

Disparate Racial Impact of Discretionary Prosecutorial Charging Decisions in Gang-Related Murder Cases: Litigating the Racial Justice Act in *People v. Windom*

Evan Kuluk*

Introduction.....	71
I. Using Data To Establish a California Racial Justice Act Violation....	73
II. Expert Testimony and the Odds Ratio Prove a Racial Disparity is Statistically Significant	75
III. Prosecutorial Discretion in Charging Increases the Likelihood of CRJA Violations Due to Implicit Bias.....	78
Conclusion	80

INTRODUCTION

Eric Windom is a young African American man, who, along with three co-defendants, was charged by the Contra Costa District Attorney’s Office with murder, attempted murder, conspiracy, and gang allegations—including the gang murder special circumstance—based on an alleged shooting that took place in Antioch, California in 2021. Mr. Windom, represented by the Contra Costa County Alternate Defender Office, successfully filed a motion to dismiss the gang murder special circumstance pursuant to the California Racial Justice Act, becoming the first in the state to do so.

Contra Costa County is situated in the East Bay of the San

DOI: <https://doi.org/10.15779/Z38K649V0X>

Copyright © 2024 Regents of the University of California.

* Evan Kuluk has been a Deputy Public Defender at the Contra Costa Public Defender Office since 2010, currently assigned to the Alternate Defender Office. From 2008 to 2010, he was a Deputy Public Defender at the San Joaquin County Public Defender Office. On behalf of his client Eric Windom, Kuluk is one of the first attorneys in the state of California to successfully secure dismissal of a gang enhancement charge under the Racial Justice Act. Kuluk served on the Structural Change panel at the 2024 Racial Justice Act Symposium hosted at Berkeley Law.

Francisco Bay Area. A county of approximately 1.15 million residents,¹ Contra Costa is highly diverse, but also significantly segregated. Two particular cities—Richmond in the far west of the county and Antioch in the far east—are home to vibrant African American communities and are historically over-policed. Anecdotally, over the past decade, public defenders practicing in Contra Costa have observed a significant over-representation of Black clients who are charged with gang enhancements and special circumstances. Special circumstances, alleged pursuant to California Penal Code Section 190.2, are statutory aggravating factors that can elevate the sentence for first-degree murder. If found true by a jury or admitted by a defendant, first-degree murder with a special circumstance carries a mandatory sentence of life in prison without the possibility of parole (“LWOP”), if the prosecution is not seeking the death penalty.²

Black defendants are disproportionately sentenced pursuant to gang allegations in Contra Costa County. Over 92 percent of people serving prison time in California for convictions with gang enhancements are Black or Latinx.³ Of that population, 24 percent are Black.⁴ In Contra Costa County, 48 percent of those sentenced to California Department of Corrections and Rehabilitation (“CDCR”) with gang enhancements are Black—double the statewide average.⁵ As of July 1, 2021, U.S. Census data establishes that the population of Contra Costa County is 9.5 percent Black or African American.⁶ Thus, Black individuals prosecuted in Contra Costa County are sentenced to prison with gang enhancements at exceedingly high rates that are vastly disproportionate to the county’s demographics.

Based on CDCR data and anecdotal experience of public defenders, the Contra Costa Alternate Defender Office requested public records information for seven years of charging decisions in homicide cases from the Contra Costa District Attorney via California Public Records Act request in 2022. The data obtained included all individuals charged with murder and gang allegations between 2015 and 2022, along

¹ *Quick Facts, Contra Costa County, California (2023)*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/contracostacountycalifornia/PST045223> (last visited Apr. 27, 2024).

² CAL. PENAL CODE § 190.2.

³ COMM. ON REVISION OF THE PENAL CODE, ANN. REP. AND RECOMMENDATIONS 45 (2020), http://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf.

⁴ *Id.*

⁵ *Id.* at 88 (Appendix B).

⁶ *Quick Facts, supra* note 1.

with the race/ethnicity for each charged defendant. Some of those individuals were charged with murder (Penal Code § 187) and a standard gang enhancement (Penal Code § 186.22(b)) which carries life in prison with the possibility of parole. Other individuals were charged with murder and the gang murder special circumstance (Penal Code § 190.2(a)(22)), which carries LWOP. Both sets of charges fall under the general grouping of “gang-related murder.”

I. USING DATA TO ESTABLISH A CALIFORNIA RACIAL JUSTICE ACT VIOLATION

Penal Code Section 745, which codifies the California Racial Justice Act (“CRJA”), declares, “the state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” Of the four statutory paths to establishing a CRJA violation,⁷ Mr. Windom specifically asserted that the gang murder special circumstance charged in his case violated Section 745, subdivision (a)(3) which provides,

“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.”⁸

This subdivision allows a criminal defendant to bring a challenge to the charges in their case based on historical overcharging practices which have led to a disparate impact based on race in the county where they are being prosecuted.

Mr. Windom’s pre-trial Racial Justice Act motion challenged the charging of gang murder special circumstances as to Black defendants when compared to non-Black defendants. The “similarly situated” group of individuals included all defendants whose cases fall under the umbrella category of gang-related murder, who could be charged pursuant to either Penal Code Section 190.2(a)(22) or Section 186.22(b). The prosecution’s charging decision in these gang-related murder cases, whether to charge

⁷ CAL. PENAL CODE § 745; *Young v. Super. Ct.*, 79 Cal. App. 5th 138, 164 (2022) (holding that subdivisions (a)(1) through (a)(4) are not “isolated pathways” to prove violation of the CRJA, but are “different means of proving that the state exercised its criminal sanctions power ‘on the basis of race, ethnicity, or national origin’ and may “work in tandem”).

⁸ CAL. PENAL CODE § 745(a)(3).

a more serious offense—murder with the gang murder special circumstance carrying LWOP—or a less serious offense—murder with the standard gang enhancement carrying life with the possibility of parole, is a discretionary charging decision.

Historical disparate charging is referred to as “more frequently sought or obtained” in the statute.⁹ Section 745, subdivision (h) defines “more frequently sought or obtained” as used in subdivision (a)(3) to mean 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.”¹⁰ The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider but is not necessary to establish a significant difference.¹¹

Proof of *purposeful* charging of more serious offenses against defendants of a certain race is not required to establish a violation of Section 745(a)(3). With the CRJA, the Legislature dispensed with the burden to show *purposeful* discrimination because, “when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish.”¹² In enacting the CRJA, the Legislature expressly disavowed *McCleskey v. Kemp*, 481 U.S. 279 (1987), which “accepts racial disparities in our criminal justice system as inevitable . . . but the court would not intervene without proof of discriminatory purpose.”¹³ The public records charging data we received established that between 2015 and 2022, there were a total of 89 individuals charged with gang-related murder in Contra Costa County.¹⁴ Of those 89 individuals, 48 (54%) were Black defendants while 41 (46%) were non-Black. Thus, even before breaking down the gang-related murder cases into the greater and lesser versions of charging, there is a clear and significant over-representation

⁹ *Id.*

¹⁰ *Id.* § 745(h)(1).

¹¹ *Id.*

¹² Assemb. B. No. 2542 § 2(c), Reg. Sess. 2019-20 (Cal. 2020).

¹³ *Id.* at § 2(f).

¹⁴ The prosecution insisted that the proper data set should be 91 individuals, based on a single case with two non-Black co-defendants for whom gang allegations were initially charged but were dismissed by the District Attorney’s Office prior to preliminary hearing. Ultimately, the Court ruled that the racial disparity in charging was established under either the 89 or the 91 person data set.

of Black defendants with gang allegations in a county with a Black population of less than 10%.

Of the 48 total Black defendants charged with gang-related murder, 30 (62.5%) were charged with the more serious gang murder special circumstance, while 18 (37.5%) were charged with the less serious standard gang enhancement. Of the 41 total non-Black defendants charged with gang-related murder, 22 (53.6%) were charged with the more serious gang murder special circumstance, while 19 (46.3%) were charged with the less serious standard gang enhancement.

An issue of controversy in Mr. Windom's case was whether all defendants in the 89-person gang-related murder data set were "similarly situated." While litigation in this motion was ongoing, the Legislature passed Assembly Bill 256, the Racial Justice Act for All, which amended Section 745 to add, *inter alia*, a definition of similarly situated as "factors that are relevant in charging and sentencing are similar" and that does not require all individuals in a group to be identical.¹⁵

If the factor of "similarly situated" required the level of identical facts between cases as suggested by the prosecution, it would leave too few cases to allow for the statistical disparity claims contemplated by the Legislature, rendering the CRJA futile. Defining "similarly situated" in a way that requires virtual homogeneity, making it exceedingly unlikely that a defendant could ever bring a successful Section 745(a)(3) claim, would be contrary to the intent of the Legislature.¹⁶ Thus, the applicable definition of similarly situated individuals who have engaged in similar conduct for purposes of Mr. Windom's CRJA litigation was those individuals who allegedly committed gang-related murder and *could have* been charged with the gang murder special circumstance but were charged with the less serious standard gang enhancement. This group includes the 19 non-Black individuals accused of gang-related murder who were charged with murder and the standard gang enhancement, a less serious offense than the charges alleged against Mr. Windom and his codefendants.

II. EXPERT TESTIMONY AND THE ODDS RATIO PROVE A RACIAL DISPARITY IS STATISTICALLY SIGNIFICANT

When analyzing criminal justice statistical data for racial

¹⁵ Assemb. B. No. 256 § 2(h)(6), Reg. Sess. 2021-22 (Cal. 2022).

¹⁶ See *In re Marriage Cases*, 43 Cal.4th 757, 831 n.54 (2008) (rejecting a challenge at the outset by finding that two groups are not "similarly situated" would have the effect of "insulat[ing] the challenged . . . [action] from any meaningful equal protection review").

discrimination, the odds ratio is a preferred measure of racial disparity used in the field. Richard McCleary, professor of Criminology, Law and Society at the University of California, Irvine, testified at Mr. Windom's Racial Justice Act hearing as an expert in statistical analysis of race and criminal justice data.¹⁷ Professor McCleary testified that the odds ratio, also called relative risk, is the "very concise measure of the difference between two odds." It is not merely a forward-looking or predictive measure but is a tool that is used regularly by statisticians to evaluate whether a data set of existing statistics shows a racial disparity. McCleary explained, "odds ratio has mathematical and statistical properties that make it ideal for testing significance, for example, ruling out chance." Part of the function of the odds ratio is to determine if a racial disparity is statistically significant.¹⁸

Applying this statistical methodology to the gang-related murder charging dataset revealed the following. The odds a Black person accused of gang-related murder will be charged with the gang murder special circumstance in Contra Costa County is 1.6667. The odds a non-Black person accused of gang-related murder will be charged with the gang murder special circumstance in Contra Costa County is 1.1578. The odds ratio, which is the risk of being charged with the more serious gang murder special circumstance (instead of the less serious standard gang enhancement) for Black defendants relative to the risk for non-Black defendants is 1.4395. In other words, Black defendants accused of gang-related murder are 43.95 percent more likely to be charged with gang murder special circumstances carrying LWOP in Contra Costa County than defendants of other races who have engaged in similar conduct.

Although the sample size of 89 individuals was relatively small compared to academic studies in statistics, Professor McCleary testified that the sample size was sufficiently large for analysis. He testified that the disparity in charging Penal Code Section 190.2(a)(22) gang murder special circumstances against Black compared to non-Black defendants is

¹⁷ Professor McCleary teaches graduate-level statistics courses. He has bachelors and masters degrees in math, and a PhD in sociology. He has performed racial statistical analysis for the CDCR, the Los Angeles Sheriff's Department, and the Department of State Hospitals. He has published 8 books and over 100 articles in the fields of criminology and statistics. Professor McCleary was deemed qualified to give expert testimony by the Court.

¹⁸ CAL. PENAL CODE § 745(h)(1) (stating that for purposes of proving that more serious charges are more frequently sought or obtained against defendants of a certain race or ethnicity, "statistical significance is a factor the court may consider, but is not necessary to establish a significant difference").

“substantially and statistically large in this case pointing to a pattern of racial discrimination.”

The 1.4395 odds ratio establishes a significant statistical racial disparity in charging, which rules out chance. Thus, the historical charging data established that the prosecution in Contra Costa County has more frequently sought the more serious offense of gang murder special circumstances against Black defendants, including Mr. Windom, than non-Black defendants.

A prosecution witness at the evidentiary hearing, an in-house forensic accountant with the Contra Costa District Attorney, compared the charging rate of Black defendants with the gang murder special circumstance against the *average* charging rate for all races, which resulted in a lower disparity than when comparing Black versus non-Black defendants. Professor McCleary explained that this is not statistically proper practice. Doing so biases, or inaccurately reduces, the measure of the effect by including the Black individuals in both sides of the equation. In the statistics field, the standard academically accepted practice when analyzing data for racial disparity is to compare Black versus non-Black.

The standard of proof at the CRJA evidentiary hearing is preponderance of the evidence.¹⁹ At the time of the CRJA litigation in Mr. Windom’s case, there was not yet any appellate guidance on application of Section 745(a)(3) for the trial court to follow. The trial court engaged in statutory analysis of Section 745(h)(1) and concluded, “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.”²⁰

Ultimately, the trial court found that Mr. Windom established “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.”²¹ The reference to “more likely than not” in the court’s finding incorporates the preponderance of the evidence burden of proof.²² Once that significant historical disparity

¹⁹ *Id.* § 745(c)(2).

²⁰ Court’s Order Re: 745(a)(3) Motion at 4, *People v. Windom et al.*, No. 01001976380, (Cal. Super. Ct. Contra Costa Cnty. filed May 23, 2023), <https://www.documentcloud.org/documents/23828698-racial-justice-act-coco-county-courts-order-re-pc-745a3-motion>.

²¹ *Id.* at 10 (emphasis added).

²² *People v. Super. Ct. (Kaulick)*, 215 Cal. App. 4th 1279, 1305 n.28 (2013).

is established, along with evidence that the particular defendant is charged with a more serious offense than similarly situated individuals of other races who have engaged in similar conduct, the burden shifts to the prosecution to establish “race-neutral reasons for the disparity.”²³

The trial court hearing Mr. Windom’s CRJA motion found that the prosecution failed to rebut the statistical disparity with any “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.”²⁴ The trial court found, “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 of explanation,” that Mr. Windom met his burden.²⁵ And in a first-of-its-kind decision in the state of California, the court dismissed the gang murder special circumstance allegations charged against Mr. Windom and his co-defendants as the legal remedy for the proven violation of the CRJA.

III. PROSECUTORIAL DISCRETION IN CHARGING INCREASES THE LIKELIHOOD OF CRJA VIOLATIONS DUE TO IMPLICIT BIAS

A successful claim of a violation of the CRJA based on charging practices by the prosecution does not require proof that the District Attorney’s Office intended to overcharge defendants of a certain race, does not require proof that the District Attorney’s Office knew about the racial disparity in charging decisions, and does not require proof that the prosecutors who filed the charges were “racist” or engaged in “racism.”²⁶ Implicit bias is sufficient.²⁷

Through the course of the evidentiary hearing, it was revealed that the Contra Costa District Attorney’s Office had no formal written policy, criteria, or guideline for prosecutors to follow when determining whether to file special circumstances in homicide cases for which special circumstances could be filed. The Office did not keep statistics on what percentage of its gang-related homicide cases have gang murder special circumstances filed. Since the passage of the Racial Justice Act, the Office had not kept any statistical data on the racial makeup of charging decisions by the unit.

Whether or not to file special circumstances is a point of

²³ CAL. PENAL CODE § 745(h)(1).

²⁴ Court’s Order Re: 745(a)(3) Motion, *supra* note 20, at 2.

²⁵ *Id.* at 10.

²⁶ *See* Assemb. B. No. 2542 § 2(c)-(i), Reg. Sess. 2019-20 (Cal. 2020).

²⁷ *Id.*

prosecutorial discretion requiring a subjective determination. Research has shown that “special-circumstance allegations could have been charged in 95 percent of all first-degree murder convictions, leaving the decision whether a life without parole sentence may be imposed to the discretion of local prosecutors.”²⁸ In the trial court’s ruling on Mr. Windom’s CRJA motion to dismiss gang murder special circumstances, the court noted, “the absence of formal written charging guidelines at the Contra Costa District Attorney’s Office . . . the absence of formal written ‘best practice’ guidelines for avoiding implicit bias”²⁹

Social science of implicit bias indicates that discretion without guidelines is prime for implicit or unconscious bias to impact decision-making. The “conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decision[s] with little accountability.”³⁰ Prosecutorial charging decisions are within the wide range of discretionary decision-making processes that can be infected by implicit bias.³¹ This may be especially true when prosecutors are deciding what level of charges to file against young Black men, given the powerful negative stereotypes of violence society associates with this demographic.³²

Since the court’s ruling in Mr. Windom’s CRJA case, the Contra Costa District Attorney’s Office has publicly addressed the need for objective charging policies to reduce the impact of implicit racial bias. District Attorney Diana Becton told the Bay Area News Group that her office “recognizes that today’s ruling is one of significance for offsetting systemic racial disparities within the criminal justice system. . . The court’s ruling provides direction, and my office will review similarly charged cases to promote fair and equitable prosecution.”³³ According to

²⁸ COMM. ON REVISION OF THE PENAL CODE, ANN. REP. AND RECOMMENDATIONS 51 (2021), http://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf.

²⁹ Court’s Order Re: 745(a)(3) Motion, *supra* note 20, at 2.

³⁰ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).

³¹ Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 785, 797 (2012).

³² *Id.* at 812 (“decision-makers in fact possess the perception that misbehavior by black youth is more dispositional than misbehavior by white youth.”); *id.* at 813 (“But how do prosecutors decide which murderers are among the most likely murderers to represent a future danger to society? The decision requires prosecutors to make a highly subjective predictive determination and thus a determination prone to bias.”).

³³ Nate Gartrell, *Judge Finds Contra Costa DA’s Filing Practice are Racist, Dismisses Special Circumstances Charges in Murder Case*, MERCURY NEWS (Mar. 16, 2024, 3:48 PM), <https://www.mercurynews.com/2023/05/19/judge-finds-contra-costa-das-gang-filing-practices-are-racist-dismisses-special-circumstances-charges-in-murder-case>.

KQED, the District Attorney's Office has now "established a committee review system for evaluating all special circumstances charges on articulable, race-neutral grounds before they are filed."³⁴

CONCLUSION

Special circumstance allegations carry the most extreme of punishments and should not be taken lightly. Implementation of objective charging criteria is a critical start to addressing the highly troubling overcharging of special circumstances, but will not be sufficient on its own to remedy decades of racially disparate charging practices. The CRJA will continue to be a necessary and valuable tool to identify and seek remedy for the impact of implicit racial bias on these weighty discretionary charging decisions made daily by prosecutors across the state of California.

³⁴ Annelise Finney, *California's Groundbreaking Racial Justice Act Cuts its Teeth in Contra Costa*, KQED (Mar. 16, 2024, 3:49 PM), <https://www.kqed.org/news/11975584/californias-groundbreaking-racial-justice-act-cuts-its-teeth-in-contra-costa>.