SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

PEOPLE OF THE STATE OF CALIFORNIA

VS.

Eric Windom
Terryonn Pugh
Keyshawn McGee
Allen Trent

Defendants.

Case No: 01001976380

Court's Order Re: PC 745(a)(3) Motion

INTRODUCTION AND SUMMARY OF ARGUMENTS

The defendants' current motion was fully heard, briefed, argued, and taken under submission by me at the last court date. I will now announce my factual findings, ruling, and reasoning from the bench today.

It is important to clarify from the beginning that this particular motion does not rely at all on the recently disclosed, racially-charged text messages originating from the phones of certain members of the Antioch police department. Nor does this motion allege that any individual prosecutor, including assigned prosecutor Jordan Sanders, has made racist statements or arguments when initiating or maintaining the prosecution of this case.

Rather, this motion alleges that the overall charging practices of the Contra Costa District Attorney's Office violate Penal Code section 745(a)(3) in that Black defendants charged with gang-related murders are also disproportionately charged with certain gang-related special circumstances that carry enhanced sentences of L.W.O.P. or death when

compared to non-Black defendants also charged with gang-related murders.

The defense contends that this disproportionate charging of Black defendants with Penal Code section 190.2(a)(22) allegations is statistically significant and is not merely the product of random chance or an insufficient numerical sample. They argue under Penal Code section 745(h)(1) that the prosecution cannot show -- and has not shown -- that the charging disparity is caused by race-neutral reasons. As a remedy for this violation of the Racial Justice Act, they cite to section 745(e)(1)(C) and seek dismissal of the section 190.2(a)(22) special circumstances. If the defense prevails, the rest of the charges, including the underlying murders, would remain in place unaffected by this motion. The defendants would still be facing indeterminate life sentences if convicted, but they would be eligible for consideration of parole release down the road.

In reply, the prosecution here has not offered race-neutral explanations for any statistical disparity that might exist in their charging practices over the relevant 7-year period. Instead, the prosecution simply argues that the different charging percentage margins that are conceded by their own expert forensic accountant, Ken Tam, are too small over too small of an overall sample of cases to have meaningful statistical significance.

Sample size considerations aside, the prosecution also questions whether the relevant subsets of Black and non-Black defendants are truly similarly situated, given hypothetical differences that could exist in the factual patterns or underlying "conduct" involved with the various cases. Moreover, the prosecution further urges the court to broaden the relevant comparison pool from 89 to 91 total cases by adding 2 cases mentioned by Ken Tam, where non-Black defendants were in fact charged with special circumstance allegations before preliminary hearing, only to have the allegations dismissed afterwards. By contrast, the initial pool of 89 cases offered by the defense includes the subset of defendants charged with gang murders and special circumstances *after* preliminary hearings.

Finally, although not directly germane to rebutting the core defense argument of a multi-year charging disparity caused by *systemic* bias, the prosecution contends that the 3 supervising prosecutors called as witnesses in this case considered non-racial factors only when making discretionary decisions to charge, or not charge, special circumstance allegations. Things like case severity, a defendant's prior criminal history, if any, and the provability and strength of the underlying case itself. They did so in the absence of formal written charging guidelines at the Contra Costa District Attorney's office, and they did so in the absence of formal written "best practice" guidelines for avoiding implicit bias -- like race-blind charging evaluations -- but the contention is that they employed traditional prosecutorial discretionary factors as mentioned above, which theoretically could account for charging disparities. However, and this is important to the court, there was no case-by-case evidentiary presentation about the underlying facts that prosecutors considered when deciding whether to charge or not charge the specific defendants in our historical data pool.

FACTUAL RECORD AND RELATED FINDINGS

Although the two sides differ greatly in their analyses of the *meaning* of the evidence presented in this case, there is extraordinary agreement between the parties about the actual *facts* proven true at our evidentiary hearing. Both sides are relying on the same original source data derived from the prosecution's computer database in order to assemble the groupings of Black and non-Black defendants charged with gang-related murders over the 7-year period from 2015-2022, and then to further subdivide those groups to establish who was charged with special circumstance allegations per PC 190.2(a)(22) and who was not. Both sides agree that the racial identification determinations from the database are reliable, as does this court, given the credible testimony about how those determinations were made, and how those findings were thereafter uploaded into the system. Both sides agree that the four defendants in the present case are Black.

Moreover, the defense called law clerk Natassja Urrutia, who testified that she was able to corroborate the factual validity and relevance of the prosecution's data by pulling and reviewing the actual charging documents maintained by the clerk's office of the court, going defendant by defendant, in order to make sure that we are dealing with gang murder cases only. Ms. Urrutia's work was in turn corroborated by the prosecution's own forensic accountant, Mr. Tam, who counted the number of defendants falling into each of the 4 relevant, subdivided groups, and who arrived at the same numerical totals per group as the defense. Taking the math a bit further, Mr. Tam also arrived at the same percentage calculations as the defense's statistical expert, Professor McCleary, when it came to determining the percentages of Black and non-Black gang-murder defendants who were also charged with special circumstance allegations in the original group of 89 defendants. While the prosecution urges this court over defense objection to add the two, pre-preliminary hearing cases mentioned earlier to the original dataset of 89 overall cases, the defense does not dispute the validity of the racial or charging data for those two cases. If added, our total sample increases to 91 cases.

In sum, the parties essentially agree on what facts were proven in the record of the evidentiary hearing.

This court also agrees with the consensus conclusions of the parties about the reliability of the underlying source data in the database, including the racial identifications. This court finds that the subdivisions into different racial groupings were done accurately, and that the percentage and "implied odds" calculations were accurate too. The court finds that the overall population groupings of 89 or 91 (meaning the 89+2 more) defendants were indeed all charged at some point in the procedural history of the cases with gang-related murders under both PC 187(a) and PC 186.22(b), and that some of those defendants were *additionally* charged with the gang-murder special circumstance under PC 190.2(a)(22). I further find that all witnesses called by both sides testified credibly and to the best of their ability, in good faith.

The challenge for this court is to evaluate what these largely undisputed facts mean when viewed through the lens of section 745(a)(3) of the Racial Justice Act.

THE LEGAL ELEMENTS OF A SECTION 745(A)(3) VIOLATION

To prove a violation of section 745(a)(3) the defense has the burden to convince the court by a preponderance of the evidence that "(1) the defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and..." (2) "the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained" (*number brackets are added for emphasis by the court, the rest is verbatim language from the statute*). Notably, the defense does *not* have to prove *explicit* racist intent to establish a violation of this section, and section 745(h)(1) allows the defense to prove its case solely by presenting aggregate statistical data to establish "systemic and institutional bias" instead.

Penal code section 745(e)(1)(c) allows the defense to do what it has done here -- bring this motion pre-trial before a defendant is even convicted. The same section explicitly empowers this court to dismiss special circumstance allegations before trial if the defense proves a violation of the Act.

Section 745(h)(6) defines the phrase "similarly situated" to mean "that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical." Notably, the code does *not* provide additional guidance or definition for what the phase "engaged in similar conduct" means.

Section 745(h)(1) defines the phrase "more frequently sought or obtained" as meaning that "the totality of the evidence demonstrates a *significant* difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, *and the prosecution cannot establish race-neutral reasons for the disparity".*

So, it is clear that any charging disparity must be "significant" to establish a violation of the RJA, which explains why I focused my questioning to both sides during Closing Arguments on the size of the percentage disparities and the size of the overall population sample, and asked– were these large enough differences over large enough sample sizes to no longer be attributed to random chance. Hence my clumsy but related baseball player analogies when comparing batting averages accumulated over a few games versus a full season.

It is equally clear that if the court finds the disparities to be "significant", that both the burden of production and proof shifts to the prosecution to establish race-neutral reasons for any charging disparity between defendants' racial group and others similarly situated.

That's my summary of the controlling law in this case based on the language of the statute. Now I must apply the facts as I find them to these legal principles when making a ruling on defendants' motion.

ANALYSIS

Statistical Disparity

Here, it is undisputed that all 4 of the charged defendants are Black, that 48 of the defendants in the historical database are Black, that 30 of those 48 Black defendants were charged with gang-related murder AND special circumstances, while the remaining 18 were only charged with gang-related murder. It is also undisputed that this means that 62.5% of the Black defendants in the historical database were charged with the special circumstance allegations that carry the greater punishment of L.W.O.P. or death.

Moving on to the non-Black group in the original database of 89 defendants, it is undisputed that 41 of those individuals are non-Black, that 22 non-Black defendants in that group were charged with gang-related murder AND special circumstances, while the remaining 19 non-Black defendants were only charged with gang-related murder. It is also undisputed that this means that 53.6% of the total non-Black defendants in the historical database were charged with the special circumstance allegations that carry the greater punishment of L.W.O.P. or death.

If we add the additional 2 non-Black defendants identified by Ken Tam as being charged with gang-related murder AND special circumstances in a pre-preliminary hearing setting only, that undisputedly brings our overall population of defendants up to 91. That also increases the total number of non-Black defendants charged *at some point* with gang-related murder and special circumstances to 24. It is undisputed that this means that 55.8% of this enhanced group of non-Black defendants were charged with the special circumstance allegations that carry the greater punishment of L.W.O.P. or death.

In summary, no matter how the court views the data when comparing the Black and non-Black defendants in the database, it is clear that the percentage of Black defendants charged with the greater special circumstances allegations was higher than that for non-Black defendants. In other words, this court finds that a statistical disparity exists in the historical charging decisions of the Contra Costa District Attorney's office in these gang-murder cases. If the court selects the original group of 89 defendants as the relevant pool for comparison, there is an absolute difference of 8.9 percentage points between Blacks and non-Blacks charged with the special circumstance allegations that carry the greater punishment. If, instead, the court uses the enhanced group of 91 defendants as the relevant pool, there is an absolute difference of 6.7 percentage points between Blacks and non-Blacks who were charged with the greater special circumstance allegations. In both groups, Blacks are charged more frequently than non-Blacks with the special circumstances carrying the greatest punishment.

This statistical disparity can also be phrased within the language of "implied odds", which the court finds is a valid, reliable, and commonly used statistical technique as described by defense expert, Professor Richard McCleary, who has extensive experience in analyzing statistical criminal justice data for purposes of evaluating claims of racially disparate practices

by institutional actors. The prosecution did not present contrary testimony from any of its witnesses, nor did it qualify any of them as a similar expert in statistical analysis, including Mr. Tam, who is a forensic accountant.

While it is this court's job to attribute legal meaning and significance to the implied odds figures within the context of this motion, the court finds that Professor McCleary made accurate calculations of the implied charging odds, or charging "risk" as he defined that term, based on the numbers in the subgroups established by the data set. He accurately calculated that within the original dataset of 89 defendants, Black defendants were 43.95% more likely than non-Black defendants to be charged with the greater special circumstance allegations over the 7-year period of 2015-2022. If this court expands the relevant population to 91 individuals as urged by the prosecution, Professor McCleary's calculation method can be extrapolated to demonstrate that Black defendants were still 32% more likely than non-Black defendants to be charged with the greater special circumstance allegations over the 7-year period. Either way, a statistical charging disparity has been conclusively proven in the factual record.

But of course that isn't the end of the analysis under section 745(a)(3).

Similarly-Situated Groups

The court must also determine whether the comparison groups between races are "similarly situated" as defined in the statute.

It seems obvious to this court that the subgroups were indeed similarly situated because the "factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical." Here, the three supervising prosecutors testified that they each employed a similar, multi-factor analysis when deciding whether to charge special circumstances or not, by looking at things like the provability of a case, the extent of a defendant's record, and the severity of the underlying misconduct. Race was not explicitly taken into account. All subgroupings were either charged/not charged by the prosecutors using the same group of relevant factors. Moreover, absolutely no evidence was presented in the record below to establish that Black defendants charged with gang-murder had, on average, worse criminal records than non-Black defendants, committed the crimes in crueler fashion, or committed more provable crimes. Thus, Black defendants in our data pool faced charging decisions that were made using the same set of relevant factors that were also used in the charging decisions for the non-Black defendants in the database.

Also, *all* defendants in the pool were charged with gang-related murder, and some of them were also charged with gang-related special circumstance allegations under 190.2(a)(22). Thus, all defendants in this group, regardless of race, are facing similar, or even identical, relevant factors to determine their sentencings – if convicted, they are either facing LWOP/death, or indeterminate life sentences with the possibility of parole. This court finds that the Black and non-Black defendants in this database are similarly-situated in the dataset for sentencing purposes under the RJA statute.

Similar Conduct

It's less obvious to me how I must address and answer the next question of whether Black defendants "engaged in similar conduct" to that of non-Black defendants. No specific definition of "similar conduct" is provided in the statute. And no case-by-case presentation of the factual allegations underlying the 89-91 cases was made by either side at the hearing in this case.

However, it seems impractical if not impossible to expect that such a presentation could ever be made in a hearing of this sort, or that the legislature intended to require as much, whereby the defense would effectively have to present dozens of mini-trials worth of evidence to establish whether, on average, members of one racial group committed "similar" conduct as members of other groups charged with similar crimes, a question that is ultimately incredibly nuanced and subjective. No expert testimony was presented to prove that, historically, Black defendants commit gang murders in substantially different factual ways than non-Black defendants do. This court will not interpret this piece of legislation obviously intended to remove/lower the difficult burden of proving explicit, intentional racism as required in other legal contexts in a way that makes a violation impossible to prove. This same legislature has recently acted to relieve defendants of similar burdens in other contexts; for example, Penal Code section 231.7, which lowers the defense burden in the jury selection context when compared to the stricter, traditional Batson-Wheeler doctrines that preceded it.

Instead, this court notes that the RJA statute explicitly allows for a pretrial attack on the charging disparities before a case is even adjudicated by a factfinder. Thus, in this pretrial context, without any facts being found or developed at all in a conclusive way, the question of whether two racial groups of defendants have "engaged in similar conduct" must turn on reasonable inferences that can be drawn by comparing the elements of the lesser and greater enhancements alleged against the different racial groups. In this case all defendants are charged with gang-murders that include the PC 186.22 enhancement, and some are also charged with special circumstances under PC 190.2(a)(22). Although not completely identical, the two code sections are very similar in wording, to the point that an appellate court observed in *People v. Carr* (2010) 190 CalApp.4th 475, 488 that "juries have not likely been misled [by the language differences in the statutes] for the simple reason the evidence that allows a jury to find a felony was committed for the benefit of the gang within the meaning of 186.22(b)(1), also typically supports a finding the defendant knew of the criminal activities of the gang [for purposes of 190.2(a)(22)]." (bracketed portions added). Moreover, both statutes are intended to address gang-related crime and to punish gang defendants more severely, and both sections were enacted in 2000 in Proposition 21, the "Gang violence and juvenile crime prevention act" (See *People v Shabazz* (2006) 38 Cal.4th 55, 65). This court finds that the defense has met its burden of proving by a preponderance of the evidence in this case that the Black defendants in our relevant comparison group engaged in similar conduct to non-Black defendants, as defined in section 745(a)(3).

Was it a Significant Disparity?

Turning to the final question in this case, I must determine whether the historical statistical disparity that has been proven in this case reflects a "significant" difference in charging decisions by the Contra Costa District Attorney's office with respect to Black and non-Black defendant subgroups charged with gang murder vs. gang murder including special circumstances. Is the charging disparity large enough in percentage or relative terms that it is more likely the result of systemic discrimination than random statistical chance or luck? Is the overall population sample size large enough to conclude that the disparity is more likely the result of systemic discrimination than random statistical chance or luck? Are the subgroup sample-sizes large enough to conclude that the disparity is more likely the result of systemic discrimination than random chance or luck? To draw once again on a dreaded sports analogy, is our record more like comparing batters who get 2 versus 3 hits over 10 at bats, or is it more like comparing .200 and .300 hitters over the course of a full season?

In making this determination, I am confined to the record *actually made* at the preceding hearing, and I cannot make assumptions or speculate about potential alternate records that perhaps *could* have been made by calling different types or numbers of witnesses. I cannot do independent research on my own into subjects like implicit or systemic racial bias, or conduct research into historical charging patterns of prosecutors generally, including those from outside of Contra Costa County. The court cannot act as its own expert witness in this case, and indeed owes the parties an independent determination, but one that is only based on the record put before it by the parties. I assure everyone that I don't take this decision lightly in any way.

Here, only the defense called an expert qualified in statistical analysis to opine on the significance of the statistical disparity demonstrated by the historical record of charging decisions in this county over the past 7 years.

This court must not automatically adopt the opinion of Professor McCleary as its own, but must instead rigorously analyze whether his opinion is supported by the actual evidence in the case, and this court must also ask whether any assumptions underlying his opinion are supported by actual evidence. However, I also cannot simply disregard on a whim, or take a blind eye towards, the amount of training and experience that Professor McCleary possesses if I find it to be extensive and rigorous, which I do. I find that he offered his ultimate opinions in this case in good faith as a trained professional because he believes them, not because he was hired by the defense with compensation provided. His testimony under oath was sincere, and not a lie. Still, the court must make up its own mind in the end about the truth of it all.

Professor McCleary at one point answered "yes" to the prosecutor's claim that the overall sample size was "small". And yes, at least when compared, for example, to voter surveys questioning 1000 people, it is indeed "small" in a relative sense. A pool of 89-91 people is also smaller than the 500-600 at bats that a full-time baseball player accumulates over one season of play.

But...he further clarified without any equivocation that in his opinion both the size of the overall pool and the size of the smaller subgroups within

the pool were clearly large enough to have statistical significance when evaluating disparities between the subgroups. Using the scientifically validated Central Limit Theorem, he testified that each subgroup must contain a minimum of 5 individuals in each of the 4 categories – Black and non-Black, with or without special circumstances – for a total of 20 individuals, and that all 4 subgroups surpassed that. In fact, each subgroup contained between 18-30 individuals, which consists of a range between 3.5 to 6 times the minimum amount necessary for a statistician to rule out pure luck and to attribute statistical significance to differences displayed between groups. Similarly, the overall pool size of 89-91 defendants was 4.5 times the amount needed to attribute statistical significance to demonstrated disparities between adequately sized subgroups. Using his favored and well-established Odds Ratio tool, Professor McCleary opined that the charging percentage disparity between Black and non-Black defendants was 8% likely to be a random occurrence, and 92% likely to be correlated with the race of the defendants as the only known control factor.

Race-Neutral Explanations, IF any

In the face of these opinions, the prosecution did not call its own statistical expert to rebut, refute, or even disagree with Professor McCleary's statistical analysis or conclusions. Nor did Mr. Tam do so in his role as the office's forensic accountant. Nor did the prosecution offer evidence or argument relating to possible race-neutral explanations for charging disparities that disfavored Black defendants. I must reject the prosecution's invitation to speculate that the disparities *could* be explained by difference in criminal records, provability, or factual severity because they put on no specific evidence on a case-by-case basis to justify their disparate filing decisions within the pool of 89-91 defendants.

CONCLUSION

As previously stated, I am bound to make a decision on the record put before me, and cannot speculate about whether such refutations were available to the prosecution at some alternate, hypothetical hearing. Rather, I must simply evaluate whether Professor McCleary's opinion when combined with all of the other evidence establishes a violation by a preponderance of the evidence.

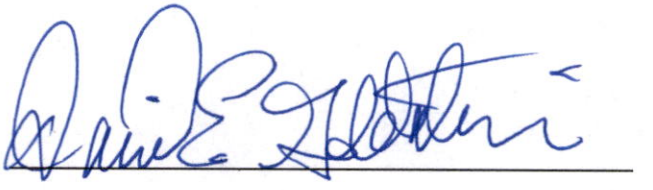
Professor McCleary came to court having been previously qualified to testify on multiple occasions as an expert in the statistical analysis of race and criminal justice data. He was a professor at UC Irvine, with appointments in environmental health science, criminology, law and society, and planning and policy. He has published academic works in the area of criminology and statistics on 110 occasions. He has previously qualified in racial discrimination statistical analysis on several occasions, and as a general statistician 50 times. He gave his opinions and analysis under penalty of perjury, admittedly as a hired expert. Based on my review of the overall record, in addition to finding his testimony to be sincere, I also find that his testimony was undergirded by significant, rigorous academic training

in the field of statistical analysis.

So, was the statistical disparity evident in the record "significant" for purposes of the Racial Justice Act, section 745(a)(3) claim, or was it insignificant?

This court finds that an overall pool sample of either 89 or 91 defendants accumulated over the better part of a decade's worth of charging decisions is a significant sample within the meaning of the Racial Justice Act, and that the same goes for the size of the subgroupings broken down by race and charging decisions. This court finds that either a 32% greater likelihood or a 44% greater likelihood of a Black defendant being charged with special circumstances is a significant statistical disparity within the meaning of the Racial Justice Act, and one that is more likely than not correlated and caused by a defendant's race than random chance alone. This court finds that, whether the absolute difference in special circumstance charging of Black versus non-Black defendants is 8.9% points or 6.7% percentage points, both figures are large enough over a large enough period of time to be significant charging disparities within the meaning of the Racial Justice Act. Professor McCleary opined that these disparities were only 8% likely to occur by chance alone. His calculation could be off by a factor of 6 or more, and it would still be the case that these disparities would more likely than not be attributable to race than random chance. Having heard no sociological or other explanation offered or proven by the prosecution that these disparities correlated with race have an alternate race-neutral cause or explanation, this court is now finding that defendants have met their burden under section 745(a)(3), and I am granting the motion to dismiss the special circumstance allegations under section 190.2(a)(22) as to all defendants.

Dated: May 19, 2023



Hon. David Goldstein, Judge