

1 ALTERNATE DEFENDER OFFICE
Elizabeth K. Barker, Asst. Public Defender, State Bar # 145490
2 By: Evan Kuluk, Deputy Public Defender; State Bar # 251008
627 Ferry St. Martinez, CA 94553
3 Telephone: (925) 335-8181
Fax: 925-335-8125
4 Evan.Kuluk@pd.cccounty.us
Counsel for Defendant WINDOM

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K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By _____
Deputy Clerk

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6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA**

7 THE PEOPLE OF THE STATE OF CALIFORNIA,

CASE No. 1-197638-0

8 PLAINTIFF,

DEFENDANT WINDOM'S MOTION
PURSUANT TO THE CALIFORNIA
RACIAL JUSTICE ACT.
(PENAL CODE § 745(A)(1))

9 v.

10 TERRYONN PUGH,
ERIC WINDOM,
KEYSHAWN MCGEE, AND
11 TRENT ALLEN

DATE: MAY 19, 2023
TIME: 8:30 AM
DEPT.: 6

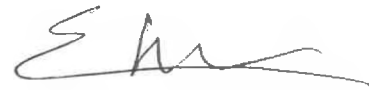
12 DEFENDANTS.

13 TO: DIANA BECTON, CONTRA COSTA DISTRICT ATTORNEY; AND CLERK OF THE COURT:

14 PLEASE TAKE NOTICE that on the above-listed date, or as soon thereafter as possible,
15 ERIC WINDOM will move the Court to hold an evidentiary hearing pursuant to Penal Code
16 section 745, subdivision (c), at which Mr. Windom will establish that Antioch Police officers
17 have exhibited bias towards the defendants in this case because of their African American race,
18 in violation of section 745, subdivision (a)(1). This motion will be based on the attached
19 memorandum of points and authorities and all other papers and pleadings on file in this case, and
20 any evidence or argument to be presented at the hearing.

21 Date: April 17, 2023.

Respectfully submitted,

22 

23 Evan Kuluk
Attorney for ERIC WINDOM
24

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **STATEMENT OF THE CASE**

3 By re-file complaint executed on November 16, 2021, the Contra Costa District Attorney
4 charged Eric Windom (along with three codefendants) with the following felony charges:

5 **Count One**, a violation of Penal Code¹ section 182(a)(1) (conspiracy to commit murder) with
6 enhancements pursuant to sections 186.22(b)(5) and 12022.53(d)/(e); **Count Two**, a violation of
7 section 187(a) (premeditated murder of Arnold Marcel Hawkins) with special circumstances
8 allegations pursuant to sections 190.2(a)(15) (Lying in Wait), 190.2(a)(21) (“Drive By”), and
9 190.2(a)(22) (Street Gang), as well as enhancements pursuant to sections 186.22(b)(5) and
10 12022.53(d)/(e); **Count Three**, a violation of section 664/187(a) (attempted willful, deliberate,
11 and premeditated murder of Aaron Patterson) with enhancements pursuant to sections
12 186.22(b)(5) and 12022.53(d)/(e); Counts Four through Five relate only to Terryonn Pugh; and
13 **Count Six**, a violation of section 182.5 (criminal street gang conspiracy).

14 Mr. Windom was held to answer at preliminary hearing on all counts and enhancements.
15 At the preliminary hearing, Antioch Police **Det. Tom Smith** testified as the lead investigating
16 detective and Antioch Police **Det. Robert Gerber** testified as the prosecution’s gang expert. On
17 January 27, 2022, the Contra Costa District Attorney filed an information alleging the same
18 counts and enhancements. On January 31, 2022, Mr. Windom was arraigned and entered pleas of
19 not guilty and denied all enhancements and special allegations. The case has not yet proceeded
20 to trial. Mr. Windom hereby brings this motion alleging violation of section 745, subdivision
21 (a)(1) of the California Racial Justice Act (“CRJA”) and seeking an evidentiary hearing pursuant
22 to section 745, subdivision (c).

23 _____
24 1 All further statutory references are to the California Penal Code, unless otherwise noted.

1 **STATEMENT OF RELEVANT FACTS²**

2 On March 9, 2021, Antioch police officers responded to a shooting on Aspen Way. The
3 initial responding officers included Officers **Kyle Smith** and **Calvin Prieto**. Arnold Hawkins
4 was unconscious with a gunshot wound to the head. He would later pass away from his injuries.
5 Aaron Patterson was standing on the sidewalk at the shooting scene. Mr. Patterson had gunshot
6 wounds. Mr. Patterson said he did not see a suspect vehicle and did not know who shot him or
7 how many people shot guns.

8 No witnesses at the scene were able to identify any suspects involved in the shooting.
9 Surveillance video from the area of Aspen Way showed a suspect vehicle driving past Mr.
10 Hawkins and Mr. Patterson and shots being fired from the vehicle, but the identities of the
11 subjects in that vehicle could not be determined from the video. In the course of the entire
12 investigation, police did not develop any eyewitness, DNA, fingerprint, gunshot residue, or
13 ballistic evidence connecting Mr. Windom to the shooting.

14 The case was assigned to Antioch Police Det. **Tom Smith** as the lead investigating
15 officer, partnered with Det. **Casey Brogdon**. The detectives coordinated with Antioch Police
16 gang unit Det. **Robert Gerber**. Det. Gerber identified Eric Windom and Terryonn Pugh as
17 possible suspects in the Aspen Way shooting based on social media surveillance and his belief
18 that they were ENT gang members. Det. Gerber testified as the gang expert at the preliminary
19 hearing in this case, opining that all four codefendants were ENT gang members and that the
20 shooting was committed for the common benefit of ENT.

21 Det. Smith identified phone numbers he believed belonged to each of the four alleged
22 codefendants in this case and obtained search warrants for call detail records and real time pings

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24 ² This statement of facts summarizes the factual allegations from the preliminary hearing and police reports
but in no way concedes the truth of these allegations.

1 from those phones. Det. Smith testified at the preliminary hearing as the lead detective and
2 provided location analysis of the cell phone records. The Antioch Police Department began
3 conducting a surveillance operation on Eric Windom and his alleged codefendants on or about
4 March 15, 2021, including Detectives **Jonathan Adams** and **Ryan McDonald**. On March 25,
5 2021, Antioch Police officers including **Tom Smith**, **Jonathan Adams** and **Eric Rombough**,
6 conducted surveillance on a BBQ at John F. Baldwin Park in Concord. Eric Windom and all
7 four codefendants were present at this BBQ.

8 On March 31, 2021, all four codefendants in this case were arrested in separate locations
9 in a coordinated “take down” by Antioch Police in collaboration with other officers. The team
10 that arrested codefendants Trent Allen and Terryonn Pugh included Officers **Brock Marcotte**,
11 **Eric Rombough**, **Timothy Manly Williams**, **Scott Duggar**, and **John Ramirez**.

12 Eric Windom is an African American man.

13 ARGUMENT

14 **I. MEMBERS OF THE ANTIOCH POLICE DEPARTMENT HAVE EXHIBITED** 15 **RACIAL ANIMUS AGAINST THE DEFENDANTS IN THIS CASE IN** 16 **VIOLATION OF THE CALIFORNIA RACIAL JUSTICE ACT.**

17 On January 1, 2021, the CRJA went into effect. (Assem. Bill No. 2542, Stats. 2020, ch.
18 317, § 2, subds. (a)- (c).) The legislative findings in the CRJA recognize that race discrimination
19 has had a “deleterious effect” on our entire criminal justice system and that current law is
20 “insufficient to address discrimination in our justice system.” (*Id.*)

21 The CRJA requires that the court remedy explicit and implicit racial bias at all stages of
22 the criminal proceedings. In broad, sweeping language, the CRJA finds that “intolerable racism”
23 infects decision making at every stage of criminal proceedings and states an express intention to
24 ameliorate bias-based injustice in the courtroom. (*Id.* at subd. (h).) The CRJA acknowledges that

1 “all persons possess implicit biases, and that these biases impacting the criminal justice system
2 “tend to disfavor people of color.” (*Id.* at subd. (g).) With the CRJA, the Legislature dispensed
3 with the burden to show *purposeful* discrimination because, “when racism clearly infects a
4 criminal proceeding, under current legal precedent, proof of purposeful discrimination is often
5 required, but nearly impossible to establish.” (*Id.* at subd. (c).)

6 The legislative intent behind the law is clear:

7 ***It is the intent of the Legislature*** to eliminate racial bias from
8 California’s criminal justice system because racism in any form or
9 amount, at any stage of a criminal trial, is intolerable, inimical to a
10 fair criminal justice system, is a miscarriage of justice under
11 Article VI of the California Constitution, and violates the laws and
12 Constitution of the State of California. Implicit bias, although often
13 unintentional and unconscious, may inject racism and unfairness
14 into proceedings similar to intentional bias. (*Id.* at subd. (i).)

11 ***It is the intent of the Legislature*** to ensure that race plays no role
12 at all in seeking or obtaining convictions or in sentencing. (*Id.*)

13 ***It is the intent of the Legislature*** to reject the conclusion that
14 racial disparities within our criminal justice are inevitable, and to
actively work to eradicate them. (*Id.*)

15 Penal Code section 745, which codifies the CRJA, declares, “[T]he state shall not seek or
16 obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity,
17 or national origin.” (Pen. Code, § 745, subd. (a).)

18 Mr. Windom asserts a violation of section 745, subdivision (a)(1) which provides: “The
19 judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness,
20 or juror exhibited bias or animus toward the defendant because of the defendant’s race, ethnicity,
21 or national origin.” (Pen. Code § 745, subd. (a)(1).) Proof of exhibition of bias or animus does
22 not require proof of intentional discrimination. (Pen. Code § 745, subd. (c)(2).)

23 Here, multiple law enforcement officers, as well as the prosecution’s expert witness on
24 gangs, have used racially discriminatory language and exhibited racial bias/animus towards the

1 defendants. This information has come to light through the disclosure of two reports authored by
2 District Attorney Senior Inspector Larry J. Wallace provided to the defendants by the District
3 Attorney's Office on April 11, 2023. Those reports reveal the following evidence of racial bias
4 against the defendants by officers involved in the investigation of this case:

5 **A. Officer Eric Rombough**

6 Antioch Police Officer Eric Rombough participated in the surveillance operation
7 involving Mr. Windom and his codefendants in the course of the investigation into the crimes
8 alleged in this case. Officer Rombough was part of the team conducting surveillance on a group,
9 including all four defendants in this case, on March 25, 2021 at Baldwin Park in Concord. He
10 was also part of the team that arrested Terryonn Pugh and Trent Allen on March 31, 2021.

11 According to Inspector Wallace's reports, Officer Rombough sent numerous text
12 messages including racially discriminatory language about Black individuals to fellow Antioch
13 Police Officers from 2020 through 2022, including use of the N-word, references to Black
14 individuals as "water buffalo," "monkey" and "gorilla," and promoting negative stereotypes.
15 Officer Rombough texted several other officers images of gorillas to refer to Black individuals.
16 There is a long historical racist dehumanizing association of African Americans with apes and
17 gorillas. (Phillip Goff, et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization,*
18 *and Contemporary Consequences*, Journal of Personality and Social Psychology, Vol. 94, No. 2,
19 292-306 (2008).)

20 On November 11, 2020, Officer Rombough texted other officers, including Brock
21 Marcotte, Timothy Manly Williams, Scott Duggar, and Sgt. Rick Hoffman in response to the
22 question "what're you guy (sic) up to?," Officer Rombough responded "Violating civil rights."
23 On January 5, 2022, Officer Adams texted Officer Rombough, "I'm in a meeting with [Special
24

1 Operations Unit] and [Det. Robert Gerber] and [Sgt. Rick Hoffman] discussing black people.
2 Officer Rombough responded, “You gonna be there for this swat op on the gorillas.”

3 Specifically with respect to this case, Officers Eric Rombough and Jonathan Adams
4 exchanged numerous texts exhibiting racial bias about the group of Black individuals – including
5 the four defendants here – who they were surveilling on March 25, 2021:

6 On 3/25/2021, at 4:32 p.m., APD Officer Rombough text APD Officer
7 Jonathan Adams, [redacted] “That fat dude in the minivan and the fat bf
8 [black female] on the balcony belong to that apartment I’ll go grab the plate to
9 the mini van.”

10 At 4:38p.m., APD Officer Rombough added, “I pulled out and into the los
11 medianos lot. The fat fucks were eye fucking me.”

12 At 5:52p.m., APD Officer Rombough text, “Sooo many black peolpe (sic).”

13 At 6:22 p.m., APD Officer Adams text, “Bro. They all look the same.” APD
14 Officer Rombough responded, “Tell me about it” and “I feel like I’m at the
15 zoo.”

16 At 6:24p.m., APD Officer Rombough text, “They’re getting ice cream.” and
17 “Swarming to it like Hennessy.”

18 At 6:39 p.m., APD Officer Rombough text, “I bet it’s chicken.” APD Officer
19 Adams responded, “Could be ribs.” APD Officer Rombough text back, “For
20 sure watermelon and kool aid.”

21 At 7:14 p.m., APD Officer Rombough text, “I hate these idiots.”

22 At 7:17 p.m., APD Officer Adams asked, “The cops or the n---ers?”³

23 At 7:18 p.m., APD Officer Rombough responded, “All of them it looks like
24 Trent is here too.”

25 At 7:31 p.m., APD Officer Adams sent Rombough [a photo depicting
26 defendants in this case].

27 At 7:36 p.m., APD Officer Rombough texted, “Well we knew they wouldn’t
28 be by the pool.”

29 3 Mr. Windom does not write out the full N-word used by the officers here.

1 At 7:39 p.m., APD Officer Rombough text, "Look at all the Infiniti's."

2 At 7:40 p.m., APD Officer Rombough text, "And cuz they're dark black."
3 APD Officer Adams responded with "[Laughing crying emoji]."

4 At 7:41 p.m., APD Officer Rombough text, "Gotta get them to smile."

5 At 8:02 p.m., APD Officer Rombough continued, "Definitely can't see them."

6 At 8:03 p.m., APD Officer Rombough sent an image [of a line drawing of a
7 horse on a black background with the words "BLACK NIGHT"].

8 This text message conversation between Officers Rombough and Adams is an
9 unambiguous exhibition of racial bias against the defendants in this case during the course of the
10 investigation into the alleged charges. The conversation involves the use of the N-word, mocking
11 Black individuals, and perpetuating racially biased stereotypes of Black people regarding food,
12 alcohol, and swimming. Reference to "smile" invokes historically racist imagery/caricature of
13 Black men with dark skin such that their teeth are the only visible detail. Reference to "zoo"
14 compares Black people to animals. Under the CRJA, language that compares the defendant to an
15 animal is "racially discriminatory language."

16 During the same surveillance, Officer Rombough exchanged text messages with Det.
17 Tom Smith as they were attempting to identify individuals at the Baldwin Park BBQ. Officer
18 Rombough wrote, "Lmao it's getting dark and we can't see them anymore they stopped smiling."
19 Det. Smith sent Officer Rombough a photo of Terryonn Pugh's brother Armonie.

20 At 7:55 p.m., APD Officer Rombough text, "You think that's him? Looks pretty
21 close and he deleted his ig."

22 At 7:56 p.m., APD [Det.] Smith responded, "I think it's looks similar the
23 eyebrows are somewhat different", "It was quick flash on the ig story", and "It's
24 close but I'm not good at that lol."

25 APD Officer Rombough texted, "They all look the same anyway."

26 Det. Smith responded by "laughing" at Officer Rombough's comment.

1 This conversation perpetuated a negative and harmful racial stereotype that all young
2 Black men look the same, which was made in reference to the group of Black individuals
3 gathering at Balwin Park, including the defendants in this case.

4 On March 29, 2021, during the continued surveillance operation, Officer Rombough
5 exchanged texts with gang unit Det. Robert Gerber referring to one of the codefendants in this
6 case. Officer Rombough sent a screen shot from social media to Det. Gerber:

7 On 3/29/2021, at 6:38 p.m., APD Officer Rombough text APD Detective Gerber,
8 "Not sure if this f-- is with any of our targets or not but here u go."⁴

9 At 6:54 p.m., APD Detective Gerber responded, "That f-- is one of our four targets
10 heh, he appears to be goin to la."

11 At 6:55p.m., APD Officer Rombough text, "Yeah I can't remember all their
12 na.m.es just another number 2."⁵

13 At 6:57p.m., APD Detective Gerber responded, "Hah facts."

14 This conversation exhibits animus at the defendants in this case expressed through use of
15 a homophobic slur by both Officer Rombough and Det. Gerber and the reference to these Black
16 individuals as excrement.

17 Further, Officer Rombough was involved with the separate arrests of Terryonn Pugh and
18 Trent Allen on March 31, 2021 in this case. During the course of that day, Officer Rombough
19 texted with others, including Brock Marcotte, Timothy Manly Williams, Scott Duggar, Jonathan
20 Adams, Robert Gerber, Josh Evans to brag about his use of excessive force upon the defendants.
21 Officer Rombough sent out photos to several officers as well as a civilian, documenting injuries
22 inflicted upon Mr. Allen and Mr. Pugh. Officer Rombough uses homophobic slurs about the
23 defendants in text messages to a civilian and boasts that he "field goal kicked his head." Officer

24 4 Mr. Windom does not write out the full homophobic slur used by the officers here.

5 Senior Inspector Wallace notes in his report that "APD Officer Rombough refers to 2s (piece of shit or turds) throughout his text threads as a reference to African American suspects."

1 Rombough texted Officer Adams that his foot hurts and uses a racial slur, "Gotta stop kicking n--
2 -as in their head."

3 **B. Det. Tom Smith**

4 On May 6, 2020, Det. Tom Smith communicated by text with other Antioch Police
5 officers, and engages in joking about other officers' reputation for racism:

6 At 8:59 p.m., APD Sgt. Josh Evans text, "Kardell's mom was yelling how we shot
and killed someone today. That rumor getting around quick."

7 At 9:00 p.m., APD Sgt. Jimmy Wisecarver text, "Laughed." APD Sgt. Evans replies,
8 "That was right after she called me a racist as cop..." APD Officer Rick Hoffman
laughed at the above listed comment and stated, "Well she has a point."

9 At 9:01 p.m., APD Sgt. Evans text, "I never said I took offense to it." APD Officer
10 Tom Smith responds, "Josh isn't a racist..he just hates women. Just ask the female
who went airborne yesterday into Jimmy."

11 On October 22, 2020, Det. Smith received text messages sent to a large group of officers
12 including an unknown photograph sent by APD Officer Jonathan Adams to which Sgt. James
13 Wisecarver responded "We're all going to prison."

14 In March 2021, Det. Smith was the lead investigating officer for the Aspen Way
15 shooting, and was responsible for coordinating the Antioch Police officers conducting the
16 investigation, including surveillance. He participated in the March 25, 2021 surveillance
17 operation during the BBQ at Baldwin Park. During that operation, while identifying the young
18 Black men at the BBQ, including the four codefendants, Det. Smith endorsed Officer
19 Rombough's racially biased text message, "They all look the same anyway" by "laughing" at
20 text in response. As the senior officer coordinating the investigation, Det. Smith thereby
21 authorized and approved the exhibition of racial bias towards the defendants in the course of this
22 investigation.

23 //

1 **C. Det. Robert Gerber**

2 In 2019 and 2020 Det. Robert Gerber received text messages sent to large groups of
3 Antioch police officers containing racially biased memes, use of racial slurs, and racial
4 stereotypes. On June 8, 2020, Det. Gerber received a text from APD Officer John Ramirez to a
5 group of officers, including officers involved in this case: Det. Gerber, Jonathan Adams, Kyle
6 Smith, Ryan McDonald, Casey Brogdon, Brock Marcotte, Scott Dugar, and Timothy Manly
7 Williams. In the text, Officer Ramirez offered officers a prime rib dinner to “40 that mfr”
8 referring to use of a .40mm launcher against Antioch Mayor Lamar Thorpe (an African
9 American man) during protests relating to the murder of George Floyd.

10 Inspector Wallace’s report does not indicate that Det. Gerber spoke up to stop this type of
11 language or reported the communication to senior management at Antioch Police Department.

12 On November 6, 2021, Officer Rombough sent a text to Det. Gerber with an image of a
13 gorilla. Approximately 10 minutes later, Det. Gerber responded by texting Officer Rombough
14 back with a different image of a gorilla. As discussed above, references to Black men as “apes”
15 and “gorillas” have a long racist history.

16 In this investigation, Det. Gerber and Officer Rombough exchanged texts about Terryonn
17 Pugh on March 21, 2021, during the course of the surveillance operation:

18 At 9:15 a.m., APD Detective Gerber responded, “Pugh is so screwed.”

19 At 9:16 a.m., APD Officer Rombough responded, “Bro I can’t wait to forty all
20 of them (“forty” or “40” are references to the deployment of the 40mm less-
lethal launcher).”

21 At 9:16 a.m., APD Detective Gerber text, “Hell yeah.”

22 At 9:54a.m., APD Officer Rombough text, “22 that I think he has it back I mix
23 up all the number 2s igs.”
24

1 In this conversation, Det. Gerber endorses Officer Rombough's premeditated plan to use
2 force upon the defendants when they are arrested and Officer Rombough's reference to
3 defendants as excrement. As discussed regarding Eric Rombough above, Det. Gerber and
4 Officer Rombough further refer to defendants using homophobic slurs and as excrement on
5 March 29, 2021 during the continued surveillance. On March 30, 2021, in a text message to
6 Officer Rombough during the continued surveillance operation, Det. Gerber writes, "Turds...all
7 turds" in reference to the defendants in this case. On March 31, 2021, Det. Gerber responds
8 "Haha!" to a text message from Officer Rombough stating "Bro my foot hurts. Trent's head is
9 like a bowling ball," thereby endorsing Officer Rombough's bragging and joking about use of
10 excessive force during the arrest of defendants in this case.

11 **D. Officer Jonathan Adams**

12 As discussed at length above in the discussion of racial bias exhibited by Officer
13 Rombough, Officer Jonathan Adams expressed racial bias or animus towards the defendants in
14 this case during the surveillance operation. This includes perpetuating racial stereotypes,
15 referring to Black individuals as animals, and Officer Adams' use of the N-word with the
16 unambiguously racist -ER ending while discussing a group of young Black men at a BBQ,
17 including all four defendants.

18 **E. Other Involved Officers**

19 Officers Kyle Smith and Calvin Prieto were among the initial responding officers to the
20 shooting on Aspen Way on March 9, 2021.

21 On May 6, 2020, Officer Kyle Smith sent by text message to over 20 members of the
22 Antioch Police Department a social media screenshot with text containing multiple uses of the
23 N-word. On June 8, 2020, Officer Smith received the text message from Officer John Ramirez
24

1 discussing using a .40mm launcher against Mayor Thorpe. On January 24, 2022, Officer Smith
2 received a text message from Officer Rombough, "I heard, 101 bottom line it doesn't matter
3 some gorilla killed another gorilla." Officer Kyle Smith did not speak up in objection to this
4 racially biased language nor report it to Antioch Police Department management.

5 In June of 2020, Officer Prieto exchanged texts with Officer Andrea Rodriguez during
6 the context of protests after the murder of George Floyd. Officer Prieto wrote, "I blame the
7 blacks. I'm trying not to get upset." A few days later he wrote again, "No sense of responsibility
8 on any of their parts." On July 2, 2020, Officer Rodriguez sent Officer Prieto a text that drug
9 recognition evaluation could not be performed on a subject "cuz he's knocked out now." Officer
10 Prieto responded, "No we'll just say he refused to comply and take blood." On July 20, 2020,
11 Officer Prieto texts Officer Rodriguez, referring to a subject as a "black bitch." In September
12 and October of 2020, Officers Prieto and Rodriguez communicated via text message to agree to
13 write a large amount of traffic citations by targeting Black communities. Officer Prieto texted,
14 "make these n---as eat shit," and later wrote "We'll get busy and start towing n---as shit."

15 **II. DEFENDANTS ARE ENTITLED TO AN EVIDENTIARY HEARING TO**
16 **PROVE THE RACIAL JUSTICE ACT VIOLATION BY A PREPONDERANCE**
OF THE EVIDENCE.

17 A defendant alleging a section 745, subdivision (a) violation must first make a prima
18 facie showing, after which the trial court *shall* hold a hearing. (*Id.* at subd. (c).) "Prima facie
19 showing" means the defendant alleges facts that, if true, establish a substantial likelihood that a
20 violation of subdivision (a) occurred. Prima facie is defined as "At first sight; on first
21 appearance; on the fact of it; so far as can be judged from the first disclosure; presumably; a fact
22 presumed to be true unless disproved by some evidence to the contrary." (Black's Law
23 Dictionary (6th ed. 1990) p. 1189, col. 2.)

1 Section 745 does not contemplate that a defendant must prove the truth of the facts
2 alleged in order to obtain an evidentiary hearing. To the contrary, the CRJA requires the trial
3 court to assume the facts the defendant alleges are true, and intentionally sets a low threshold to
4 establish a prima facie case. (Pen. Code, § 745, subd. (h)(2).) “Substantial likelihood” requires
5 more than a mere possibility but is less than “more likely than not.” (*Id.* at subd. (h)(2).) In the
6 context of 1170.95 felony murder resentencing, the California Supreme Court recently clarified,
7 “at the prima facie stage, a petitioner’s allegations should be accepted as true, and the court
8 should not make credibility determinations or engage in ‘factfinding involving the weighing of
9 evidence or the exercise of discretion.’” (*People v. Lewis* (2021) 11 Cal.5th 952, 974, quoting
10 *People v. Drayton* (2020) 47 Cal.App.5th 965, 980, abrogated on other grounds.) “The prima
11 facie bar was intentionally and correctly set very low.” (*Id.* at p. 972.) The same is true for the
12 prima facie showing under section 745. Mr. Windom has met the prima facie burden here.

13 Upon a showing that subdivision (a) has been violated by a preponderance of evidence at
14 the evidentiary hearing, the court *shall* impose a remedy specific to the violation found. (*Id.* at
15 subd. (e).) When judgement has not been entered, the court may grant mistrial, empanel a new
16 jury, dismiss enhancements or reduce charges. (*Id.* at subd. (e)(1). The Legislature further gave
17 courts broad discretion to fashion any appropriate remedy: “The remedies available under this
18 section do not foreclose any other remedies available under the United States Constitution, the
19 California Constitution, or any other law.” (*Id.* at subd. (e)(4).)

20 Mr. Windom is entitled to an evidentiary hearing and is prepared to prove a violation of
21 section 745, subdivision (a)(1) by a preponderance of the evidence. At the conclusion of such
22 hearing, Mr. Windom will request that the Court enact an appropriate remedy for the violation.

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III. MOTION FOR RELEVANT EVIDENCE.

Mr. Windom hereby joins in codefendant Pugh’s motion for relevant evidence pursuant to Section 745, subdivision (d). For the reasons stated above, Mr. Windom is entitled to an order requiring the prosecution to disclose *all* text messages from the involved in this case which demonstrate racial animus or bias.

CONCLUSION

Having established a prima facie showing of a violation of section 745, subdivision (a)(1), Eric Windom respectfully requests that the court set an evidentiary hearing.

Dated: April 17, 2023

Respectfully submitted,



Evan Kuluk, Deputy Public Defender
Attorney for ERIC WINDOM