

(Without Reference to File)**CONCURRENCE IN SENATE AMENDMENTS**

AB 2542 (Kalra, et al.)

As Amended August 25, 2020

Majority vote

SUMMARY:

Prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin.

The Senate Amendments:

Delete the Assembly version of this bill and instead:

- 1) Prohibit the state from seeking or obtaining a criminal conviction or seeking, obtaining or imposing a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:
 - a) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin;
 - b) During the trial, in a court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, except as specified, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful;
 - c) Race, ethnicity, or national origin was a factor in the exercise of peremptory challenges, whether or not purposeful;
 - d) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses 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;
 - e) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed; or,
 - f) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in the county where the sentence was imposed.
- 2) State that a defendant may file a motion in the trial court, or if judgement has been imposed, may file a petition for writ of habeas corpus or a motion to vacate the conviction or sentence in a court of competent

jurisdiction alleging a violation of the prohibition.

- 3) State that if a motion is filed in the trial court and the defendant makes a prima facie showing of a violation, the court shall hold a hearing, as specified.
- 4) Provide that a defendant may file a motion requesting disclosure of all evidence relevant to a potential violation of the prohibition that is in the possession or control of the prosecutor. Upon a showing of good cause, and if the records are not privileged, the court shall order the records to be released and may permit, upon a showing of good cause, redaction thereof.
- 5) State that, notwithstanding any other law, except for an initiative approved by the voters, if the court finds by a preponderance of evidence a violation of the prohibition, the court shall impose a remedy specific to the violation found from the following list of remedies:
 - a) Before a judgment has been entered, the court may reseal a juror removed by use of a peremptory challenge, declare a mistrial if requested by the defendant, discharge the jury panel and empanel a new jury, or, in the interests of justice, the court may dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges;
 - b) When judgement has been entered:
 - i) If the court finds that the conviction was sought or obtained in violation of the prohibition, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings;
 - ii) If the court finds the violation was based only on the defendant being charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins, and the court has the ability to rectify the violation by modifying the judgment, the court may do so and impose an appropriate remedy for the violation that occurred, except that the court shall not impose a sentence greater than that previously imposed; and,
 - iii) If the court finds that only the sentence was sought or obtained in violation of the prohibition, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence no greater than the sentence previously imposed.
- 6) Prohibit imposition of the death penalty where the court finds a violation of the prohibition.
- 7) Provide that a court is not foreclosed from imposing any other remedies available under the United States Constitution, the California Constitution, or any other law.
- 8) Specify that these provisions apply to adjudications and dispositions in the juvenile delinquency system.
- 9) Define "more frequently sought or obtained" or "more frequently imposed" as meaning that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated and the prosecution cannot establish race-neutral reasons for the disparity.
- 10) Define "prima facie showing" as meaning that the defendant produces facts that, if true, establish a substantial likelihood that a violation of the prohibition occurred, as specified.
- 11) Define "racially discriminatory language" as meaning language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

- 12) Apply these provisions only prospectively to cases in which a judgment has not been entered prior to January 1, 2021.
- 13) State that a writ of habeas corpus may be prosecuted, as specified, following a judgment entered on or after January 1, 2021, based on evidence of a violation of the prohibition.
- 14) Make conforming changes to allow a person who is no longer in custody to vacate a conviction or sentence based on a violation of the prohibition.
- 15) State that if the Legislature adopts AB 3070 and it is chaptered and enrolled, then the provisions of this bill related to peremptory challenges shall only apply to cases in which jury selection was completed prior to January 1, 2021.
- 16) State that these provisions are severable.
- 17) Make a number of Legislative findings and declarations including that it is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California.

COMMENTS:

According to the Author:

"One year ago, Governor Gavin Newsom imposed a moratorium on executions, stating that it is a racist system perpetuating inequality. As person of color and a former deputy public defender, I have seen racial discrimination in the court system first hand. We must confront racism in the courts. We can no longer accept racial bias in the criminal justice system as unfixable. The California Racial Justice Act will help us take an important step in prohibiting the use of race and ethnicity as a factor in the state's justice system across the board.

"The California Racial Justice Act is a countermeasure to a widely condemned 1987 legal precedent established in the case of *McCleskey v. Kemp*. Known as the *McCleskey* decision, the U.S. Supreme Court has since required defendants in criminal cases to prove intentional discrimination when challenging racial bias in their legal process. This established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted. The Court's majority, however, also observed that State Legislatures concerned about racial bias in the criminal justice system could act to address it.

"Regarding the unprecedented times we are facing in the fight against COVID-19, this bill is more needed today than it was prior to the appearance of the virus. Prejudiced and discriminatory treatment does not stop because of COVID-19. It continues and those impacted by the socio-economic disparities in the application of the law have historically been and continue to be disproportionately people of color. This plays a distinct role in how and when a person is charged with a crime and how they pursue their due process in the courts. Without acting now, we continue to allow rulings such as the *McCleskey* precedent to guide the application of race and racism in courts."

Arguments in Support:

According to the American Civil Liberties Union, "...This bill is needed because of a widely condemned 1987 legal precedent established by the U.S. Supreme Court in the case of *McCleskey v. Kemp*. The *McCleskey* decision has the functional effect of requiring that criminal defendants prove intentional discrimination when challenging racial bias in their legal process. This is an unreasonably high standard and is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate, and targeted.

[...]"

Arguments in Opposition:

According to the California District Attorneys Association, "...[A] successful motion to overturn a conviction or obtain habeas relief based on a violation of section 745 requires no showing of prejudice! Together, proposed Penal Code sections 745(b)(1) and 745(e)(1) would require either the granting of a mistrial, the dismissal of a case, or a reduction in charges if a judge, attorney, law enforcement officer involved in the case, expert witness, or juror was biased against a defendant because of defendant's race, ethnicity, or national origin - without any showing that the defendant suffered any prejudice as a result of the bias, that the bias has any impact whatsoever on the outcome of the trial, or that the defendant was deprived of a fair trial!

[...]"

FISCAL COMMENTS:

According to the Senate Appropriations Committee:

- 1) Courts: Unknown workload cost increases, potentially in the low millions of dollars. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources. For example, the Budget Act of 2020 appropriated \$273.8 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations. (General Fund*)
- 2) Incarceration savings: Unknown potential savings in state incarceration costs for individuals who do not receive a prison sentence because of this bill. The FY 2020-2021 per capita cost to detain a person in a state prison is \$91,100 annually, with an annual marginal rate per person of over \$12,000. The contract bed rate averages to about \$29,000 annually. Aside from marginal cost savings per individual, however, the department would experience an institutional cost savings only if the number of persons incarcerated decreased to a level to effectuate the closing of a yard or wing of a prison. (General Fund)

*Trial Court Trust Fund

VOTES:

ASM TRANSPORTATION: 15-0-0

YES: Frazier, Fong, Aguiar-Curry, Berman, Chu, Cunningham, Daly, Diep, Friedman, Gipson, Grayson, Kiley, Medina, Nazarian, O'Donnell

ASM APPROPRIATIONS: 18-0-0

YES: Gonzalez, Bigelow, Bauer-Kahan, Bloom, Bonta, Calderon, Carrillo, Chau, Megan Dahle, Diep, Eggman, Fong, Gabriel, Eduardo Garcia, Petrie-Norris, McCarty, Robert Rivas, Voepel

ASSEMBLY FLOOR: 76-0-3

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Brough, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Chu, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Diep, Eggman, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager, Kiley, Lackey, Levine, Limón, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Nazarian, O'Donnell, Obernolte, Patterson, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood, Rendon

ABS, ABST OR NV: Low, Muratsuchi, Quirk

UPDATED:

VERSION: August 25, 2020

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