

Answering the Call: Avoiding Bias in Prosecution **THE CALIFORNIA RACIAL JUSTICE ACT**

Sherry Thompson-Taylor, Sophia Roach, Thienvu Ho & Chuck Hughes



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How did we get here?

**Sherry Thompson-Taylor
San Diego County**

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AB 2542 – Legislative Digest

- Would prohibit the state from seeking a criminal conviction or sentence on the basis of **race, ethnicity or national origin (RENO)**.
- Would allow a **habeas corpus** to be prosecuted
- Would require the defendant to appear at the **evidentiary hearing** by video.
- Would permit a defendant to file a motion requesting **disclosure** of all **evidence** relevant to a potential violation that is in the possession or control of the prosecutor
- Would require the court upon a showing of **good cause** to order those **records released**
- Would authorize a court to impose **remedies**.

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The Legislature Finds

Section (d)

- Current legal precedent results in **courts sanctioning racism** in criminal trials.
- Existing Precedent provides no recourse for a defendant who's **attorney harbors racial animus**.
- Existing Precedent holds appellate courts must defer to rulings of **judges who make racially biased comments** during jury selection.

Section (e)

- Existing precedent tolerates the use of **racially incendiary or racially coded language, images, and racial stereotypes** in criminal trials.

Section (f)

- Existing precedent also accepts **racial disparities in our criminal justice system as inevitable**.

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United States v. Shah 768 Fed. Appx. 637

Courts sanctioning racism in criminal trials.

- Defendant was a psychiatrist. Failed to pay federal taxes in 2006/2007.
- As audit closed, Def. started to offer free medical care, free prescriptions, potential jobs for IRS Agent and his wife.
- Agent declined. Reported offers to Inspector General.
- Def was determined to owe \$410K in back taxes. Def. again offered money and employment to reduce or elimination back taxes.
- Sting operation Def. agreed to give Agent \$30,000 to eliminate the debt.
- Def. indicted.

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United States v. Shah 768 Fed. Appx. 637

Courts sanctioning racism in criminal trials.

- Defendant ultimately raised the defense of **entrapment**.
 - DA must prove either defendant was **PREDISPOSED** or not **INDUCED**.
- To defeat the defense of entrapment DA offered testimony of first IRS Agent assigned to the case. Agent Raghaven.
- Agent Raghaven is native to India.
- Def. made several comments including
 - Both being from India.
 - Being "brother" & "sister".
 - "Make this audit go away."

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United States v. Shah 768 Fed. Appx. 637

Courts sanctioning racism in criminal trials.

- She testified based on her knowledge there is “a lot of corruption and bribery goes on in India. She assumed that the defendant was asking her to make the audit go away and was offering her a bribe to do so.
- She told the defendant we’re in America and I have to do the audit.
- She told her supervisor and def’s comments and asked to be reassigned.
- On cross, def’s counsel asked Agent questions about India, culture, language.
- Def’s counsel: Did she think Def was offering a bribe because he was “ethnically” from India.
- Agent: In India that’s what happens so I thought he was offering. By asking me to make the audit go away.
- Def’s counsel: Because he’s Indian, you had that kind of notion about how things work in India
- Agent: YES.

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United States v. Shah 768 Fed. Appx. 637

- **Holding:** government did not commit structural error in eliciting **allegedly racist** testimony from witness.
- Raghaven’s testimony was NOT in the same category of testimony that a criminal defendant is predisposed to commit violence because of race.
- But **Legislative History** reflects: **Current legal precedent results in courts sanctioning racism in criminal trials.**

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United States v. Shah 768 Fed. Appx. 637

- **Takeaway:** If this case is cited by defense counsel in your case – first point out of the gate is that the representation in the legislative history is
- Misleading,
- ~~misleading,~~
- Misrepresented,
- ~~misrepresented,~~
- is different than the actual finding of the court.

Courts: 1 Legislature: 0

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Mayfield v. Woodford 270 F.3d 915

Existing Precedent provides no recourse for a defendant whose attorney harbors racial animus.

- Mayfield had unfettered access to a friend's car (Wafer).
- Wafer took off and the car was repossessed.
- Mrs. Pope, a neighbor, bought the car for her son Bryson.
- The car was missing and Bryson reported it stolen.
- Mayfield and his friends were arrested in the car the next day.
- Mayfield pled guilty.
- Mayfield was told it would be 365.
- Mayfield FTA'd at PHS.

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Mayfield v. Woodford 270 F.3d 915

Defendant whose attorney harbors racial animus.

- Two months later, Mayfield over hears Mrs. Pope talking to a friend, John Moreno, about Mayfield.
- Mayfield doesn't like what he hears & tells a friend, "he's going to show them".
- Mayfield gets a shotgun, climbs in her window and confronts Mrs. Pope & Moreno.
- They argue for 15-20 minutes, she stands to light a cigarette and he shoots her and then kills Moreno because he was a witness.
- Mayfield tells friend, he didn't mean to do it, it was an accident.

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Mayfield v. Woodford 270 F.3d 915

Defendant whose attorney harbors racial animus.

- Mayfield leaves friend's house returns to Pope house, replaces screen window. Drags bodies of Mrs. Pope and Moreno outside to a storage closet, washes the blood from the walk.
- He then waited for Byron to come home. Confronts Byron. During the argument one of Byron's friend drives up and intervenes.
- Byron wasn't able to get into the house so he left with his friend.
- Mayfield was arrested the next day, confessed and reenacted the crime.
- After 3 days in trial, the jury convicted him in 2 ½ hours and recommended death.

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Mayfield v. Woodford 270 F.3d 915

Defendant whose attorney harbors racial animus.

- Defendant asserted an ineffective assistance of counsel due to a conflict of interest arising out of defense counsel's racial prejudice.
- Defendant submitted six declarations.
- None of the declarations alleged that defense counsel used racial epithets described by the defendant or that the alleged prejudice affected his representation of the defendant.
- In order to establish IAC resulting from a COI, the defendant must show an actual COI adversely affected his lawyer's performance.

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Mayfield v. Woodford 270 F.3d 915

- Def counsel's daughter: his contempt for his family was exceeded only by his contempt for people of other races and ethnic groups.
- He used such terms as n****r, schwartze, jig, jungle bunnies, trigger the n****r, shoot the coon to the moon.
- His secretary stated he constantly referred to clients, secretary, and a fellow lawyer as n****r.
- "Because his client was black he did not trust him and did not care what happened to him".
- "Another black client deserve to fry".
- *Case was reversed on other grounds – IAC in the penalty phase as to investigation and preparation.*

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Mayfield v. Woodford 270 F.3d 915

- **Takeaway:** The court finds that def counsel's personal animus against African-Americans is not sufficient to prove IAC.
- Legislature is saying, come on now.
- If this is your defense attorney, you can make the same arguments, but.....you'd be straining your own credibility.

Courts: 1 Legislature: 1

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People v. Williams 56 Cal.4th 630

Appellate courts must defer to rulings of **Judges who make racially biased comments during jury selection.**

- Defense counsel made 3 Batson/Wheeler motions.
- 1st motion after prosecutor excused three black female prospective jurors.
- Trial court said, "I have to say that I did have some of them marked that I expected to be excused".
- Prosecutor said, he employed a rating system by which he rated the reluctance of the prospective juror toward answering questions he posed about the death penalty, which he considered reflective of a reluctance to impose the death penalty.

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People v. Williams 56 Cal.4th 630

Appellate courts must defer to rulings of **Judges who make racially biased comments during jury selection.**

- The prosecutor's general impression from their answers was that **IN SPITE OF WHAT THEY SAID**, they wouldn't have the ability to impose it when it actually came down to it.
- At this point, there were 40 prospective jurors called to the box. Four were black and the prosecutor dismissed three (all of whom were women).
- The court denied the Batson/Wheeler motion.

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People v. Williams 56 Cal.4th 630

Appellate courts must defer to rulings of **Judges who make racially biased comments during jury selection.**

- 2nd motion – At this point four out of the six African-Americans called to the box had been challenged and all four were women.
- The prosecutor noted the juror as ambivalent, which was distinctive because he usually did not write anything next to the names.
- Trial court said that she indicated she was willing to impose the death penalty.
- Prosecutor replied that his impression had a lot more to do with **not what she said** but how I read what she was saying from observing her demeanor and the way she answered the questions.
- Trial court denied the motion.

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People v. Williams 56 Cal.4th 630

Appellate courts must defer to rulings of **Judges who make racially biased comments during jury selection.**

- 3rd motion – Five out of six African-American prospective jurors had been challenged.
- The prosecutor had accepted the panel, the subsequently kicked a black juror.
- Prosecutor said, "I reviewed my notes and rated her reluctant to impose the death penalty. **Not formed only from her answers, but her demeanor and the fashion in which she answered them.** She would not be able to impose the death penalty."
- The court denied the motion. Court had stopped taking notes, but accepted prosecutor's explanation.

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People v. Williams 56 Cal.4th 630

Appellate courts must defer to rulings of **judges who make racially biased comments during jury selection.**

- Defense counsel said the numbers speak for themselves.
- Trial court said, **In my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I am just making a little point. I just wanted to tell you my observation that I have seen this before and I can understand why. That's why. But I am not making my ruling based on that.**
- The final composition of the jury was seven whites and five blacks, four of which were men and one woman.

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People v. Williams 56 Cal.4th 630

Holding:

- Apparent reluctance to impose death penalty was valid neutral reason for striking African-American female prospective jurors.

Takeaway: The court may allow you to kick jurors based on your impression of demeanor and the way someone answers questions.

- Legislature is saying, based on appearances, this doesn't look good.
- The Legislature used this case to take issue with appellate court because it sanction the trial court and in turn the trial courts acceptance of the prosecutor's kicks.

Courts: 1 Legislature: 2

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Duncan v. Ornoski
286 Fed. Appx. 361

Prosecutor's closing argument:

[Y]ou have seen the defendant sitting there in a suit, and in the sanitized area of a courtroom, you have jurors, court reporters, people in the audience. You have a bailiff who is armed. Sometimes we lose sight of what it must have been like at a little after midnight..

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

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Duncan v. Ornoski
286 Fed. Appx. 361

You have friends come in from out of town. And so one of the things you do with them, you take them to the San Diego Zoo. And as you walk along with your friends, these high steel bars and moats, you look back there; there are large striped animals lolling in the sun, looking like kittens. And this little brass plaque up here says, 'Bengal tiger.' And **you tell your friends that that's a Bengal tiger.** Wrong, wrong, wrong. That's a Bengal tiger in captivity, behind bars, and is being fed so much meat every day.

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

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Duncan v. Ornoski
286 Fed. Appx. 361

However, if you and your friends were on a houseboat in Pakistan or India, and the boat comes up to the shoreline in the evening; and you get off the boat; you're walking along; and you push a big palm frond aside; and there you see a huge striped animal with blazing eyes, with cubs, that's a Bengal tiger. And that's a **Bengal tiger in its natural habitat.**

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

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Duncan v. Ornoski 286 Fed. Appx. 361

...If you were there that night, you wouldn't see the defendant in his suit, the way you have seen him in this trial. You would see him with a butcher knife, out to get money. **You would be seeing him in a very natural habitat.**

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

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Duncan v. Ornoski 286 Fed. Appx. 361

- We find **no impropriety in the argument.**
- The prosecutor was attempting to focus the jury's attention on the **vicious nature of the crime**. He clearly wanted the jury not to be misled by defendant's benign and docile appearance at trial, but to remember him as the murderer.
- The prosecutor was entitled to point out that **modest behavior in the courtroom was not inconsistent with violent conduct** under other less structured and controlled circumstances. We find no error in this argument.
- Defendant's complaint that the Bengal tiger argument was a thinly veiled racist allusion does not withstand scrutiny. **Likening a vicious murderer to a wild animal does not invoke racial overtones.**

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Duncan v. Ornoski 286 Fed. Appx. 361

Takeaway: (In 1991) Courts may sanction this language. So it may not be prosecutorial misconduct.

- But that's the point the legislature is making – Court's shouldn't allow this language.
- Find other ways to describe the defendant and the crime, because if you use this language now, you stand a chance of being accused of using race to obtain a conviction.

Courts: 1 Legislature: 3

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McCleskey v. Kemp

481 US 279

- The Racial Justice Act uses this case as its foundation.
 - 1987 case out of Georgia
 - A black man convicted of armed robbery and murder of a white police officer was convicted at trial and the jury recommended the death penalty.
- Holding:
- Baldus Study conclusion black defendants who killed white victims have the greatest likelihood of receiving the death penalty.
 - The petition must prove that the decision maker in his case acted with **discriminatory purpose**.
 - Petitioner offered no evidence **specific to his own case that racial considerations played a part in his sentence**.

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McCleskey v. Kemp

481 US 279

Takeaway:

- But legislature is saying – Court's shouldn't do this.
- You may now be required to provide statistics to show refute **discriminatory purpose or discriminatory impact**.
- And the legislature has told you why these changes are necessary and now they're going to tell you how this is going to effect:
 - the way you charge cases,
 - the way you question witnesses,
 - the way you prep your expert,
 - the way you argue closing and
 - the way you sentence cases.
- Introducing **Penal Code Section 745**

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How do we answer the call for Racial Justice?

Sophia Roach
San Diego County

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The Racial Justice Act

- PC 745(a) 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.
 - Creates new code sections regulating language and conduct of judges, attorneys, officers, experts & jurors.
 - Provides new discovery and hearing rights.
 - Creates mandatory remedies for conduct and language violations as well as disparate outcomes based on RENO.
- **Effective January 1, 2021 for all prejudgment cases.**

CAVEAT: AB 3070

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Penal Code Section 745(a)(1) Violation

The judge, an attorney, officer, expert witness or juror in the case exhibited bias or animus toward D due to their RACE, ETHNICITY or NATIONAL ORIGIN

- Bias: Implicit and Explicit
 - Legislative findings discuss bias in judicial context
 - Williams, Shah & Duncan (facts vs. interpretations)
 - Implicit bias may be unintentional and unconscious but still requires remedy
- Animus
 - Legislative findings discuss animus in extrajudicial context impacting trial conduct
 - Mayfield
- Can be isolated incident: "Some toxins deadly in small doses"
- Applies to a limited group of actors IN THE CASE
- Based on actual RENO of D according to statutory language

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Penal Code Section 745(a)(2) Violation

Judge, attorney, officer, expert witness or juror in the case uses racially discriminatory language about D's RENO

1. Explicitly or implicitly appeals to racial bias
2. Racially charged or coded language
3. Language that compares the defendant to an animal
4. Language that references the defendant's physical appearance, culture, ethnicity, or national origin

Exceptions

Relevant, racially neutral and unbiased physical description
Language used by another that is relevant to the case

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PROHIBITED LANGUAGE

Racially charged or coded language:

Super Predator, Thug, Urban, Ghetto, Hood Rat, Welfare Queen, Spade, Gypped, Svengali, Shyster, Macho, Illegal, Illegal Immigrant*

Animals, animal attributes:

Gorilla Pimp, Bottom Bitch, Coyote, Snake, Pack of dogs, etc...

Hunt, Pack, Prey, Predator

Brute, Savage, Feral

Us-them-they language

Descriptors demeaning entire communities

Pro Tip: Learn to use PEOPLE FIRST language
(Person with a conviction vs Felon)

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Questions we need to ponder

- What stylistic changes can I make to combat bias?
- What is a racially neutral description?
- How do we accurately describe relevant subcultures while being mindful of the systemic impact of our words?
- How do we cull non-essential information that could lead to violations?

LE will need instruction

- Gangs & HT will need extra thoughtfulness and sensitivity
 - "I am responsible for documenting Asian gangs in the city." vs. "I am responsible for documenting 4 gangs in the city."
 - "A bottom bitch is a recruiter for other prostitutes." vs. "When the victim described herself as a bottom bitch, she was referring to her role as a recruiter of other women into prostitution."
- Strip unnecessary references to RENO from search warrants, reports and testimony to avoid allegations of systematic practice moving forward.

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Penal Code Section 745(a)(3-5)

VIOLATION OCCURS WHEN A COMPARISON TO SIMILARLY SITUATED DEFENDANTS IN THE SAME COUNTY SHOWS DEFENDANT WAS:

- 3) Charged or convicted of a more serious offense than others of different RENO's and data shows prosecutors seek or obtain more serious offenses for defendants with same RENO.

Black D's charged with sale while other RENO D's charged with possession of same quantity of narcotics.

- 4) Sentenced to a longer/more severe penalty than others of different RENO's and data shows prosecutors seek or obtain longer/more severe sentences for defendants with same RENO.

Latinx D's sentenced to 25-life for single victim murders while other RENO D's charged with single victim murders receive determinate terms.

- 5) Sentenced to a longer/more severe penalty for a victim of a specific RENO and data shows prosecutors seek or obtain longer/more severe sentences when other victims of the same RENO.

D's who rape white V's are sentenced to prison while D's who rape other RENO V's are sentenced to probation.

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PC 745(d) Discovery Motion

Discovery shall be granted where there is **Good Cause** to believe "evidence relevant to a potential violation" described by defendant is in "possession or control" of the state.

REQUIREMENTS FOR DISCOVERY

- Plausible justification, material to defense
- Described with specificity
- Not available through other means
- In possession/control of the state (here described as prosecution offices: AG, DA, CA)

OTHER CONSIDERATIONS

- Reasonably available
- Third party confidentiality or privacy rights
- Protected governmental interest
- Timeliness, including time for production
- Necessity of delay in proceedings
- Unreasonable burden

RELEVANT EVIDENCE: Statistical evidence, aggregate data, expert testimony, witnesses, and other information. Privileged and statutorily/constitutionally protected information can be redacted.

GOOD CAUSE: Not defined by the statute. Will be defined by courts and reviewed for abuse of discretion

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Good Cause

- *Pitchess v. Superior Ct.* (1974) 11 Cal. 3d 954: **Materiality + reasonable belief in possession.**
- *Murquía v. Municipal Ct.* (1975) 15 Cal.3d 297: **Materiality (FN 16. Proof of existence not required).**
- *Warrick v. Superior Ct.* (2005) 35 Cal.4th 1011: **Plausible justification** (Not a credibility test; could or might have occurred. Relatively relaxed standard insures production of potentially relevant evidence).
- *US v. Sellers* (2018) 906 F.3d 848: **More than mere speculation, scope relates to reliability/strength of showing.**
- *People v. Johnson* (2019) 222 Cal App 4th 486: **Sufficient showing supports reasonable belief conduct occurred.**
- *Facebook, Inc. v. Superior Court (San Diego)* (2020) 10 Cal. 5th 329: **Multi-factorial analysis of specificity, availability, materiality, privacy, burden, delay and justification.**

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PC 745(b) & (c) Pre-Judgment Motion for Hearing

- Motion must be filed in court of competent jurisdiction.
- Motion must allege a violation of PC 745(a).
- Defendant has burden of establishing a prima facie case:
 - Credible facts must establish **substantial likelihood** that a violation occurred.
 - More than a mere possibility, but less more likely than not.
 - If defendant meets the burden, the court **MUST** hold a hearing to determine if a violation of PC 745(a) has occurred.

FILLABLE MOTION IN ONLINE MATERIALS

THANK YOU TO DDA Alissa Kubochi in Sacramento for collaboration!

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Hearings, Post-Judgment Procedure & Remedies

Thienvu Ho
Sacramento County

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PC 745 Hearing

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PC 745 Hearing

Statistical Evidence

Aggregate Data

Expert Testimony

Sworn Witnesses

Court Expert

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PC 745 Hearing

Statistical Evidence

Aggregate Data

Expert Testimony

Sworn Witnesses

Court Expert

Rules of Evidence Apply:
???????

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PC 745 Hearing

Statistical Evidence

Aggregate Data

Expert Testimony

Sworn Witnesses

Court Expert

Burden of Proof:
Defense must prove by a preponderance

County Specific:
PC 745(a)(3)

Court:
- Make findings
- Appellate Review

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PC 745 Hearing

Statistical Evidence

Aggregate Data

Expert Testimony

Sworn Witnesses

Court Expert

Litigating the Hearing:

- Turn the tide
- Scrutinize the Stats
 - Small sample size
 - Data dredging
 - Confusing correlation for causation
 - Apples vs. Oranges

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Data Dredging/Data Fishing

- The misuse of data analysis to find patterns that are then presented as statistically significant
- More data & more variables can result in more false positives
- **Testing multiple hypotheses/theories using the same data set can cause false positives**

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Example: Testing Hypotheses



- Flip a coin 5 times
- Theory:
 - "Tails Never Fails"
 - The coin is bias
 - To test this theory you cannot rely on just those 5 flips, you need more data

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Correlation is **NOT** Causation

When statistics show a correlation between A & B, there are usually 6 possibilities:

1. A causes B
2. B causes A
3. A & B both partly cause each other
4. A & B are both caused by a third factor, C
5. B is caused by C, which is correlated to A
6. The correlation was due purely to chance

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Correlation is **NOT** Causation

Example:

- The number of people who buy ice cream at the beach correlates/relates to the number of people who drown at the beach.
- Does ice cream cause drowning?
- Of course not, both ice cream and drowning are related to a third factor: the number of people at the beach.

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Disparity is demonstrated when 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**.

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Race Neutral Factors

- ✓ Mitigating & Aggravating Factors (Rules 4.421 & 4.423)
- ✓ Criminal History
 - ✓ Strikes
 - ✓ Prison
 - ✓ Felony vs. Misdemeanor
 - ✓ Recent vs. Stale
 - ✓ Probation vs. Parole vs. None
 - ✓ Concurrent Cases
- ✓ Injuries
 - ✓ GBI vs. Other vs. None

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Race Neutral Factors

- ✓ Enhancements
- ✓ Gangs
- ✓ Crime Specific: sex, embezzlement, etc.
- ✓ Victim
- ✓ None vs. One vs. Multiple
- ✓ Vulnerable & Impact Statements
- ✓ Planning and Sophistication
- ✓ Principal vs. Aider/Abettor
- ✓ Age of Defendant
- ✓ Fact Specific

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Rules of Evidence: ???

- Testimony of Prosecutor(s)
 - Assigned Prosecutor
 - Expert Witness – Prosecutor With Experience Charging, Negotiating And Trying Cases
- Declarations
- Probation Report/Recommendation
- Statistics
- Best Practice: PC 745 Hearing Prosecutor Different Than The Assigned Prosecutor

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PC 745 (e)(1): Remedies Sustained Violations **Before** Judgment

The court shall impose a remedy specific to the violation found from the following list:

- Declare a mistrial, if requested the by the defendant
- Discharge the jury panel and empanel a new jury
- Dismiss enhancements, special circumstances, or special allegations
- Reduce charges
- Ineligibility for death penalty

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Post-Judgment Litigation

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Example: Defense Attorney

- Source: Alameda County DA
- 25+ years after trial, D found out his lawyer was a racist. Attorney called his defendants and African-American court staff the n-word; once said an Asian judge was a "f***ing J** who should remember Pearl Harbor."
- 9th Circuit granted a new trial to the D, an African-American, because his lawyer's racism deprived him of a fair trial.
- Today, D could use habeas section of PC 745 for relief.

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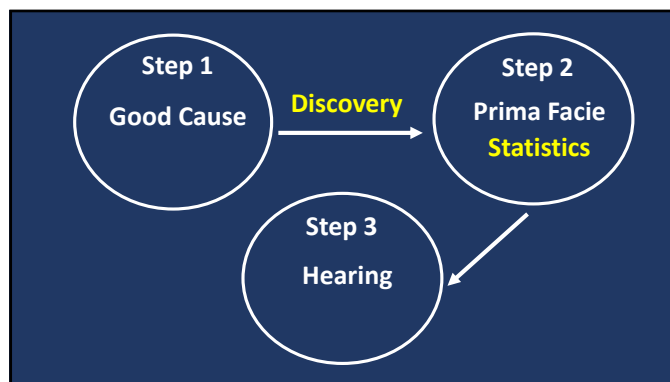
Example: Juror

- Source: Alameda County DA
- After trial, two jurors reported that another juror made racially charged statements against D, who was charged with sexually assaulting two teenagers. The juror said, "Mexican men have a bravado that makes them think they can do whatever they want with women."
- U.S. Supreme Court remanded case to investigate juror bias.
- Defendant could now make motion under PC 745.

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Post-Judgment Motions

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Remedies: Post-Judgment

- 745(e)(2)(A)
 - Wide Discretion
 - Shall Vacate Conviction & Sentence
 - Shall Find Conviction Legally Invalid
 - May Order A New Trial Or
 - Modify The Sentence
 - ❖ Cannot Impose A New Sentence Greater Than That Previously Imposed
 - Not Eligible For The Death Penalty

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Habeas Corpus

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PC 1473: Habeas Corpus

- Provides post-conviction remedies for in custody D
- AB 2542 added subsection (f) to the habeas law:
 - A writ of habeas corpus may now be prosecuted upon a PC 745(a) violation if judgment was entered on or after 1/1/2021.
 - ❖ Allows for amending existing petitions
 - ❖ Not considered successive or abusive
 - ❖ Counsel shall be appointed
 - ❖ Video appearance permitted

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PC 1473.7: Habeas Corpus

- Provides post conviction remedies for out of custody defendants
- AB 2542 added subsection (a)(3):
 - A defendant can now file a motion to vacate a conviction or sentence for a PC 745(a) violation even after the defendant is released from actual or constructive custody.

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The Role of Data

Chuck Hughes
Ventura County

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The Role of Data – PC 745(a)(3)&(4)

- Disparate **charge, conviction, or sentence** based on RENO
- Two questions:
 - Is D being treated significantly worse than similar others?
 - Does the data show D's RENO receives more severe treatment?
- Goal – Data from which accurate conclusions can be drawn

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Developing a Data Strategy

- **Every county is different**
- Challenges to consider:
 - Qualification to collect, analyze data – Statistician?
 - Available data & resources
 - Quality of data
 - Definitions / terminology
 - **Complexity of factors to analyze**
 - Timeframe for data

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1. Determine Data Availability

- Case management system
- Case files
- Other agencies' data to which you have access
 - Law enforcement
 - Probation
 - Jail
 - Courts
- Other agencies' data they will give you

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Data Availability – Key Factors

- | | |
|---------------------|---------------------------|
| • D's race | • Weapons (by type) |
| • V's race | • Injuries (by severity) |
| • Requested charges | • Gangs |
| • Filed charges | • Other enhancements |
| • Convicted charges | • Probation/parole status |
| • Sentences | • Other pending cases |
| • Priors | • Age (18-29; 30-54; 55+) |

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2. Decide Initial Approach

- It's not entirely up to you
 - Involve your PDO, bench?
- Data alone or with case file analysis
- **Broad vs. narrow comparisons**
 - All 211 cases, broken down by race
 - All 211 cases, broken down by race, other listed factors

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2. Decide Initial Approach

- **Timeframe for analysis** – compare apples to apples
- Plus or minus 6 months from charge, conviction, sentence?
- If too long or short, won't account for
 - Changes in law (e.g. 667.5(b), 667(a) priors; misdemeanors)
 - Changes to DA administrations
 - COVID
 - New programs
 - Statistical significance

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3. Collect Data

- **Run / collect sample data?**
 - Broad and narrow comparison
 - Varied timeframes
- **How long does it take?**

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4. Analyze the Data

- **Qualified** analyst
- Sample sizes, averages, ranges, curves, std. deviations, factors
- **Broad vs. narrow comparison**
 - All 211 cases, broken down by race
 - All 211 cases, broken down by race, other listed factors
- What if there are facial discrepancies?
- Feasibility of further case file analysis?

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5. Discovery

- Format
 - Databases, **spreadsheets**, proprietary software, etc.
 - Aggregates
- Privileges apply
- Privacy concerns
- Your interpretation
- Timing

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Overcharge Claims under 745(a)(3)

- Common discretion scenarios
 - Wobblers
 - DUI / Wet (if applicable)
 - 211 / 487(c) – Especially *Estes*
 - 459 1st / 2nd
 - Murder degree
 - Possession for sales / Sales / Simple possession

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Overcharge Claims under 745(a)(3)

- Compare charges at **discretionary stages** by race and factors
 - LE requested vs. diverted
 - LE requested vs. filed
 - Filed vs. convicted of same charge
 - Filed vs. convicted of lesser charge
 - Filed vs. dismissed

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Sentencing Claims under 745(a)(4)

- Compare **sentences imposed** by race and factors
 - Compare sentences at different stages of the proceedings
 - Arraignment, pre-prelim, Info arraign., pre-trial, post-trial
- What is a significant difference?
 - Averages, ranges, etc.

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Future Data Collection Practices

- Develop a tracking system for some/all of the above?
- Document data items above, plus:
 - Washed out priors
 - Injuries not amounting to GBI
 - Gang related offenses
 - Other aggravating / mitigating factors
 - Reasons for sentence increase / decrease
- **Complexity can cause problems - GIGO**

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Q & A

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