

**To:** [Dan Cabral](#); [Ryan Wagner](#)  
**Subject:** ACTION REQUIRED: PC 745(d) motion  
**Date:** Friday, July 9, 2021 7:20:57 PM  
**Attachments:** [People's Response to the Def's Motion to Disclose Evidence.pdf](#)  
[People's Response to the Def's Motion to Dismiss PC 745.pdf](#)  
[PC 745\(d\) Declaration.docx](#)

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Dan,

When you get a moment, can you sign the attached "PC 745(d) declaration.docx" document and provide to Ryan so he can file it?

Note: The (2) PDF attachments in this email are for context only if you want to see our original motion.

To quickly summarize the issue:

In one of my old PC 187 gang JTs, defense counsel filed a racial justice act motion, claiming that our office disproportionately uses rap music and rap lyrics against Black defendants. Defense counsel has asked for the following discovery in regards to their motion:

"All training materials regarding the use of rap music, lyrics, and videos in the prosecution of criminal cases, including training materials, handouts, Power Point presentations, training videos, as well as dates of training and names of all presenters;"

To my memory, if this topic were to ever come up it would be in the gang prosecution context. To my memory, the last person to do an office wide training on gangs was Aron.

I talked to Aron and looked at his old power point presentation, and there was no mention of using rap music/lyrics/videos.

As such, we indicated in our PC 745(d) response that there were no trainings/training materials regarding rap music/lyrics/video [but did not do so via a declaration].

Judge Mair believes it needs to be in declaration form and has ordered us to provide a declaration.

Since you are in charge the training in our office, I was hoping you could sign the attached declaration.

Once you sign it, just let Ryan know and he can pick it up and file it.

And obviously, if there are any issues regarding this, let me know.

Thanks,  
Chris

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**From:** Chris Walpole

**Sent:** Friday, July 9, 2021 4:39 PM

**To:** Ryan Wagner <[RWagner@contracostada.org](mailto:RWagner@contracostada.org)>; Venus D. Johnson <[Venus.Johnson@contracostada.org](mailto:Venus.Johnson@contracostada.org)>

**Subject:** PC 745 motion

Ryan/Venus,

I just got off the phone with Aron, who appeared on this case this afternoon.

This is my one of my old PC 187 cases, where (D) filed a PC 745(a)(2) motion regarding the use of the (D)'s own RAP lyrics in trial to prove the gang enhancement.

To my surprise, Judge Mair found that (D) counsel made a prima facia showing, and has scheduled a hearing to fully litigate the matter.

If I recall correctly, the hearing will be in September.

On a related issue, regarding the PC 745(d) motion [Discovery motion]:

The court found our representation that our office has not done any training on the use of rap lyrics was insufficient, and has ordered us to provide an affidavit. [Ryan I am hoping you can file that affidavit please]

The court denied the rest of defense counsel's discovery request, but oddly enough, recommended that defense counsel file an SDT to obtain those same records.

This is an odd recommendation b/c we already indicated to the court that those records do not exist.

Defense counsel is seeking a list of cases where rap lyrics were included in discovery, and we do not keep track of whether or not rap lyrics are included in discovery.

This would require us to look through every case, which obviously is a practical impossibility.

Chris

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**From:** Ryan Wagner <[RWagner@contracostada.org](mailto:RWagner@contracostada.org)>

**Sent:** Wednesday, June 30, 2021 12:09 PM

**To:** Chris Walpole <[CWalpole@contracostada.org](mailto:CWalpole@contracostada.org)>

**Subject:** FW: People's Responses for People v. Diallo Jackson and Gary Bryant (5-152003-0)

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**From:** Judy Chow <[JChow@contracostada.org](mailto:JChow@contracostada.org)>

**Sent:** Wednesday, June 30, 2021 12:07 PM

**To:** Department 36 <[dept36@contracosta.courts.ca.gov](mailto:dept36@contracosta.courts.ca.gov)>; Criminal Research Attorneys <[ratts@contracosta.courts.ca.gov](mailto:ratts@contracosta.courts.ca.gov)>

**Cc:** Ryan Wagner <[RWagner@contracostada.org](mailto:RWagner@contracostada.org)>

**Subject:** People's Responses for People v. Diallo Jackson and Gary Bryant (5-152003-0)

Good afternoon Dept. 36 and Criminal Research Attorneys,

Please see attached People's Response to the Defendant's Motion to Disclose Evidence Pursuant to Penal Code Section 745(d) and People's Response to the Defendant's Motion to Dismiss and/or Grant New Trial Pursuant to Penal Code Section 745.

ADO Evan Kuluk and Matthew O'Connor have been served via fax.

Both responses will be filed at the Clerk's Office today.

Thank you,

Judy Chow  
Office Manager  
CCC District Attorney's Office  
(925) 957-2211

1 **DIANA BECTON**  
District Attorney  
2 Contra Costa County  
Dan Cabral  
3 Deputy District Attorney  
State Bar No. 133592  
4 900 Ward Street  
Martinez, CA 94553  
5 (925) 957-2200  
6 (925) 646-2524 (fax)

7  
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF CONTRA COSTA**

10  
11 PEOPLE OF THE STATE OF CALIFORNIA,

Case No. 5-152003-0

12 Plaintiff,

**DECLARATION OF DANIEL CABRAL**

13 vs.

14  
15 Diallo Jackson and  
16 Gary Bryant

17 Defendants

18  
19 I, DANIEL CABRAL, declare the following:

- 20  
21 1. I am an attorney in good standing with the State Bar of California.  
22 2. I am currently employed as an Assistant District Attorney with the Contra Costa County  
23 District Attorney's Office (CCCDAO). I have been employed by the CCCDAO since July  
24 1, 1988. I am currently assigned to supervise multiple attorneys in the CCCDAO.  
25 3. In my role as Assistant District Attorney, I regularly schedule office wide trainings for  
26 Deputy District Attorneys in the CCCDAO. In addition, I am aware of office training  
27  
28

1 materials and office policies regarding the prosecution of criminal offense by Deputy  
2 District Attorneys.

3 4. I can represent the following in regards the formal training in our office:  
4

5  
6 a. I am aware of the motion filed by defense counsel in the above listed case, where  
7 defense counsel requests, “All training materials regarding the use of rap music,  
8 lyrics, and videos in the prosecution of criminal cases, including training materials,  
9 handouts, Power Point presentations, training videos, as well as dates of training  
10 and names of all presenters;”  
11

12  
13 b. I am not aware of any training conducted by the CCCDAO regarding the use of rap  
14 music, lyrics, and/or videos in criminal prosecutions.  
15

16  
17 Dated: July 12<sup>th</sup>, 2021

18 Respectfully Submitted,

19  
20 Daniel Cabral  
21 Assistant District Attorney  
22  
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1 **DIANA BECTON**  
District Attorney  
2 Contra Costa County  
Ryan Wagner  
3 Deputy District Attorney  
State Bar No. 250907  
4 900 Ward Street  
Martinez, CA 94553  
5 (925) 957-2200  
6 (925) 646-2524 (fax)

7  
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF CONTRA COSTA**

10  
11 PEOPLE OF THE STATE OF CALIFORNIA,

Case No. 5-152003-0

12 Plaintiff,

13 vs.

**PEOPLE’S RESPONSE TO THE  
DEFENDANT’S MOTION TO DISCLOSE  
EVIDENCE PURSUANT TO PENAL  
CODE SECTION 745(d)**

14  
15 Diallo Jackson and  
16 Gary Bryant

July 9<sup>th</sup>, 2021

1:30 pm

Department: 36

17 Defendants

18  
19  
20 **INTRODUCTION**

21 On September 30, 2020, Governor Gavin Newsom signed Assembly Bill No. 2542 (AB  
22 2542) into law, also known as the California Racial Justice Act (hereafter “the Act”). The Act  
23 prohibits the state from seeking or obtaining a criminal conviction or from imposing a sentence  
24 based upon race, ethnicity, or national origin. (Pen. Code<sup>1</sup>, § 745, subd. (a).) The Act only applies  
25 prospectively to cases where judgment has not been entered prior to January 1, 2021. (Pen. Code,  
26 § 745, subd. (j).)  
27  
28

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

1 Key components of the Act include the right to: 1. Discover evidence relevant to potential  
2 violations, upon a showing of good cause (§ 745, subd. (d)); 2. Move for hearing in a court of  
3 competent jurisdiction, which can be granted upon a prima facie showing the Act was violated (§  
4 745, subd. (b)); 3. Present evidence at an evidentiary hearing, which requires judicial findings if it  
5 is shown by a preponderance of evidence that a violation occurred (§ 745, subd. (c)); and 4. A right  
6 to remedies for adjudicated violations (§ 745, subd. (e)).  
7

8  
9  
10 **STATEMENT OF THE CASE**

11 In the present case, the defense seeks to establish good cause to require the People to produce  
12 the following information pursuant to Penal Code Section 745(d):  
13

- 14 1. All training materials regarding the use of rap music, lyrics, and videos in the prosecution  
15 of criminal cases, including training materials, handouts, Power Point presentations,  
16 training videos, as well as dates of training and names of all presenters;
- 17 2. A list of all individuals charged with murder for the last five years, which identifies for  
18 each: defendant's name, date of arrest, defendant's race and ethnicity, whether gang  
19 allegations were charged, and whether raps music lyrics and/or videos were included in  
20 case discovery;
- 21 3. Copies of all Indictments, Complaints, and Informations for all persons identified in  
22 response to Request No. 2;
- 23 4. All prosecution and defense in limine motions, Penal Code Section 995 motions and  
24 oppositions, and other trial motions filed in Contra Costa County arguing for or against  
25 the admissibility of music videos and/or music lyrics of any and all genres of music as  
26 evidence against a criminal defendant.  
27  
28

1  
2 Note: Defense counsel does not appear to place any time limitation [i.e. “in the last five  
3 years”] or charge limitations [i.e. “individuals charged with murder”] in their request  
4 under “Request #4.”  
5

6  
7 **POINTS AND AUTHORITIES AND ARGUMENT**  
8

9  
10 **I. THE DEFENSE FAILS TO ESTABLISH “GOOD CAUSE” FOR THE**  
11 **REQUESTED DISCOVERY.**

12 The express language of *section 745*, subdivision (d) allows a person to file a motion  
13 requesting disclosure of relevant evidence, upon a showing of good cause:  
14

15 A defendant may file a motion requesting disclosure to the defense  
16 of all evidence relevant to a potential violation of subdivision (a) in  
17 the possession or control of the state. A motion filed under this  
18 section shall describe the type of records or information the  
19 defendant seeks. Upon a showing of good cause, the court shall  
20 order the records to be released. Upon a showing of good cause, and  
if the records are not privileged, the court may permit the  
prosecution to redact information prior to disclosure. (Emphasis  
added.)

21 Discovery shall be granted where there is “Good Cause” to believe evidence “relevant to a  
22 potential violation described by the defendant is in the “possession or control of the state”.  
23

24 Good cause for discovery does not automatically exist in every case. (*Hill v. Superior Court*  
25 (1974) 10 Cal.3d 812, 819; *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 804.) Without adequate  
26 factual allegations, the court is prevented from exercising its discretion in making an independent  
27 assessment of good cause. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1150.)  
28

1           The defense must establish a plausible justification for the material requested. (*Hill v.*  
2 *Superior Court, supra*, 10 Cal.3d at p. 817; *People v. Navarro* (1978) 84 Cal.App.3d 355, 359.)  
3  
4           It must appear that the information sought will assist in the preparation of the defense. (*Hill v.*  
5 *Superior Court, supra*, 10 Cal.3d at p. 817.) Good cause for discovery exists when the defendant  
6 shows both “ ‘materiality’ to the subject matter of the pending litigation and a ‘reasonable belief’  
7 that the agency has the type of information sought.” (*City of Santa Cruz v. Municipal Court*  
8 (1989) 49 Cal.3d 74, 84, 776 P.2d 222 (*Santa Cruz* ).)

9           A ‘plausible factual foundation’ requires a declaration by defendant’s counsel or other  
10 evidence and documentation that supports the motion. (*People v. Moreno* (2011) 192  
11 Cal.App.4th 692, 701.)

12           In the present case, defense counsel alleges that prosecution violated Penal Code Section  
13 745(a)(2) by introducing “racial coded language” and “rap music lyrics” against the defendant.  
14 Specifically, defense counsel alleges that “rap evidence – traditionally a Black music form – is  
15 singled out for use in criminal prosecutions” when compared to other music genres, such as  
16 “Country, Opera, [or] Metal.” Defense counsel further alleges that they have made a sufficient  
17 showing of good cause to require the production of the aforementioned discovery requests. The  
18 defense is incorrect, and their motion should be denied.  
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22           In essence, the defense is making the outlandish accusation that when the People possess  
23 defendant authored incriminating music videos/lyrics, the People either intentionally (or  
24 unintentionally) tend to not to use the incriminating evidence against non-minority defendants  
25 [White/Caucasian defendants] compared to minority defendants [Black defendants]. On its face,  
26 the court should be able to see how outlandish and unfounded this accusation is. The People  
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28

1 would be derelict in their duty if they filed a criminal case against a defendant and chose not to  
2 use relevant incriminating evidence against a defendant, regardless of race.

3           Defense counsel’s offer of proof includes a, “Westlaw database” search for Contra Costa  
4 County murder cases where defendant authored rap lyrics were used. Defense counsel claims to  
5 have found that 7 out of 8 of those murder cases were against Black defendants, and that none  
6 involved white defendants. Assuming that is even true, such an offer of proof does not  
7 establish good cause. Defense counsel readily admits that rap music is “closely associated to  
8 Black culture,” when compared to other music genres such as country music or heavy metal, and  
9 that rap music is “traditionally a Black music form.” As such, one would expect that, in a  
10 criminal case, the use of incriminating rap lyrics/videos occurs at a much higher rate when  
11 compared to the use of rap lyrics in criminal cases where the defendants are of a different race.  
12

13           Furthermore, defense counsel fails to point to any specific articulable fact that tends to  
14 demonstrate that the People either intentionally or unintentionally choose not to use  
15 incriminating self authored, non-rap music videos or lyrics, against non minority defendants  
16 charged with a crime. In essence, defense counsel is just guessing that this occurs, without any  
17 good cause to establish that fact. Common sense would dictate that a prosecutor who attempting  
18 to prove a case beyond a reasonable doubt would use all relevant incriminating evidence against  
19 a defendant, regardless of race. As such, defense counsel’s motion to compel discovery should  
20 be denied.  
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1           **II.    EVEN IF THE COURT FINDS THAT DEFENSE COUNSEL HAS MADE A**  
2                           **GOOD CAUSE SHOWING TO COMPELL DISCOVERY, THE PEOPLE ARE**  
3                           **NOT IN POSSESSION OF ANY OF THE REQUESTED MATERIALS.**  
4

5  
6           **1.    The People have not conducted any training regarding the use of rap music, lyrics,**  
7                           **and/or videos.**

8           The Defense has requested all training materials regarding the use of rap lyrics in criminal  
9 cases, as well as the names of all presenters. [Defense request #1] The Contra Costa County  
10 District Attorney's office has not conducted any trainings regarding the use of rap music. As such,  
11 the Defense has requested materials that do not exist.  
12

13           **2.    The People do not maintain records of whether or not music lyrics and/or videos**  
14                           **are included in case discovery on criminal matters, and as such, the People cannot**  
15                           **comply with the defendant's request.**

16           The Defense has requested a list of all individuals charged with murder for the last five  
17 years, which identifies for each: defendant's name, date of arrest, defendant's race and ethnicity,  
18 whether gang allegations were charged, and whether raps music lyrics and/or videos are included  
19 in case discovery. [Defense request #2] The defense further requests all complaints, informations,  
20 and indictments related to defense request#2, as well as all 995 motions and trial motions regarding  
21 the admissibility of music videos and/or music lyrics of "any and all genres of music" as evidence  
22 against a criminal defendant. [Defense request #3 and #4] Defense counsel does not place any  
23 time limitation or charge limitations in regards to Defense request #4.  
24

25           The defense has requested information that cannot be obtained. Although the Contra Costa  
26 County District Attorney's Office has previously charged defendants with crimes where relevant  
27 music videos or lyrics have been included in discovery, a database that lists those instances does  
28

1 not exist. The Contra Costa County District Attorney's Office does not maintain a record keeping  
2 system that tracks or categorizes the type of evidence used in a case, whether it be in the form of  
3 songs, rap lyrics, short stories/journals, or any other medium. As such, the records defense counsel  
4 seeks, cannot be obtained.  
5

6 In addition, in certain instances documentation of the records requested by the defense  
7 simply does not exist. For example, depending on the case, a diligent law enforcement official  
8 or criminal prosecutor could review the defendant's various social media sites to see if there is  
9 any information that could be relevant to the charged offense. In that scenario, a prosecutor  
10 could locate music videos or song lyrics that are wholly irrelevant to the case (regardless of race)  
11 and as such, documentation of that video/lyrics imply would not exist. As such, the defense is  
12 requesting information that the People cannot provide.  
13  
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### 16 CONCLUSION

17 For the aforementioned reasons, the People respectfully request that this court deny the  
18 defendants motion for discovery pursuant to Penal Code Section 745(d).  
19  
20

21 Dated: June 30<sup>th</sup>, 2021

Respectfully Submitted,

22  
23   
24 Ryan Wagner  
25 Deputy District Attorney  
26  
27  
28

**CERTIFICATE OF SERVICE**  
Facsimile Transmission (CCP 1012, 1013, 2015.5)

PEOPLE vs. GARY BRYANT & DIALLO RAY JACKSON

DOCKET: 05-152003-0

I certify that my business address is Contra Costa County District Attorney's Office, 900 Ward St, 3rd Fl, Martinez, CA 94553, and I am a citizen of the United States, over 18 years of age, and not a party to the within action:

I served a true copy of the attached:

People's Response to the Defendant's Motion to Disclose Evidence

Pursuant to Penal Code Section 745(d)

by placing said copy in the Facsimile Machine and transmitting as follows:

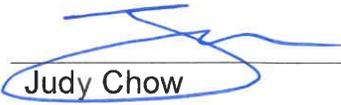
Evan Kuluk  
Facsimile No. (925) 335-8125

Matthew O'Connor  
Facsimile No. (925) 938-0505

The instrument of transmittal is a facsimile machine which is located in a place having proper telephone hookup and transmission capabilities and is served by facsimile number (925) 957-2240, located at 900 Ward St, 3rd Fl, Martinez, CA 94553.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: 06/30/21

  
Judy Chow  
Office Manager

Broadcast Report

P 1  
06/30/2021 11:19  
Serial No. AA6R011001678  
TC: 424159

Addressee	Start Time	Time	Prints	Result	Note
93358125	06-30 11:09	00:04:58	008/008	OK	
99380505	06-30 11:14	00:05:23	008/008	OK	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX,  
 DPG:Page Separation TX, MIX:MixeD Original TX, CALL:Manual TX, CSAC:CSAC,  
 FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original,  
 FCODE:F-code, RTX:re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax,  
 IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF,  
 TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer,  
 Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over,  
 POUR:Receiving page Over, Fil:File Error, DC:Decode Error, MDN:MDN Response Error,  
 DSN:DSN Response Error, PRINT:Compulsory Memory Document Print,  
 DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

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**CERTIFICATE OF SERVICE**  
 Facsimile Transmission (CCP 1012, 1013, 2015.5)

PEOPLE vs. GARY BRYANT & DIALLO RAY JACKSON

DOCKET: 05-152003-0

I certify that my business address is Contra Costa County District Attorney's Office, 900 Ward St, 3rd Fl, Martinez, CA 94553, and I am a citizen of the United States, over 18 years of age, and not a party to the within action:

I served a true copy of the attached:

People's Response to the Defendant's Motion to Disclose Evidence

Pursuant to Penal Code Section 745(d)

by placing said copy in the Facsimile Machine and transmitting as follows:

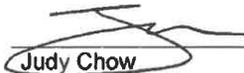
Evan Kuluk  
 Facsimile No. (925) 335-8125

Matthew O'Connor  
 Facsimile No. (925) 938-0505

The instrument of transmittal is a facsimile machine which is located in a place having proper telephone hookup and transmission capabilities and is served by facsimile number (925) 957-2240, located at 900 Ward St, 3rd Fl, Martinez, CA 94553.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: 6/30/21

  
 Judy Chow  
 Office Manager

1 **DIANA BECTON**  
District Attorney  
2 Contra Costa County  
Ryan Wagner  
3 Deputy District Attorney  
State Bar No. 250907  
4 900 Ward Street  
Martinez, CA 94553  
5 (925) 957-2200  
6 (925) 646-2524 (fax)

7  
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF CONTRA COSTA**

10  
11 PEOPLE OF THE STATE OF CALIFORNIA,

Case No. 5-152003-0

12 Plaintiff,

13 vs.

**PEOPLE’S RESPONSE TO THE  
DEFENDANT’S MOTION TO DISMISS  
AND/OR GRANT NEW TRIAL  
PURSUANT TO PENAL CODE SECTION  
745**

14  
15 Diallo Jackson and  
16 Gary Bryant

July 9<sup>th</sup>, 2021

1:30 pm

Department: 36

17 Defendants

18  
19  
20 **INTRODUCTION**

21 Defendants Gary Bryant and Diallo Jackson move the court grant a hearing to hear  
22 evidence on a motion to dismiss their convictions and/or grant a new trial pursuant to Penal  
23 Code Section 745(a)2. The defense contends the following: One, the People used racially  
24 discriminatory language by using racially charged and racially coded language. Two, the court  
25 improperly, “admonished the jurors ‘not to consider defense counsel’s statement,’ making race  
26 salient.” And three, the People’s use of the defendant’s rap music videos was racially coded  
27 language, all in violation of Penal Code Section 745(a)(2).

28 The defense is incorrect, and therefore fails to make a prima facie showing under Penal  
Code Section 745. As such, the People ask the court to deny the defendants’ motion.

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**PROCEDURAL HISTORY**

On February 28, 2017, a Contra Costa County jury found defendants guilty of first degree murder (Pen. Code, § 187, count 1),1 assault with a semiautomatic firearm (§ 245, subd. (b), count 2), discharging a firearm at an occupied vehicle (§ 246, count 3), and possession of a firearm by a felon (§ 29800, subd. (a)(1), counts 4 and 5). The jury also found true allegations that counts 1 through 3 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), that a principal personally used a firearm in counts 1 and 3 (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm in count 1 (§ 12022.53, subd. (c)), and that defendant Bryant had previously served a prison term (§ 667.5). The court sentenced Bryant to 53 years to life in prison, and Jackson to 50 years to life in prison.

Both defendants appealed their convictions and/or sentences. On September 30<sup>th</sup>, 2019, the court of appeal affirmed the underlying convictions, but remanded the case to the trial court in order for the trial court to re-sentence both defendants on the personal use of a firearm enhancement under Penal Code Section 12022.53.

Prior to being re-sentenced, on Aril 16<sup>th</sup>, 2020 defendant Gary Bryant filed a motion pursuant to Penal Code Section 1170.95. On September 9<sup>th</sup>, 2020, Defendant Diallo Jackson filed a motion pursuant to Penal Code Section 1170.95. The trial court scheduled numerous hearing dates to rule on the PC 1170.95 motions filed by both defendants, but the hearing date was repeatedly continued, and has yet to be heard.

On June 7<sup>th</sup>, weeks before the most recently scheduled PC 1170.95 hearing date, defense counsel for Gary Bryant filed the aforementioned motion to dismiss and/or grant new trial pursuant to Penal Code Section 745. Defendant Gary subsequently joined in the motion to dismiss and/or grant a new trial.

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**STATEMENT OF FACTS:**

The following statement of facts are derived from the transcripts and exhibits from the jury trial:

Testimony of Antioch Police Officer Rick Hoffman: Volume 6, beginning on page 1041

Antioch Police Officer Rick Hoffman testified as a gang expert during the trial and covered, in detail, his qualifications as an expert in gangs. Officer Hoffman previously qualified as an expert in gangs approximately a dozen times and received extensive formal and informal training. [R.T. 1047:28 – 1048:5]

Officer Hoffman's informal gang training included speaking to 50 – 100 other police officer on the topic of gangs and gang activities. [R.T. 1044:5-14] He has spoken to several dozen officer who have responded to gang crimes. [R.T. 1044:15-20] He has spoken to several dozen civilians about gang activity [R.T. 1044:26 – 1045:3] He has spoken to victims of gang crimes over fifty times and has participated in community outreach [R.T. 1045:4-14; 1047: 6-15] He has spoken to hundreds of gang members about gang activities. [R.T. 1045:15 – 1046:1] He has previously debriefed a half dozen gang members and spoken to other officers who have debriefed gang members. [R.T. 1046: 2-13]

Officer Hoffman's formal training included 140 - 150 hours of training in gang investigations. Officer Hoffman previously attended 3 separate gang conferences. [R.T. 1046:22-25] Not only has Officer Hoffman been formally trained in criminal street gangs, he has training other officers in gang investigations on several occasions. [R.T. 1047:6-18] In addition to training police officers, Officer Hoffman provided gang training to probation officers. [R.T. 1047: 28- 1048:5]

Officer Hoffman testified as to his specific qualifications and expertise in regards to the Broad Day criminal street gang. Officer Hoffman investigated 50 – 100 cases involving Broad Day. [R.T. 1048: 9-21] He has spoken to Broad Day gang members 4 to 5 times regarding Broad Day's activities. [R.T. 1048: 22-28] Officer Hoffman was familiar with Broad Day's rival, the Broad Day Killers, and investigated approximately 50 cases involving Broad Day

1 Killers. [R.T. 1049: 1-9] Officer Hoffman investigated over 50 gang crimes involving related  
2 gangs, such as Lo Mob and AAM Jack Boys [R.T. 1049: 16 – 1050: 16] Officer Hoffman has  
3 spoken to 5-6 gang experts regarding Broad Day, and has testified as an expert in Broad Day 6-7  
4 times prior to testifying at trial. [R.T. 1050:17 – 1051:3]

5 At trial, after testifying to his qualifications, Officer Hoffman testified to the importance  
6 of loyalty, reputation, respect, the “code of silence,” and “putting in work” as it pertains to  
7 criminal street gangs. [R.T. 1058 – 1063]

8 Officer Hoffman testified to the origins of the Broad Day gang. [R.T. 1063] In the city  
9 of Pittsburg there is an area of residential houses referred to as the El Pueblo Housing Projects.  
10 [R.T. 1063:12-16] This portion of the Pittsburg was commonly referred to as, “The Lo.” [R.T.  
11 1063:22] A gang started in the El Pueblo Housing Projects that was known as, “Lo mob.” [R.T.  
12 1063:28- 1064:4]

13 Over time, many Lo Mob gang members migrated from Pittsburg to the Sycamore Drive  
14 area in the city of Antioch, and referred to themselves as “Broad Day.” [R.T. 1064:13-21] In  
15 2009, at or near the time when Lo Mob/Broad Day migrated to the Sycamore area of Antioch,  
16 another criminal street gang, known as the “All About Money” Jack Boys [aka AAM Jackboys]  
17 occupied that portion of Antioch. [R.T. 1065:6-14] Once Broad Day migrated to Antioch, the  
18 AAM Jack Boys gang merged into the Broad Day gang, and many AAM Jack Boys gang  
19 became Broad Day gang members. [R.T 1068: 12-15]

20 The Broad Day gang called themselves, “Broad Day” because there were willing to  
21 committed violent crimes in “broad day.” [R.T. 1071:19 – 1072] Following the move to  
22 Antioch, Broad Day considered the Sycamore area of Antioch their “turf,” and had an  
23 approximate membership of about 15 – 20 members. [R.T. 1068:27-1069:5; 1072:27 – 1073:1]  
24 Broad Day used a common hand signal where the index finger and thumb would form a circle, to  
25 form the shape of a “b.” [R.T. 1072: 2-9] Broad Day gang members would also form their  
26 fingers/thumb in the shape of on “L,” as a reference to “Low mob,” which was one was their  
27 gangs of origin. (R.T. 1072: 2 – 9)  
28

1           Officer Hoffman testified in regards to both defendant's prior police contacts as it  
2 pertained to their involvement in the Broad Day/Lo Mob gang. On April 9<sup>th</sup>, 2013, police  
3 observed defendant Diallo Jackson and Broad Day gang member Larry White, and attempted  
4 to contact them. Both Larry White and defendant Diallo Jackson fled from police. [R.T.  
5 1262:15 – 1263:6]

6           On February 25<sup>th</sup>, 2006, prior to the formation of Broad Day, Lo Mob members Gary  
7 Bryant, Richie Asidanya, and Demarus Whitner (all of whom subsequently became Broad Day  
8 Gang members) were inside a vehicle and contacted by the police. All three individuals fled  
9 from police, but a gun was recovered at the scene. [R.T 1262: 7 – 11]

10           In 2014, prior to the murder of Kenneth Cooper, numerous Broad Day members were  
11 seen at the Delta View Apartments, which is the location where the murder occurred. The Broad  
12 Day members seen at the Delta View apartment included Diallo Jackson and Demarcus Whitner  
13 [R.T. 1075: 1-5]

14           During the trial, numerous prior convictions were introduced into evidence as predicate  
15 gang offenses. One of the predicate offenses was People's Exhibit 151. [R.T. 1075:8 – 1076:9]  
16 People's Exhibit 151 was defendant Diallo Jackson's prior conviction for the crime of possession  
17 of a firearm with a gang enhancement. [R.T. 1075:8 – 1076:9] The prior conviction indicated  
18 that Diallo Jackson was an active member of the gang, AAM Jack Boys, and as a condition of  
19 probation, he was not to associate with gang members. [R.T 1075:8 – 1076:9]

20           People's exhibit #150 was introduced at trial as an additional predicate offense. [R.T.  
21 1082:10] People's Exhibit #150 was a prior robbery conviction against Larry white. The  
22 predicate conviction included gang terms, which barred Larry White from associating with AAM  
23 Jack Boys members, and specifically barred association with defendant Diallo Jackson. [R.T.  
24 1082:10 1084:28] Officer Hoffman testified that, in his opinion, Larry White was a Broad Day  
25 gang member. [R.T. 1084: 23-28]

26           During the trial, numerous pictures were introduced depicting defendant Gary Bryant  
27 and/or Diallo Jackson with other Broad Day gang members, and/or displaying Broad Day/Lo  
28 Mob gang signs. People's Exhibit 162, which was introduced at trial, was a photo of defendant

1 Gary Bryant and defendant Diallo Jackson together, with Gary Bryant wearing a red hat and  
2 displaying the Broad Day “b” sign. [R.T. 1210:25 – 1211:18] In People’s Exhibit 161, defendant  
3 Gary Bryant is seen with Broad Day gang member Corey Richardson [R.T. 1215: 13-20] In  
4 addition, numerous other photos were introduced into evidence which depicted either defendant  
5 Gary Bryant, defendant Diallo Jackson, or other Broad Day gang members displaying Broad  
6 Day/Lo Mob gang signs. [People’s exhibit 1154, 156, 158, 159, 163, 164, 165, 176, etc].  
7 People’s exhibit #157 depicted a number of Broad Day gang members, including Diallo Jackson,  
8 Larry Goines, Corey Richardson, Demarcus Whitner, Larry White, Richie Asidanya, and Willie  
9 Richardson. [R.T. 1078: 26 - 1081:20]

10 In addition to the photographic evidence, numerous videos were introduced into evidence  
11 where defendants would refence, “Broad Day.” Specifically, People’s Exhibit 172 was played  
12 for the jury. [R.T. 1219:23] In the video, defendant Gary Bryant displayed the “b” hand sign.  
13 During the video, Gary Bryant stated, “You know it’s in the broadday camp nigga.” [R.T. 1220:  
14 22-23]

15 Officer Hoffman testified, on direct examination, that during the video marked as  
16 People’s Exhibit 172, the phrase, “Pueb-loaded” was used. Officer Hoffman testified that the  
17 phrase referred to being people from El Pueblo being armed with a firearm, but also admitted the  
18 phrase could also refer to a rapper named “Gallo Pueb-loaded.” [R.T. 1222:5 – 8]

19 During the trial, the People played a video marked as People’s exhibit #171. In the  
20 video, which was called, “Broad Day Dolla,” defendant Diallo Jackson is part of a music video  
21 that specifically mentions the Broad Day gang on numerous occasions. During the video there is  
22 a referred to “selling candy.” Officer Hoffman testified that this phrase referred to selling drugs.  
23 [R.T. 1222:11 – 1223:19]

24 During the same video, the phrase, “add a fucking murder to my nine” was used. Officer  
25 Hoffman explained to the jury that this referred to murdering someone with a 9 millimeter  
26 firearm. [R.T 1223:27 – 1224:2]

27 Officer Hoffman continued to explain numerous relevant phrases used in multiple music  
28 videos, such as, “Did time in the slammer,” “rollers,” “I’ve got goons everywhere. Bitch. We

1 can go to war.” and “fuck with the gang, get your fucking melon split.” [R.T. 1224:8-10; 1224:  
2 17-22; 1224: 24-26; 1226:17-22; 1230: 9-10]

3 During the trial, an additional music video was played where defendant Diallo Jackson  
4 states, “Fuck Randell.” [R.T. 1229:24] Officer Hoffman explained to the jury that a person  
5 named “Randall Wilson” is the leader of Broad Day’s rival, Broad Day Killers. [R.T. 1230: 1-3]  
6 In addition, in the same video, the following statement is made, “man man, we’re going to empty  
7 the whole clip.” [R.T. 1230: 19-26] Officer Hoffman explained to the jury that man-man was  
8 another leader in the rival Broad Day Killers gang.

9 In the same video where defendant Diallo Jackson references murdering people, he states,  
10 “like every day Pueb-loaded.” Of note: “Pueb-loaded” the same phrase used in a video  
11 including defendant Gary Bryant, People’s exhibit #172 [R.T 1233:2-7; R.T. 1222:5 – 8]

12 Defendant Diallo Jackson makes a number of statements in the music videos that are  
13 highly relevant to the issue of whether or not he is in the Broad Day gang, whether or not Broad  
14 Day engages in a pattern of criminal activity, or whether or not he himself does anything for the  
15 benefit of the Broad Day gang. Specifically, at various points during the video, Diallo Jackson  
16 states, “Stop then all snitching, they going to find their ass fishing,” “Everything I do, Broad day  
17 nigger,” and “You know we are going to slide today.” [R.T. 1232:18-19; 1234: 11-15; 1235:  
18 16-20]

19 Ultimately, although notably not an essential element to a gang enhancement, Officer  
20 Hoffman testified that, in his opinion, defendants Gary Bryant and Diallo Jackson were members  
21 of the Broady Day gang. Officer Hoffman based his opinion on the totality of the evidence,  
22 which included all of the above referenced evidence. [R.T. 1216:23 – 1219:5]

## 23 POINTS AND AUTHORITIES

24  
25 On September 30, 2020, Governor Gavin Newsom signed Assembly Bill No. 2542 (AB  
26 2542) into law, also known as the California Racial Justice Act (hereafter “the Act”). The Act  
27 prohibits the state from seeking or obtaining a criminal conviction or from imposing a sentence  
28 based upon race, ethnicity, or national origin. (Pen. Code § 745(a).) The Act only applies

1 prospectively to cases where judgment has not been entered prior to January 1, 2021. (Pen. Code  
2 § 745(j).)

3 A motion pursuant to Penal Code Section 745 may be filed in the trial court. Pursuant to  
4 subdivision (c), the defendant must make a prima facie showing of a violation of subdivision (a).  
5 If the defense is able to make a prima facie showing, the trial court shall hold a hearing. At the  
6 hearing, the defendant shall have the burden of proving a violation of subdivision (a) by a  
7 preponderance of the evidence.  
8

9 A prima facie showing means that the defendant produces facts that, if true, establish that  
10 there is a substantial likelihood that a violation of subdivision (a) occurred. "Substantial  
11 likelihood" requires more than a mere possibility, but less than a standard of more likely than  
12 not. [Penal Code Section 745(h)(2)]  
13

14 Defense counsel, in their moving papers, specifically allege a violation of subdivision  
15 (a)(2) of Penal Code Section 745. Penal Code section 745(a)(2) states the following:  
16

17 During the defendant's trial, in court and during the proceedings, the judge, an attorney in  
18 the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially  
19 discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise  
20 exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or  
21 national origin, whether or not purposeful.  
22

23 "Racially discriminatory language" means language that, to an objective observer,  
24 explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or  
25 racially coded language, language that compares the defendant to an animal, or language that  
26 references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence  
27 that particular words or images are used exclusively or disproportionately in cases where the  
28

1 defendant is of a specific race, ethnicity, or national origin is relevant to determining whether  
2 language is discriminatory. [Penal Code Section 45(h)(3)]

3 Penal Code Section 745(a)(2) acknowledges that a witness/speaker may testify/state  
4 racially charged language if the racially charged language was used by another and is relevant to  
5 the case. The last sentence of Penal Code Section 745(a)(2) [which was curiously  
6 excluded/omitted from defense counsel's moving papers] states the following:  
7

8 This paragraph does not apply if the person speaking is describing language used by  
9 another that is relevant to the case or if the person speaking is giving a racially neutral and  
10 unbiased physical description of the suspect. [Penal Code Section 745(a)(2)]  
11

12 **ARGUMENT**

13  
14 **I. THE DEFENSE FAILS TO DEMONSTRATE THAT THE PEOPLE USED  
15 RACIALLY CHARGED OR RACIALLY CODED LANGUAGE IN VIOLATION  
16 OF PENAL CODE SECTION 745(a)(2)**

17 The defense alleges the People violated Penal Code Section 745(a)(2) in the following  
18 manner: One, the defense alleges the prosecutor and the gang expert used racially charged  
19 language during Officer Hoffman's testimony about statements made by defendants themselves.  
20 Two, the defense alleges the prosecutor used racially coded language in how the prosecution  
21 characterized the defendant's actions. The defense is incorrect and their motion for a hearing  
22 should be denied.  
23

24 ///

25 ///

26 ///

1           **A. THE DEFENSE FAILS TO MAKE A PRIMA FACIA SHOWING THAT**  
2           **UNLAWFUL RACIALLY CHARGED LANGUAGE WAS USED DURING**  
3           **THE QUESTIONING OF GANG EXPERT RICK HOFFMAN, REGARDING**  
4           **STATEMENTS MADE BY DEFENDANTS GARY BRYANT AND DIALLO**  
5           **JACKSON.**

6           The defense alleges that the prosecutor and the gang expert used racially charged  
7 language, in violation of Penal Code Section 745(a)(2), when questioning Officer Hoffman about  
8 statements made by defendants Gary Bryant and Diallo Jackson. The defense is incorrect and  
9 their motion should be denied. The Racial Justice Act expressly states that Penal Code Section  
10 745(a)(2) is not violated, even if racially charged language is used, “if the person speaking is  
11 describing language used by another that is relevant to the case.”

12           In the present case, on numerous occasions, the defendants would create social media  
13 posts, videos, and music videos, where they would either make references to being in the Broad  
14 Day/Lo Mob gang, commit acts for the Broad Day/Lo Mob gang, reference the Broad Day/Lo  
15 Mob gang, or reference activities relevant to the gang. On many instances, the defendant  
16 themselves would use a racial slur that would be incorporated into the highly relevant gang  
17 related statement.  
18

19           In their moving papers, defense counsel claims the prosecutor/gang expert used “racially  
20 charged” language, in violation Penal Code Section 745(a)(2), on the following five occasions:  
21

- 22
- 23           1. Exhibit 172 was introduced at trial, which included a short video of defendant Gary  
24           Bryant. In the video, Gary Bryant makes the “b” symbol in his hand and states, “You  
25           know its in the broadday camp nigga.” After playing the clip for the jury, the  
26           prosecution asked Officer Hoffman, directly quoting the defendant, “Did you hear him  
27           [the defendant] say, ‘You know its in the broadday camp nigga.’” Officer Hoffman  
28           acknowledged that he heard that statement, and testified that this particular statement was

1 relevant because it showed his affiliation to the Broad Day gang. [R.T 1219:23 –  
2 1222:4] (Defense Moving Papers: 8:6; 8:14-16)

3  
4  
5 2. Officer Hoffman testified to various social media posts as is pertained to his opinion as a  
6 gang expert. In one social media post, which was marked a People’s exhibit 160,  
7 defendant Gary Bryant referenced, “B’s up,” and “Lo Mob.” Defendant Bryant further  
8 mentioned, “laying a demo,” which in gang terms, can reference committing a shooting.  
9 Specifically, the defendant’s social media post stated, “I’m solo. That’s why I ride solo.  
10 Waiting for one of you suckas to trip so I can lay a demo. And I’ still rep’ing this real  
11 shit. B’s up. You sucka’s come out and play. I hollerin’ fuck niggas from my hood.  
12 You niggas ain’t got it. But like master P, Ya’ll niggas soft Lo Mob.” Officer Hoffman  
13 was asked by the prosecution what the defendant said in his social media post, the officer  
14 repeated the defendant’s direct quote, and then described the meaning and relevance  
15 behind various statements the defendant made in this post. [R.T. 1263:2 – 1264:16]  
16 (Defendant Gary Bryant Moving Papers 8:10-11; 11:2-5)

17  
18  
19  
20  
21 3. Defendant Gary Bryant, while on the witness stand, was asked various questions by the  
22 People regarding a social media post he made, contained in People’s exhibit 188. In the  
23 defendant’s social media post, which was multiple sentences in length, Gary Bryant  
24 references the “gang,” and El Pueblo. In the post, People asked the defendant, while he  
25 was on the witness stand, about the meaning behind multiple aspects of his post,  
26 including the “gang” reference, and references to El Pueblo. In one portion of his post,  
27 Gary Bryant stated, “I love niggas that bump their gums about this my spot” and was  
28

1 asked by the prosecution about the meaning behind this statement by using the  
2 defendant's direct quote in trial. Mr. Bryant stated that this was referencing a "dis" song  
3 between him and another individual. [R.T. 1588:6 – 1591:5] (Defense Moving Papers:  
4 8:8]  
5

6  
7  
8 4. People's Exhibit 171 was introduced at trial, which depicted an approximate 4+ minute  
9 long music video featuring defendant Diallo Jackson. The video was played for the jury,  
10 and gang expert Officer Hoffman was asked multiple questions about the meaning and  
11 relevance of numerous statements made in the video. For example, Officer Hoffman was  
12 asked about the meaning behind "empty the whole clip," "BDK," "We're going to slide  
13 today," "fuck with the gang, get your melon split," "squeeze until face is missing," [R.T.  
14 1228:2 – 1236:22] In addition to the previously mentioned statement, the prosecution  
15 asked Officer Hoffman about Diallo Jackson's statement and directly quoted the  
16 defendant asking, "and what about the phrase, 'Everything I do broadday nigger,' what  
17 does that mean?" Officer Hoffman explained that this phrase mean that everything the  
18 defendant does in his life revolves around the Broad Day gang. [R.T. 1232:18-24]  
19 (Defense moving papers 9:7)  
20  
21

22  
23  
24 5. While testifying in regards to People's Exhibit 171 [see above] the prosecution asked  
25 Officer Hoffman if defendant Diallo Jackson stated, "check them papers nigga." The  
26 prosecution used the defendant's direct quote, and asked Officer Hoffman the meaning  
27 behind that statement. Officer Hoffman testified that if referred to a person being  
28 accused of being a snitch. [R.T. 1235:24 – 1236:13]

1  
2 The defendants' argument that the aforementioned five statements/questions violate  
3 Penal Code Section 745(a)(2) is without merit. At trial, the prosecutor/gang expert quoted the  
4 defendant's own words. The statements made by the defendants were highly relevant on the  
5 issue of whether or not the defendants were in the gang, associated with the gang, or committed  
6 acts to benefit the gang, and the officer's testimony on this topic helped to explain either the  
7 meaning behind the defendant's own words, or helped explain the relevance of the words.  
8

9  
10 A plain reading interpretation of Penal Code Section 745(a)(2) supports that conclusion.  
11 Penal Code Section 745 was not intended to exclude relevant evidence, and the defendant's own  
12 words regarding their involvement in the Broad Day gang could not be more relevant. In  
13 essence, the defense is arguing that a racially charged word or phrase can never be used in court,  
14 regardless of context, which is obviously not true. If the legislature intended that a racially  
15 charged word could never be said in court, they would have indicated so in Penal Code Section  
16 745.  
17  
18

19 **B. THE DEFENSE FAILS TO PROVE THE PROSECUTOR USED RACIALLY**  
20 **CODED LANGUAGE IN HIS CHARACTERIZATION OF DEFENDANT**  
21 **GARY BRYANT'S ACTIONS.**  
22

23 The defense alleges that the prosecutor used racially coded language, in violation of  
24 Penal Code Section 745(a)(2). Specifically the defense alleges the People used, "racially coded  
25 dog-whistle phrases" by "intimat[ing] that Mr. Bryant could not have felt fear during the murder  
26 because he was an experienced drug dealer," and by using the phrases, "mean mugged," "pistol  
27 whipped," and "drug rip." The defense is incorrect and their motion should be denied.  
28

///

1  
2 **1) The Defense Fails to Prove that the Prosecutor “intimated that Mr. Bryant could**  
3 **not have felt fear during the underlying incident because he was an ‘experienced**  
4 **drug dealer.’”**

5 Defense counsel contends that, “the prosecutor ‘intimated that Mr. Bryant could not have  
6 felt fear during the underlying incident because he was an ‘experienced drug dealer’” and cites to  
7 specific transcripts to support that claim. [10 R.T. 1943:26 – 1944:1; 1959:16] A thorough  
8 reading of the transcripts, however, reveals that the defense counsel is incorrect.

9 The People did not argue to the jury that defendant Bryant was unafraid during the  
10 charged shooting because he was an experienced drug dealer. Instead, the People used the  
11 defendant’s prior history of selling drugs in 2004 to impeach him. When defendant Bryant took  
12 the witness stand, he claimed, that on the charged offense, he walked up to the victim’s car to  
13 sell drugs and did not approach the car with anyone else (including defendant Diallo Jackson).  
14 Defendant Bryant was asked by the People if he looked around before he approached the car, to  
15 see who was nearby, due to the inherently dangerous nature of selling drugs. The defendant  
16 denied looking to see who was around and claimed that selling drugs is not dangerous.

17 Unfortunately, the defendant is well aware that selling drugs is dangerous. Years earlier,  
18 in 2004, the defendant was involved selling drugs in a transaction where a person he knew was  
19 shot and killed. While on the witness stand in the charged offense, Defendant Bryant did not  
20 want to testify that he approached the car with defendant Diallo Jackson because he did not want  
21 to be labeled as a snitch for incriminating a fellow gang member. Instead of identifying  
22 defendant Jackson as the 2<sup>nd</sup> shooter, defendant Bryant lied to the jury, claiming that he didn’t  
23 pay attention to who was near him when he approached the car, and to support that lie he tried to  
24 claim that he wasn’t paying attention because dealing drugs is not dangerous. As such, the  
25 People did not argue to the jury that defendant Bryant was unafraid during the charged shooting  
26 because he was an experienced drug dealer. Instead, the People argued that the defendant lied on  
27 the witness stand when he claimed that dealing drugs is not dangerous because of his past  
28 experiences in dealing drugs indicates that he knows full well that selling drugs is dangerous.

1                   **2) Even if the Court Believes the People Argued to the Jury that Defendant Bryant**  
2                   **was Unafraid During the Charged Shooting because he is an Experienced Drug**  
3                   **Dealer, such an Argument is Not a Racially Coded Language that Warrants**  
4                   **Relief Under Penal Code Section 745(a)(2).**

5                   Even if the court were to find that the prosecution somehow intimated that the defendant  
6                   was unafraid during the charged shooting because he was an experienced drug dealer, such an  
7                   agreement is not racially coded statement under Penal Code Section 745(a)(2). Although  
8                   theoretically, a drug dealer could be potentially less likely to be afraid during a shooting, the  
9                   People fail to see how this would be dependent on the color of the person's skin, and certainly  
10                  the People did not argue that point to the jury. In order for a statement to be racial  
11                  discriminatory under Penal Code Section 745(a)(2), the defense must prove that an "objective  
12                  observer" would believe the statement to "implicitly appeal to racial bias." Under this standard,  
13                  or any other standard, the defense fails.

14  
15                   **3) The defense fails to prove that "mean mugged," "pistol whipped," or "drug rip,"**  
16                   **are racially Coded Language that Warrants Relief Under Penal Code Section**  
17                   **745(a)(2).**

18                  The defense contends that the People used three "racially coded dog-whistle phrases,"  
19                  including, "mean mugged," "pistol whipped," and "drug rip," and that such language warrants  
20                  relief under Penal Code Section 745(a)(2). The defense is incorrect.

21                  Although the People used the three aforementioned phrases at one point during the trial,  
22                  the defense fails to establish that these phrases are racially coded phrases under the law. As  
23                  mentioned previously, the defense must prove that "an objective observer" would believe the  
24                  statement "implicitly appealed to racial bias". A drug rip is a common term used when someone  
25                  is robbed for drugs, and the term itself is not attributable to any specific race. The phrase "pistol  
26                  whipped" is a term used when someone is struck with a gun, and is not attributable to any  
27                  particular race. The defense contends that these two phrases are "unquestionably racially  
28                  coded," but cites nothing to support such a claim. As such, the defense motion should be

1 dismissed.

2 "Mean mugged" is a common term used to describe when one person stares at another  
3 person in a hostile or unpleasant way. Such a phrase has been used for years, regardless of the  
4 color of the person's skin. Defense counsel, in their moving papers, cites "Dictionary.com" and  
5 claims that Dictionary.com indicates that the phrase "is credited to Black slang in the early  
6 2000's." A quick review of the website [www.Dictionary.com/e/slang/mean-muggin](http://www.Dictionary.com/e/slang/mean-muggin) reveals that  
7 the website does attempt to define different slang terms, but for multiple reasons, does not appear  
8 to be the most accurate or reliable source of information. Dictionary.com defines "mean  
9 mugging" in a less than professional manner, and expressly states the following:

10  
11 This is not meant to be a formal definition of mean-mugging like most terms we define on  
12 Dictionary.com, but is rather an informal word summary that hopefully touches upon the key  
13 aspects of the meaning and usage of mean-mugging that will help our users expand their word  
14 mastery.

15 However, regardless of how accurate Dictionary. Com is on the origins of "mean  
16 mugging," the defense fails to prove that an "objective observer" would believe that the phrase,  
17 "mean mugging" implicitly appeals to racial bias, and as such, the defense fails to make a prima  
18 facial showing.

19 **II. THE DEFENSE FAILS TO MAKE A PRIMA FACIA SHOWING THAT THE**  
20 **COURT VIOLATED PENAL CODE SECTION 745(A)(2) BY ADMONISHING**  
21 **THE JURY NOT TO CONSIDER A STATEMENT MADE BY DEFENSE**  
22 **COUNSEL DURING HIS CLOSING STATEMENTS.**

23 The defense, in their moving papers, contends that "juror outgroup bias is reduced when  
24 race is made salient at trial," and further claimed that when defense counsel attempted to address  
25 that subject during their closing argument, the People objected and the court improperly  
26 admonished the jurors "not to consider defense counsel's statement." [Defense moving papers:  
27 18:14-22] Defense counsel is incorrect.

28 ///

1           Although not included in defense counsel's brief, listed below is the language taken from  
2 the transcripts at trial: [R.T. 2103]

3  
4           MR. KULUK: Mr. Byrant told you that Broad day is not a gang. It's not a name of a  
5 group. It's a term. It's a term that comes from popular culture, and it's a term that he associates  
6 with being positive. Sunlight, broad day. Pride in his neighborhood and his community.

7           And Mr. Walpole played a number of times through the courts of this trial this short  
8 video clip of Mr. Bryant and some of the other musicians that he works with in that room with  
9 the red walls in the music studio. Hying it up. Talking in slang. Kind of, you know, barking at  
10 the screen. And those men are smiling and laughing as they're doing it.

11           And Mr. Bryant said this is not aggressive. This is a promo. This is hype.

12           And its really troubling. Mr. Walpole plays that video and says this is aggression. This  
13 is scary black men, is the implication. There is a racial component to this gang prosecution.

14           MR. WALPOLE: Objection. Your Honor. That's improper. It has nothing to do with  
15 race.

16           THE COURT: Ladies and gentlemen. I do want to emphasize with you that anything  
17 that the attorneys says is not evidence. It is argument.

18           I would ask both attorneys to approach.

19           THE COURT: So ladies and gentlemen, with regard to the last statement by the defense  
20 attorney, I'm going to ask you to disregard it. I think he will rephrase.

21           As an initial matter, the People fails to see how the court sustaining an objection by the  
22 People, and the court subsequently admonishing the jury not to consider a statement by defense  
23 counsel, violates Penal Code Section 745(a)(2). As stated previously, Penal Code Section  
24 745(a)(2) prohibits, " the judge, an attorney in the case, a law enforcement officer involved in the  
25 case, an expert witness, or juror, used racially discriminatory language about the defendant's  
26 race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant  
27 because of the defendant's race, ethnicity, or national origin, whether or not purposeful."

28           In this particular instance, neither the judge, nor the People, made a statement, nor did  
they use any language at all. In fact, the People's objection to defense counsel's statement was,

1 in exact quotes, “Objection, your honor. That’s improper. It has nothing to do with race.” It  
2 would be a true travesty of justice if a violation of the Racial Justice Act was found based on a  
3 prosecutor firmly stating to a jury that a case is not being prosecuted because of the defendant’s  
4 race.

5 Lastly, a further review of the transcripts reveals that after the People’s objection, the  
6 court asked defense counsel to rephrase his objectionable statement, and defense counsel then  
7 subsequently addressed issues of race. Defense counsel pointed out to the jury that Broad Day is  
8 predominately African American, and the case involves, “black culture” and “hip hop.”

9 Lastly, it should be noted that the defense is not alleging that the court outright prohibited  
10 the defense from addressing racial bias during the trial. The People are unaware of the court  
11 barring the defense from addressing issues of race during voir dire, or any other stage of the  
12 proceeding. As such, the defense fails to establish a prima facie showing and his motion should  
13 be dismissed.

14  
15 **III. THE DEFENSE FAILS TO PROVE BY A PREPONDERANCE OF THE**  
16 **EVIDENCE THAT THE USE OF THE DEFENDANTS’ MUSIC VIDEOS**  
17 **VIOLATED PENAL CODE SECTION 745(A)(2).**  
18

19 The defense contends that the Racial Justice Act bars the use of music video/rap music  
20 because the use of such evidence, “relie[s] on inaccurate and prejudicial tropes about rap lyrics  
21 as criminal confessions and stereotypes of Black men as hyper violent.” Specifically, the  
22 defense alleges the use of rap music is “racially coded and discriminatory” and violates Penal  
23 Code Section 745(a)(2). The defense is incorrect.  
24

25 **A. USE OF RAP LYRICS DURING A CRIMINAL PROSECUTION IS NOT**  
26 **RACIALLY DISCRIMINATORY UNDER PENAL CODE SECTION 745(A)(2).**  
27

28 Pursuant to Penal Code Section 745(a)(2), not all words, phrases, or language that have a

1 connection to a specific racial group, are deemed “racially discriminatory.” In order for  
2 language to be deemed, “racially discriminatory,” the defense must prove that an “objective  
3 observer” would believe the statement/language, “explicitly or implicitly appeal to racial bias.”

4 In the present case , defense counsel correctly points out that rap is an “art form,” and  
5 that “artists of all races and ethnicities create and perform rap music.” As such, the defense fails  
6 to prove that the prosecution should have been barred from introducing the defendant’s rap  
7 music, because an “objective observer” would believe that rap music inherently appeals to  
8 “racial bias.”

9  
10 **B. EVEN IF THE COURT FINDS THAT THE DEFENDANT’S RAP LYRICS ARE**  
11 **RACIALLY DISCRIMINATORY, THE PEOPLE WERE NOT BARRED FROM**  
12 **INTRODUCING THE DEFENDANT’S OWN RELEVANT STATEMENTS.**  
13

14 The Racial Justice Act correctly put limitations on what language the attorneys, judges,  
15 or witness may use in a court of law, but it does not put limitations on what evidence is  
16 admissible during a criminal proceeding. Specifically, PC 745(a)(2), which is the provision that  
17 prohibits discriminatory language, states, “This paragraph does not apply if the person speaking  
18 is describing language used by another that is relevant to the case.”

19 Put simply, the Racial Justice Act does not put limitations on the introduction of  
20 relevant admissible evidence, especially statement that come from perhaps the most important  
21 person: the accused themselves. The sole determination of what evidence is excluded come from  
22 the judge pursuant to Penal Code Section 352, and nothing in the Racial Justice Act changed that  
23 procedure.

24 In the present case, defense counsel had every opportunity to argue that the music video  
25 and/or other statements made by the defendants themselves were substantially more prejudicial  
26 than probative. The defense could have argued that rap music videos/lyrics are too prejudicial  
27 because they appeal to bias, they are based on stereotypes, that they are merely artistic  
28 expressions and are not to be taken literally what-so-ever. In fact, in their moving papers,

1 defense counsel cites numerous sources that pre-date the trial. All of arguments that the rap  
2 music lyrics should have be excluded were available to the defense, but they were either not  
3 made by the defense, or they were rejected by the court.

4 In the present case, the court correctly admitted the defendant's rap lyrics and music  
5 videos, because they were relevant. Sometimes rap music lyrics are artistic impressions with no  
6 basis in reality. Sometimes they are not. Sometimes art intentionally imitates a person's real  
7 life. Ultimately, however, in this particular case, the court correctly ruled that this was an issue  
8 for the jury to decide.

9 In the videos/lyrics, both defendants repeatedly referenced the Broad Day gang. In the  
10 videos, one or both of the defendants rapped about the crimes they would commit, the  
11 importance violence in the gang, "snitching," and whether or not they would do acts for the  
12 benefit of Broad Day (just to name a few). Of particular importance, one or both of the  
13 defendants flashed the broad day gang sign during the video/s. This is obviously highly relevant  
14 gang evidence in a gang prosecution, and to exclude it would improper. During cross  
15 examination of the People's witnesses, direct examination of their own witness, and during  
16 closing argument, defense was free to argue, and did argue, what they believed were other  
17 reasonable interpretation of the defendant's statements. Ultimately, however, the jury correctly  
18 rejected those interpretations, based on the totality of evidence as a whole.

19 Defense counsel claims that, "the only gang evidence as to Mr. Bryant was his social  
20 media posts and rap lyrics." The defense is incorrect. Many aspects of this case firmly support  
21 the gang enhancement charged in this case against both defendants. Defendant Diallo Jackson  
22 has a prior conviction for not only being a gang member, but being a gang member of AAM,  
23 which was subsumed by the Broad Day gang. Numerous photographs/videos depict defendant  
24 Jackson flashing the Broad Day gang sign and in the company of other Broad Day gang  
25 members. Defendant Jackson was known to associate with multiple other members of the Broad  
26 Day gang. Lastly, prior to the murder, Mr. Jackson was seen with other Broad Day gang  
27 members in the same area of Antioch, where the murder occurred.

28 The gang evidence against defendant Bryant was also strong. Defendant Bryant, prior to

1 the formation of Broad Day, associated with Lo Mob gang members (who would eventually  
2 become Broad Day gang members). Numerous photos were introduced where defendant Bryant  
3 would display the Low Mob gang sign. Defendant Bryant was seen in a picture with defendant  
4 Jackson where defendant Bryant was displaying the Broad Day gang sign as he stood next to  
5 defendant Jackson. Defendant Bryant, on the day of the shooting, was with co defendant, and  
6 Broad Day gang member, Diallo Jackson when they committed the crime together. As such, the  
7 gang enhancement evidence against Mr. Bryant was strong, even without the previously  
8 mentioned videos where both defendants would refer to Broad Day.  
9

10 **CONCLUSION**  
11

12 The People respectfully request that this court find that the petitioner has failed to make a  
13 prima facie showing and deny his motion for a new trial/motion to dismiss.  
14

15 Dated: June 30<sup>th</sup>, 2021  
16

17 Respectfully submitted,  
18 **DIANA BECTON**  
19 District Attorney

20   
21 Ryan Wagner  
22 Deputy District Attorney  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**  
Facsimile Transmission (CCP 1012, 1013, 2015.5)

PEOPLE vs. GARY BRYANT & DIALLO RAY JACKSON

DOCKET: 05-152003-0

I certify that my business address is Contra Costa County District Attorney's Office, 900 Ward St, 3rd Fl, Martinez, CA 94553, and I am a citizen of the United States, over 18 years of age, and not a party to the within action:

I served a true copy of the attached:

People's Response to the Defendant's Motion to Dismiss and/or Grant New Trial

Pursuant to Penal Code Section 745

by placing said copy in the Facsimile Machine and transmitting as follows:

Evan Kuluk  
Facsimile No. (925) 335-8125

Matthew O'Connor  
Facsimile No. (925) 938-0505

The instrument of transmittal is a facsimile machine which is located in a place having proper telephone hookup and transmission capabilities and is served by facsimile number (925) 957-2240, located at 900 Ward St, 3rd Fl, Martinez, CA 94553.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: 6/30/21

  
Judy Chow  
Office Manager

Addressee	Start Time	Time	Prints	Result	Note
93358125	06-30 11:19	00:15:19	022/022	OK	
99380505	06-30 11:36	00:16:41	022/022	OK	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX,  
 DPS:Page Separation TX, MIX:Mix Original TX, CALL:Manual TX, CSRC:CSRC,  
 FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original,  
 FCODE:F-code, RTX:Re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax,  
 IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF,  
 TEL: TX from TEL, NB: Other Error, Cont: Continue, No Ans: No Answer,  
 Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length over,  
 POVR:Receiving page over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error,  
 DSN:DSN Response Error, PRINT:Compulsory Memory Document Print,  
 DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

1  
 2  
 3 **CERTIFICATE OF SERVICE**  
 4 Facsimile Transmission (CCP 1012, 1013, 2015.5)  
 5  
 6  
 7 PEOPLE vs. GARY BRYANT & DIALLO RAY JACKSON  
 8  
 9 DOCKET: 05-152003-0  
 10  
 11 I certify that my business address is Contra Costa County District Attorney's Office, 900 Ward  
 12 St, 3rd Fl, Martinez, CA 94553, and I am a citizen of the United States, over 18 years of age,  
 13 and not a party to the within action:  
 14  
 15 I served a true copy of the attached:  
 16 People's Response to the Defendant's Motion to Dismiss and/or Grant New Trial  
 17 Pursuant to Penal Code Section 745  
 18 by placing said copy in the Facsimile Machine and transmitting as follows:  
 19 Evan Kuluk  
 20 Facsimile No. (925) 335-8125  
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 25 2240, located at 900 Ward St, 3rd Fl, Martinez, CA 94553.  
 26  
 27 I certify under penalty of perjury that the foregoing is true and correct.  
 28  
 Dated: 6/30/21  
  
 Judy Chow  
 Office Manager