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Subject: AB 2542 (Racial Justice Act) Description of New P.C. 745
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**P.C. 745
(New)
(Ch. 317) (AB 2542)
(Section 3.5)
(Effective 1/1/2021)**

The California Racial Justice Act of 2020.

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

Subdivision (f) provides that P.C. 745 applies to adjudications and dispositions in juvenile court, as well as to cases in criminal courts.

Subdivision (j) specifically provides that P.C. 745 “applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.” Stated another way, P.C. 745 is *not* retroactive, and applies only to cases in which judgment is entered on and after January 1, 2021.

Establishing a Violation (Subdivision (a))

Provides that a violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

- 1.) 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; or
- 2.) During the defendant’s trial, in 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, or otherwise exhibited bias or animus towards the defendant because of his or her race, ethnicity, or national origin, *whether or not purposeful*.

Provides that this does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect; or

- 3.) The defendant was charged with 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; or

4.) a.) 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.

b.) 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.

[Note that there is no requirement that the defendant make any showing of prejudice. That is, the defendant is not required to prove that the alleged bias had any impact whatsoever on the bringing of charges, the trial, the conviction, or sentencing. Bias by an officer involved in the case who had a peripheral role in the investigation and never testified at trial could result in the vacating of convictions in a mass shooting case, despite the fact that dozens of eyewitnesses saw the shootings and the defendant gave a videotaped confession. The consequences of new P.C. 745 could be devastating. Legal experts expect that the lack of a requirement to show prejudice will be challenged as a violation of Article 6, Section 13 of the California Constitution, which provides as follows: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."]

Where the Motion May Be Filed (Subdivision (b))

Permits a defendant to file a motion in the trial court, or, if judgment has been imposed, a habeas corpus petition may be filed, or a motion to vacate a conviction or sentence may be filed pursuant to P.C. 1473.7.

The Hearing (Subdivisions (c) and (i))

Provides that if a motion is filed in the trial court and the defendant makes a prima facie showing that P.C. 745 has been violated, the trial court must hold a hearing. Provides that at the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. Permits the court to appoint an independent expert.

Provides that the defendant has the burden of proving a violation by a preponderance of the evidence.

Requires the court to make findings on the record.

Subdivision (i) provides that a defendant may share a race, ethnicity, or national origin with more than one group. Permits a defendant to aggregate data among groups to demonstrate a violation of P.C. 745.

[The bill contains no funding for the increased costs to the courts to hold these lengthy hearings or to pay for independent experts, or to hear the appeals that will certainly be brought by every losing party. The bill also contains no funding for prosecutors to prepare for and participate in these hearings.]

Discovery (Subdivision (d))

Permits the defense to file a motion requesting disclosure of all evidence relevant to a potential violation of P.C. 745 in the possession or control of the state.

Defines “state” as a district attorney, a city prosecutor, or the Attorney General.

Requires that the motion describe the type of records or information sought.

Requires the court to release the records if good cause is shown. Provides that 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.

[This appears to be a drafting error. The phrase “if the records are not privileged” was placed into the fourth sentence of subdivision (d) when it should have been placed into the third sentence. The current language mandates the release of records even if privileged. And only if the records are not privileged may the court permit redaction. This is how the third and fourth sentences read:

“Upon a showing of good cause, the court shall 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.”

These sentences should read this way:

Upon a showing of good cause, and if the records are not privileged, the court shall 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.”

[This is how these sentences read in the version of P.C. 745 that did not become operative – Section 3 of the bill.]

[This bill imposes substantial burdens and costs on counties without any funding for the increased workload. The time that it will take for prosecutors to identify, locate, review, and redact the information requested by each defendant will be enormous. These costs and burdens will hit small district attorney offices especially hard. Nothing in the bill indicates how far back prosecutors would have to comb through records – 5 years, 10 years, 25 years?]

Remedies (Subdivision (e))

Provides that if a court finds by a preponderance of the evidence that there is a violation of P.C. 745, the court “shall impose a remedy specific to the violation found from the following list:”

- 1.) Before a judgment has been entered, the court may impose any of the following remedies:
 - a.) Declare a mistrial, if requested by the defendant.
 - b.) Discharge the jury panel and empanel a new jury.
 - c.) Dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges, if the court determines that it would be in the interest of justice.

- 2.) After a judgment has been entered:
 - a.) Vacate the conviction and sentence, find that it is legally invalid, and order new proceedings. If the court finds that the only violation of P.C. 745 is based on paragraph (3) of subdivision (a) (defendant was charged with 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 shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. Provides that on resentencing, the court shall not impose a new sentence greater than that previously imposed.
 - b.) If the court finds that only the sentence was sought, obtained, or imposed in violation of P.C. 745, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. Provides that on resentencing, the court shall not impose a new sentence greater than that previously imposed.

- 3.) Provides that when the court finds a violation of P.C. 745, the defendant shall not be eligible for the death penalty.

- 4.) Provides that the remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

Definitions (Subdivision (h))

Provides definitions of “more frequently sought or obtained,” “more frequently imposed,” “prima facie showing,” “racially discriminatory language,” and “state.”

- 1.) “More frequently sought or obtained” or “more frequently imposed” means 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.
[The bill does not provide any definition of “disparity” or explain how to calculate disparity between groups. If there is a disproportion based on statistics going back 25 years, but no disproportion going back only 10 years, what is the relevant statistic? The bill gives no guidance. No definition of “significant difference” is provided. Is a 5%, 10%, 50%, or 75% differential significant? The bill does not say.]

2.) “Prima facie showing” means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of P.C. 745 occurred. A “substantial likelihood” requires more than a mere possibility, but *less* than a standard of more likely than not.

3) “Racially discriminatory language” means 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.

4.) “State” includes the Attorney General, a district attorney, or a city prosecutor.

Subdivision (g) provides that new P.C. 745 does not prevent the prosecution of hate crimes pursuant to P.C. 422.6 through P.C. 422.865.

[AB 2542 contained two versions of P.C. 745 - Section 3 and Section 3.5. Uncodified Section 7 of the bill provides that Section 3.5 shall only become operative if Assembly Bill 3070 is enacted and becomes effective on or before January 1, 2021. AB 3070 is indeed effective on January 1, 2021, even though its provisions do not apply (*i.e.*, are not operative) until January 1, 2022. California Constitution Article 4, Section 8(c)(1) provides that a statute enacted at a regular session shall go into effect on January 1st next, following a 90-day period from the date of the enactment of the statute. The California Supreme Court recognizes that there is a difference between the effective date of a statute and the operative date of a statute. In *People v. Alford* (2007) 42 Cal.4th 749, 753, fn #2, the court cites other cases in finding that the effective date of a statute is the date upon which the statute came into being as an existing law and that the operative date is the date upon which the directives of a statute may be actually implemented. Although the effective and operative dates are often the same, the Legislature may postpone the operation of certain statutes until a later time. This writer contacted editors at both Thomson Reuters and LexisNexis, and both say that Section 3.5 is operative, not Section 3.]