ORANGE COUNTY DISTRICT ATTORNEY

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CAUTION

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The California Racial Justice Act of 2020 (Assembly Bill 2542)

On September 30, 2020, Governor Gavin Newsom signed Assembly Bill 2542 (AB 2542), also known as the California Racial Justice Act of 2020, which created Penal Code section 745 and amended Penal Code sections 1473 and 1473.7.[1] The stated purpose of this Act is to eliminate racial bias from the criminal justice system. This training bulletin will give you a summary of the rights and obligations created by this new law.

What does AB 2542 do?

AB 2542 prohibits the seeking or obtaining of a criminal conviction or the seeking, obtaining, or imposing of a sentence on the basis of race, ethnicity, or national origin. This bill applies to adjudications and dispositions in the juvenile delinquency system as well as prosecutions in the superior court. (Pen. Code, § 745, subd. (f).)[2] This bill allows a defendant to file a motion alleging a violation in a trial court if judgment has not yet been imposed. (Pen. Code, § 745, subd. (b).) Additionally, AB 2542 grants a defendant the ability to seek a writ of habeas corpus based on evidence that a criminal conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin. (Pen. Code, §§ 745, subd. (b) & 1473, subd. (f).) Furthermore, AB 2542 allows a person no longer in custody to file a motion to vacate a conviction or sentence on the basis that said conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin. (Pen. Code, §§ 745, subd. (b) & 1473.7, subd. (a)(3).) This act, however, only applies to cases in which judgment has not been entered prior to January 1, 2021. (Pen. Code, § 745, subd. (j).) Additionally, this law does not prevent the prosecution of hate crimes pursuant to Penal Code sections 422.6 to 422.865. (Pen. Code, § 745, subd. (g).)

When has a criminal conviction or sentence been sought, obtained or imposed on the basis of race, ethnicity, or national origin?

Pursuant to Penal Code section 745, subdivision (a), a conviction or sentence is deemed to have been sought, obtained, or imposed on the basis of race, ethnicity or national origin if the defendant proves, by a preponderance of the evidence, any of the following five claims.

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[1] Assemb. Bill No. 2542 (2019-2020 Reg. Sess.)

[2] Although this bill applies to juvenile cases, the term "defendant" will be used to refer to both adults and juveniles throughout this training bulletin for the sake of simplicity.

1. **The judge, an attorney, a law enforcement officer, an expert witness, or juror involved in the case exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin (Pen. Code, § 745, subd. (a)(1).)**

"Bias" and "animus," are terms not defined within the plain language of the statute. However, interpretations of these words can be gleaned from the plain language as well as the legislative findings which accompany this bill. (Stats. 2020, ch. 317, § 2.) "Bias," in the context of AB 2542, means both purposeful and implicit bias. (Stats. 2020, ch. 317, § 2, subds. (c), (g), (h), & (i).) "Animus," in its ordinary every day meaning, means "ill will." (See Black's Law Dict. (7th ed. 1999) p. 86, col. 2.)[3] While "animus" is more overt than "bias," there is nothing in this bill that requires the defendant show the animus is purposeful, leaving open the argument that this could be implicit as well.

2. **During the defendant's trial, in court and during proceedings, the judge, an attorney, a law enforcement officer, an expert witness, or juror involved in the case (A) used racially discriminatory language about the defendant's race, ethnicity, or national origin, or (B) otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. (Pen. Code, § 745, subd. (a)(2).)**

Here, "racially discriminatory language" means "language that, to an objective observer, explicitly or implicitly appeals to racial bias[.]" (Pen. Code, § 745, subd. (h)(3).) "Racially discriminatory language" includes, but is not limited to, the following:

A. Racially charged or racially coded language,
B. Language that compares the defendant to an animal,[4] or
C. Language that references the defendant's physical appearance, culture, ethnicity, or national origin.

(*Ibid*.) The statute emphasizes that "[e]vidence 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 the language is discriminatory." (*Ibid*.) However, 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. (Pen. Code, § 745, subd. (a)(2).)

The legislature explicitly states such language is a violation regardless of whether the language or bias was purposeful or not. (*Ibid*.)

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[3] The case of *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, which is cited by the bill's legislative findings as an example of "animus", involved a defense attorney who had a history of using racial slurs against members of the same race as his client. (*Id*. at pp. 939-940 (dis. opn. of Graber, J.))

[4] This would mean references to a defendant as a "snake in the grass," "wolf in sheep's clothing," "predator," etc., would now be deemed racially coded language and a violation of subdivision (a).

3. **The defendant was charged or convicted of a more serious offense than similarly situated defendants of other races, ethnicities, or national origins who commit similar acts 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 (Pen. Code, 745, subd. (a)(3)).**

This paragraph, which focuses specifically on the type of offense rather than the sentence, requires the defense to prove both the specific and general elements of this claim – both that (A) the defendant was personally charged or convicted of a more serious offense than similarly situated defendants of other races, ethnicities, and national origins who commit similar acts and (B) the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin.[5]

In this statute, "more frequently sought or obtained" 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." (Pen. Code, § 745, subd. (h)(1).)

No specific guidance is given within the statute as to what qualifies as a "similarly situated defendant," "similar act," or "race neutral reason," and this will likely be the source of much litigation. Rules 4.421 and 4.423 of the California Rules of Court provide relevant circumstances in mitigation and aggravation that a court may consider in sentencing a defendant and which may justify a disparity in sentencing between individual cases and individual defendants. Specifically some things to consider are the recency, frequency, and severity of the defendant's criminal history; the existence or seriousness of injuries to a victim; the presence and type of enhancements; the existence, number, and vulnerability of victims; the defendants role in the crime; the defendants age; and any other race-neutral specific facts that differentiate the defendant's case from the other cases.

It is also important to note that the comparative cases must be from the same county in which the defendant was charged or convicted. (Pen. Code, § 745, subd. (a)(3).) It does not allow for inclusion of cases from surrounding counties or jurisdictions for comparison. However, it does not state that the comparisons must be from the same prosecutor's office. Therefore, it is possible a defendant may be able to use cases from another prosecutor's office (e.g. a city attorney's office) within the same county to support an alleged violation of AB 2542.

[5] It should be noted that this law expressly notes that a defendant may share a race, ethnicity or national origin with more than one group and that he or she may aggregate data among groups to demonstrate a violation of subdivision (a). (Pen. Code, § 745, subd. (i).)

4. **A longer or more severe sentence was imposed on the defendant compared to 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 (Pen. Code, § 745, subd. (a)(4)(A).)**

Like the previous paragraph, a violation of this subdivision requires proof of both a specific harm (that a longer or more severe sentence was imposed on the defendant compared to similarly situated individuals convicted of the same offense) and a general harm (that longer or more severe sentences were more frequently imposed for that offense on people who share the defendant's race, ethnicity, or national origin than on other defendants).[6] (Pen. Code, § 745, subd. (a)(4)(A).) This paragraph differs from the previous one in three main ways: (1) it focuses on the sentence imposed rather than the type of offense, (2) it only considers comparison to those convicted of the "same offense" rather than similar ones, and (3) the specific harm element does not require that the other similarly situated individuals whose sentences are compared to the defendant's be of a different race, ethnicity or national origin as that language was omitted from this paragraph.

In the general harm element, the law requires that the defense prove that longer and more severe sentences were "more frequently imposed" for the same offense on those with the defendant's race, ethnicity, or national origin. (Pen. Code, § 745, subd. (a)(4)(A).) The term "more frequently imposed" has the same definition as "more frequently sought or obtained" above.[7] Again, since no specific guidance is provided as to what qualifies as a "similarly situated individual" or "race neutral reason," prosecutors would be advised to focus on the circumstances in aggravation and mitigation discussed above. (Cal. Rules of Court, rules 4.421 & 4.423.)

This paragraph also limits comparative cases to those from the same county in which the defendant was sentenced. (Pen. Code, § 745, subd. (a)(3).) It does not allow for inclusion of cases from surrounding counties or jurisdictions for comparison, but does not exclude cases from other prosecutor's offices within the same county.

5. **A longer or more severe sentence was imposed on the defendant compared to other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that 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. (Pen. Code, § 745, subd. (a)(4)(B).)**

The analysis for a violation of this paragraph is largely similar to that of paragraph four above. The only difference is that the comparative analysis in the second step focuses on the victim's race, ethnicity, or national

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[6] Again, this law expressly notes that a defendant may share a race, ethnicity or national origin with more than one group and that he or she may aggregate data among groups to demonstrate a violation of subdivision (a). (Pen. Code, § 745, subd. (i).)

[7] Defined as "statistical evidence or aggregate data demonstrate[ing] 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." (Pen. Code, § 745, subd. (h)(1).)

origin rather than the defendant's. If it is proven that a longer or more severe sentence was imposed on the defendant compared to other similarly situated individuals convicted of the same offense, then the defendant must show that longer or more severe sentences were more frequently imposed for that offense in cases with victims of one race, ethnicity or national origin than in cases with victims of other races, ethnicities, or national origins. (Pen. Code, § 745, subd. (a)(4)(B).) Definitions of "more frequently imposed" and limitations of cases from the same jurisdiction for comparative purposes remain identical to the previous paragraph.

The People's New Discovery Obligation

To provide the defense the information necessary to prove a violation of Penal Code section 745, subdivision (a), AB 2542 creates a new discovery obligation on the prosecution. A defendant is now authorized to file a motion requesting "disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state." (Pen. Code., § 745, subd. (d).) The defense motion is required to "describe the type of records or information the defendant seeks." (*Ibid*.) The first step in this process requires the defendant to show good cause as to why the records should be disclosed. If the court finds good cause for the disclosure, the court must order that the records be released. (*Ibid*.) The second step shifts the burden to the prosecution to show that records are either privileged or that there is good cause to redact portions of them. If the records are not privileged and the prosecution shows good cause, "the court may permit the prosecution to redact information prior to disclosure." (*Ibid*.)

While the specific types of records subject to disclosure are not detailed in the statute, because the statute uses the phrase "all evidence," this is likely to be interpreted broadly. At a minimum it will include statistical evidence and aggregate data. (See Pen. Code, § 745, subd. (c)(1).)

The phrase "good cause" is used twice in regards to the AB 2542 discovery obligation – once for the defense burden and once for the prosecution burden. "Good cause," in either context, is not defined by the statute. "Good cause" as it relates to a defense burden to receive discovery in a criminal case has a variety of interpretations in the law.[8] The definition of "good cause" as it relates to the defense burden for AB 2542 discovery will likely be another area of significant litigation and it will ultimately be decided by the courts.

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[8] See Evid. Code, § 1043, subd. (b)(3) [in a police personnel records context, materiality plus reasonable belief the agency has the records or information sought]; *People v. Superior Court (baez)* (2000) 79 Cal.App.4th 1177, 1190-91 [in discriminatory prosecution claim, must show materiality and produce some evidence of discriminatory prosecution]; *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026 [in *Pitchess* context, plausible scenario plus how information sought could lead to or be evidence potentially admissible in trial]; *United States v. Sellers* (2018) 906 F.3d 848 [in a selective prosecution claim in a stash house reverse sting case, defendants have to provide more than mere speculation, but what that something is varies based on the specific facts]; *People v. Johnson* (2019) 222 Cal.App.4th 486 [in a motion to reveal juror information, must show that talking to jurors is reasonably likely to provide evidence of juror misconduct]; *Facebook, Inc. v. Superior Court (San Diego)* (2020) 10 Cal.5th 329 [in considering whether good cause exists to enforce an SDT directed to 3rd party, court will consider multiple factors including plausible justification, availability, 3rd party privacy/governmental interest, timely request, unreasonable delay of trial, and unreasonable burden on 3rd party].

As to the People's "good cause" requirement, while it is also not defined, the courts are likely to be guided by Penal Code section 1054.7. In deciding whether to delay or deny the granting of discovery to the defense, Section 1054.7 states that "good cause" for delaying or denying discovery to the defense is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. While the court may ultimately decide that good cause under Section 745, subdivision (d), is broader than that in Section 1054.7, those scenarios listed in 1054.7 will provide guidance to prosecutors and the court on when redactions may be allowed. It should be noted however that while the statute requires that courts "shall" release records if the defense shows good cause, it only states that courts "may," but are not required to, allow the prosecution to redact if they show good cause. (Pen. Code, § 745, subd. (d).)

Some additional considerations in a discovery motion under Penal Code section 745, subdivision (d), are the common law discovery defenses of undue burden and "due diligence self-help." The undue burden argument applies when "the burden placed on [the] government and on third parties substantially outweigh the demonstrated need for discovery." (*People v. Jenkins* (2000) 22 Cal.4th 900, 957.) The "due diligence self-help" defense states that if a defendant could obtain information through his or her own efforts, he or she is not entitled to discovery of the information from the prosecution. (See, e.g., *Arcelona v. Municipal Court* (1980) 113 Cal.App.3d 523, 530; *Cadena v. Superior Court* (978) 79 Cal.App.3d 212, 222-223; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 158, n.2.) While the "undue burden" argument may be appropriate in the right circumstances in a Penal Code section 745, subdivision (d), discovery motion, it is unlikely the "due diligence self-help" defense would be successful since the one party that would possess all the information requested about the prosecutions in a county is the prosecutor's office. Unfortunately, as this is a new discovery obligation, the interpretation of the statutory language and the legal requirements for a discovery order will only become known after the court weighs in following litigation.

What is the procedure for an alleged violation of Section 745, subdivision (a)?

If a defendant believes the state acted in violation of the above provision, the defendant may seek relief in one of three ways depending on the status of the case.

1. If judgment has not yet been imposed, the defendant may file a motion in the trial court. (Pen. Code, § 745, subd. (b).)
2. If judgment has been imposed and the defendant is currently incarcerated or in any way restrained of his or her liberty, then he or she may file a writ of habeas corpus. (*Ibid.*, Pen. Code., §1473, subd. (a).)
3. If judgment has been imposed and the defendant is no longer in criminal custody, then he or she may file a motion to vacate the conviction or sentence pursuant to Penal Code section 1473.7. (Pen. Code, §§ 745, subd. (b) & 1473.7, subd. (a).)

Procedure for a motion in the trial court

Court Procedure

If a motion is filed in the trial court and the defendant makes a prima facie showing of a Penal Code section 745, subdivision (a), violation, then the trial court shall hold a hearing. (Pen. Code, § 745, subd. (c).) The "prima facie showing" in this context means that the defendant must produce facts that, if true, establish there is a "substantial likelihood" (defined as "more than a mere possibility, but less than a standard of more likely than not") that a violation of subdivision (a) occurred. (Pen. Code, § 745, subd. (h)(2).)

At the hearing, the defendant will have to prove a violation of subdivision (a) by a preponderance of the evidence. (Pen. Code, § 745, subd. (c)(2).) Evidence may be presented by either party, including but not limited to, statistical evidence, aggregate data, expert testimony, the sworn testimony of witnesses, or a court-appointed independent expert. (Pen. Code, § 745, subd. (c)(1).) It is unclear whether the rules of evidence strictly apply at this hearing or whether hearsay evidence would be admissible. At the conclusion of the hearing, the court must make findings on the record. (Pen. Code, § 745, subd. (c)(3).)

Remedies

If the trial court finds a violation, the court must impose one of the following remedies:

1. Declare a mistrial (but only if requested by the defendant),
2. Discharge the jury panel and empanel a new jury, or
3. If the court determines it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(Pen. Code, § 745, subd. (e)(1).) Additionally, if the court finds a violation, the defendant will be ineligible for the death penalty. (Pen. Code, § 745, subd. (e)(3).)

It is important to note that these remedies are not exclusive. While one of them must be imposed, they do not foreclose any other remedies available under the United States Constitution, the California Constitution, and any other law. (Pen. Code, § 745, subd. (e)(4).)

Procedure for a writ of habeas corpus

Court Procedure

If judgment has been imposed and the defendant is currently incarcerated or in any way restrained of his or her liberty, then he or she may file a writ of habeas corpus alleging a violation of Penal Code section 745, subdivision (a). (Pen. Code., §§ 745, subd. (b) & 1473, subd. (a) & (f).) The court shall review the petition and determine if the petitioner made a prima facie showing that would entitle them to relief. (Pen. Code, § 1473, subd. (f).) This prima facie showing would be the same as that required for a motion in the trial court - the defendant must

produce facts that, if true, establish there is a "substantial likelihood" (defined as "more than a mere possibility, but less than a standard of more likely than not") that a violation of subdivision (a) occurred. (Pen. Code, § 745, subd. (h)(2).)

If the defendant has not made a prima facie showing, the court shall state the factual and legal basis for its conclusion either verbally on the record or in a written order. (*Ibid*.)

If the petitioner makes a prima facie showing, the court shall issue an order to show cause why relief should not be granted. (Pen. Code, § 1473, subd. (f).) If the state opts to show cause, the court shall hold an evidentiary hearing. (*Ibid*.) The defendant must appear at the hearing by video unless defense counsel indicates their presence in court is needed. (*Ibid*.) If the state declines to show cause, then no evidentiary hearing is needed. (*Ibid*.)

Remedies

If the court finds that the defendant was charged or convicted of a more serious offense than similarly situated defendants of other races, ethnicities or national origins who commit similar offense and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against the defendants who share the defendant's race, ethnicity or national origin in violation of subdivision (a)(3) of Penal Code section 745, and the court has the ability to rectify the violation by modifying the judgment, then 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. (Pen. Code, § 745, subd. (e)(2)(A).)

For any other conviction the court finds was sought or obtained in violation of subdivision (a) (including a violation of subdivision (a)(3) that cannot be rectified as described above) the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). (*Ibid*.) In either case, upon resentencing, the court cannot impose a new sentence greater than that previously imposed. (*Ibid*.)

If the court finds that only the sentence was sought, obtained, or imposed, in violation of Penal Code section 745, subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. (Pen. Code, § 745, subd. (e)(2)(B).) On resentencing, the court cannot impose a new sentence greater than that previously imposed. (*Ibid*.)

In any circumstance where there is a violation of subdivision (a), the defendant shall not be eligible for the death penalty. (Pen. Code, § 745, subd. (e)(3).)

Further, these remedies do not foreclose any other remedies available under the United States Constitution, the California Constitution, and any other law. (Pen. Code, § 745, subd. (e)(4).)

Procedure of a motion under Penal Code §1473.7

Court Procedure

If judgment has been imposed and the defendant is no longer in criminal custody, then he or she may file a motion pursuant to Penal Code section 1473.7 to vacate the conviction or sentence alleging a violation of Penal Code section 1473.7 to vacate the conviction or sentence alleging a violation of Penal Code section 745, subdivision (a). (Pen. Code, §§ 745, subd. (b) & 1473.7, subd. (a)(3).) The defendant is required to file this motion without undue delay from the date he or she discovered, or could have discovered with the exercise of due diligence, the evidence that provides the basis for relief. (Pen. Code, § 1473.7, subd. (c).)

Unlike other avenues of relief for a violation of section 745, subdivision (a), there is no requirement for a prima facie showing prior to ordering a hearing.[9] All motions filed under Penal Code section 1473.7 are entitled to a hearing. (Pen. Code, § 1473.7, subd. (d).) If the defendant requests, the court may hold the hearing without the defendant being personally present as long as the court finds good cause as to why he or she could not be present. (*Ibid*.)

At the hearing, the court shall grant the motion to vacate the conviction or sentence if the defendant proves a violation of Penal Code section 745, subdivision (a), by a preponderance of the evidence. (Pen. Code, § 1473.7, subds. (a)(3) & (e)(1).) If the court grants the motion to vacate a conviction or sentence obtained through a plea, the court must allow the moving party to withdraw the plea. (Pen. Code, § 1473.7.)

Remedies

The remedies for a violation of Penal Code section 745, subdivision (a), proven through a Penal Code 1473.7 motion are identical to those available for such a violation proven through a writ of habeas corpus. (Pen. Code, § 745, subds. (e)(2) & (e)(3).) Please refer to the "*Remedies*" section under the Habeas Corpus heading above.

If you have any questions about this training bulletin, please contact the OCDA Professional Responsibility & Training Unit at Training@da.ocgov.com.

[9] If the prosecution has no objection to the motion, the court may grant the motion to vacate without a hearing. (Pen. Code, § 1473.7, subd. (d).)