"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."

SAY NO EVIL
Gang Prosecution &
The Racial Justice Act

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1

Take out your phone!
TEXT
"TACCOUNT100"
TO 37607

2

Racial Justice Act Violations

- **PC 745(a)(1) EXHIBITION OF BIAS**
  - By CJ player involved in case
  - DUE TO RENO
- **PC 745(a)(2) DISCRIMINATORY LANGUAGE OR EXHIBITION OF BIAS**
  - During trial, in court & during proceedings
  - By CJ player involved in case
  - Used racially discriminatory language about RENO of D (Exceptions ID and quotes)
  - Exhibited bias or animus due to race purposeful or not
- **PC 745(a)(3-5) DISPARATE CHARGES OR SENTENCE BASED ON RENO**
  - Compares those similarly situated of different RENOS
  - Requires more serious charges or more severe or longer sentence

PROVIDES FOR REMEDIES
FOR CONSCIOUS OR UNCONSCIOUS BIAS

3

Race	
Any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry.	
Ethnicity	
The fact or state of belonging to a social group that has a common national or cultural tradition.	
National Origin	
Birthplace, Ethnicity, Culture & Ancestry.	

4

Biology recognizes one race: Human
Race is a social construct we use to define perceived heritage or culture

Asian *48

Black *54

White *44

5

Hispanic: a person of Latin American (all of the Americas south of the US) descent and especially of Cuban, Mexican, or Puerto Rican origin living in the U.S. or a person from Spain or of Spanish descent.

Latino/a/x: a native or inhabitant of Latin America or a person of Latin American origin living in the U.S.

Ethnicity

Chicano/a/x: an American of Mexican descent.

Mexican: a native or inhabitant of Mexico or of Mexican descent.

6

Racial Justice Act

PC 745(a)(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 RENO.

7

BIAS

A natural inclination for or against an idea, object, group, or individual.

Categorization of and preference for people based on "identity" is a fundamental and automatic process of the brain.

8

Prosecutorial Bias

- **The Bad News**
  - We continue to see multiple observational studies that show disparities in issuing and sentencing based on race.
  - We are not bias free.
  - Our own biases are compounded by biases of witnesses, victims, & officers before we issue a case.
  - After issuance, biases of defense counsel, judges, and jurors compound the problem further.
- **The Good News**
  - U of A study indicates prosecutors not a substantial source of bias in a controlled study on case issuance and disposition.
  - We can work against bias.

9

Avoiding Bias in Case Issuance

▪**Case Issuing**
  ▪**Use guidelines and/or consistent factors**
▪**Make a clear written record**
  ▪**Detail rationale for any deviations**
  ▪**Watch your language: RENO, gender, poverty, joblessness, status etc…**
  ▪**Don't include race unless necessary to ID or elements**
  ▪**Don't editorialize, write as if your notes are discoverable**

10

Avoiding Bias in Settlement

• **Be aware of office disposition policies**
• **Make a clear written record of offers that deviate from guidelines**
  • Use sentencing factors
  • Detail rationale for any deviations
• **Chambers/Video Conferences**
  • **Do not refer to RENO unless relevant: ELEMENTS, ID, MOTIVE**
  • Casual, even unintentional remarks can lead to RJA violations
  • Do not make fun of people's names
  • Beware of and report concerning judicial or defense conduct to supervisors
  • Alert co-workers to possible unintentional violations
    • Let's protect each other and put down our defenses!

11

Choose your written words wisely!

▪Motions and Other Documentation
  ▪Don't include RENO unless necessary
▪Two BMAs attempt to rob business claiming to have a gun.
  ▪Defendants attempt to rob business claiming to have a gun.
▪D is dirtbag, residing in a parolee, dirtbag motel.
  ▪D is serial offender. (If relevant: residing at the Relax Inn on ECB.)
▪Co-D has previously been identified as his "bottom bitch" and his "enforcer."
  ▪Co-D identified by V's as assisting D in recruitment, advertising and enforcement of other prostitutes working under her.
▪BP Agent followed van driving in suspicious manner and in his experience was possibly transporting illegals.
  ▪BP Agent followed van driving in suspicious manner and in his experience possibly transporting unauthorized immigrants.

12

4

Avoiding Bias in Trial: Voir Dire

- **Employ a Presumption of Fitness**
- **Rethink the goal of voir dire: All about TRUST**
- **The problem with your GUT!**
  - It is often code for bias
  - Will not save you from RJA, 3070, Wheeler or Juror Mistrust!
  - There are legal mechanisms for dealing with rogue jurors
- **Why practice inclusivity?**
  - Jurors like a fair DA, change the dynamics of exclusion
  - It's the law
- Distinguish your use of gang names from neighborhoods
- Practical Concern: documenting RENO

13

Avoiding Bias in Trial: Opening & Exam

- RJA prohibits certain language, some physical descriptions and non-essential references to race (More on this later!)
- Watch out for questionable THEMES.
- Moderate your tone. Be a provider of fact and evidence and avoid getting overly emotional or using inflammatory language or a highly accusatory tone.
  - Most gang cases are serious! The facts will speak for themselves.
  - Accusatory tone is out of place in a non-serious case and can disadvantage you with jurors.
- Try not to take things personally with hostile witnesses, your professionalism will pay off.

14

Avoiding Bias in Trial: Closing Argument

- Lean into your RELEVANT facts!
- Avoid prohibited language.
- Only refer to RENO if relevant to Elements, ID, Motive.
- Do not use themes or quotes unless completely neutral.
- Learn to use PEOPLE FIRST language:
  - Person with a conviction vs Felon
  - Young man in a gang vs gangster
  - Neighborhood affected by crime vs crime ridden neighborhood
- Don't dehumanize, use names.
- Save the anger!

15

Sentencing

- Remember: While we have a duty to ensure victim rights, we have a constitutional mandate to apply equal protection under the law.
- Make sure that YOU are not the problem…
  - Just because a case is yours does not mean that it needs to be sentenced more harshly. This could lead to unintentional, yet harmful, disparities between cases.
- GANG prosecutors should be aware of what is going on in general unit prosecutions to make sure that disparities can be attributed to:
  - specific conduct allegations: priors, gang, hate crime, and drug weight allegations
  - special victim allegations: age, capacity, employment
- Use the sentencing factors, they are race neutral!
- Watch for language and tone.

16

ANIMUS

Strong dislike, ill will, or enmity that tends to display itself in action.

Belief that people of another race are not like you, cannot be trusted, and do not deserve what you deserve.

17

REAL LIFE: Exhibition of Bias/Animus

- Gang Det. writes police report where RENO of suspects is referenced four times in the summary.
- Drafts search warrant where RENO of suspects is unnecessarily referenced in the body.
- Presents case, they tell you it's an "NHI" case.
- Testifies the defendant is a member of MS-13 which they describe as a particularly violent due to the corrupt and violent countries from which members hail.

18

Is this an RJA violation?

A	B
Yes	No

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19

Racial Justice Act

PC 745(a)(2)

Judge, attorney, OFFICER, <u>expert witness</u> or juror in the case uses racially discriminatory language or exhibits bias about D's RENO during trial, in court and during proceedings.

20

Racially Discriminatory Language

▪Language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, 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 RENO is relevant to determining whether language is discriminatory.

Exceptions
▪Repeating relevant descriptions of others
▪Relevant racially neutral and unbiased physical description

21

PROHIBITED LANGUAGE

Racially charged or coded language:

Super Predator, Predator, Thug, Urban, Ghetto, Welfare Mom, Trap Queen, Spade, Gypped, Svengali, Shyster, Macho, Illegal*, etc…

Animals:

Gorilla Pimp, Bottom Bitch, Coyote, Snake, Dog, Hood Rat, etc…

Avoid us-them-they language

Different World, Street Justice, Local Woman, Outsiders, Foreigner, Those People, Quiet Community, Not From Here

Avoid descriptors demeaning entire communities

Inner City, Crime Ridden, Gang Infested, Jungle, Ghetto, Barrio*, Hood, Wrong Side of Town, High Crime, Low Income

22

Stay Away From Animal Attributes

Animal, ape, barbaric, beast, bellow, brute, claw, collar, crawl, crouch, feral, flush, hairy, howl, hunt, husky, jungle, monster, net, pack, pounce, predator, prey, prowl, savage, scamper, scratch, slaughter, spring, stalk, stampede, swarm, tail, tame, trap and wild.

23

The Gang Name Trap

Beware of using common terms that are not actually used by the gang itself or if considered pejorative, think about asking about the name one with the expert then using a common acronym to avoid repeating the concerning term.

Italian Mafia	Cosa Nostra or Our Thing
Mexican Mafia	Eme
Aryan Brotherhood	AB, The Brand
Oriental Killer Boys	OKB

24

RJA and Gang Experts

- Discuss renaming LE/DA gang teams
  - Numeric vs Racial Assignment
    - I am assigned to Gang Team 1 or South Eastern Division Gang Team vs Hispanic gangs, Black gangs, White gangs…
  - I am responsible for investigating Asian Gangs vs. I am responsible for investigating the following gangs/area …
- Talk about Operation names! *(People v Vue)*
- Discuss all potential RENO dynamics in case.
- Consider if relevant and necessary, and then how to discuss in compliance with the RJA.
- Caution against casual conversation that could be interpreted as violative of the RJA.

25

REAL LIFE
Racially Discriminatory Language

- V describes suspect as wearing "Cholo pants" in BWC interview.
- V recants at trial, DDA redacts unnecessary term "Cholo pants" from BWC statement to avoid RJA.
- Judge says he doesn't care about RJA and ordered DDA to include "Cholo pants."

26

What are the possible RJA violations or exceptions?

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27

Racially Neutral Identification

▪Language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, language that references the defendant's physical appearance, culture, ethnicity, or national origin.

Exceptions
▪Repeating relevant descriptions of others
▪Relevant racially neutral and unbiased physical description

28

Why do we use race anyway?
Shortcut for: Skin tone, hair/eye color, features, ethnicity, national origin, ancestry.
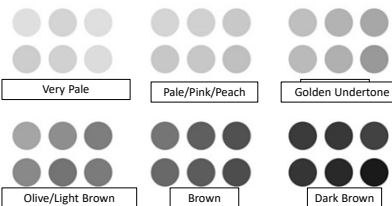

Usually, we are guessing.

29

Trial: Identification

NUDE?

TAN?

FLESH?

TAN?

NUDE?

SKIN TONES

Very Pale

Pale/Pink/Peach

Golden Undertone

Olive/Light Brown

Brown

Dark Brown

30

Tips for Race Neutral ID

▪Talk to the officer/expert witnesses before trial!
  ▪ Use photos or in court ID
▪Never compare to "normal" or "usual"
▪Can you describe the person you saw?
  ▪NO: Black with nappy* hair
  ▪YES: Dark brown skin and short tightly curled black hair
  ▪NO: Greasy looking Hispanic male
  ▪YES: Male with light brown skin and dark, oily hair

31

REAL LIFE
Racially Neutral Identification

In a SW affidavit and at trial, an officer provides the following description of the suspects:

Witness said that Jones had random individuals, who he described as "gang looking people", coming and going from the house at all hours of the night. Witness said last night, they observed two Black "thug" looking males enter the house and meet with Jones. Witness was asked to clarify what was meant by "gang" and "thug" looking and explained the two males were wearing baggy dark clothing.

32

Explain how this SW affidavit or trial testimony by the officer complies with or violates the RJA?

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33

Take Aways

▪**NO RENO unless relevant to Elements, ID, or motive.**

▪**We can and should reduce unnecessary references to RENO in SW affidavits, so long as it does not affect PC.**

▪**We should not introduce prohibited language unless necessary and permitted by a defined exception.**

▪**We should talk to LE ahead of testimony to discuss the best way to approach a racially neutral ID**

▪**We should train LE to:**
  ▪**Understand and comply with the RJA**
  ▪**Ask individuals to define their own RENO for documentation.**
  ▪**Use "apparently" when not self defined**
  ▪**Clarify what is meant when witnesses use prohibited language and designate with quotes**

34

Questions?

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35

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36