Cal Pen Code § 745

§ 745. Sentencing on the basis of race, ethnicity or national origin

(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. 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.

(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 the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph 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.

(3) 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.

(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.

(b)A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under *Section 1473.7* in a court of competent jurisdiction, alleging a violation of subdivision (a).

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing.

(1) 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. The court may also appoint an independent expert.

(2) The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence.

(3) At the conclusion of the hearing, the court shall make findings on the record.

(d)A defendant may 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. A motion filed under this section shall describe the type of records or information the defendant seeks. 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.

(e) Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), 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 the by defendant.

(B) Discharge the jury panel and empanel a new jury.

(C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(2)

(A) When a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a) 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. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) When a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(3) When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.

(4) 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.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system.

(g) This section shall not prevent the prosecution of hate crimes pursuant to *Sections 422.6* to *422.865*, inclusive.

(h) As used in this section, the following definitions apply:

(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.

(2)"Prima facie showing" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred. For purposes of this section, 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.

(i)A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of subdivision (a).

(j) This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.

History

Added *Stats 2020 ch 317 § 3.5 (AB 2542)*, effective January 1, 2021.

Annotations

Notes

Note—

Stats 2020 ch 317 provides:

SECTION 1. This act shall be known and may be cited as the California Racial Justice Act of 2020.

Stats 2020 ch 317 provides:

SEC. 2. The Legislature finds and declares all of the following:

(a) Discrimination in our criminal justice system based on race, ethnicity, or national origin (hereafter "race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." (*Rose v. Mitchell, 443 U.S. 545, 556 (1979)* (quoting *Ballard v. United States, 329 U.S. 187, 195 (1946))*. The United States Supreme Court has also recognized "the impact of … evidence [of racial bias] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." (*Buck v. Davis, 137 S. Ct. 759, 777 (2017))*. Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law.

(b) A United States Supreme Court Justice has observed, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate

effects of centuries of racial discrimination." (*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 572 U.S. 291, 380-81 (2014)* (Sotomayor, J., dissenting)). We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals.

(c) Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms. More and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system. (*State v. Saintcalle, 178 Wash. 2d 34, 35 (2013)*; *Ellis v. Harrison, 891 F.3rd 1160, 1166-67 (9th Cir. 2018)* (Nguyen, J., concurring), reh'g en banc granted Jan. 30, 2019; *Turner v. Murray, 476 U.S. 28, 35 (1986)*; *People v. Bryant, 40 Cal.App.5th 525 (2019)* (Humes, J., concurring)). Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish. For example, one justice on the California Court of Appeals recently observed the legal standards for preventing racial bias in jury selection are ineffective, observing that "requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context." (*Bryant, 40 Cal.App.5th 525 (Humes, J., concurring))*.

(d) Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony, including expert testimony, and arguments in criminal trials. A court upheld a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery. (*United States v. Shah, 768 Fed. Appx. 637, 640 (9th Cir. 2019))*. Existing precedent has provided no recourse for a defendant whose own attorney harbors racial animus towards the defendant's racial group, or toward the defendant, even where the attorney routinely used racist language and "harbor[ed] deep and utter contempt" for the defendant's racial group (*Mayfield v. Woodford, 270 F.3d 915, 924-25 (9th Cir. 2001)* (en banc); id. at 939-40 (Graber, J., dissenting)). Existing precedent holds that appellate courts must defer to the rulings of judges who make racially biased comments during jury selection. (*People v. Williams, 56 Cal. 4th 630, 652 (2013)*; see also id. at 700 (Liu, J., concurring)).

(e) Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials. For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are "highly offensive and inappropriate" (*Duncan v. Ornoski, 286 Fed. Appx. 361, 363 (9th Cir. 2008)*; see also *People v. Powell, 6 Cal.5th 136, 182-83 (2018))*. Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system (Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, and Matthew Christian Jackson, Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology (2008) Vol. 94, No. 2, 292-293; Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham Law Review, Volume 86, Issue 6, Article 24 3091, 3105-06 (2018)).

(f) Existing precedent also accepts racial disparities in our criminal justice system as inevitable. Most famously, in 1987, the United States Supreme Court found that there was "a discrepancy that appears to correlate with race" in death penalty cases in Georgia, but the court would not intervene without proof of a discriminatory purpose, concluding that we must simply accept these disparities as "an inevitable part of our criminal justice system" (*McCleskey v. Kemp, 481 U.S. 279, 295-99, 312 (1987))*. In dissent, one Justice described this as "a fear of too much justice" (Id. at p. 339 (Brennan, J., dissenting)).

(g) Current law, as interpreted by the courts, stands in sharp contrast to this Legislature's commitment to "ameliorate bias-based injustice in the courtroom" subdivision (b) of *Section 1* of Chapter 418 of the Statutes of 2019 (Assembly Bill 242). The Legislature has acknowledged that all persons possess implicit biases (Id. at *Section 1(a)(1)*), that these biases impact the criminal justice system (Id. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (Id. at Section (1)(a)(3)-(4)). In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear

that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.

(h) There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decisionmaking in the criminal justice system. Examples of the racism that pervades the criminal justice system are too numerous to list.

(i) 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. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.

(j) It is the further intent of the Legislature to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination. It is the further intent of the Legislature to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.

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