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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**Docket: H10662**
PLAINTIFF/RESPONDENT,	**PETITION FOR RELIEF**
	DEATH PENALTY CASE
v.	Dept.: 13
	Date: Dec. 13, 2024
FRANKLIN LYNCH,	Time: 9:00 a.m.
DEFENDANT/PETITIONER,	

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**

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986) ..... passim

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

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

Statutes

Cal. Penal Code § 1172.1 2

Cal. Penal Code § 1473 ..... 2, 4

Cal. Penal Code § 745 ..... passim

Cal. Evid. Code § 452 2

Cal. Evid. Code § 955 5

Other Authorities

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Assem. Bill No. 2542 ..... passim

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Constitutional Provisions

Cal. Const. art. I, § 7 2

Cal. Const. art. I, § 15 ..... 2, 53

Cal. Const. art. I, § 16 ..... 2, 53

Cal. Const. art. I, § 17 ..... 2, 53

Cal. Const. art. I, §§ 7 53

Cal. Const. art. VI, § 11 ..... 2, 48

Cal. Const. art. VI 10

U.S. Const. amend. VI 10, 48, 53, 54

U.S. Const. amend. VIII 53, 54

U.S. Const. amend. XIV 10, 48, 53, 54

I. INTRODUCTION

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

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

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

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

II. UNLAWFUL RESTRAINT

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

[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.

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

III. JURISDICTION

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

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

IV. JUDICIAL NOTICE AND INCORPORATION

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

V. PROCEDURAL HISTORY

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

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

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

VI. THE CLAIMS IN THIS PETITION ARE NOT BARRED

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

Here, an adequate justification exists for each of the claims below. Claim One centers on the recently disclosed notes of prosecutor James Anderson, and seeks relief based on the RJA, which was only recently made retroactively applicable. As such, there are at least two adequate

justifications for raising Claim One now. First, this is the first petition alleging claims under the RJA in Mr. Lynch's case, and second, Anderson's notes, which provide a basis for the claim, "could not have been previously known by the petitioner with due diligence." Cal. Pen. Code § 1473(e).

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

VII. SCOPE OF CLAIMS AND EVIDENTIARY BASIS

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

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

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

VIII. CLAIMS FOR RELIEF

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

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

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

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

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

[2] Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial 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).

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

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

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

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

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

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

ii. Racial Bias in Jury Selection[3]

James Anderson tried Mr. Lynch in the fall of 1991 and spring of 1992. Anderson was responsible, among other things, for the entirety of the People's representation in jury selection. As his recently disclosed jury selection notes in this case reveal, Anderson tracked the race of Black—and only Black—prospective jurors, systematically rated Black venire members unfavorably, crafted pretextual reasons to justify strikes, and, as revealed by the entirety of the record, based his use of peremptory strikes on the race of the four Black prospective jurors he struck. Ex. 1 (jury selection notes of James Anderson). His behavior in this case was consistent with the actions he undertook in other cases, including his pattern of targeting Black women to exclude from jury service. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) ("gender, like race, is an unconstitutional proxy for juror competence and impartiality"). While Anderson refrained from striking certain Black venire members, who were then seated on Mr. Lynch's jury (*infra* at 31), his restraint with respect to those three individuals reflects the extremely pro-

[3] The District Attorney's Office has been in possession of this argument since this summer. They have not yet conceded that Anderson discriminated on the basis of race in jury selection. Perhaps after completing discovery related to these issues—including obtaining files and deposing former members of the District Attorney's Office—they will be in a position to confess error in this specific case, in addition to acknowledging the "systemic" *Batson* violations and destruction of 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.

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

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

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

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

At trial, Mr. Lynch's counsel did not object to any of Anderson's peremptory strikes and thereby failed to make a record, pursuant to *Batson*, of the People's proffers of purportedly race-neutral rationale for each given strike and, in turn, the trial court's evaluation of whether the record established the prosecution's "purposeful discrimination." *Batson*, 476 U.S. at 98. But extra-record evidence, including a prosecutor's jury selection notes, may emerge long after the trial to establish an Equal Protection Clause violation. *See Foster v. Chatman*, 578 U.S. 488, 499 (2016) (citing *Batson*, 476 U.S. 79) (granting relief on Equal Protection Clause violation evidenced and litigated in state post-conviction); *Miller-El*, 545 U.S. at 240 (examining information "beyond the case at hand" to determine whether the People's proffered reasons for a strike are false and thereby "raise an inference of purposeful discrimination"); *Swain v. Alabama*, 380 U.S. 202, 223 (1965) (ruling systematic racial exclusion across a county's prosecutions violates the Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (ruling statutory exclusion of Black people from grand and petit jury service violates the Equal Protection Clause). Further, pattern and practice established in various trials, too, may establish such jury discrimination. *Flowers*, 588 U.S. at 305.

Indeed, in other remarkably similar circumstances, courts have found that a prosecutor's notes are "not only relevant, but dispositive" in establishing a constitutional violation. *People v.*

Superior Court (Jones), 12 Cal.5th 348, 359 (2021) (citing *Foster*, 578 U.S. at 514); *see also, e.g.*, *Mitcham v. Davis*, 103 F. Supp. 3d 1091, 1097 (N.D. Cal. 2015). Here, as in these cases, "the prosecutor's notes revealed a singular focus on the jurors' race that 'plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury.'" *Jones*, 12 Cal.5th at 359 (quoting *Foster*, 578 U.S. at 514).

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

a. James Anderson Prosecuted This Case

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

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

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

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

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

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

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

In 2004 to 2005, a controversy over excluding Jewish and Black prospective jurors embroiled Alameda prosecutors in another capital case, this one tried in 1987. Ex. 6. Although the Alameda County Superior Court ultimately concluded that such discrimination did not occur in that case, Ex. 6, Anderson suggested otherwise in statements to the media. He claimed that excluding Black and Jewish prospective jurors is "not a racist thing, but just common sense . . . It is an axiom. It is not because of prejudice. Their politics are not going to be on your side." Dean E. Murphy, *Case Stirs Fight on Jews, Juries and Execution*, New York Times (Mar. 16, 2005), attached as Ex. 7. That view was something Anderson internalized from advice he purportedly had received from a judge. "When I was a young D.A., [the judge] would tell me, 'If you have a cop case, be careful of blacks on the jury, because they don't like cops,' Mr. Anderson said. I heard him tell defense lawyers: 'Be careful of Asians. They are very law-and-order oriented.'" *Id.* Anderson believed it to be an established, "axiom[atic]" truth that as a group, Black and

Jewish jurors held views that biased them against the State by sole virtue of their belonging to that racial or ethnic group, and it was necessary to remove them on those bases. *See id.*

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

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

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

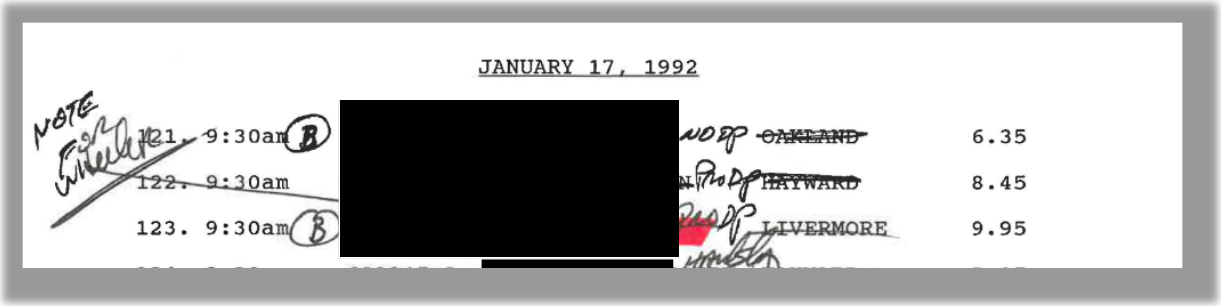
from the world," Ex. 4 at 2. These racist remarks are probative of Anderson's purpose when he struck the four prospective Black prospective jurors at issue.

b. Anderson Systematically Noted the Race of Only Black Prospective Jurors

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

Ex. 1 at 4.

He sustained this practice over 17 separate days of jury selection.



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/mvnwzz. *See also infra* at 44 (discussing *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896)).

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

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

Research on priming demonstrates the "primacy effect," which is "the tendency for the first piece of information to shape understanding and memory of subsequent information." Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 305, 346 (2010). "Once people have an impression or belief, they are inclined to pay less attention to subsequent information, particularly information that contradicts the impression." Linda L. Berger & Kathryn M. Stanchi, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 105, 118 (2018). Additionally, the recency of when the priming information was presented significantly affects how the information is processed.

Research shows that "[o]ur brains interpret new information by fitting it into existing categories, particularly categories that have been recently accessed." *Id.* "Priming is a way of influencing the categories that are at the forefront of our brains." *Id.* at 107.

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

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

Implicit bias is particularly likely to affect "judgments that are inherently difficult, subjective or ambiguous . . . ." Erik James Girvan, *On Using the Psychological Science of Implicit*

Bias to Advance Anti-Discrimination Law, 26 Geo. Mason U. Civ. Rts. L. J. 1, 33 (2015) (footnotes omitted). Implicit bias also "translate[s] most readily into discriminatory behavior [] when people have wide discretion in making quick decisions with little accountability." Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1142 (2012). Jury selection required these exact kinds of subjective, discretionary, and quick judgments of Anderson, creating a scenario ripe for implicit bias to operate.

Of course, there is a far simpler understanding of Anderson's conduct from the record now before this Court. The newly available evidence from Anderson's striking of Mr. Lynch's jury, when viewed with the totality of his pattern and practice and the wider public record and specific record in this case, leaves little to the imagination as to Anderson's explicit intent to eliminate as many Black prospective jurors as he could get away with striking. However, as the foregoing discussion submits, even an unduly charitable view of Anderson's conduct manifests racialized intent in violation of the federal and state authorities, dating to the first Reconstruction, that foreclose such discrimination.

c. Anderson Scored Potential Jurors on his Novel "Rambo Scale," Noting the Race of Only Black Prospective Jurors While Dramatically Raising or Lowering Scores by Race

As part of jury selection, Anderson used a rating system he deployed in his cases, something he called a "Rambo scale." 16 RT 2100. He placed jurors—and often asked jurors to place themselves—on a scale of one to ten, with one being a "Mother Theresa[-]type personality" and ten being the iconic Sylvester Stallone character and one-man killing machine, John Rambo. *Id.* As with this scale, Anderson's voir dire overwhelmingly emphasized jurors' views on the death penalty.

Although this case presented a number of complex factual issues, Anderson's voir dire of jurors almost exclusively focused on their views on capital punishment.[5] Anderson repeatedly described his ranking scale to prospective jurors. He would ask them to "[i]magine a scale of one to ten." 16 RT 2099. At the lower end of the scale "would be someone who hardly, if ever, would impose the death penalty." *Id.* He suggested such a person would "forgive every wrong that's been done," did not believe people have "responsibility for their own acts," and that there is "good in everybody." *Id*. On Anderson's scale, such a person would be a "Mother Theresa[-]type personality." *Id*

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

What Mr. Lynch could not have known, until just months ago, was that Anderson had a practice of keeping score for himself, and his scores mark an extreme racial divide. *See, infra* (discussion of Anderson's similar juror rankings in *People v. Ervin*). Anderson's notes reflect his own ranking of the jurors, where he frequently moved jurors higher or lower on the scale than

[5] This is likely in part because the only part of voir dire that had ever been required to be 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).

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

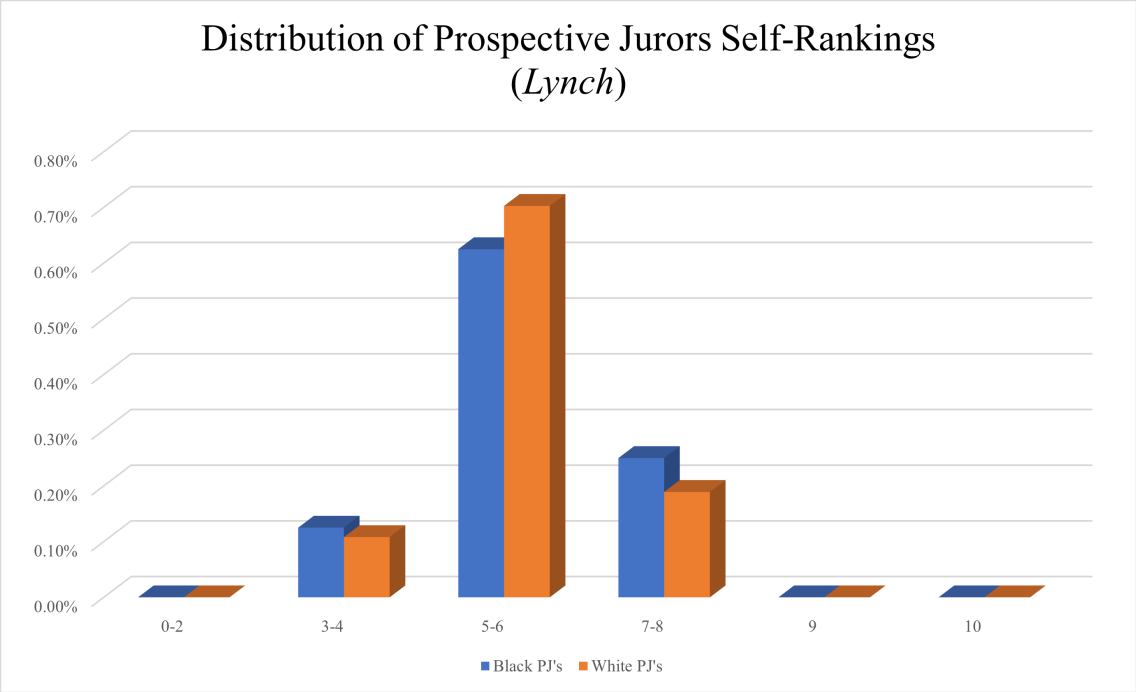
Anderson first ranked them in handwritten notes, in categories 0-2, 3-4, 5-6, 7-8, 9, and 10. Again, next to the names of only the Black prospective jurors, he notated their race with a handwritten "B" in a circle.

Ex. 1 at 4.

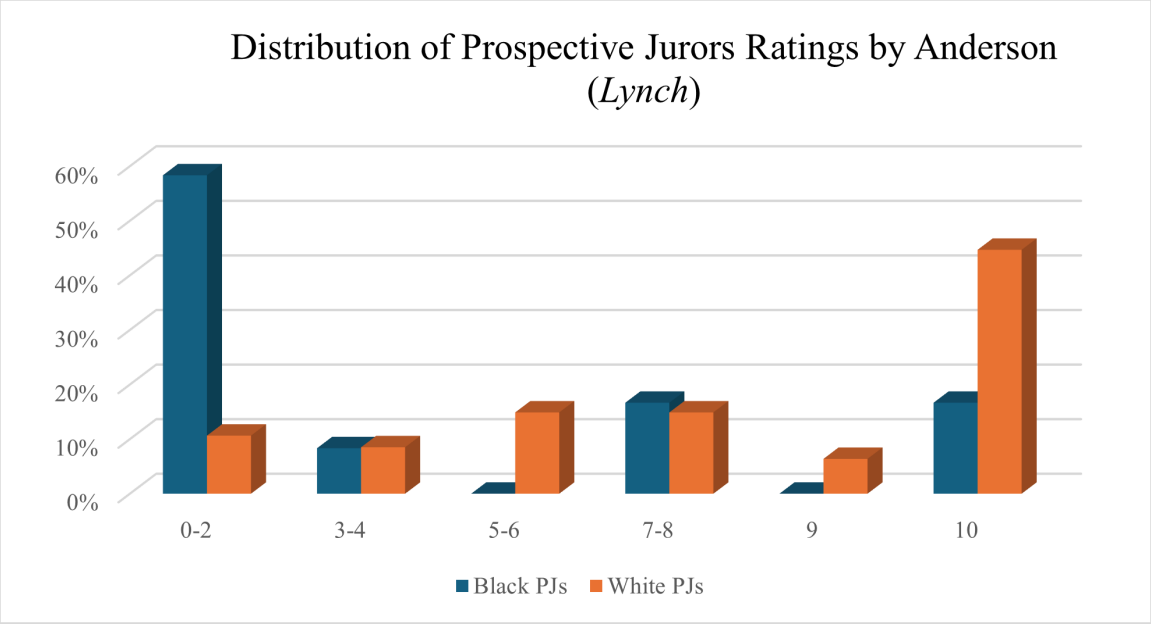
Anderson typed up his notes later, again ranking the jurors 0-2, 3-4, 5-6, 7-8, 9, or 10. He continued singling out the Black prospective jurors, this time using a red dot to distinguish them from the rest of the venire:

Ex. 1 at 5.

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:



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

This racial divide was a product of Anderson's bias—not the jurors' self-reported scores. Anderson consistently disregarded and disbelieved Black prospective jurors' answers and steeply lowered their self-ranking, while crediting or raising that of white prospective jurors. Anderson raised or left the same the self-reported score for 35 non-Black prospective jurors[6] while lowering it for only 5.[7] In contrast, he raised or left the same the self-reported score of only 4 Black prospective jurors,[8] while lowering it for 5.[9] In other words, Anderson lowered the score of Black prospective jurors at a higher rate than he raised it for them. Whereas, for non-Black prospective jurors, he raised their self-reported scores at *7 times* the rate that he lowered it. Anderson loaded the dice in favor of non-Black prospective jurors and against Black prospective jurors.

Anderson's rank of specific jurors bears out this trend. Take for example [redacted], who is Black. 26 CT 7015. She had explained that whether the death penalty is appropriate "depends on the circumstances." 26 CT 7032. She also indicated that she found rape, murder,

[6] If asked, jurors provided their own view of their "Rambo" score during voir dire. Anderson raised the score of 35 non-Black prospective jurors. *Compare* 3 RT 183, 202, 238, 254; 5 RT 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.
[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.

and crimes related to children to be particularly upsetting. 26 CT 7026. Despite her self-described retributive leanings, Anderson ranked [redacted] in his lowest category, 0-2. Ex. 1 at 4.

[redacted], who is Black, ranked herself at a 5 or 6. 4 RT 396; 16 CT 3922. She said she would vote for the death penalty proposition if it were on the ballot as a referendum. 4 RT 394. Further predisposing herself as a pro-prosecution juror in this case, she expressed that crimes against the elderly particularly bothered her, because she believed those victims could not defend themselves. 4 RT 384. Furthermore, [redacted] was also a caretaker for her mother-in-law, who was afflicted with Alzheimer's. 4 RT 401. Anderson ranked [redacted] in his lowest category, 0-2. Ex. 1 at 4.

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

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

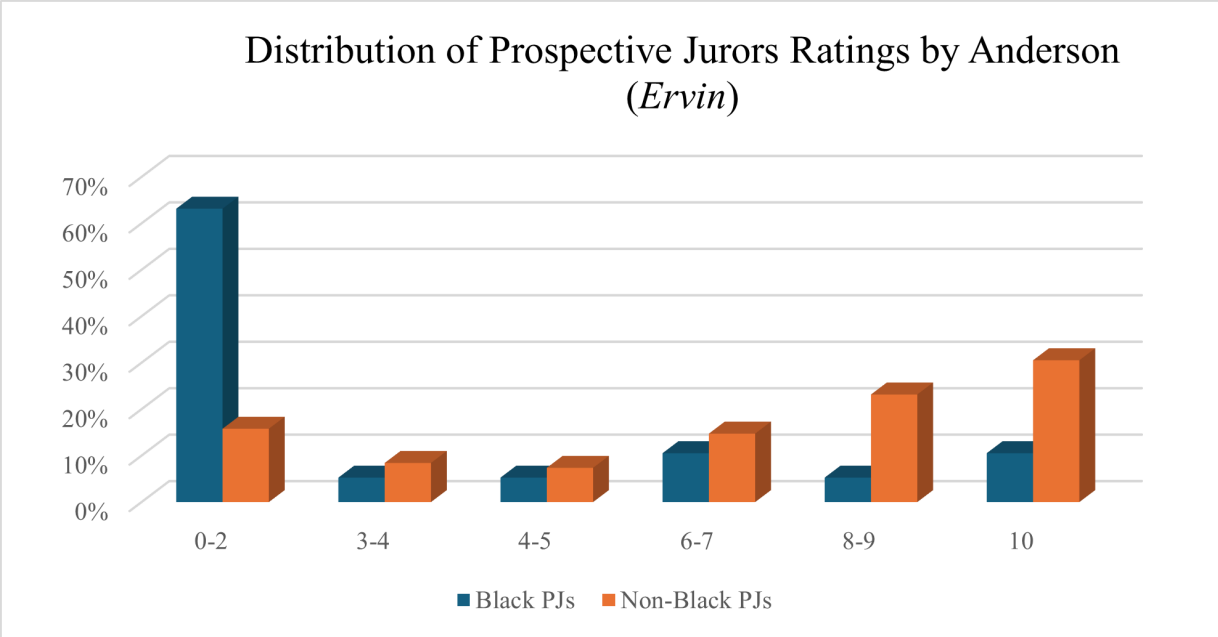
On June 17, 2024, in *People v. Nadey*, the Supreme Court of California, *without* the benefit of Anderson's trial notes in its record, credited Anderson's claim that he struck a Black prospective juror for her view that the death penalty is a "last resort." 555 P.3d 961, 987 (Cal. 2024). That juror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

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

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

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

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



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

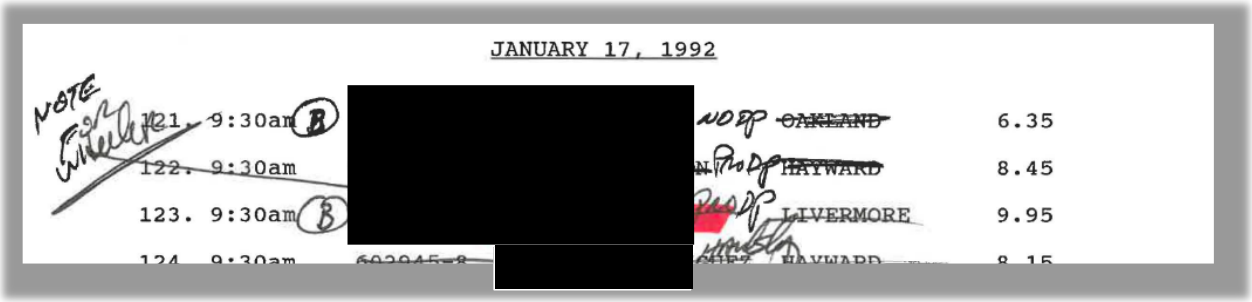
Returning to Mr. Lynch's case, the way Anderson scored the prospective jurors here, as contrasted with the scores they had given themselves, is consistent with a process impacted by bias against the Black venire. Anderson's assessment of the jurors' answers was shaped by conscious and unconscious race-based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

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

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

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

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



Ex. 1 at 9.

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

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

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

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

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

e. Anderson Unconstitutionally Struck Four Black Prospective Jurors

Anderson struck four Black prospective jurors: [redacted]. Against the backdrop of his own repugnant public views about the role of race and ethnicity in jury selection (*supra*), it should come as no surprise that a comparative juror analysis demonstrates those strikes were race-based. Moreover, his willingness to seat three Black prospective jurors is not to the contrary of these four instances of discrimination and constitutional violations. Those jurors had strongly pro-prosecution views, providing Anderson with the tactical opportunity to shield himself from *Wheeler*. Moreover, despite their extreme views, he ranked the seated Black jurors substantially lower than comparable non-Black jurors, further demonstrating his anti-Black, and especially anti-Black woman, bias.

Anderson's historical antipathy for Black women jurors repeated itself in Mr. Lynch's case. At the first opportunity, he exercised three of the four strikes at issue here against Black women (*supra*). 21 RT 2622–24. The historical record reflects that the State has frequently targeted Black women in jury selection. *See People v. Holmes, et al.*, 12 Cal.5th 719, 840 (2022) (Liu, J., dissenting) (collecting "[e]mpirical studies [which] demonstrate that Black women are the frequent targets of prosecutors' peremptory challenges in capital cases and are struck disproportionately compared to other groups"). Anderson's own history of this racism repeated itself in Mr. Lynch's case.

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

[redacted]:

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

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

Ex. 1 at 4, 5, 11.

Support for the Death Penalty

[redacted] 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. [redacted] 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, [redacted] 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, [redacted], 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,"

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

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

Multiple non-Black prospective jurors expressed significant hesitation to impose the death penalty, but Anderson still ranked them higher than [redacted] and did not strike them. For example, [redacted], a white juror who was seated, never actually answered whether she was for or against the death penalty. In her questionnaire, she wrote, "I am not completely for or against the death penalty. I have never had to come to a definite conclusion about my feelings about the death penalty." 38 CT 10464. During voir dire, she confirmed that non-position. 17 RT 2247. And she could not even answer how she would vote on a hypothetical ballot initiative legalizing the death penalty. *Id.*; *see, infra*. Her unsteady stance on capital punishment earned her a spot in the middle of Anderson's ranking, at a 5-6. Ex. 1 at 4, 5. [redacted], another unchallenged white juror, said he viewed the death penalty as "a last resort, type of punishment." 8 RT 879–80. He wrote the same in his questionnaire, that he supported the death penalty "only in very unique situations." 24 CT 6259. Again, Anderson ranked him a 5-6, increasing [redacted]'s self-rank (of 3-4, 8 RT 889), and refrained from striking him. Ex. 1 at 4, 5.

[redacted] expressed a general support for the death penalty, but, unlike [redacted], was glaringly unsure of her answers and her position on the penalty. During voir dire, [redacted] appeared visibly uncomfortable, as she was told twice to "relax"—once by the court and once by defense counsel. Both times, she said, "I am trying." 14 RT 1730, 1749. When Anderson provided her the same description of the verdict process that he provided [redacted] that their jury verdict could lead to Mr. Lynch being executed, he asked [redacted], "Does that bother you?" [redacted] said, "Yes, it does." 14 RT 1736. Yet Anderson did not press her and changed the subject. Anderson ranked [redacted], who is Japanese,[11] a 10 out of 10, and she was seated. Ex. 1 at 4, 5.

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

[redacted]'s answers were also comparable to those of the jury foreman, [redacted], a white man. When asked about the death penalty in his juror questionnaire, [redacted] wrote, "[j]ustified in some cases." 36 CT 9822. Throughout his voir dire, like [redacted], [redacted] repeatedly gave affirmative answers indicating he was open to either punishment. 17 RT 2144–

[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.

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

Ballot Initiative

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

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

Other seated white jurors also could not explain why they would vote yes, unlike [redacted]s explanation that she was "more than sure it's needed." 10 RT 1211. For example,

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

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

LWOP vs. Death

When asked whether, for her personally, the death penalty or life without the possibility of parole was a worse punishment, [redacted]'s response was identical to multiple unchallenged, non-Black jurors whom Anderson ranked highly. She answered, "Well, probably I would think life without possibility of parole." 10 RT 1213. But she understood that the law stated differently and that she "certainly" could set her own feelings aside and evaluate the case in accordance with the law. 10 RT 1213. [redacted] took the same position. He supported the death penalty and even said "it would take some pretty strong evidence" to convince him to vote for an LWOP sentence. Further, his belief that, "In some ways life without parole is a worse sentence than death," did not cause him to lose any points. 8 RT 942. Anderson ranked him a 10. Ex. 1 at 4, 5. Likewise, [redacted], the foreperson whom Anderson ranked a 9 (Ex. 1 at 4, 5), felt that although both punishments were severe, LWOP was worse than death. 17 RT 2153. [redacted] felt the same, agreeing with Anderson's restating of her view that LWOP "would be a

fate almost equally as bad as the death penalty, if not worse." 14 RT 1737–38. She elaborated, "I 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 somebody to spend their life in there." 14 RT 1737. As noted above, Anderson ranked her a 10. Ex. 1 at 4, 5. Evidently, Anderson did not interpret a juror feeling that LWOP was worse than death and life in prison was not "right" for anyone to mean they would be an unfriendly juror. [redacted]'s position on the matter can explain neither her placement in the 0-2 category nor her strike.

Ranking

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

Other Similarities to Seated Non-Black Jurors

Although Anderson's pretextual metric for a good juror was their views on the death penalty, [redacted]'s other views were strikingly similar to seated white jurors whom Anderson approved.

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

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

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

ADA Anderson discriminated on the basis of race when he struck [redacted].

[redacted]:

Ex. 1 at 4, 5, 11.

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

[redacted] said she would vote yes on a ballot initiative legalizing the death penalty, explaining, "Because there [are] certain circumstances that I feel that it's appropriate [for]." 10 RT 1291–92. Seated juror [redacted] said the same, writing that she was open to the death penalty "if guilty & appropriate." 30 CT 8142. And unlike [redacted], [redacted] exhibited wariness, explaining that "somebody would have to really convince me that someone . . . took lives and were of a sane mind and weren't very caring about taking a life." 14 RT 1796. [redacted] also could not independently explain why she would vote yes on the ballot initiative. 14 RT 1795. Anderson ranked [redacted] a 7-8. Seated juror [redacted] used language similar to [redacted]'s in her questionnaire. [redacted] wrote that she was "not completely for or against the death penalty." 38 CT 10464. But unlike [redacted], [redacted] could not answer how she would vote on the ballot initiative, despite being asked twice and provided equivocal answers for many questions during voir dire. 17 RT 2247–48, 2249. Anderson ranked her a 5-6. [redacted]. [redacted]'s favorable position on capital punishment was also nowhere near those of struck, white

jurors. For example, [redacted] said he would oppose a ballot initiative legalizing the death penalty, because there would be hope to "help them out" via rehabilitation instead of executing them. 16 RT 2057. He also said he was having "second thoughts" about his ability to vote for someone to die. 16 RT 2061.

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

[redacted]'s answers demonstrated she would be a fair juror in the penalty phase, open to both outcomes. She agreed with counsel that "there are certain crimes that are so bad that the person should receive the death penalty." 10 RT 1292. She also agreed that this was one of those crimes. When asked whether the crimes Mr. Lynch was charged with would "meet [her] threshold point" of severity that she would consider the death penalty, she answered "Yes." 10 RT 1292. And for her, the death penalty was a worse punishment than LWOP. 10 RT 1293. Unchallenged jurors were split on their feelings about which penalty was worse. The court found [redacted]'s responses to exhibit an openness to either penalty outcome, asking "I take it then from your responses, that your views are such that we would be having a real trial if we ever

reached a penalty stage?" [redacted] confirmed more than once that she would be open to the possibility of either punishment. 10 RT 1290, 1291. [redacted]'s position pointedly diverged from [redacted]'s view, as [redacted] indicated that the State would have to "really convince" her that the death penalty was appropriate before she could vote for it. 14 RT 1796. Anderson not only left [redacted] to be seated, he also did not challenge [redacted], who viewed the death penalty "as a last resort, type of punishment," 8 RT 879.

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

[redacted]:

Ex. 1 at 4, 5, 8.

As Anderson did with the other Black prospective jurors, he marked [redacted]'s 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

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

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

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

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

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

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

[redacted]:

Ex. 1 at 5, 15.

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

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

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

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

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

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

f. A New Trial Free from Racial Bias Is Required

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

[13] [redacted] also compared favorably to the white prospective jurors who Anderson struck. For example, in addition to [redacted], discussed *supra*, [redacted] would have been more favorable than [redacted] 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.

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

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

iii. Racial Bias in Guilt-Phase Proceedings

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

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

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

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

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

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

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[14] *See* German Lopez, *The Sneaky Language Today's Politicians Use to Get Away with Racism and Sexism*, Vox (Feb. 1, 2016) ("'inner city' and 'urban' have been widely adopted to refer to black people—but they have also been used by prominent figures to refer to high crime and poor work ethic in a way that effectively connects crime, violence, and laziness with black Americans.").

[15] Anderson also implicitly invoked race when recounting witness testimony during his closing arguments. Rather than simply noting that the perpetrator ran toward the exit of the 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.

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

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

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

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

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

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

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

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

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

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

c. The State painting Mr. Lynch in dehumanizing terms that appealed to the historical trope of the "Black Brute" constituted racially discriminatory language.

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

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

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

This myth grew in particular by focusing on violence against white women at the hands of Black men. Smiley, *supra,* at 353. However, the myth went beyond the accounts of sexual violence. In one case of Sam Hose, who killed his employer after being threatened with a pistol, the newspaper described Mr. Hose as "a monster in human form." *Id.* at 35. As lynch mob violence fell out of favor, the brute myth continued and evolved; "the mythical brute became the realistic thug via the process of criminalization." *Id.* at 354. Here, the People's rhetoric invoked this caricature repeatedly. By describing Mr. Lynch as the alien predator of elderly women, the State directly called to one of the most insidious iterations of the trope, a fear of violence against white women by Black men.

The statements the People used in painting his "Brute" character have very little relevance if understood by their precise meanings, as opposed to their rhetorical weight. The relevance of describing Mr. Lynch as a monstrous, alien, non-human, was in building the image of the mythical "Black Brute" boogeyman. It created a picture of a supernatural predator, the Brute. While rhetoric has its place in summation, under the RJA, it is no longer unfettered. Its limits are drawn by the rhetoric's association with historical racism and its propensity to draw its power by invoking those racist tropes to depict Black men like Mr. Lynch in hyperbolic terms to justify their condemnation. Given their ingrained roots and ubiquity, the tropes are "likely to be a strong motivating force, motivating a fear response when activated by external stimuli, such as a racist summation." Alford, *supra*, at 345.

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

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

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

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

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

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

iv. Racial Bias in Juror Deliberations at Guilt

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

****

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

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

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

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

The Hat from the Larson Scene

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

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

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

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

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

[17] "Init. Hab. Pet." refers to the habeas petition previously filed in the California Supreme Court. As with any part of the record, Mr. Lynch is happy to provide it these exhibits upon the Court's request.

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

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

Dr. Zajac evaluated the evidence used to convict Mr. Lynch by reviewing numerous reports from the law enforcement agencies including "lab reports and bench notes, autopsy reports, and a summation of the testimony of the medical personnel, including pathologists, who testified at the trial, numerous photographs and crime scene video tapes, and reviewed all of the evidence remaining in law enforcement custody." Init. Hab. Pet. Ex. 421 ¶7. Dr. Zajac also examined "the test results and bench notes from ACSD criminalist Sharon Binkley, relating to the testing of blood found under the fingernails of victim Constantin." *Id.* She discovered that "the ABO typing excluded both . . . Franklin Lynch and the victim Ana Constantin as the source of the blood under Constantin's fingernails." *Id.* In fact, while "the test results indicate the possibility of Type O blood as well as type A blood, there is no question that there was type A blood under Constantin's fingernails." Init. Hab. Pet. Ex. 421 ¶14.

The conclusion "that the stain in sample 12 had a donor other than Lynch or Constantin is further supported by comparing the results for sample 12 with the other analyses that were run on other blood stains, which were found to have come from the victim." Init. Hab. Pet. Ex. 421 ¶15. More importantly:

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

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

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

Hair from the Constantin and Larson Scenes

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

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

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

> Microscopic examination of this hair, and comparison with hair samples (both head and pubic hair samples) from Lynch show significant differences in diameter, color, pigmentation, cuticle, and medullation from which I conclude Mr. Lynch is excluded as the source of this hair.
>
> All of the hair analysis in 1987-1992 would have involved the same type of microscopic examination using a comparison microscope.

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

The State collected two hairs from the victim's body and one from the victim's pants. None of those hairs came from the victim. At trial, the People's expert witness concluded that the second hair from the victim's body did not come from Mr. Lynch and that the first hair "probably" did not. However, had trial counsel conducted independent testing, based on widely used techniques at the time, they would have learned that "differences in pigmentation, including 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.

The People's witness further reported that the hair found on the white pants could have come from Mr. Lynch's head. "His bench notes state 'easily matched with hair (head) of Lynch slide 2 – matched with respect to color, diameter and pigment distribution.'" *Id.* Had trial counsel engaged their own expert, they would have learned otherwise:

> [A] more detailed and refined examination showed that this hair is very different than the reference hairs from Lynch. The diameter of [the hair from the pants] is generally smaller; there is different pigmentation than Lynch; [it] has a prominent, thick cuticle that is absent in all of the Lynch samples; [it] has a distinctive medulla which is absent in the Lynch samples; the cuticle in [it] is smooth whereas the samples of Lynch show a rough or "lifting" cuticle.

Id. The difference in conclusions is likely due to the People's examination lacking microscopic testing: "It appears that Ojena made a cursory or 'gross' examination of the hairs whereas a more thorough and refined examination revealed these significant differences." *Id.*

Had trial counsel retained an independent expert, they would have uncovered compelling evidence that both undermined the People's evidence (in Constantin) *and* provided a powerful basis for suggesting someone other than Mr. Lynch committed the Larson and Constantin offenses. For these reasons, Mr. Lynch was prejudiced by their failure, depriving him of his state and federal constitutional right to counsel.

IX. CONCLUSION

Undersigned respectfully requests that this Court resentence Mr. Lynch in a manner that will bring about finality and justice to this matter and further respectfully submits that a determinate sentence would so achieve those essential objectives.

X. PRAYER FOR RELIEF

Franklin Lynch has no other plain, speedy, or adequate remedy at law other than by this petition. Wherefore, Lynch requests this Court:

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

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

PROOF OF SERVICE

I, the undersigned hereby declare:

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

PETITION FOR RELIEF

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

Aimee Solway
Aimee.Solway@acgov.org

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

John R. Mills
Attorney