 5.⁷ In contrast, he raised or left the same the self-reported score of only 4
12 Black prospective jurors,⁸ while lowering it for 5.⁹ In other words, Anderson lowered the score
13 of Black prospective jurors at a higher rate than he raised it for them. Whereas, for non-Black
14 prospective jurors, he raised their self-reported scores at *7 times* the rate that he lowered it.
15 Anderson loaded the dice in favor of non-Black prospective jurors and against Black prospective
16 jurors.
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18 Anderson’s rank of specific jurors bears out this trend. Take for example [REDACTED],
19 who is Black. 26 CT 7015. She had explained that whether the death penalty is appropriate
20 “depends on the circumstances.” 26 CT 7032. She also indicated that she found rape, murder,
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25 ⁶ If asked, jurors provided their own view of their “Rambo” score during voir dire. Anderson
26 raised the score of 35 non-Black prospective jurors. *Compare* 3 RT 183, 202, 238, 254; 5 RT
27 478, 560, 593; 6 RT 665; 8 RT 847, 889, 944; 9 RT 1103, 1128, 1030; 13 RT 1601, 1658; 10 RT
1253, 1196; 14 RT 1739, 1790, 1815; 15 RT 1914; 16 RT 2031–32, 2079; 17 RT 2156, 2173,
2232, 2250; 19 RT 1945, 2472, 2516 *with* Ex. 1 at 4.

28 ⁷ *Compare* 3 RT 313; 4 RT 369; 7 RT 758; 16 RT 2100; 18 RT 2330 *with* Ex. 1 at 4.

⁸ *Compare* 3 RT 222; 9 RT 1050; 12 RT 1510; 18 RT 2278 *with* Ex. 1 at 4.

⁹ *Compare* 4 RT 396; 5 RT 505; 10 RT 1214, 1296; 19 RT 2538 *with* Ex. 1 at 4.

1 and crimes related to children to be particularly upsetting. 26 CT 7026. Despite her self-
2 described retributive leanings, Anderson ranked ██████ in his lowest category, 0-2. Ex. 1 at 4.
3 ██████, who is Black, ranked herself at a 5 or 6. 4 RT 396; 16 CT 3922. She said
4 she would vote for the death penalty proposition if it were on the ballot as a referendum. 4 RT
5 394. Further predisposing herself as a pro-prosecution juror in this case, she expressed that
6 crimes against the elderly particularly bothered her, because she believed those victims could not
7 defend themselves. 4 RT 384. Furthermore, ██████ was also a caretaker for her mother-in-law,
8 who was afflicted with Alzheimer's. 4 RT 401. Anderson ranked ██████ in his lowest category,
9 0-2. Ex. 1 at 4.

11 By contrast, ██████, who is white, in his questionnaire said he is for the death
12 penalty only in "very unique situations." 24 CT 6259; 24 CT 6242. He reiterated the same
13 sentiment during voir dire, describing it as something only to impose as a "last resort." 8 RT 888.
14 ██████ ranked himself as a 3-4 on Anderson's scale. 8 RT 889. Anderson, however, raised his
15 score, placing him at 5-6. Ex. 1 at 4.

17 ██████, another white prospective juror in Mr. Lynch's case, also described the
18 death penalty as a "last resort" punishment. 36 CT 9859; 17 RT 2170. She ranked herself as a 5
19 on Anderson's Rambo scale, and he did the same. Ex. 1 at 4; 17 RT 2173. Similarly, ██████
20 ██████, who is white, ranked himself a 5-6. 36 CT 9805; 17 RT 2156. But Anderson raised him to
21 a near-Rambo score of 9. Ex. 1 at 4.

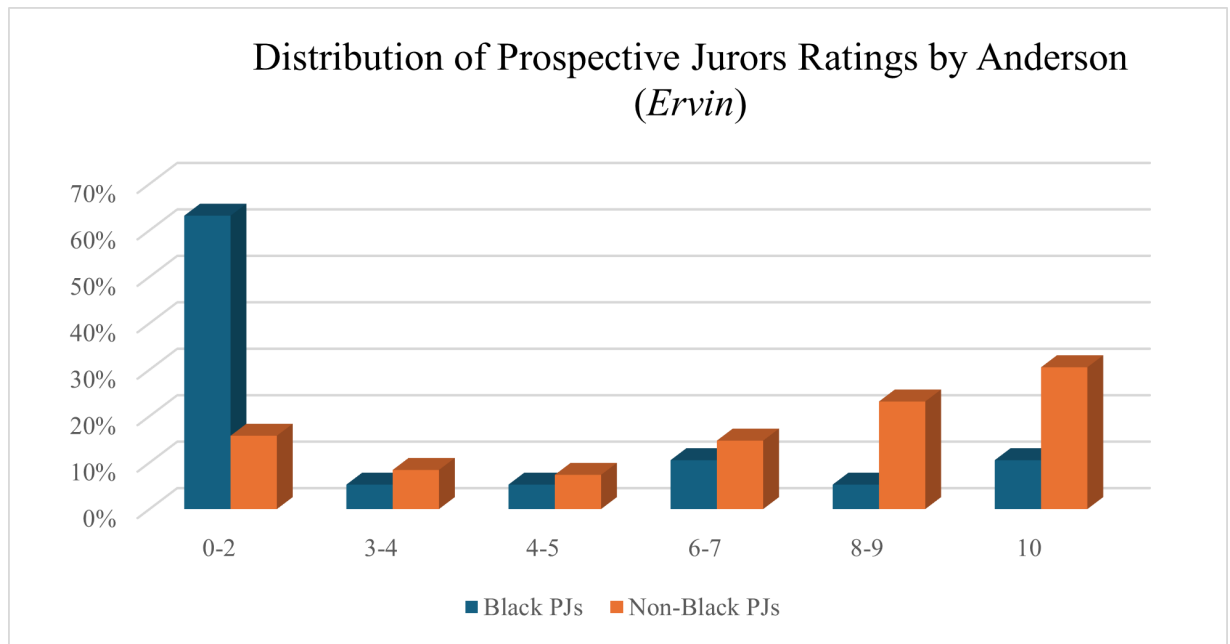
23 On June 17, 2024, in *People v. Nadey*, the Supreme Court of California, *without* the
24 benefit of Anderson's trial notes in its record, credited Anderson's claim that he struck a Black
25 prospective juror for her view that the death penalty is a "last resort." 555 P.3d 961, 987 (Cal.
26 2024). That juror had ranked herself in the middle of Anderson's scale. *Id.* The record in *Nadey*,
27 unlike the present record now, does not include Anderson's contemporaneous notes and thus
28

1 does not reflect Anderson’s practice of rating the venire members himself, let alone Anderson’s
2 score for that individual. In affirming the trial result, the court credited Anderson’s reliance on
3 the “last resort” description of the death penalty as race-neutral. *Id.*

4
5 However, Justice Liu, joined in dissent by Justice Evans, noted the current, ongoing
6 review of capital cases in Alameda County and how the light now being shed on the jury
7 selection practices there are probative of whether members of the office had discriminated on the
8 basis of race in jury selection. *Id.* at 1030. That review has already upended a number of
9 sentences. *See* Nick Watt, *Man Convicted of Killing Boy May Be Set Free Because Prosecutors*
10 *Racially Profiled the Jury Pool*, CNN (June 21, 2024); David Hernandez, *Alameda County DA*
11 *Backs Resentencing for Man on Death Row for Toddler’s Murder*, San Francisco Chronicle (Oct.
12 31, 2024); Bob Egelko, *Newsom Appointee Noted in Probe of Bias*, San Francisco Chronicle
13 (July 5, 2024). And, as a further result of the review, the sitting District Attorney has claimed she
14 has uncovered criminal activity of members of that office. Stephanie Becker & Elizabeth Wolfe,
15 *Prosecutors in Alameda County Death Penalty Cases May Have Acted Criminally During Trials,*
16 *District Attorney Says*, CNN (June 25, 2024). In *Nadey*, Anderson struck five of six of the Black
17 women who made it to the jury box. *Nadey*, 555 P.3d at 1030. (The sixth was struck by the
18 defense.) *Id.*

19
20
21 In light of the decision, *Nadey* moved the California Supreme Court to reconsider,
22 wherein he attached portions of Anderson’s notes *from Mr. Lynch’s case*. That motion prompted
23 three members of the court to indicate their willingness to reconsider their decision in direct
24 review in light of the extra-record evidence (including one justice who had not dissented from
25 the original affirmance). They were particularly troubled by the emerging pattern of “systemic”
26 exclusion of Black venire members, as demonstrated by Anderson’s notes in this matter. *Id.* at
27 1045.
28

1 Disclosures from another Anderson prosecution demonstrate a markedly similar pattern
2 of scoring Black and non-Black prospective jurors on his Rambo scale. In *People v. Ervin*, the
3 distribution of Anderson’s scores parallels that in Mr. Lynch’s case: Black prospective jurors
4 were heavily overrepresented in Anderson’s lowest category.
5



16 Ex. 8 at 13. In *Ervin*, Anderson again overwhelmingly ranked Black prospective jurors in the 0-2
17 range, showing a bias towards non-Black prospective jurors in that case as well. In *Ervin*,
18 Anderson used a peremptory strike on all six Black women prospective jurors. Ex. 9 at 40; Ex.
19 11 (member of Anderson’s team describing it as “standard practice” to exclude Black women as
20 jurors).
21

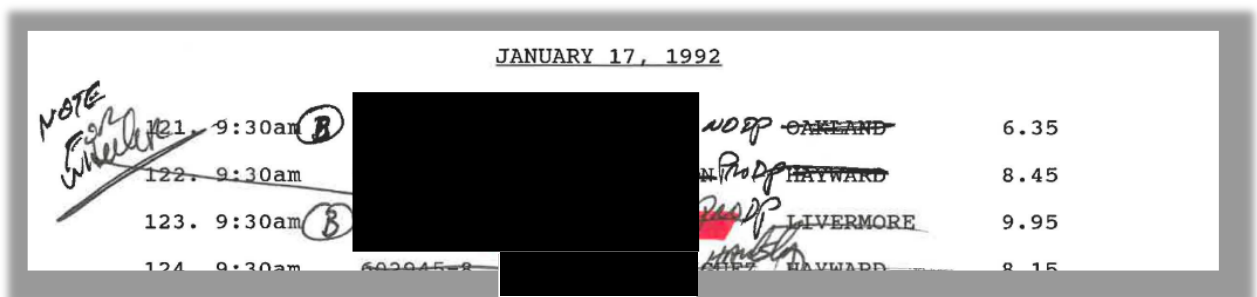
22 Returning to Mr. Lynch’s case, the way Anderson scored the prospective jurors here, as
23 contrasted with the scores they had given themselves, is consistent with a process impacted by
24 bias against the Black venire. Anderson’s assessment of the jurors’ answers was shaped by
25 conscious and unconscious race-based assumptions about Black prospective jurors. First, he was
26 primed to have race at the forefront of his questioning and decision-making when he repeatedly
27 notated the race of Black prospective jurors. Then, his belief that Black prospective jurors’
28

1 politics “are not going to be on [the People’s] side” shaped the way he interpreted or
2 remembered their answers about their views on capital punishment, thus impacting his rankings.
3 Ex. 7. As research has found, “[o]nce people have an impression or belief, they are inclined to
4 pay less attention to subsequent information, particularly information that contradicts the
5 impression.” Berger, *supra*, LEGAL PERSUASION at 118. Whether purposeful or not, bias
6 pervaded Anderson’s jury selection process.
7

8 **d. Anderson Prepared Pretextual Responses to a *Batson/Wheeler* Challenge to**
9 **His Race-Based Strikes**

10 Anderson’s notes reflect that his strategy to strike Black prospective jurors was
11 premeditated. He anticipated the defense to object to his use of peremptory strikes under *People*
12 *v. Wheeler*, 22 Cal.3d 258, 272 (1978). That case, decided prior to *Batson*, held that the racially
13 discriminatory use of peremptory challenges by the state violates the right, under the California
14 Constitution, to a jury drawn from a cross-section of the community. *Id.* So, Anderson pre-
15 crafted explanations to mask race-based strikes, perhaps a practice that predated *Batson*.
16

17 On the first page of Anderson’s jury selection notes, he wrote, “Wheeler” followed by an
18 exhortation to “use peremptory challenge to jurors who express even the slightest
19 concern/reservation about death penalty.” Ex. 1 at 1. Then, later in his notes, he highlighted a
20 Black prospective juror’s name, wrote a circled “B” next to it, and made two notes: “Pro DP”
21 and “Note for Wheeler”:
22



Ex. 1 at 9.

1 But the defense never raised a *Wheeler* challenge, and this prospective juror never made
2 it to the jury box in the first place. Anderson was not only tracking the race of each Black
3 prospective jurors, but he was anticipating being called out for striking pro-death penalty
4 prospective jurors. His preemptive notes on *Wheeler*, read in conjunction with his systematic and
5 explicit notations of race for Black prospective jurors, demonstrate a conscious program to
6 prevent Black jurors from serving on Mr. Lynch’s jury while hiding these rights violations
7 behind pretext.
8

9 Mr. Lynch’s case is not the only instance of Anderson and his office crafting pretext for
10 his race-based strikes. One of his subordinates did the same thing in his capital prosecution of
11 Ernest Dykes. Their recently disclosed notes flag a Hispanic, female juror: “Must kick. Son
12 convicted [of burglary]. Must kick as Wheeler fodder.” Ex. 10 at 2.
13

14 This behavior, across cases, is nearly identical to that of a member of his office recently
15 castigated by this Court in a grant of habeas corpus relief based on *Batson. Mitcham*, 103 F.
16 Supp. 3d at 1094. That is, another capital prosecutor working alongside Anderson included in his
17 jury selection notes a reminder to keep a solitary Black prospective juror “if necessary to avoid
18 *Wheeler*—She would try to be fair.” *Id.* at 1097. The Court described the note to keep the juror
19 “to avoid *Wheeler*” as “direct evidence suggestive of improper racial motives.” *Id.* at 1114.
20 Given that Anderson was a member of the same capital team as the prosecutor in *Mitcham*, it is
21 unsurprising that he had a similar note. And Anderson’s note is, like the one in *Mitcham*, “direct
22 evidence” of Anderson’s “improper racial motives.” *Id.*
23

24 This pattern also places into context the three seated Black jurors in Mr. Lynch’s case.
25 Those jurors each espoused extremely pro-prosecution views on the death penalty. One of these
26 seated jurors, per his questionnaire, encapsulated his strident view on the death penalty with,
27 simply, “Let’s get it on.” 3 RT 215. He did so because, as he flatly explained, “I feel it’s
28

1 appropriate.” *Id.* Another thought that the death penalty was “necessary” if a person had been
2 convicted of a “severe crime.” 12 RT 1517. She explained that her religion would pose no
3 impediment to a death sentence: “Well, the Bible says thou shall not kill.” 12 RT 1527. And the
4 third wrote he had “no problems with the death penalty,” 30 CT 8124, and testified in voir dire
5 that the crimes in question “definitely” warranted it. 18 RT 2275. Even these extreme views only
6 earned two middling scores and one high score from Anderson: 7-8, 7-8, and 10, respectively. In
7 light of Anderson’s desire for cover, he was likely more than happy to have them serve. And, of
8 course, the seating of Black jurors plainly does not foreclose a finding that a prosecutor
9 discriminated on the basis of race when striking Black prospective jurors, notwithstanding
10 whatever else the State may try to argue. *Miller-El*, 545 U.S. at 250 (declining to allow a
11 prosecutor to use the seating of Black jurors “to obscure the otherwise consistent pattern of
12 opposition to” seating Black jurors).

13
14
15 **e. Anderson Unconstitutionally Struck Four Black Prospective Jurors**

16 Anderson struck four Black prospective jurors: [REDACTED]

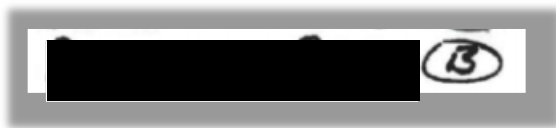
17 [REDACTED]. Against the backdrop of his own repugnant public views about
18 the role of race and ethnicity in jury selection (*supra*), it should come as no surprise that a
19 comparative juror analysis demonstrates those strikes were race-based. Moreover, his willingness
20 to seat three Black prospective jurors is not to the contrary of these four instances of
21 discrimination and constitutional violations. Those jurors had strongly pro-prosecution views,
22 providing Anderson with the tactical opportunity to shield himself from *Wheeler*. Moreover,
23 despite their extreme views, he ranked the seated Black jurors substantially lower than
24 comparable non-Black jurors, further demonstrating his anti-Black, and especially anti-Black
25 woman, bias.
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1 Anderson’s historical antipathy for Black women jurors repeated itself in Mr. Lynch’s
2 case. At the first opportunity, he exercised three of the four strikes at issue here against Black
3 women (*supra*). 21 RT 2622–24. The historical record reflects that the State has frequently
4 targeted Black women in jury selection. *See People v. Holmes, et al.*, 12 Cal.5th 719, 840 (2022)
5 (Liu, J., dissenting) (collecting “[e]mpirical studies [which] demonstrate that Black women are
6 the frequent targets of prosecutors’ peremptory challenges in capital cases and are struck
7 disproportionately compared to other groups”). Anderson’s own history of this racism repeated
8 itself in Mr. Lynch’s case.

9
10 A single peremptory strike based on race will suffice to establish an Equal Protection
11 Clause violation and require a new trial. *See Flowers*, 588 U.S. at 298; *Snyder*, 552 U.S. at 478;
12 *Kesser v. Cambra*, 465 F.3d 351, 369 (9th Cir. 2006) (“[J]ust one racial strike calls for retrial.”);
13 *Vasquez-Lopez*, 22 F.3d at 902 (quoted in *Snyder*); *Nadey*, 16 Cal. 5th at 129 (“Excluding even a
14 single prospective juror for reasons impermissible under *Batson* and *Wheeler* requires reversal.”
15 (internal quotations omitted)). Here, there were four.

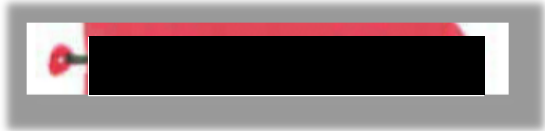
16
17 [REDACTED]:

18 By all unbiased accounts, [REDACTED] was a strong prospective juror for the State.¹⁰
19 She expressed consistent support for capital punishment. Her views were stronger than many
20 who were ultimately seated. Her responses were direct and unequivocal. But Anderson did not
21 credit her answers. Anderson repeatedly marked her race in his notes. He ranked her at the
22 bottom of his Rambo Scale, and he struck her as soon as she joined the jury box.



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¹⁰ The record reflects [REDACTED] is black. 21 CT 5521.

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Ex. 1 at 4, 5, 11.

Support for the Death Penalty

██████████ was clearly in favor of the death penalty and willing to vote for it in this case. In her questionnaire response as to her feelings about the death penalty, she wrote, “Yes, if deserved.” 21 CT 5538. She repeatedly affirmed this position in voir dire. The court described the kind of juror who “could never vote to send another human being to die in the gas chamber” and asked if she felt that way. ██████████ answered, “I certainly don’t.” 10 RT 1210. When asked to confirm that she “would be open to the possibility of either punishment, depending on the evidence,” she answered, “Certainly.” 10 RT 1209–10. And when asked if the crimes Mr. Lynch was charged with were the kind that would allow her to consider the death penalty, ██████████ again answered unequivocally, “Certainly.” 10 RT 1212–13. Anderson described in detail to her, “you are going to have to come down in open court and announce that in the courtroom, in front of Mr. Lynch, his attorneys, Judge Sarkisian, the court staff, me, and probably a full courtroom, that you, ██████████, are voting to execute Mr. Lynch sometime in the future, knowing this is going to be the first step which leads to his execution. Do you understand that?” 10 RT 1217. She responded, “Yes.” *Id.* He asked again, “Can you do it?” *Id.* She responded, “Yes.” *Id.* He pressed further, telling her that some jurors support the death penalty in theory but would get “cold feet” and want to “let somebody else do the dirty work,”

1 asking if she had any similar thoughts. 10 RT 1217–18. She responded, “No, I don’t, not at this
2 time I don’t, no.” 10 RT 1218. Anderson continued pressing and said “so you are telling me then
3 . . . you have the inner strength, the guts” to vote for the death penalty if warranted. *Id.* She
4 responded, “Certainly.” *Id.*

5
6 Over and over, Anderson asked ██████████ if she understood the role of a capital juror,
7 supported the death penalty, would legitimately consider the death penalty as an appropriate
8 punishment in this case, and could stand behind a death sentence. Again and again, ██████████
9 gave clear, affirmative responses demonstrating her willingness to vote for death, yet Anderson
10 ranked her as 0-2. Ex. 1 at 4, 5. ██████████’s favorable views of capital punishment were in
11 stark contrast to those of several non-Black, unchallenged jurors.

12
13 Multiple non-Black prospective jurors expressed significant hesitation to impose the
14 death penalty, but Anderson still ranked them higher than ██████████ and did not strike them.
15 For example, ██████████, a white juror who was seated, never actually answered whether she
16 was for or against the death penalty. In her questionnaire, she wrote, “I am not completely for or
17 against the death penalty. I have never had to come to a definite conclusion about my feelings
18 about the death penalty.” 38 CT 10464. During voir dire, she confirmed that non-position. 17 RT
19 2247. And she could not even answer how she would vote on a hypothetical ballot initiative
20 legalizing the death penalty. *Id.*; *see, infra*. Her unsteady stance on capital punishment earned her
21 a spot in the middle of Anderson’s ranking, at a 5-6. Ex. 1 at 4, 5. ██████████, another
22 unchallenged white juror, said he viewed the death penalty as “a last resort, type of punishment.”
23 8 RT 879–80. He wrote the same in his questionnaire, that he supported the death penalty “only
24 in very unique situations.” 24 CT 6259. Again, Anderson ranked him a 5-6, increasing ██████████
25 ██████████’s self-rank (of 3-4, 8 RT 889), and refrained from striking him. Ex. 1 at 4, 5.
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1 [REDACTED] expressed a general support for the death penalty, but, unlike [REDACTED]
2 [REDACTED], was glaringly unsure of her answers and her position on the penalty. During voir dire,
3 [REDACTED] appeared visibly uncomfortable, as she was told twice to “relax”—once by the court
4 and once by defense counsel. Both times, she said, “I am trying.” 14 RT 1730, 1749. When
5 Anderson provided her the same description of the verdict process that he provided [REDACTED]
6 [REDACTED] that their jury verdict could lead to Mr. Lynch being executed, he asked [REDACTED],
7 “Does that bother you?” [REDACTED] said, “Yes, it does.” 14 RT 1736. Yet Anderson did not
8 press her and changed the subject. Anderson ranked [REDACTED], who is Japanese,¹¹ a 10 out of
9 10, and she was seated. Ex. 1 at 4, 5.

11 [REDACTED] also expressed significantly stronger support for the death penalty than
12 white prospective jurors who were not struck. [REDACTED], who Anderson ranked a 10 (Ex. 1
13 at 4), had, like [REDACTED], ranked himself a 5 (9 RT 1030), and expressed views on capital
14 punishment that paralleled [REDACTED]’s. [REDACTED] believed in a limited role for capital
15 punishment, as “a deterrent to some very serious crimes.” 9 RT 1025. He also said that whether
16 death is appropriate in a particular case would depend “on what I heard as evidence and what I
17 heard as mitigating and aggravating circumstances.” 9 RT 1027. Nonetheless, Anderson had far
18 fewer questions for [REDACTED] than [REDACTED], ranked him a 10, and did not strike him. Ex. 1 at 4, 5.

19 [REDACTED]’s answers were also comparable to those of the jury foreman, [REDACTED], a
20 white man. When asked about the death penalty in his juror questionnaire, [REDACTED] wrote,
21 “[j]ustified in some cases.” 36 CT 9822. Throughout his voir dire, like [REDACTED], [REDACTED]
22 repeatedly gave affirmative answers indicating he was open to either punishment. 17 RT 2144–
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28 ¹¹ The record reflects that [REDACTED] is Japanese. 30 CT 7981. This harkens back to the
perhaps apocryphal judge’s racist admonishment to defense counsel against Asian jurors that
Anderson recounted in his musings to the New York Times in 2005. *Supra* at 6.

1 59. Anderson ranked [REDACTED] a 9, yet assigned [REDACTED], as noted above, a 0-2. Ex. 1 at 4,
2 5.

3 *Ballot Initiative*

4 A recurring tack during Anderson’s voir dire concerned a hypothetical California without
5 the death penalty and how the prospective juror would vote on a state ballot initiative proposing
6 to legalize it. [REDACTED]’s response was definitive: she would vote yes, because “[i]n some
7 situations, I’m more than sure it’s needed and there should be a choice.” 10 RT 1211. When
8 asked if she thought the death penalty was justified for certain types of crime “just as a
9 punishment,” she agreed, saying, “For certain types, sure, it would have to be.” 10 RT 1212. And
10 when asked if the death penalty acted as a deterrent, she again affirmed, “I would like to think
11 so.” *Id.*

12
13
14 Seated, non-Black jurors struggled to decide on an answer, justification, or both, but were
15 left unchallenged. [REDACTED], who Anderson ranked 5-6 (Ex. 1 at 4, 5), was asked twice how she
16 would vote on the hypothetical ballot initiative—first by defense counsel and then by Anderson.
17 Both times, she could not land on a yes or a no. When defense counsel asked her, she said, “I’m
18 not sure. I’d have to think about it. But are you asking me to think, I mean, to say one way or the
19 other?” Without answering that question, she went on to say, “I thought about it occasionally, but
20 it’s never been something that I really thought about. I’ve never come – I’ve thought about it, but
21 I’ve never come to a conclusion. I guess that’s the best way.” 17 RT 2247–48. When Anderson
22 repeated the ballot question later, [REDACTED] again dodged it: “At this instant, I would, of course,
23 have to come to some decision before I voted.” 17 RT 2249. [REDACTED]’s uncertain responses did
24 not elicit follow-up from Anderson and did not lead to a strike.
25

26
27 Other seated white jurors also could not explain why they would vote yes, unlike [REDACTED]
28 [REDACTED]’s explanation that she was “more than sure it’s needed.” 10 RT 1211. For example,

1 foreperson ██████ said he would similarly vote to legalize the death penalty, but that “I
2 can’t think of any arguments for it. I suppose it was just the way I was raised.” 17 RT 2152. And
3 when asked why she would vote for the initiative, ██████, ranked a 7-8 (Ex. 1 at 4, 5),
4 responded, “Gee, I can’t think of anything off the top of my head.” 14 RT 1795. When probed
5 further and provided with potential justifications for the death penalty, both seated jurors said
6 they did not think the death penalty acted as a deterrent or that it should be used for financial
7 reasons. 17 RT 2152–53; 14 RT 1795.

9 ██████’s response is, again similar to ██████’s, who Anderson ranked a 10 and seated.
10 Ex. 1 at 4, 5. He, like ██████, would “probably vote to have a death penalty.” 9 RT 1029. He
11 thought that it was a “potential deterrent.” 9 RT 1025–26. Based on these responses, ██████’s
12 0-2 cannot be reconciled with ██████’s 10.

14 *LWOP vs. Death*

15 When asked whether, for her personally, the death penalty or life without the possibility
16 of parole was a worse punishment, ██████’s response was identical to multiple
17 unchallenged, non-Black jurors whom Anderson ranked highly. She answered, “Well, probably I
18 would think life without possibility of parole.” 10 RT 1213. But she understood that the law
19 stated differently and that she “certainly” could set her own feelings aside and evaluate the case
20 in accordance with the law. 10 RT 1213. ██████ took the same position. He supported the
21 death penalty and even said “it would take some pretty strong evidence” to convince him to vote
22 for an LWOP sentence. Further, his belief that, “In some ways life without parole is a worse
23 sentence than death,” did not cause him to lose any points. 8 RT 942. Anderson ranked him a 10.
24 Ex. 1 at 4, 5. Likewise, ██████, the foreperson whom Anderson ranked a 9 (Ex. 1 at 4, 5), felt that
25 although both punishments were severe, LWOP was worse than death. 17 RT 2153. ██████
26 ██████ felt the same, agreeing with Anderson’s restating of her view that LWOP “would be a
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1 fate almost equally as bad as the death penalty, if not worse.” 14 RT 1737–38. She elaborated, “I
2 also feel that life in jail, I don’t believe, is all that great, and I don’t, I don’t think it’s right for
3 somebody to spend their life in there.” 14 RT 1737. As noted above, Anderson ranked her a 10.
4 Ex. 1 at 4, 5. Evidently, Anderson did not interpret a juror feeling that LWOP was worse than
5 death and life in prison was not “right” for anyone to mean they would be an unfriendly juror.
6 [REDACTED]’s position on the matter can explain neither her placement in the 0-2 category nor
7 her strike.
8

9 *Ranking*

10 Anderson asked [REDACTED] to rank herself on his Rambo scale of 1 to 10 in terms of
11 her support for the death penalty. She ranked herself right in the middle, at a 5. 10 RT 1214. So
12 did [REDACTED]—the foreperson who couldn’t articulate reasons to support the death penalty (17 RT
13 2156), [REDACTED]—the seated juror who could not decide how to vote on the hypothetical ballot
14 initiative (17 RT 2250), [REDACTED]—the seated juror who felt bothered by the idea of Mr.
15 Lynch being executed (14 RT 1739), and [REDACTED]—the seated juror who said she was a
16 “middle of the road type person” (14 RT 1790). For those non-Black jurors, Anderson either
17 raised their rankings, or credited their self-rankings. But for [REDACTED], he ignored her 5 and
18 ranked her a 0-2. Ex. 1 at 4, 5. [REDACTED]—the juror who said the death penalty was a “last
19 resort” in his eyes—said, “Well, probably three or four. Just – I can’t really – it’s hard to say.”
20 Anderson followed up, “So, you are a little bit less than in the middle of the road,” and [REDACTED].
21 [REDACTED] agreed. 8 RT 890. Still, Anderson raised him to the proverbial middle of the road, a 5-6.
22 Ex. 1 at 4, 5.
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26 *Other Similarities to Seated Non-Black Jurors*

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1 Although Anderson’s pretextual metric for a good juror was their views on the death
2 penalty, ██████’s other views were strikingly similar to seated white jurors whom Anderson
3 approved.

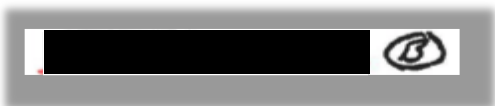
4 ██████, like several white seated jurors or alternates, had been the victim of a crime.
5 Someone had cut off part of ██████’s finger. 10 RT 1221. ██████ had been mugged. 38 CT
6 7348. ██████ was the victim of a home break-in. 16 CT 3897. These non-Black jurors
7 were seated without objection from Anderson.

8
9 Moreover, ██████ lacked indicia of being sympathetic to the defense or as holding
10 antipathy to the prosecution. Even though her brother had been stopped for trespassing, she said,
11 “Well, I mean, he was trespassing, and how were they to know [he wasn’t the person committing
12 a more serious crime] until they checked it out?” 10 RT 1219.

13
14 In contrast, Anderson accepted apparently defense-friendly white prospective jurors. For
15 example, ██████ was involved with a prison ministry and conducted phone and mail
16 correspondence with several people at San Quentin State Prison. 36 CT 9994; 16 RT 2095,
17 2100–02. Stereotypically, ██████’s status as a crime victim should have made her a much
18 stronger candidate than ██████. Yet she received the same score on Anderson’s Rambo
19 Scale. Ex. 1 at 4, 5.

20
21 ADA Anderson discriminated on the basis of race when he struck ██████.

22 ██████:



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4 Ex. 1 at 4, 5, 11.

5 ██████████, a second Black woman Anderson struck, believed the death penalty was a
6 legitimate form of punishment when the circumstances warranted it. Although she did not
7 consider herself “really for or against” the death penalty, writing in her juror questionnaire that
8 “it depends on the circumstances,” 26 CT 7032, her voir dire provided more context about her
9 capital punishment views. Her explanations were consistent with someone who did not consider
10 herself either an extreme proponent or opponent of the death penalty, but who believed that it
11 was an appropriate punishment for certain crimes—a position identical to most of the
12 unchallenged non-Black jurors.
13

14 ██████████ said she would vote yes on a ballot initiative legalizing the death penalty,
15 explaining, “Because there [are] certain circumstances that I feel that it’s appropriate [for].” 10
16 RT 1291–92. Seated juror ██████████ said the same, writing that she was open to the death
17 penalty “if guilty & appropriate.” 30 CT 8142. And unlike ██████████, ██████████ exhibited
18 wariness, explaining that “somebody would have to really convince me that someone . . . took
19 lives and were of a sane mind and weren’t very caring about taking a life.” 14 RT 1796. ██████████
20 ██████████ also could not independently explain why she would vote yes on the ballot initiative. 14
21 RT 1795. Anderson ranked ██████████ a 7-8. Seated juror ██████████ used language similar to
22 ██████████’s in her questionnaire. ██████████ wrote that she was “not completely for or against
23 the death penalty.” 38 CT 10464. But unlike ██████████, ██████████ could not answer how she
24 would vote on the ballot initiative, despite being asked twice and provided equivocal answers for
25 many questions during voir dire. 17 RT 2247–48, 2249. Anderson ranked her a 5-6. ██████████.
26 ██████████’s favorable position on capital punishment was also nowhere near those of struck, white
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1 jurors. For example, ██████████ said he would oppose a ballot initiative legalizing the death
2 penalty, because there would be hope to “help them out” via rehabilitation instead of executing
3 them. 16 RT 2057. He also said he was having “second thoughts” about his ability to vote for
4 someone to die. 16 RT 2061.

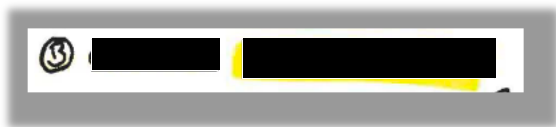
5 ██████████ ranked herself “[a]round 7” in terms of her favoring capital punishment. 10
6 RT 1294. This self-rank was higher than that of most of the venire who were asked the question.
7 For many of the prospective non-Black jurors who expressed similar, or notably weaker, capital
8 punishment views compared to ██████████’s, Anderson elevated their scores. He elevated
9 ██████████’s self-rank of 5 to a 10, ██████████’s 3-4 to a 5-6, ██████████’s 5 to a 7-8,
10 ██████████’s 5-6 to a 9. In contrast, in Anderson’s handwritten ranking of ██████████, he
11 initially included her under the 7-8 category—where she had ranked herself. Ex. 1 at 4. And on
12 the typed version of the list, ██████████’s name can still be seen under 7-8. Ex. 1 at 5.
13 However, it was then crossed out, and her name was handwritten under 0-2. Hers is the only
14 name that was handwritten on the printed list. Ex. 1 at 5. Nothing in ██████████’s questionnaire
15 or voir dire explained her demotion to the bottom of Anderson’s ranking.

16 ██████████’s answers demonstrated she would be a fair juror in the penalty phase, open
17 to both outcomes. She agreed with counsel that “there are certain crimes that are so bad that the
18 person should receive the death penalty.” 10 RT 1292. She also agreed that this was one of those
19 crimes. When asked whether the crimes Mr. Lynch was charged with would “meet [her]
20 threshold point” of severity that she would consider the death penalty, she answered “Yes.” 10
21 RT 1292. And for her, the death penalty was a worse punishment than LWOP. 10 RT 1293.
22 Unchallenged jurors were split on their feelings about which penalty was worse. The court found
23 ██████████’s responses to exhibit an openness to either penalty outcome, asking “I take it then
24 from your responses, that your views are such that we would be having a real trial if we ever
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1 reached a penalty stage?" [REDACTED] confirmed more than once that she would be open to the
2 possibility of either punishment. 10 RT 1290, 1291. [REDACTED]'s position pointedly diverged
3 from [REDACTED]'s view, as [REDACTED] indicated that the State would have to "really convince" her that
4 the death penalty was appropriate before she could vote for it. 14 RT 1796. Anderson not only
5 left [REDACTED] to be seated, he also did not challenge [REDACTED], who viewed the death
6 penalty "as a last resort, type of punishment," 8 RT 879.

7
8 [REDACTED] was also willing and able to stand behind a death sentence. Anderson asked
9 her if she would get "cold feet," or want "somebody else do the dirty work" when it came to
10 voting for the death penalty. 10 RT 1296. She said, "No." *Id.* He asked again, if she would have
11 the "inner strength" to stand behind death sentence. *Id.* She confirmed, "Yes." *Id.* Anderson
12 struck her anyways. 21 RT 2623.

13
14 [REDACTED]:



23
24 Ex. 1 at 4, 5, 8.

25 As Anderson did with the other Black prospective jurors, he marked [REDACTED]'s
26 race in his notes about her.¹² Ex. 1 at 4, 5, 8. He did not even bother to ask her to rank herself on
27

28

¹² The record otherwise reflects that [REDACTED] is Black. 28 CT 7516.

1 his Rambo Scale and he ranked her “0-2” on the Scale, placing a red dot next to her name, again
2 denoting her race. Ex. 1 at 5.

3 In her questionnaire, ██████████ explained that, about the death penalty, she had not
4 “made a strong decision one way or the other.” 28 CT 7533. She said she would “ask herself”
5 whether “taking one life to correct as punishment for taking another, is justified.” 28 CT 7533.
6 She also expressed being middle-of-the-road during voir dire with the court, “I don’t see that I
7 have made a decision.” 12 RT 1540. And she explained to Anderson that the word to describe
8 her position is “undecided.” 12 RT 1543. She explained that she had not “gotten to where [she is]
9 strongly pro-death penalty or against [the] death penalty.” 12 RT 1243. She also committed
10 herself to the “process” and repeatedly offered that for her, the decision would come down to the
11 evidence. 12 RT 1539–40. ██████████ thus offered mainstream answers to whether she
12 supported capital punishment and demonstrated an equable temperament ideally suited for the
13 deliberative process.
14

15
16 A comparison with non-Black jurors and alternates Anderson accepted demonstrates that
17 his strike of ██████████ was motivated by her race. Anderson’s Rambo score for her—0-2—is
18 markedly lower than his score for the less pro-prosecution non-Black jurors. Ex. 1 at 5. For
19 example, ██████████, an alternate, scored himself as a 3-4. 8 RT 889. ██████████ thought the death
20 penalty should only be a “last resort.” 8 RT 888. He also did not think it would act as a deterrent.
21 8 RT 882. Anderson, however, raised ██████████’s score to a 5-6. Ex. 1 at 4. ██████████ also
22 described the death penalty as a “last resort” and received a mid-range score from Anderson. 17
23 RT 2170; Ex. 1 at 4. The comparison reflects that, for Anderson, the difference between ██████████
24 and the seated non-Black jurors was simply their race.
25

26
27 The same goes for her answers about the ballot initiative. She said that she did not think
28 she could “give an answer to say [she] would vote one way,” but that having to vote would

1 “force [her] at that time to try to deal with it because [she tries] to follow through and make a
2 decision.” 12 RT 1544. Non-Black jurors also exhibited uncertainty about their support for the
3 ballot initiative. On this question, ██████████ said that she was “not sure” how she’d vote on the
4 ballot initiative. 17 RT 2247. Similarly, ██████████ also offered that she did not think the
5 death penalty was a deterrent and would “probably” support the ballot measure. 4 RT 367. ██████████
6 ██████████ could not explain why she would support a ballot initiative. 14 RT 1795. Yet they were
7 seated and Anderson struck ██████████. 21 RT 2624.

9 ██████████ :



16 Ex. 1 at 5, 15.

17 ██████████ described himself as “Mexican/Black.” 38 CT 10553. Anderson’s notes
18 describe him—and only him—as “1/2.” Anderson used this term on his typewritten notes, as
19 well as by hand, where ██████████ is listed with the other prospective jurors. Ex. 1 at 5, 15.
20 Anderson’s fractional approach to race harkens to the “separate but equal” scheme of Jim Crow.
21 *See Plessy v. Ferguson*, 163 U.S. 537, 541 (1896) (concerning the denial of a railcar seat
22 reserved for white passengers because Mr. Plessy, a so-called “octoroon,” possessed “seven
23 eighths Caucasian and one eighth African blood.”). Anderson did not ask ██████████ to rank
24 himself on Anderson’s Rambo Scale, but Anderson provided a score for this person he
25 characterized as a fraction: 0-2. Ex. 1 at 4.
26
27
28

1 Anderson gave ██████ this score despite his measured, thoughtful statements on the
2 death penalty. Regarding his feelings on capital punishment, ██████ said “I have no direct
3 feeling for or against it. I believe each case should be looked at individually.” 38 CT 10570.
4 Regarding the “effectiveness of the criminal justice system,” he offered a pro-prosecution
5 lament: “Victims seemed to be having less rights than the accused.” 38 CT 10567.
6

7 During voir dire, he testified that, “I feel if it’s warranted, I may vote for the death
8 penalty, but if it’s not warranted, I think I would give life in prison.” 18 RT 2291. He said he
9 believed the crime Mr. Lynch was accused of was serious enough for the death penalty, but he
10 said he would “have to see the tangible evidence.” 18 RT 2292. He explained that “I just think I
11 have to take it individually. I just think it’s too important to generalize . . . I have to be involved
12 and listen to all the evidence pertaining to this case before I could make that judgment.” 18 RT
13 2294. These answers echo those of the non-Black seated jurors discussed *supra* and reflect a
14 serious, considered view on a capital juror’s role. *Cf. Witherspoon v. Illinois*, 391 U.S. 510, 522
15 (1968) (ruling “a sentence of death cannot be carried out if the jury that imposed or
16 recommended it was chosen by excluding veniremen for cause simply because they voiced
17 general objections to the death penalty or expressed conscientious or religious scruples against
18 its infliction”).
19

20 ██████ admitted he “probably would vote no” to the hypothetical ballot initiative,
21 18 RT 2295, but he explained that he saw his role as a juror differently than that of voter: “this is
22 what I feel just for myself. But if I’m on a jury and I’m listening to all the evidence presented to
23 me and I feel that the crime is heinous enough, we, as a group, feel it’s heinous enough . . . that
24 [it] deserves the death penalty, then this is the way I would vote.” 18 RT 2301. When asked
25 whether the crimes for which Mr. Lynch was indicted were serious enough for the death penalty,
26 ██████ responded: “Most definitely they are serious enough.” *Id.* When asked whether he
27
28

1 could put his preference for a life sentence and choose a death sentence instead, he said “I
2 believe so, yes.” 18 RT 2302. ██████’s views then, were more strongly pro-prosecution
3 than those of ██████, one of the white jurors whom Anderson did not strike.¹³ ██████ said
4 that sentencing Mr. Lynch to death “would not be easy, but if I came to that conclusion, I would
5 do that.” 8 RT 945.

6
7 Consistent with the trend, Anderson ranked ██████ a 10, an increase from ██████’s self-rank
8 of 6-7. 8 RT 944; Ex. 1 at 4. Having ranked ██████ a 0-2, Anderson struck him. 21 RT
9 2627.

10 **f. A New Trial Free from Racial Bias Is Required**

11 Each time Anderson struck a Black prospective juror in this case, he did so based on race.
12 In the light of the disclosure of Anderson’s own rankings on his Rambo Scale and his denoted
13 fixation on Black racial identity among the venire, each one of those strikes, on their own,
14 requires relief. *See Flowers*, 588 U.S. at 298; *Kesser*, 465 F.3d at 369 (“[J]ust one racial strike
15 calls for retrial.”); *Vasquez-Lopez*, 22 F.3d at 902 (quoted in *Snyder*, 552 U.S. at 478). A
16 comparative analysis of the white jurors he accepted and the Black prospective jurors he struck
17 makes his discriminatory intentions unmistakable. The larger record in this case as well as
18 Anderson’s own words and actions in other cases, coupled with the widespread practices of the
19 District Attorney’s “death penalty team” that he oversaw at that time (*supra* at 4), reinforce that
20 race motivated his use of peremptory strikes here. *See Batson*, 476 U.S. at 89 (“the Equal
21 Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their
22 race or on the assumption that black jurors as a group will be unable to impartially consider the
23

24
25
26 ¹³ ██████ also compared favorably to the white prospective jurors who Anderson struck.
27 For example, in addition to ██████, discussed *supra*, ██████ would have been more
28 favorable than ██████ who speculated there “could be some circumstances that warrant
the death penalty,” but admitted, she “couldn’t give you one.” 18 RT 2333. Anderson ranked her
a 5-6. Ex. 1 at 5.

1 State’s case against a black defendant.”). As set forth above, Andersons’s scoring system in
2 practice weighted race to differentiate Black and white prospective jurors, with his score of even
3 the most pro-death of Black prospective jurors not equaling that of equivocal white jurors.

4
5 Indeed, the Court explicitly declined to adopt a piecemeal approach that evaluated each
6 individual strike in a vacuum. *See Ervin v. Davis*, 12 F.4th 1102, 1107 (9th Cir. 2021) (“The
7 side-by-side comparison of [a juror who was removed against one who was retained] . . . cannot
8 be considered in isolation in this case. . . . [W]e must examine the whole picture.”); *see also*
9 *Miller-El*, 545 U.S. at 265 (noting that evidence of discriminatory strikes must be viewed
10 “cumulatively,” even if the probative value of each individual component may be “open to
11 judgment calls”). Anderson’s publicly stated views, the application of his scoring system, and his
12 treatment of Black prospective jurors relative to their white counterparts all point to the same
13 conclusion: Anderson exhibit racial animus towards Black persons generally and prospective
14 jurors in particular and discriminated based on race in multiple instances in selecting this jury.
15 *See* Cal. Pen. Code § 745(a)(1), (2).

16 **iii. Racial Bias in Guilt-Phase Proceedings**

17 **a. The State and Trial Counsel used dehumanizing imagery and language**
18 **against Mr. Lynch.**

19 In opening and closing statements at the guilt phase, Anderson referred to Mr. Lynch as
20 “predator,” invoking non-human imagery from the very outset of the trial. 21 RT 2641. To be
21 clear, Anderson did not use the common noun. He, instead, invoked the then-popular movie
22 “Predator” about a “technologically advanced extraterrestrial who stalks and hunts [people]
23 down.” *Predator*, Wikipedia (last visited Oct. 15, 2024). That is, Anderson was referring to Mr.
24 Lynch as a non-human/alien when he said in his opening statement, “We’re going to re-enact
25 five days of the *Predator*” 21 RT 2641. Having opened its strategy by painting this picture
26 of the Predator, the State came full circle with the reference to Mr. Lynch as a villainous creature
27 in its guilt phase closing statement, calling him the “predator” three more times. In one instance,
28

1 he added another racial code word “urban,”¹⁴ to the epithet, “The Predator, this urban terrorist,
2 Franklin Lynch.”¹⁵ 32 RT 4113. In another, he suggested Mr. Lynch was a spinoff of the movie
3 creature, “the Predator of the elderly.” 32 RT 4146. Note that Anderson did not describe him as
4 “a” predator of the elderly, suggestive of a different, but still problematic use of the term.¹⁶
5 Anderson instead called him “the predator of the elderly,” calling back to his opening
6 statement’s promise to “reenact” the movie villain. 21 RT 2641. Anderson also called back to the
7 movie monster when he said that he “hop[ed he doesn’t] wake him up.” 32 RT 4146.

8 Defense counsel, for his part, recognized what Anderson was doing. He countered
9 Anderson’s narrative, not of a predator, but of the *Predator*: “If the defendant was *half the*
10 *monster* the prosecution would like him to be in your eyes, her standing in the backyard with that
11 piece of iron wouldn’t have thwarted him.” 32 RT 4167 (emphasis added).

12 And in rebuttal, shortly before the jury left to deliberate, Anderson returned to his
13 dehumanizing message: “And I’m asking each and every one of you to find this predator guilty
14 of all the crimes he is charged with during his reign of terror in the summer of 1987.” 32 RT
15 4216. Just as he began his opening statement, Anderson closed his arguments with the same
16 attempt at dehumanizing Mr. Lynch.

17 The People’s use of language to paint Mr. Lynch as the “predator,” built on historically
18 racist tropes and dehumanizing stereotypes, including the “Black Brute,” (*infra* § c) supports a
19 further violation of the RJA. This violation injected impermissible racial bias into Mr. Lynch’s

20
21
22 ¹⁴ See German Lopez, *The Sneaky Language Today’s Politicians Use to Get Away with Racism*
23 *and Sexism*, Vox (Feb. 1, 2016) (“‘inner city’ and ‘urban’ have been widely adopted to refer to
24 black people—but they have also been used by prominent figures to refer to high crime and poor
25 work ethic in a way that effectively connects crime, violence, and laziness with black
26 Americans.”).

26 ¹⁵ Anderson also implicitly invoked race when recounting witness testimony during his closing
27 arguments. Rather than simply noting that the perpetrator ran toward the exit of the
28 neighborhood, which is in a town adjoining Oakland, Anderson saw fit to recount for the jury
that he was “going toward Oakland.” 32 RT 4106.

¹⁶ That is, either understanding of the term is in line with the kind of language the Legislature
had in mind in adopting the RJA. And either understanding is consistent with the Legislature’s
condemnation of animal imagery to depict a defendant.

1 trial and constituted structural error. Accordingly, this Court should vacate his conviction and
2 sentence. U.S. Const. amends VI, XIV; Cal. Const. Art. VI; Cal. Pen. Code § 745.

3 **b. The use of dehumanizing depictions at Mr. Lynch’s trial constituted racially**
4 **discriminatory language prohibited by the RJA.**

5 Seeking to break with “[e]xisting precedent tolerates the use of racially incendiary or
6 racially coded language, images, and racial stereotypes in criminal trials,” Assembly Bill 2542
7 (Stats. 2020, ch. 317), the RJA explicitly prohibits the use of “racially discriminatory language”
8 in a defendant’s trial or proceedings by “the judge, an attorney in the case, a law enforcement
9 officers involved in the case, an expert witness, or juror.” Cal. Pen. Code § 745(a)(2). The statute
10 goes on to define racially discriminatory language as “language that, to an objective observer,
11 explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or
12 racially coded language, language that compares the defendant to an animal, or language that
13 references the defendant’s physical appearance, culture, ethnicity, or national origin.” Cal. Pen.
14 Code § 745(h)(4). Reference to the statute’s legislative history confirms that the People’s animal
15 comparisons also constitute prohibited racially discriminatory language under the law.
16

17
18 In defining “discriminatory language,” the RJA applies an “objective observer standard.”
19 Cal. Pen. Code § 745(h)(4) (“Racially discriminatory language” means language that, to an
20 objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to,
21 racially charged or racially coded language, language that compares the defendant to an animal, or
22 language that references the defendant's physical appearance, culture, ethnicity, or national
23 origin.”). This standard, when properly construed, takes the perspective of someone who is
24 reasonably informed regarding racial discrimination and its effects. While not defined in the
25 statute, the “objective observer,” has been understood in California courts as someone who is
26 “impartial” (*Haworth v. Superior Court*, 50 Cal.4th 372, 391 (2010)), “a well-informed, thoughtful
27 observer” (*Id.* at 389, quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)). In applying rules
28

1 to identify racial bias, the Washington Supreme Court has adopted a similar definition of
2 “objective observer” and describes this as “a person who is aware of the history of explicit race
3 discrimination in America and aware of how that impacts our current decision-making in non-
4 explicit, or implicit, unstated, ways.” *State v. Zamora*, 512 P. 3d 512, 523 (Wash. 2022).

5
6 The State committed multiple violations of the RJA’s prohibition of racially
7 discriminatory language under subdivision (a)(2), making liberal use of animal imagery to
8 dehumanize Mr. Lynch. This rhetoric “explicitly or implicitly appeal[ed] to racial bias” and
9 constituted a further violation of the RJA.

10 As explained in the social science cited in the legislative findings regarding the danger of
11 animal imagery, “By using similes that do not explicitly allude to race but conjure up stereotypes
12 of Black people as having animalistic tendencies or behaving like an animal would, prosecutors
13 can conjure up violent images about the defendant in jurors’ minds.” Praatika Prasad, *Implicit*
14 *Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *Fordham L.*
15 *Rev.* 3091, 3105–06 (2018); A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (e) (citing Prasad, *supra*).
16 These images call upon pervasive stereotypes that paint Black people as “violent, threatening,
17 criminal.” Phillip Atiba Goff, et al., *Not Yet Human: Implicit Knowledge, Historical*
18 *Dehumanization, and Contemporary Consequences*, 95 *J. Per. & Soc. Psych.* 292, 294 (2008).

19
20 A “prosecutor’s language does not have to directly refer to an animal to activate the
21 juror’s mental association.” Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at*
22 *Trial*, 71 *Case W. Res. L. Rev.* 39, 61 (2020). Language associated with animals and animal
23 metaphors invokes the same harmful stereotypes as direct references to animal imagery, and
24 “descriptive terms such as “primal,” “savage,” “tame,” or “predator,” used to dehumanize the
25 defendant” can “encourage a judge or jury to think of the defendant as less than human.” Shana
26 Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animal*
27
28

1 *Imagery*, 51 Crim. Law Bulletin 4 (Summer 2015). Dehumanizing rhetoric has historically been
2 associated with attempts to subjugate people based on their membership in a particular racial,
3 ethnic, or national origin group. Goff et al., *supra*, at 293 (citing how comparison to nonhuman
4 animals was used to justify slavery, the Holocaust, and violence against immigrants). The
5 Legislature was clear that the RJA was enacted “to provide remedies that will eliminate racially
6 discriminatory practices in the criminal justice system.” A.B. 2542, Stats. 2020, ch. 317, § 2,
7 subd. (j).

9 The Legislature noted the exceptionally pernicious effect of animal imagery and its deeply
10 engrained association with discrimination: “Because use of animal imagery is historically
11 associated with racism, use of animal imagery about a defendant is racially discriminatory and
12 should not be permitted in our court system.” A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (e)).
13 Allowing the State to invoke harmful stereotypes and racialized associations by directly or
14 indirectly invoking animal imagery would contravene the Legislature’s intent in passing the RJA.
15 Accordingly, the People’s use of animalistic descriptions of Mr. Lynch violates the RJA.

17 **c. The State painting Mr. Lynch in dehumanizing terms that appealed to the**
18 **historical trope of the “Black Brute” constituted racially discriminatory**
19 **language.**

20 The People’s rhetoric during Mr. Lynch’s guilt phase depicting him as “the predator of
21 the elderly,” (32 RT 4146) portrayed Mr. Lynch as unnaturally and innately violent. While
22 universally inflammatory and evocative, in Mr. Lynch’s case, this rhetoric appealed specifically
23 to the Black Brute caricature, a trope that has deeply racist historical associations. In light of its
24 history, using this language constituted a violation of the RJA irrespective of the speaker’s intent.
25 Cal. Pen. Code § 745(a)(2).

27 Under the RJA, language that appeals to racialized tropes and stereotypes is racially
28 discriminatory language prohibited under (a)(2). Cal. Pen. Code § 745(h)(4) (“Racially

1 discriminatory language” means language that, to an objective observer, explicitly or implicitly
2 appeals to racial bias[.]”). Similar to animal imagery, the “Black Brute” is a trope that has a long
3 historical association with racism. Prasad, *supra*, at 3106 (“The brute caricature is an extension
4 of animal imagery.”) The “brute caricature portrays Black men as innately savage, animalistic,
5 destructive, and criminal—deserving punishment, maybe death. This brute is a fiend, a
6 sociopath, an anti-social menace.” Ryan Patrick Alford, *Appellate Review of Racist Summations:
7 Redeeming the Promise of Searching Analysis*, 11 Mich. J. Race & L. 325, 345 (2006). It grew in
8 the era known as the “Redemption Era,” where, following the end of Reconstruction and the end
9 of the Civil War, whites in the South sought to regain political and physical control of Black
10 people. The “Black Brute” trope became a mechanism to instill a fear of Black men and urge
11 their control and subjugation. The fear and hysteria spread by the caricature brought violence,
12 “as the myth grew and stories spread about the savage Black brute, so did the occurrences of
13 lynching.” Calvin Smiley & David Fakunle, *From “Brute” to “Thug”: The Demonization and
14 Criminalization of Unarmed Black Male Victims in America*, 26 J. Hum. Behav. in Soc. Environ.
15 350, 350–66 (2016).

16 This myth grew in particular by focusing on violence against white women at the hands
17 of Black men. Smiley, *supra*, at 353. However, the myth went beyond the accounts of sexual
18 violence. In one case of Sam Hose, who killed his employer after being threatened with a pistol,
19 the newspaper described Mr. Hose as “a monster in human form.” *Id.* at 35. As lynch mob
20 violence fell out of favor, the brute myth continued and evolved; “the mythical brute became the
21 realistic thug via the process of criminalization.” *Id.* at 354. Here, the People’s rhetoric invoked
22 this caricature repeatedly. By describing Mr. Lynch as the alien predator of elderly women, the
23 State directly called to one of the most insidious iterations of the trope, a fear of violence against
24 white women by Black men.
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1 The statements the People used in painting his “Brute” character have very little
2 relevance if understood by their precise meanings, as opposed to their rhetorical weight. The
3 relevance of describing Mr. Lynch as a monstrous, alien, non-human, was in building the image
4 of the mythical “Black Brute” boogeyman. It created a picture of a supernatural predator, the
5 Brute. While rhetoric has its place in summation, under the RJA, it is no longer unfettered. Its
6 limits are drawn by the rhetoric’s association with historical racism and its propensity to draw its
7 power by invoking those racist tropes to depict Black men like Mr. Lynch in hyperbolic terms to
8 justify their condemnation. Given their ingrained roots and ubiquity, the tropes are “likely to be a
9 strong motivating force, motivating a fear response when activated by external stimuli, such as a
10 racist summation.” Alford, *supra*, at 345.

11 **d. The People and trial counsel repeatedly made extraneous racial references to**
12 **create and exploit a racial divide.**

13 Anderson’s work inserting race into this matter was not limited to his arguments, as it
14 also extended to witness examination. Anderson repeatedly made clear that the allegations
15 involved a Black man entering a “white neighborhood,” where that man was an outsider. 22 RT
16 2797–98; 23 RT 2824, 2888, 2906. Then, over and over, Anderson referenced the race of the
17 person about whom his witnesses were testifying, uniformly in ways that did nothing to solidify
18 the identity of the perpetrator as anyone other than a “black man.” 21 RT 2644; 22 RT 2795–98,
19 2823; 23 RT 2888, 2935. And in other instances, Anderson introduced the race and/or nationality
20 of the victims, which was wholly irrelevant to the trial. For example, in opening and closing
21 statements he referred to one of the victims as a “British lady.” 21 RT 2648; 32 RT 4196. He
22 referred to another as a “Russian immigrant,” again signaling that these crimes involved a black
23 man victimizing white women. 21 RT 2644, 2652.

24 Remarkably, defense counsel, at times, did little better. When questioning an officer
25 about a deceased witness’s statement, defense counsel twice asked whether the witness had
26 identified a “negro” male. 30 RT 3985. Even if the deceased witness had used such language, it
27 was defense counsel, not the testifying officer, who injected the dated, racist term into the trial.
28

1 At other times, defense counsel tried to counter Anderson’s racist arguments and tropes,
2 even beyond the “Predator” narrative. Acknowledging how race had pervaded the People’s case
3 in guilt, defense counsel tried to confront it:

4 When you think about this case, when you review the evidence,
5 when you deliberate, I think you will reach[] a conclusion that there
6 was a certain amount of hysteria that existed in San Leandro and the
7 unincorporated area of Hayward. There were assaults going against
8 elderly people. The media ran rampant, and Black men became
9 suspect. And when I was a kid on the east coast, they used to call
10 them “boogiemán.” “The boogiemán was going to get you.” And the
11 description of the boogiemán was always somebody who didn’t look
12 like you. Every neighborhood you were in, there was somebody,
13 different racial group. Psychologically and subtly, that’s what
14 occurred here.

15 32 RT 4178. Defense counsel’s efforts failed in this close case in which the jury, after four days
16 of deliberations, returned guilty verdicts.

17 **iv. Racial Bias in Juror Deliberations at Guilt**

18 The racial bias Anderson injected throughout the trial even infected the jury room,
19 causing a coerced outcome. Juror [REDACTED] was one of only two Black members of the jury
20 who deliberated. Fed. Hab. Ex. 16. She did not believe there was sufficient evidence to convict
21 Mr. Lynch. *Id.* However, the foreperson, a white man, relentlessly targeted her, asserting that
22 they were “not going to have a hung jury,” ultimately forcing [REDACTED] and the other holdout juror
23 to relent. *Id.* Of the episode, [REDACTED] noted that the “racial pressure to change my vote was
24 palpable.” *Id.* [REDACTED], in her early twenties at the time, “felt pressured and intimidated to go along
25 with the rest of the jurors, so [she] changed [her] votes to agree with theirs,” resulting in Mr.
26 Lynch’s conviction. *Id.*

27 *****

28 The repeated emphasis on race, individually and collectively, violated Mr. Lynch’s rights
and require a new trial. *See* U.S. Const. amends. VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15, 16,
17; Cal. Pen. Code § 745. Racism is poison in our system of criminal law. And while it is among

1 the “toxins [which] can be deadly in small doses,” the dose here was not small. *See Buck v.*
2 *Davis*, 580 U.S. 100, 120 (2017). The animus exhibited here would be “odious” in any context,
3 but it is “especially pernicious in the administration of justice.” *Rose v. Mitchell*, 443 U.S. 545,
4 555 (1979); *see also Bennett v. Stirling*, 842 F.3d 319, 325 (4th Cir. 2016) (condemning the
5 People’s “not so subtle dog whistle on race” (quotation omitted)). Mr. Lynch is entitled to a new
6 trial free from racial bias.
7

8 **B. Claim Two: Trial Counsel Failed to Develop Readily Available Exculpatory**
9 **Evidence**

10 Trial counsel in Mr. Lynch’s case unconstitutionally failed to ensure there was basic,
11 readily available forensic testing on two key pieces of evidence. Had they done so, the jury
12 would have been presented with physical evidence that did not originate with either Mr. Lynch
13 or the respective victim, casting profound doubt on whether he was the perpetrator. Because of
14 these failures, Mr. Lynch is entitled to a new trial. *See* U.S. Const. amends. VI, VIII, XIV; Cal.
15 Const. art. I, §§ 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, 28; *Strickland v. Washington*, 466 U.S. 668
16 (1984); *Johnson v. Premo*, 399 P.3d 431, 442 (Or. 2017).

17 *The Hat from the Larson Scene*

18 In the Larson matter, trial counsel failed to have serological testing conducted on the hat
19 recovered at the scene and believed by the prosecution to belong to the perpetrator. Had they
20 done so, counsel—and the jury—would have learned that the hat had type B blood on it,
21 excluding Mr. Lynch and the victim as the contributor. That evidence is strongly suggestive that
22 someone other than Mr. Lynch committed the Larson murder.

23 Serological evidence was tested in the Larson, Figuerido, and Constantin crimes, but no
24 testimony was received regarding any of this testing. Counsel’s omission was grossly deficient.
25 Mr. Lynch’s trial counsel failed to conduct a thorough analysis of the physical evidence found at
26 the crime scenes. Competent trial counsel would have understood the necessity of an
27 independent analysis of law enforcement’s forensic conclusions and physical evidence
28

1 supporting those conclusions, especially in a capital case. Counsel must have been aware of this
2 evidence as police investigators disclosed some of the evidence gathered during the early stages
3 of the investigations as they were collecting it. For instance, during a press conference, one of
4 the investigating officers announced, “We found a hat at the scene of [the Larson] crime.” *Init.*
5 *Hab. Pet. Ex. 249 at 9873.*¹⁷ The officer speculated that the hat found at the Larson crime scene
6 “was worn by a black male. It’s a very distinctive hat, and I’ll just go ahead and show it to you
7 real quick, because many of you will want to put it on film.” *Id.* He explained that “the physical
8 evidence we found in the hat” allowed the police to “chase this hat down, and it’s been up to the
9 lab. We just got it back this morning.” *Id.* at 9873–74.

11 The sweatband of this hat had been typed in the ABO genetic marker system. *Init. Hab.*
12 *Pet. Ex. 188 at 4.* These tests revealed the presence of type B blood on the hat band. *Id.* at 5. The
13 criminalist examining the hat immediately called one of the investigating officers to report the
14 results of her analysis. *Init. Hab. Pet. Ex. 186 at 8119.* Later, it was determined that Mr. Lynch
15 was a non-secretor, excluding both him and the victim as a contributor. *Init. Hab. Pet. Ex. 421*
16 ¶18.

18 Counsel was also aware of the weaknesses of the People’s evidence. In fact, counsel
19 alluded to these facts at trial by saying: “Even here to this day, right now, there is no undisputed
20 objective scientific evidence that establishes that Mr. Lynch was in any one of those places. No
21 blood types are similar, no fingernail scrapings, no hair, no—as I said when we started—nothing.
22 That is the kind of objective unbiased, unpsychological, unmanipulated kind of evidence that
23 leads to certainty, and it is not here.” 32 RT 4178–79.

27 ¹⁷ “*Init. Hab. Pet.*” refers to the habeas petition previously filed in the California Supreme Court.
28 As with any part of the record, Mr. Lynch is happy to provide it these exhibits upon the Court’s
request.

1 The blood typing evidence would have been an opportunity to present an expert witness
2 to testify to this weakness of the evidence. An expert would have demonstrated the problems
3 outlined by counsel’s argument that the available evidence excluded Mr. Lynch as the
4 perpetrator of the crimes. In fact, the expert report provided by Mr. Lynch’s post-conviction
5 expert Dr. Patricia Zajac during the state habeas corpus proceedings explained how trial counsel
6 could have used the physical evidence.
7

8 Dr. Zajac, who served as a criminalist for the Alameda County Sheriff’s Department
9 Crime Laboratory from 1970-1981 had “extensive experience in the methods and protocols for
10 collecting and processing evidence, the analysis and comparison of physical evidence, including
11 serological testing, trace evidence analyses, crime scene reconstruction and homicide
12 investigation.” Init. Hab. Pet. Ex. 421 ¶5. She frequently served as an expert witness in the state
13 and federal courts on the “collection, testing and evaluation of physical evidence.” *Id.*
14

15 Dr. Zajac evaluated the evidence used to convict Mr. Lynch by reviewing numerous
16 reports from the law enforcement agencies including “lab reports and bench notes, autopsy
17 reports, and a summation of the testimony of the medical personnel, including pathologists, who
18 testified at the trial, numerous photographs and crime scene video tapes, and reviewed all of the
19 evidence remaining in law enforcement custody.” Init. Hab. Pet. Ex. 421 ¶7. Dr. Zajac also
20 examined “the test results and bench notes from ACSD criminalist Sharon Binkley, relating to
21 the testing of blood found under the fingernails of victim Constantin.” *Id.* She discovered that
22 “the ABO typing excluded both . . . Franklin Lynch and the victim Ana Constantin as the source
23 of the blood under Constantin’s fingernails.” *Id.* In fact, while “the test results indicate the
24 possibility of Type O blood as well as type A blood, there is no question that there was type A
25 blood under Constantin’s fingernails.” Init. Hab. Pet. Ex. 421 ¶14.
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1 The conclusion “that the stain in sample 12 had a donor other than Lynch or Constantin is
2 further supported by comparing the results for sample 12 with the other analyses that were run on
3 other blood stains, which were found to have come from the victim.” Init. Hab. Pet. Ex. 421 ¶15.

4 More importantly:

5
6 In addition to having ABO blood type O, Franklin Lynch is a non-
7 secretor. This means that he does not have the ABO blood group
8 substances present in his non-blood body fluids, such as saliva,
9 semen and urine. In a non-secretor, such as Franklin Lynch, his non-
10 blood body fluids will not produce positive test results for his blood
11 type. For secretors, it is possible to determine the ABO blood type
12 from tests of non-blood body fluids. These tests and results were
13 well known in 1987-1992.

14 *Id.* Independent analysis and testimony would have undermined the People’s claim that Mr. Lynch
15 was responsible for the Constantin homicide.

16 Such analysis and testimony would have also bolstered the defense’s claim that Mr.
17 Lynch was not responsible for the murder of Ms. Larson. The weight of this evidence is
18 underscored by the fact that the San Leandro Police Department clearly believed that the tested
19 hat was worn by the person who killed Ms. Larson. The ABO evidence tends to exclude Mr.
20 Lynch as having worn the hat. Instead of arguing, as trial counsel did to the jury, that no physical
21 evidence established that Mr. Lynch was present at the crime scene, trial counsel could have
22 used this evidence to argue that the evidence strongly suggested that Mr. Lynch was not involved
23 in the murder at all.

24 *Hair from the Constantin and Larson Scenes*

25 Likewise, trial counsel failed to conduct independent testing on the hair collected from
26 the Constantin and Larson scenes. Had they done so, Mr. Lynch and the victims would have
27 been excluded as the contributor of the hair, again undermining any probability that Mr. Lynch
28 was the true perpetrator.

 Had trial counsel conducted independent review or testing, the trace evidence found at
the Constantin and Larson crime scenes would have provided powerful evidence that Mr. Lynch

1 did not commit the crimes. Alameda County Sheriff's Department (ACSD) Crime Lab
2 criminalists Binkley and Spear described their review of numerous items recovered from the
3 Constantin crime scene, and their attempts to ascertain any hair "which was foreign to the
4 victim." Init. Hab. Pet. Ex. 221 at 1. Ultimately, only one hair was retained for analysis. This
5 hair was described as a "short, dark, coarse human hair with a cut tip." Init. Hab. Pet. Ex. 221 at
6 5. As Dr. Zajac explains, the investigators appeared to collect hairs likely to have been associated
7 with African Americans. Init. Hab. Pet. Ex. 421 ¶19. However, the State appears to have not
8 conducted any testing on that hair, and the defense team at trial failed to have an expert review it.

9
10 Had trial counsel engaged with an expert and reviewed the evidence, they would have
11 learned that commonly-used microscopic hair analysis at the time would have excluded Mr.
12 Lynch as the contributor:

13
14 Microscopic examination of this hair, and comparison with hair
15 samples (both head and pubic hair samples) from Lynch show
16 significant differences in diameter, color, pigmentation, cuticle, and
17 medullation from which I conclude Mr. Lynch is excluded as the
18 source of this hair.

19 All of the hair analysis in 1987-1992 would have involved the same
20 type of microscopic examination using a comparison microscope.

21 Init. Hab. Pet. Ex. 421 ¶24. Neither Mr. Lynch nor Ms. Constantin contributed the hair collected
22 by the State.

23 The State collected two hairs from the victim's body and one from the victim's pants.
24 None of those hairs came from the victim. At trial, the People's expert witness concluded that the
25 second hair from the victim's body did not come from Mr. Lynch and that the first hair
26 "probably" did not. However, had trial counsel conducted independent testing, based on widely
27 used techniques at the time, they would have learned that "differences in pigmentation, including
28 color, shapes, sizes and distribution of pigment granules, are very significant factors that clearly
indicate Mr. Lynch is excluded as the source of this hair." Init. Hab. Pet. Ex. 421 ¶22.

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1. Pursuant to Evidence Code, section 452, subdivision (d), take judicial notice of the transcripts, files, and briefs, in Alameda Superior Court Case No. H-10662 and Court of Appeal Case No. S026408;

2. Issue an order directing that James Hill, Warden of the Richard J. Donovan Correctional Facility and the California Department of Corrections and Rehabilitation show cause why this Court should not vacate Mr. Lynch's judgment and/or sentence;


3. Release Mr. Lynch on his own recognizance pending resolution of the issues as authorized by sections 1476 and 1277, as acknowledged by the California Supreme Court in *People v. Romero*, 8 Cal.4th 728, 744 (1994); *In re William M.*, 3 Cal.3d 16, 22 (1970); *In re Smiley*, 66 Cal.2d 606, 613 (1967); *In re Johnson*, 62 Cal.2d 325, 328 (1965); *In re Newbern*, 53 Cal.2d 786, 788 (1960); and *In re Osslo*, 51 Cal.2d 371, 376 n. 3, 4 (1958);

4. After granting discovery, an evidentiary hearing, and full consideration of the issues raised by this petition, grant the petition and vacate the judgment and/or sentence imposed on Mr. Lynch; and

5. Grant Mr. Lynch any further relief as is appropriate in the interests of justice.

Respectfully submitted,

DATED: December 3, 2024

By: 
JOHN R. MILLS
Attorney for Petitioner
FRANKLIN LYNCH

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VERIFICATION

I, John Mills, declare as follows:

1. I am a member of the Bar of the State of California. As such, I am admitted to practice before the courts of the State of California.
2. I represent Franklin Lynch in filing his petition for writ of habeas corpus. Mr. Lynch is confined at the California State Prison, Richard J. Donovan Correctional Facility.
3. I am authorized to file this petition for writ of habeas corpus on Mr. Lynch's behalf.
4. I make this verification pursuant to Code of Civil Procedure, section 446, subdivision (a) because Mr. Lynch is incarcerated outside of the county, some matters are more within my knowledge than his, and the petition relies in part on citations to the record in *People v. Lynch*, Case No. H10662, which is not in his possession, so he is not in a position to verify this petition.
5. I have drafted and read the foregoing petition for writ of habeas corpus. I declare that all the matters alleged here are true of my own personal knowledge or are supported by the record or by the attached exhibits.
6. The attached declarations are true copies of original declarations. I believe them to be true.

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

Executed on Dec. 3, 2024, in Alameda County, California.



JOHN R. MILLS
State Bar No. 257853
PHILLIPS BLACK, INC.
Attorney for Petitioner

1 **PROOF OF SERVICE**

2 I, the undersigned hereby declare:

3 I am over the age of eighteen years and not a party to the within cause. I certify that, on
4 December 3, 2024 I served the within:

5 **PETITION FOR RELIEF**

6 in the matter of *In re Lynch*, H10662 by E-filing a redacted version of this document in this
7 matter at <https://california.tylertech.cloud/OfsEfsp/ui/dashboard> and by emailing a copy of the
8 redacted and unredacted versions this document and the related exhibits to the following address:

9 Aimee Solway
10 Aimee.Solway@acgov.org

11 I certify or declare under penalty of perjury that and that the foregoing is true and correct,
12 and that I signed this document on December 3, 2024.

13
14 
15 John R. Mills
16 Attorney

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