Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712

July 17, 2023

The Honorable Jorge F. Navarette
Clerk/Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Amicus Curiae Letter in support of Petition for Writ of Habeas Corpus in *In re Sergio Nelson*, No. S280701

Dear Mr. Navarette:

This letter is written on behalf of the State Public Defender, appearing here as amicus curiae, in support of the petition for writ of habeas corpus filed in the above-captioned case. Please transmit this letter to the justices for consideration in this case.

INTEREST OF AMICUS CURIAE

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) Further, OSPD is statutorily "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes.

OSPD has a particular interest in the fair application of the California Racial Justice Act ("CRJA") – which is at issue here. OSPD has filed pleadings as amicus curiae in several cases involving this landmark statute,

including *Young v. Superior Court of Solano County* (2022) 79 Cal.App.5th 138; *Harris v. Superior Court of Los Angeles County* (S269619, review denied, July 1, 2021); *Flores v. Superior Court of Orange County* (S270692, review denied, Nov. 10, 2021); *Finley v. Superior Court of San Francisco County* (A167311, writ pending, argument deemed waived June 29, 2023); and *Jenkins v. Superior Court of Orange County* (S273838, review granted & transferred, May 18, 2022).

Moreover, government entities and scholars have acknowledged that California's criminal legal system sentences Black and Hispanic defendants, especially young defendants, more harshly than White defendants. Mr. Nelson,[1] who is Black and Hispanic,[2] was sentenced to death and then to life without the possibility of parole ("LWOP") for crimes he committed when he was 19, yet he has not had a meaningful opportunity to litigate his claims under the CRJA. Mr. Nelson will not have these claims adequately considered unless this Court grants the relief requested in his petition.

INTRODUCTION

In 2020, the California Legislature passed Assembly Bill 2542, a groundbreaking law known as the California Racial Justice Act. (Assem. Bill No. 2542 (2019-2020 Reg. Sess.) Stats. 2020, ch. 317 (AB 2542).) Codified in Penal Code sections 745 and 1473, subdivision (f),[3] the CRJA adopted an ambitious and novel statutory scheme for combatting racial discrimination and disparities in every facet of the criminal legal system. As the Legislature explained, "we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively." (AB 2542, *supra*, § 2, subd. (g) [findings and declarations].)

The CRJA became effective on January 1, 2021. (Stats. 2020, ch. 317.) More than two years after the effective date of the act, litigants and trial courts continue to lack definitive guidance on how to apply this novel and important statute. At the time of this filing, there have only been two

---

[1] Mr. Nelson is also a former OSPD client. (See *People v. Nelson* (2016) 1 Cal.5th 513, Case No. S048763.)

[2] "Hispanic" is used here because it is the term that Mr. Nelson uses in his habeas petition and is the term used by the Court of Appeal. (See *People v. Nelson* (February 2, 2023, B313825) [nonpub opn.], p. 2, fn. 2.)

[3] All further references are to the Penal Code unless otherwise indicated.

published cases directly interpreting the CRJA. (See *Young v. Superior Court of Solano County* (2022) 79 Cal.App.5th 138 (*Young*) [interpreting the standard to obtain discovery possessed by the state to support a CRJA claim pursuant to section 745, subd. (d)]; *People v. Garcia* (2022) 85 Cal.App.5th 290 (*Garcia*) [analyzing the circumstances under which a defendant has shown good cause for a continuance to prepare and litigate a CRJA claim].)

Nevertheless, CRJA claims continue to be litigated throughout the state and basic questions remain about how litigants and courts should approach these claims. Perhaps the greatest uncertainty lies in how to analyze CRJA claims based on racial disparities in charging and sentencing (§ 745, subds. (a)(3)-(4)), which invariably rely on qualitative and quantitative statistical data and analysis. (See Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act* (March 27, 2023) Hastings L.J., at p. 3 (forthcoming), [among the two central obstacles to the CRJA's implementation is confusion regarding how to apply the new law to claims of racial disparities in charging and sentencing].)[4] Such claims, like those at issue here, are often denied without ever allowing defendants to obtain discovery or to offer proof to be weighed and assessed at a hearing—despite unequivocal (and unexplained) racial disparities in charging and sentence. Ignoring such racial disparities is contrary to the Legislature's intent to ensure "access to all relevant evidence" related to a potential CRJA violation and to "provide remedies" that effectively address discrimination. (AB 2542, *supra*, § 2, subd. (j).)

The Court should grant an order to show cause returnable to the superior court in this case to address the CRJA claims presented here. The petition raises two bases for relief pursuant to the CRJA, but under either, Mr. Nelson is entitled to an order to show cause.

The first basis is ineffective assistance of counsel (IAC). (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [to establish IAC, a defendant must show both that their counsel's performance was deficient, and that the deficient performance was prejudicial].) Trial counsel failed to pursue a CRJA claim ahead of Mr. Nelson's sentencing hearing or to seek a continuance to do so. (See *Garcia, supra,* 85 Cal.App.5th 290 [error for trial court to deny continuance of sentencing hearing to prepare CRJA discovery motion].) Mr. Nelson was thus forced to file a rushed pro per CRJA motion or miss the opportunity to raise his claim before being sentenced. Counsel's deficient performance – leaving his client to raise a CRJA claim on his own behalf at a

---

[4] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392014≥ (as of July 14, 2023).

sentencing hearing – was prejudicial. As discussed below, there was data available to trial counsel to show that White defendants charged with more than one murder were charged with the multiple murder special circumstance less frequently than similarly eligible Black and Hispanic defendants. Had counsel promptly and diligently investigated Mr. Nelson's CRJA claim and moved for an evidentiary hearing, or sought a continuance to do so, it is reasonably probable that Mr. Nelson's motion would not have been denied without an evidentiary hearing.

Mr. Nelson's second basis for relief directly alleges violations of section 745, subdivisions (a)(3) and (a)(4)(A). Pursuant to section 1473, subdivision (f), CRJA claims may be raised in a petition for a writ of habeas corpus and the court "shall review a petition raising a claim pursuant to [s]ection 745 and shall determine if the petitioner has made a prima facie showing of entitlement to relief." If a prima facie case is established "the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause." (*Ibid.*) Mr. Nelson's habeas petition demonstrates concerning disparities in the rate at which eligible Black and Hispanic defendants are charged with multiple murder special circumstances compared to eligible White defendants. These discrepancies are particularly troubling when considered along with contextual evidence that race may have played a role in the charging and sentencing decisions in his case, including evidence of racial bias against Black and Hispanic defendants in other aspects of the justice system. Multiple murder is unquestionably an extremely serious crime and is properly met with severe punishment. But there is no obvious reason that, among eligible defendants, Black and Hispanic individuals should more frequently be charged with special circumstances or sentenced to LWOP.

The evidence in Mr. Nelson's petition supports both allegations that counsel's deficient performance prejudiced him at his resentencing hearing, and that he has met his burden for further proceedings under the CRJA. Given the clear legislative intent behind the CRJA, to root out racial bias in our criminal justice system, Mr. Nelson is entitled to a meaningful opportunity to litigate his CRJA claims. This Court should thus grant an order to show cause returnable to the trial court.

FACTUAL AND PROCEDURAL HISTORY[5]

Mr. Nelson is a person of mixed race/ethnicity, both Black and Hispanic. (Petition, pp. 47-48.) In August 1995, he was convicted by jury on two counts of first degree murder with, as relevant here, true findings regarding multiple murder and lying-in-wait special circumstances. (*Id.* at p. 24.) He was sentenced to death. (*Ibid.*) More than twenty years later, in *People v. Nelson* (2016) 1 Cal.5th 513, this Court reversed the lying-in-wait special circumstance for insufficient evidence and separately reversed the penalty judgment and remanded for a new penalty trial. (*Ibid.*) The prosecution and Mr. Nelson subsequently agreed that he could be resentenced by the court without a penalty retrial. (*Id.* at p. 25.)

However, prior to the sentencing hearing, the CRJA was enacted. Mr. Nelson asked his appointed trial counsel to file a motion alleging a CRJA violation. (Petition, p. 31.) When trial counsel declined,[6] Mr. Nelson filed a pro se motion for an evidentiary hearing, discovery, and dismissal of the special circumstance allegations based on violations of section 745, subdivisions (a)(3) and (a)(4)(A). (*Id.* at pp. 31-33.) The pro se motion relied on data showing racial disparities in capital sentencing in Los Angeles County. (*Id.* at pp. 32-33.) The trial court denied the petition, finding that Mr. Nelson's case was not impacted by his race and that his petition lacked merit. (*Id.* at pp. 33-34.) Mr. Nelson was sentenced to LWOP. (*Id.* at p. 25.)

In his direct appeal, Mr. Nelson argued, inter alia, that the trial court erred by denying his CRJA petition without an evidentiary hearing. Rejecting this claim, the court concluded that Mr. Nelson failed to make a prima facie showing because the statistics he produced related to the death penalty and therefore were not a "relevant comparison." (*People v. Nelson* (February 2, 2023, B313825) [nonpub opn.], p. 4.) According to the court, the relevant comparison was "the racial makeup of those charged with or convicted of multiple murders and the racial makeup of those who engaged in multiple murders." (*Ibid.*) Because the prosecution sought and the trial court imposed an LWOP sentence, the court reasoned that statistics showing a racial

---

[5] The following factual and procedural history is derived from the Petition for a Writ of Habeas Corpus in this case, cited here as "Petition."

[6] Trial counsel disputes the timing of when Mr. Nelson first brought to his attention the possibility of pursuing a CRJA claim but acknowledges that he was aware of the possibility of the CRJA claim at the time of the sentencing hearing and nevertheless did not consider presenting a CRJA motion because he did not know how it would affect sentencing and did not think the trial court would grant a continuance. (Petition, pp. 44-47.)

disparity in death sentencing were not helpful. (*Ibid.*) This Court denied review on April 12, 2023 (Case No. S279009).

Appellate counsel also filed a petition for writ of habeas corpus in the court of appeal alleging substantially similar claims to those raised in the petition for a writ of habeas corpus Mr. Nelson has filed in this Court. (See Petition, Exh. G [Petition for Writ of Habeas Corpus in *In Re Sergio Nelson* (Court of Appeal, Second Appellate District, Division One)].) The petition included a preliminary study by researchers at the University of California, Los Angeles, demonstrating a concerning racial disparity in the charging of multiple murder special circumstances in Los Angeles County. (See Petition, Exh. D ["UCLA Study"].) The court summarily denied Mr. Nelson's habeas petition on April 27, 2023 (Case No. B322900).

Mr. Nelson is now before this Court pursuant to a writ of habeas corpus, alleging that his case should be remanded to the trial court to afford him a fair opportunity to litigate his CRJA claims because he received ineffective assistance of counsel or, in the alternative, because his current petition meets the threshold showing to obtain either an evidentiary hearing or the disclosure of relevant evidence from the state to support the granting of an evidentiary hearing under the CRJA.

WHY AN ORDER TO SHOW CAUSE SHOULD BE GRANTED

As discussed below, Mr. Nelson presents summary data and related contextual evidence demonstrating a concerning racial disparity related to the charging and sentencing in his case, which trial counsel could have similarly obtained, and which conforms to the type of evidence the Court of Appeal indicated was relevant to Mr. Nelson's CRJA claim. Under the relaxed standards of proof set forth in the CRJA, Mr. Nelson is entitled to an evidentiary hearing, and/or, at a minimum, a chance to obtain further discovery from the state to bolster his CRJA claim. Whether due to ineffective assistance of counsel or a misinterpretation of the relevant standards under the CRJA, however, Mr. Nelson's claims were dismissed without an evidentiary hearing, a result that cannot be squared with the unambiguous legislative intent behind the CRJA. Accordingly, this Court should grant an order to show cause, returnable to the trial court, and ensure that Mr. Nelson has a meaningful opportunity to litigate his CRJA claims.

A. RESEARCH INDICATES THAT CALIFORNIA'S CRIMINAL LEGAL SYSTEM SENTENCES BLACK AND HISPANIC DEFENDANTS, ESPECIALLY YOUNG DEFENDANTS, MORE HARSHLY THAN WHITE DEFENDANTS

Before addressing the relaxed evidentiary burdens under the CRJA and how Mr. Nelson has met those burdens, amicus briefly discusses the background that gave rise to Mr. Nelson's claim: racial disparities in special circumstance charging decisions, LWOP, and other contexts in California generally and in Los Angeles County specifically.

In 2021, the Committee on the Revision of the Penal Code (CRPC) concluded that "[l]ife without the possibility of parole sentences have become much more common in California and have disturbing racial disparities[.]" (CRPC Annual Report 2021, p. 50.)[7] The report noted that 79% of people serving LWOP are people of color, which "suggest[s] that inappropriate factors may be playing a role in who receives this sentence." (*Id.* at p. 50.) Specifically, 35% of those serving LWOP are Black, 35% are Latino, and only 21% are White. (CRPC Annual Report 2021, p. 51.) The report further explains that special circumstances could have been charged in 95% of all first-degree murder convictions and 59% of all second-degree murder and voluntary manslaughter convictions. (*Ibid.*) The ubiquitous nature of special circumstances under California law "places tremendous discretion in the hands of local district attorneys" to decide whether or not to charge special circumstances in a given case, "but very little is known about how prosecutors decide to charge special circumstances." (*Ibid.*) The report cited other recent research that found disturbing statewide racial disparities including the increased likelihood of special circumstance charging based on the race of the victims in one study and in the application of specific special circumstances in another study. (*Id.* at pp. 51-52.)

Substantial research has also demonstrated that "unconscious racial biases result in systemically harsher results for youth of color, including a tendency to discount developmental immaturity when considering their behavior." (Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder* (2021) 11 UC Irvine L. Rev. 905, 940–941; Michaels*, A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty* (2016) 40 N.Y.U. Rev. L. & Soc. Change 139, 144, fn. 26 ["racial and ethnic biases influence attitudes about the punishment of young offenders and [] decision makers are more likely to discount the mitigating

---

[7] Available at: http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf

impact of immaturity when judging the behavior of minority youths"], internal citations omitted.) The CRPC report bears this out, as it found racial disparities in LWOP sentences are even more prevalent among people who were 25 or younger, like Mr. Nelson who was 19, at the time of the offense – "86% are people of color (vs. 79% of the total life without parole population)." (CRPC Annual Report 2021, p. 53.) Equally alarming, defendants sentenced to LWOP were disproportionately younger at the time of their commitment offenses, compared to the entire prison population in California. (*Ibid.*)

Additionally, in 2020, the Legislature established the California Task Force to Study and Develop Reparation Proposals for African Americans (Reparation Task Force). (Assem. Bill No. 3121 (2019-2020 Reg. Sess.) Stats. 2020, ch. 319.) Among the Task Force's findings was that "[f]ollowing the abolition of slavery, the United States government at the federal, state, and local levels continued to perpetuate, condone, and often profit from practices that continued to brutalize and disadvantage African Americans, including . . . disproportionate treatment at the hands of the criminal justice system." (Gov. Code, § 8301, subd. (a)(5).) The Reparation Task Force found one persistent effect of slavery and discrimination is that nationally "African Americans are more likely than white Americans to be serving sentences of . . . life without parole[.]" (Reparation Task Force Interim Report 2022, p. 382.) In California, "punitive criminal justice policies, such as the state's three-strikes law, have resulted in large numbers of African Americans in prisons and jails" serving longer sentences. (*Id.* at pp. 368-369, 383.) Further, "[t]he City of Los Angeles imprisons more people than any other American city" and "African Americans are overrepresented in correctional facilities." (*Id.* at p. 385 [approximately 28.3 percent of California's prisoners were Black, when they make up about 6 percent of the population].) "Black youth are 31.3 times more likely to be committed to imprisonment in the state's juvenile justice system than white youths." (*Id.* at p. 387.) While the report does not specifically address special circumstance charging and sentencing, like the CRPC report, the Reparation Task Force report provides data indicating racial disparities in sentencing in California and Los Angeles specifically.

Hispanic people were not enslaved in the United States and their experience in the California legal system has not been as extensively reported. Nevertheless, this country also has a long history of discrimination against Hispanic people like Mr. Nelson. For example, Mexicans have been targeted with violence, segregation, and subject to "repatriation," i.e., mass deportation. (See *State v. Zamora* (Wash. 2022) 512 p.3d 512, 524.) "Latinx men, women, and children alike were brutalized, tortured, and lynched by white mobs with impunity." (*Ibid.*) Such atrocities have occurred in

California, and Los Angeles specifically. (Faragher, Eternity Street: Violence and Justice in Frontier Los Angeles (2016) pp. 263-280 [noting early use of lynching to punish and terrorize Latinx people in Los Angeles and Northern California]; Delgado, *The Law of the Noose: A History of Latino Lynching* (2009) 44 Harv. C.R.-C.L. L. Rev. 297, 304-307 [exploring why the history of Latinx lynching is not better known]; Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?* (2004) 31 Soc. Just. 242 [explaining that prior research has followed a Black/White approach].) It is, therefore, unsurprising to see the similar racial disparities in sentencing for Black people as compared to Hispanic people noted by the CRPC.

B. THE LEGISLATURE DELIBERATELY SET RELAXED EVIDENTIARY BURDENS UNDER THE CRJA, PARTICULARLY IN THE CONTEXT OF RACIAL BIAS IN CHARGING AND SENTENCING

In enacting the CRJA, the Legislature expressly established relaxed evidentiary burdens for a defendant to obtain discovery from the state, to hold an evidentiary hearing, and to ultimately obtain a remedy based on the existence of racial bias within the criminal justice system. The legislative intent is particularly unambiguous with respect to cases like Mr. Nelson's, where a defendant asserts a potential CRJA violation based on racial disparities in charging and sentencing.

As the Legislature observed in its uncodified legislative findings for the CRJA,[8] racial discrimination in the criminal justice system "has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole." (AB 2542, *supra*, § 2, subd. (a).) "Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law." (*Ibid.*) The problem, as the Legislature recognized in enacting the CRJA, is that "[e]ven though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms." (AB 2542, *supra*, § 2 subd. (c).)

---

[8] *Young*, *supra*, 79 Cal.App.5th at p. 149 [uncodified legislative findings for CRJA "provide an illuminating guide to the legislative objectives in passing the Act"]; see *California Housing Financial Agency v. Elliott* (1976) 17 Cal.3d 575, 583 [legislative findings "are given great weight and will be upheld unless they are found to be unreasonable and arbitrary"].

This failure to confront more subtle forms of racial bias is particularly acute in the context of systemic racial disparities. The authors of the CRJA singled out for disapproval the United States Supreme Court's decision in *McCleskey v. Kemp* (1987) 481 U.S. 279 (*McCleskey*), which: 1) rejected the use of statistical evidence of racial disparities to prove equal protection claims under the federal Constitution, 2) required a showing of intentional discrimination, and 3) demanded affirmative proof that the defendant was prejudiced by that discrimination. As the Legislature observed, the Court's approach in *McCleskey* accepted racial disparities in the criminal justice system "as inevitable." (AB 2542, *supra*, § 2, subd. (f); see *Young*, *supra*, 79 Cal.App.5th at pp. 150-153 ["There is little doubt which side of the *McCleskey* debate our Legislature has aligned California with by statute" and the CRJA "appears to be a direct response to the result" in that case].)

To ensure that the goals behind the CRJA were not merely aspirational or illusory, the Legislature established a process to obtain discovery, to litigate claims of racial disparity and bias, and to provide concrete remedies to "eliminate racially discriminatory practices in the criminal justice system." (AB 2542, *supra*, § 2, subd. (j) [CRJA enacted to ensure "access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences."].)

The CRJA established two categories of violations that address racial disparities in charging and sentencing that are relevant to Mr. Nelson's case. First, pursuant to section 745, subdivision (a)(3), the state violates the CRJA if 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 the evidence establishes that 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." Second, pursuant to subdivision (a)(4)(A), the state violates the CRJA if a "longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed."

The CRJA also sets forth a series of "escalating burdens of proof" depending on whether the defendant seeks discovery, an evidentiary hearing, or relief. (*Young*, *supra*, 79 Cal.App.5th at p. 160.) The standards to obtain discovery and an evidentiary hearing are not meant to be insurmountably

onerous and must not be interpreted in a manner that frustrates the unambiguous legislative intent to provide defendants with a meaningful opportunity to investigate and litigate their CRJA claims.

1. A CRJA violation need only be established by a preponderance of the evidence.

Mr. Nelson's petition, like many CRJA claims since the law's enactment, was denied without either discovery or an evidentiary hearing. His current petition thus implicates the standards for discovery and an evidentiary hearing under the CRJA. It is nevertheless important to note, at the outset, that the ultimate standard for obtaining relief, the most onerous under the CRJA, is itself relatively low. The CRJA also includes several provisions intended to make it more than a theoretical possibility that a defendant could establish a CRJA violation based on racial disparities in charging and sentencing.

First, to obtain *relief* under the CRJA, the defendant need only establish a violation "by a preponderance of the evidence." (§ 745, subds. (a), (c)(2).) The preponderance standard "apportions the risk of error among litigants in roughly equal fashion" and is at "the other end of the spectrum" from the beyond a reasonable doubt standard typically applied in criminal cases. (*People v. Arriaga* (2014) 58 Cal.4th 950, 961; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1177 ["Proof by a 'preponderance of the evidence'" is "a considerably lower burden of proof than the due process requirement of proof beyond a reasonable doubt for a charged offense."].) Given that the most onerous standard under the CRJA is itself relatively relaxed, it stands to reason that the less demanding standards for discovery and an evidentiary hearing, discussed *infra*, should be relatively easy to meet. (See *Young, supra,* 79 Cal.App.5th at p. 161 [the standard of obtaining discovery under the CRJA, "the least onerous of all three, should not be difficult to meet."].)

Second, and in a direct repudiation of *McCleskey*, the CRJA expressly contemplates that a violation based on racial disparities can be established through statistical analysis *and* contextual evidence of racial bias. Specifically, pursuant to section 745, subdivision (h)(1):

> "More frequently sought or obtained" or "more frequently imposed" means 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. The

> evidence may include *statistical evidence, aggregate data, or nonstatistical evidence*.

(Emphasis added.)

More importantly, "[s]tatistical significance is a factor the court may consider, but *is not necessary* to establish a significant difference" under the CRJA. (§ 745, subd. (h)(1), emphasis added.) Instead, the trial court must evaluate the "totality of the evidence," including "whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall." (*Ibid.*) The court must also consider race-neutral factors "that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (*Ibid.*)

Accordingly, even at the final stage of a CRJA claim, proving a violation based on a combination of descriptive statistical data and relevant contextual evidence demonstrating racial disparities is not an impossible undertaking and the more relaxed standards for discovery or an evidentiary hearing should be interpreted in that context.

2. A defendant need only show that it is "more than a mere possibility" that a CRJA violation has occurred to obtain an evidentiary hearing to litigate his claim.

In contrast to the preponderance standard for relief under the CRJA, a defendant need only make a "prima facie" showing to obtain an evidentiary hearing whether at trial or in a habeas proceeding. (§ 745, subd. (c); § 1437, subd (f).) A prima facie showing is made under the CRJA when "the defendant produces facts that, if true, establish that there is a substantial likelihood" of a CRJA violation. (§ 745, subd. (h)(2).) A "substantial likelihood" means "more than a mere possibility, but less than a standard of more likely than not" that the CRJA has been violated. (§ 745, subd. (h)(2).)

As is evident from the legislative history of the CRJA, discussed *supra*, the Legislature had good reason to set a low threshold to allow defendants to proceed to an evidentiary hearing. The statute's structure reinforces that intent. At a hearing, the defendant can fully present their statistical and contextual evidence of racial bias. The prosecution may possess relevant information that is unknown to the defendant. The CRJA thus contemplates that, at the hearing, the prosecution can present evidence of "race-neutral reasons" for any disparities demonstrated by the defendant. (§ 745, subd. (h)(1).) The defendant can, of course, rebut that evidence. Without an evidentiary hearing, however, the court can only speculate about potential

race-neutral reasons that might exist, and their validity goes untested. The court thus cannot meaningfully assess the totality of the circumstances without a hearing.

Simply put, the CRJA does not contemplate that a defendant must come forward with all possible evidence related to a possible CRJA violation to obtain an evidentiary hearing.

a. Descriptive statistics, combined with contextual evidence of systemic, institutional, and historical patterns of racial bias are sufficient to make a prima facie case.

Given the unambiguous legislative intent of the CRJA, and the Legislature's express rejection of *McCleskey*, this new statutory scheme must be interpreted to permit a defendant to make a prima facie case for an evidentiary hearing based on descriptive or summary statistics – raw or unadjusted data that does not control for other variables – that demonstrate a racial discrepancy relevant to the defendant's charges or sentence.

Even when purposeful bias is required, summary statistics have long been recognized as powerful and compelling evidence. For example, in *Yick Wo v. Hopkins* (1886) 118 U.S. 356 (*Yick Wo*), San Francisco enacted ordinances that required laundry owners to obtain a permit if they operated in a wooden building. All 200 Chinese laundry owners who applied for a permit were denied while permits were granted to all 80 White laundry applicants. (*Id.* at pp. 368, 374.) Without requiring further analysis, the Court found that "the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial" of equal protection under the federal Constitution. (*Id.* at p. 373; see also *Young*, *supra*, 79 Cal.App.5th at pp. 164-165 [discussing *Yick Wo*].)

The high court later explained that the facts of *Yick Wo* led to "a 'conclusion [that was] irresistible, tantamount for all practical purposes to a mathematical demonstration' . . . that the State acted with a discriminatory purpose." (*McCleskey*, *supra*, 481 U.S. at p. 293, fn. 12, quoting *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 341 [if proven, allegations that Tuskegee's boundaries "transformed it into a strangely irregular twenty-eight-sided figure" that excluded all but 4 or 5 of 400 Black voters from city limits would "abundantly establish" gerrymandering].)

In contrast to an equal protection claim, a CRJA violation is easier to establish because it does not require a showing that the prosecution acted

with a discriminatory purpose. (See § 745; compare *People v. Garcia* (2011) 52 Cal.4th 706, 737 [despite statistical evidence of underrepresentation of protected groups in grand jury pools, court rejected equal protection claim due to other evidence dispelling inference of intentional discrimination].) *Yick Wo*, however, demonstrates how "summary allegations" of raw disparities can establish a prima facie CRJA violation.

For example, imagine that in County X, 50 of 50 Black or Hispanic defendants charged with murder also had a special circumstance alleged in their cases. In comparison, none of the 50 White murder defendants charged with murder had any special circumstance alleged. Without any statistical analysis or additional facts, a trial court could reasonably conclude that this information shows "more than a mere possibility" that subdivision (a)(3) of section 745 has been violated. Coupled with a reasonable assumption that White people who commit murder are at least sometimes eligible for a special circumstance, the raw statistical disparity should entitle a defendant to an evidentiary hearing. California courts have similarly found, in other contexts, that summary statistical disparities can be sufficient to establish prima facie proof of discrimination irrespective of whether there was a discriminatory purpose. (See e.g. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 986-987 [noting that "statistical disparities alone may constitute prima facie proof of discrimination" and finding a prima facie case where 47.8% of the White firefighters passed a lieutenant examination compared to only 18.18% of the Black firefighters].)

The significance of summary statistics is also amplified when accompanied by contextual evidence of systemic, institutional, or historical racial discrimination and bias. For example, if in the above example, the defendant also presented evidence of racial bias and discrimination against Black and Hispanic defendants in other aspects of the justice system, or more broadly against Black and Hispanic citizens across the State or in the County where the defendant is prosecuted, the probability of a CRJA violation is significantly strengthened. While summary statistics can by themselves establish that there is more than a "mere possibility" of a CRJA violation, where those statistics are bolstered by contextual evidence of racial bias, the defendant's entitlement to an evidentiary hearing is even more clear cut.

Conversely, to hold that summary statistics are never sufficient to make a prima facie case under the CRJA would be a reversion to the *McCleskey* approach that our Legislature unambiguously rejected. As the Court observed in *McCleskey*, even the most robust statistical analysis cannot definitively demonstrate racial bias in a particular case. The majority in *McCleskey* thus feared that accepting a claim based on statistical disparities

would open the door to widespread challenges in all aspects of criminal sentencing. (*McCleskey*, *supra*, 481 U.S. at p. 293 ["McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."].)

The CRJA expressly rejects the *McCleskey* Court's fear of "too much justice." (*McCleskey*, *supra*, 481 U.S. 279 at p. 339 [dis. opn. of J. Brennan].) Instead, the CRJA unambiguously states that while summary statistical evidence or aggregate data *can* be used to prove a CRJA violation, the trial court must also consider the totality of the evidence, including evidence of systemic, institutional, and historical bias, as well as any race-neutral reasons put forth by the prosecution. (§ 745, subd. (h)(1).)

The CRJA thus contemplates a low bar to obtain an evidentiary hearing, because it is only at an evidentiary hearing that the defendant will have a meaningful opportunity to have their CRJA claim considered in the context of both case specific facts and evidence of systemic racial bias. The prima facie standard under the CRJA must be interpreted with this legislative purpose in mind. Where a defendant presents summary statistics giving rise to an inference of racial bias, particularly where that data is combined with contextual evidence of the same, an evidentiary hearing is warranted.

b. **Defendants should not be required to demonstrate, at the prima facie stage, that all defendants included in summary data are similarly situated.**

Nothing in the language of the CRJA itself states that a prima facie showing of a section 745, subdivision (a)(3) or (a)(4)(A) claim necessarily requires a defendant to show – prior to an evidentiary hearing – that any disparities observed in summary data are necessarily among similarly situated defendants. Rather, a defendant need only show "more than a mere possibility" that those subdivisions have been violated. (See § 745, subds. (c) and (h)(2).) Requiring a defendant to control for every possible variable, or to account for every possible dissimilarity between cases also runs counter to how social scientists empirically analyze the issue of racial disparities and the intent of the Legislature to ensure that litigants have a meaningful opportunity to identify racial bias and disparities. (See *Schechner v. KPIX-TV* (9th Cir. 2012) 686 F.3d 1018, 1023 ["statistical evidence need not necessarily account for an employer's proffered non-discriminatory reason for the adverse employment action to make a prima facie case of [age] discrimination" under the California Fair Employment and Housing Act].)

"[T]here are many different methods for measuring racial discrimination." (National Research Council, Measuring Racial Discrimination (2004) at p. 72.) The appropriate statistical methodology will depend on the data available and the question to be answered. (Bachman and Schutt, The Practice of Research in Criminology and Criminal Justice (2020) pp. 405 (The Practice of Research).) Generally, however, an empirical researcher starts with summary or descriptive statistics. These are numbers that summarize or describe various aspects of interest in the data at issue. (See Epstein and Martin, An Introduction to Empirical Legal Research (2014) p. 130.) Descriptive statistics "focus attention on particular aspects of a distribution and facilitate comparison among distributions." (The Practice of Research, *supra*, at p. 416.) Descriptive statistics relevant to analyzing data for racial disparities could include the frequency with which members of different racial groups are charged with a particular crime, if that data is available, and the percentage or relative frequencies of charging for the various racial groups. (See The Practice of Research, *supra*, at p. 412.)

As *Yick Wo* demonstrates, simple descriptive or summary statistics can be powerful enough to warrant relief even under the demanding federal equal protection standard. It would be illogical to hold that such statistics cannot be sufficient to warrant an evidentiary hearing under the less-stringent CRJA. Similarly, a defendant should get an evidentiary hearing even if he has not, at the prima facie stage, statistically controlled for all factors that might drive the charging of a particular offense or enhancement (or conviction or sentence). At the hearing, the prosecutor is free to provide a race-neutral explanation for racial disparities or argue that the comparator groups are not sufficiently alike to provide a legitimate basis for comparison.

But the credibility of race-neutral justifications proffered by the prosecution cannot be assessed prior to an evidentiary hearing. After all, the definition of the prima facie showing dictates that the defendant's allegations are presumed true. (§ 745, subd. (h)(2).) Race-neutral justifications are also described under the statute as factors that "the prosecution . . . establish." (§ 745, subd. (h)(1).) And the proffer of evidence by the prosecution is only contemplated *at the hearing*. (§ 745, subd. (c)(1) ["At the hearing, evidence may be presented by either party. . ."].) Without an evidentiary hearing, speculating about the theoretical possibility that race-neutral differences may account for demonstrated disparities deprives defendants of a meaningful opportunity to litigate their claims.

And while multiple regression or other more sophisticated statistical analysis might be an ideal method to compare similarly situated defendants and cases, it will often be infeasible, particularly at the prima facie stage and

without knowing all the potentially race neutral explanations the prosecutor might raise. Multiple regression also requires a large amount of data and significant expert resources (and often funding), which may not be available prior to an evidentiary hearing, and the amount of data needed may simply not exist in smaller counties or where the specific charges are not made in a sufficient number of relevant or comparable cases.

Finally, requiring a defendant to present a sophisticated statistical analysis that compares similarly situated people or cases to get an evidentiary hearing goes against the spirit of the CRJA. As previously explained, in enacting AB 2542, the Legislature intended to tear down, not maintain, barriers to proving racial discrimination and disparities. Such an inflexible interpretation of the prima facie standard will inevitably prevent meritorious CRJA claims from being presented.

3. Only a minimal threshold showing is required to establish good cause for discovery under the CRJA.

While the standards to establish a CRJA violation (preponderance) and to obtain an evidentiary hearing (more than a mere possibility) are not stringent, the legislature made it particularly easy to obtain discovery from the state to develop a CRJA claim. As the legislature declared, a significant purpose in enacting the CRJA was to "ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences." (AB 2542, *supra*, § 2, subd. (j).) The CRJA thus "authorizes compelled disclosures upon a motion supported by a showing of good cause." (*Young*, *supra*, 79 Cal.App.5th at p. 157.)

Specifically, pursuant to section 745, subdivision (d), a "defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential [CRJA violation] in the possession or control of the state." "Upon a showing of good cause," and subject to certain limitations to protect privacy and other privileges," "the court shall order the records to be released." (*Ibid.*) Thus, to obtain discovery, the defendant need only make a "plausible case, based on specific facts, that" a CRJA violation "could or might have occurred." (*Young, supra,* 79 Cal.App.5th at p. 144.) This aspect of the CRJA was similarly intended to push back against prior legal precedents that frustrated attempts to identify and address racial disparities in the criminal justice system by requiring the defendant to demonstrate intentional disparate treatment as a prerequisite to discovery. (*Id.* at pp. 162-163.)

C. MR. NELSON PRESENTS CONCERNING EVIDENCE OF RACIAL DISPARITIES IN CHARGING AND SENTENCING FOR MULTIPLE MURDER SPECIAL CIRCUMSTANCES AND HAS THE RIGHT TO A MEANINGFUL OPPORTUNITY TO LITIGATE HIS CRJA CLAIMS

The data in the UCLA Study presented in Mr. Nelson's petition reveals a concerning discrepancy in the percentage of eligible Black and Hispanic defendants charged with multiple murder special circumstances compared to the percentage of eligible White defendants. The data is based on a comparison of similarly situated defendants, i.e. those who were charged with more than one murder in Los Angeles County during the 10-year period preceding the sentencing hearing in this case. This data thus demonstrates a substantial likelihood of racial disparities in charging and sentencing decisions under both section 745 subdivisions (a)(3) and (a)(4)(A).

First, the data establishes a prima facie subdivision (a)(3) claim because it directly reflects the state's exercise of discretion to pursue more serious charges based on similar conduct, by comparing all defendants who were charged with committing more than one murder and were thus eligible for a multiple murder special circumstance allegation. The relatively low rate at which eligible White defendants were charged with multiple murder special circumstances (58.97%), compared to Black (75.65%) and Hispanic defendants (70.40%) suggests "more than a mere possibility" that race played a role in the decision to charge multiple murder special circumstances in Mr. Nelson's case. The preceding data is particularly troubling in the context of Mr. Nelson's case, as he was only 19 at the time of his offenses and had no significant criminal history, and because there were two victims in his case, the minimum required for the special circumstance at issue.

Second, the data establishes a prima facie subdivision (a)(4)(A) claim because charging Mr. Nelson with special circumstances increased the potential punishment compared to simply being charged with two murders. Data indicating a racial disparity in charging the multiple murder special circumstances thus demonstrates more than a mere possibility that race also played a role in Mr. Nelson's sentence. (See also *Young*, *supra*, 79 Cal.App.5th at p. 164 [recognizing that racial bias impacting the pool of defendants who are arrested can taint the prosecutor's "downstream" charging process].) This conclusion is particularly apt in Mr. Nelson's case, where the special circumstance finding left the trial court with no choice but to impose LWOP, which would not have been required had the state elected not to pursue the special circumstance allegation in the first instance.

Indeed, in rejecting a prima facie showing in the direct appeal, the Court of Appeal specifically explained that the pertinent data for purposes of a CRJA claim was the form of evidence which Mr. Nelson has now provided in his habeas petition. (*People v. Nelson*, *supra*, at p. 4.) [relevant comparison was "the racial makeup of those charged with or convicted of multiple murders and the racial makeup of those who engaged in multiple murders."].) Yet, after being provided the *very data which it had demanded*, the lower court nonetheless summarily denied the petition. (See Petition, Exh. G [habeas petition filed in the Court of Appeal, which cited UCLA Study comparing, by race, the percentage of eligible defendants who are charged with multiple murder special circumstances].)

The CRJA also expressly provides that "statistical significance" is not required, even to ultimately prove a CRJA violation. (§ 745, subd. (h)(1).) This aspect of the CRJA, as discussed above, was a deliberate repudiation of prior judicial precedents that treated racial disparities as inevitable. If non-"statistically significant" data indicating a racial discrepancy can be sufficient to meet the preponderance standard to obtain relief under the CRJA, it must also be sufficient to establish a prima facie case to obtain an evidentiary hearing. It is conceivable that the state may ultimately be able to establish race neutral reasons for the charging disparities in multiple murder special circumstances allegations presented here. However, because much of the relevant information regarding the charging process is in the hands of the state—and can be presented at an evidentiary hearing, it would be unfair to penalize Mr. Nelson at this point by denying him an evidentiary hearing, especially given that the prosecution will have ample opportunity in a hearing to present such evidence if it exists.

Additionally, while the summary statistics discussed above should be sufficient on their own to establish more than a mere possibility that a CRJA violation occurred, Mr. Nelson's petition presents further contextual evidence of "systemic and institutional racial bias" and "historical patterns of racially biased … prosecution." (§ 745, subd. (h)(1).) Specifically, Mr. Nelson's petition identifies troubling racial disparities in the charging of all special circumstances in Los Angeles County. (Petition, pp. 63-64.) Additional contextual evidence of racial bias in California and in the Los Angeles criminal justice system discussed in Section A., *supra*, amplifies the weight of the data presented by Mr. Nelson.

It is also important to note that in his original pro per CRJA motion, which is referenced in the current petition, Mr. Nelson presented significant evidence of racial discrepancies in Los Angeles County regarding death penalty sentencing. While Mr. Nelson no longer has a death sentence, the

decision to seek the death penalty cannot be divorced from the state's decision to charge special circumstances or to continue to press for LWOP. (See *McCleskey*, *supra*, 481 U.S. at p. 356 (dis. opn. of Blackmun, J.) [criticizing the majority for failing to recognize the role that racial factors play in various steps in the prosecutorial decision-making process and recognizing that each element of the discretionary decision-making process must be considered when interpreting aggregate statistics].)

Accordingly, Mr. Nelson has demonstrated more than a mere possibility that race played a role in the charging and sentencing in his case and that he is entitled to an evidentiary hearing.

The petition also demonstrates that Mr. Nelson was prejudiced by his attorney's deficient performance, as it is reasonably likely that the CRJA motion would not have been summarily denied without an evidentiary hearing had counsel timely investigated and litigated the CRJA claim on his behalf. (See *In re Hardy* (2007) 41 Cal.4th 977, 1019 [the "second part of the *Strickland* test 'is not solely one of outcome determination. Instead, the question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." [Citation]'"]; see also *People v. Daniel* (2020) 57 Cal.App.5th 666, 676 [where, prior to the issuance of an order to show cause, court failed to appoint counsel in a section 1172.6 resentencing proceeding, the defendant established prejudice because it was "'reasonably probable that if [he or she] had been afforded assistance of counsel his [or her] petition would not have been summarily denied without an evidentiary hearing.'"]; *People v. Cooper* (2020) 54 Cal.App.5th 106 [accord].) Mr. Nelson's petition should thus be granted so that he has a meaningful opportunity to prove his CRJA claim at an evidentiary hearing.

Mr. Nelson has also clearly met his burden to obtain further discovery from the state, as he has come forward with specific facts that demonstrate that it is at least plausible, if not substantially likely, that race played a role in the charging and sentencing decisions in his case. Mr. Nelson has also described the "type of records or information" that he seeks, indicating that, if permitted an opportunity to further litigate his CRJA claims, he will seek:

> [A] list of all cases in a specified time period where persons were charged with violating section 187 and of all cases where persons were charged with the multiple murder special circumstance, identifying the race of the defendants and victims; a copy of the charging policies of the District Attorney's office during that time period; and the probation, pre-plea or pre-sentence reports for all

> such cases for the purpose of providing a factual snapshot of each case.

(Petition, p. 53; see also UCLA Study [to understand the "ramifications of bias" in multiple murder special circumstances charging, the authors of the study need "additional data and information from LA County regarding the factors that contribute to charging decisions for multiple murder special circumstance designations"].)

Accordingly, and at a minimum, Mr. Nelson has demonstrated a plausible likelihood that racial bias exists within the context of multiple murder special circumstances charging and sentencing in Los Angeles County and that the same bias may have played a role in his case. To the extent the UCLA Study and other contextual evidence of racial bias are insufficient to entitle Mr. Nelson to an evidentiary hearing, the failure of trial counsel to investigate the CRJA claim and pursue additional discovery under section 754, subdivision (d), further demonstrates prejudice under *Strickland*.

//
//

CONCLUSION

Mr. Nelson has a statutory right to a meaningful opportunity to establish whether a CRJA violation occurred in his case. Whether due to ineffective assistance of counsel or a misinterpretation of the relaxed standards to obtain discovery and an evidentiary hearing under the CRJA, Mr. Nelson has been denied that opportunity. Accordingly, and for the reasons set forth above, amicus requests that this Court issue an order to show cause and remand the matter to the trial court for further proceedings under the CRJA.

Dated: July 17, 2023

Respectfully Submitted,

MARY J. MCCOMB
State Public Defender

/s/ Elias Batchelder
ELIAS BATCHELDER
Director of Amicus Litigation

/s/ Mark R. Feeser
MARK R. FEESER
Deputy State Public Defender

/s/ Alyssa Mellott
ALYSSA MELLOTT
Supervising Deputy State Public Defender

Attorneys for Amicus Curiae

DECLARATION OF SERVICE

Case Name: ***In re Sergio Nelson***
Case Number: **Supreme Court Case No. S280701**
2DCA, Division 1 Case No. B322900

I, **Paula Pimentel**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a true copy of the following document:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **July 17, 2023**, as follows:

Los Angeles County Superior Court Attn: Hon. Mike Camacho Pomona Courthouse South 400 Civic Center Plaza Pomona, CA 91766

//

//

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **July 17, 2023:**

Office of the Attorney General- Docketing 300 South Spring St., Suite 1702 Los Angeles, CA 90013-1230 *DocketingLAAWT@doj.ca.gov*	Office of the Attorney General Attn: Chung L. Mar, D.A.G. 300 South Spring St., Suite 1702 Los Angeles, CA 90013-1230 *Chung.Mar@doj.ca.gov*
Steven Schorr, Attorney for Petitioner Law Office of Steven Schorr P.O. Box 1931 Discovery Bay, CA 94505 *Schorr126312@gmail.com*	District Attorney of L.A. County Hall of Justice 211 W. Temple St., Floor 12 Los Angeles, CA 90012 *Truefiling@da.lacounty.gov*
2nd District Court of Appeal, Division 1 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 *Service Copy via TrueFiling*	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 17, 2023**, at Merced, CA.

Paula Pimentel Digitally signed by Paula Pimentel
Date: 2023.07.17 10:31:50 -07'00'

Paula Pimentel