

AB 3070 – New Jury Voir Dire & Wheeler-Batson Rules
Effective January 1, 2022
By Robert Mestman, Assistant District Attorney, Orange County

AB 3070 is new jury selection (*voir dire*) legislation that goes into effect in 2022. It codifies some *Wheeler-Batson*¹ precedent, but also goes much further by eliminating the *prima facie* showing, creating a new objective standard that incorporates implicit bias, abolishing the requirement for purposeful discrimination, creating a list of presumptively invalid reasons, and instituting a “clear and convincing” standard to overcome the presumption. The legislation is based on a recently enacted Washington State court rule, but goes much farther.

The goal of the legislation is laudable: “to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.” AB 3070 contains the following “intent of the Legislature” language:

- Peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, etc.
- Current framework disproportionately harms African Americans, Latinos, and other people of color, and has failed to eliminate discrimination.
- Requiring proof of intentional bias renders the current procedure ineffective as many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes or otherwise based on unlawful discrimination.

AB 3070 includes the following significant elements and changes from existing law/practice:

- Eliminates the first prong of *Wheeler- Batson* precedent by no longer requiring a *prima facie* showing.
 - “Upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge ***shall*** state the reasons the peremptory challenge has been exercised.” (CCP § 231.7(c), emphasis added.)
- Expressly states that the court need not find purposeful discrimination, upending decades of decisional law to the contrary.
 - Creates a new standard where an “objectively reasonable person” would view race, etc. as a “factor” in the peremptory challenge [“If the court determines there is a **substantial likelihood** that an objectively reasonable person would view race [etc.] as a factor in the use of the peremptory

¹ *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79

challenge, then the objection shall be sustained.”] (CCP § 231.7(d)(1), emphasis added.)

- “Substantial likelihood” means more than a mere possibility but less than a standard of more likely than not. This would permit a court to find a challenge improper even when the judge determines it is more likely than not that there was no discrimination.
- Defines “objectively reasonable person” as someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors. Unconscious bias includes implicit & institutional bias
- Creates a list of presumptively invalid reasons, including many common sense reasons that seem legitimate on their face (expressing a distrust of or having a negative experience with law enforcement, having a close relationship with a criminal, dress/attire/appearance, employment in certain fields, etc.).
 - Requires the court to verify juror physical behavior (inattentive, failing to make eye contact, etc.) if that is a stated reason; unless corroborated by the judge, it is presumptively an invalid reason.
 - Establishes a burden of “clear and convincing evidence” to overcome the presumption referenced above.
- Prevents a court from considering its own observations or reasons not articulated by the prosecutor (“The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications.”)
- Codifies comparative analysis and disparate questioning as tools that the court should use when ruling on an objection (this is essentially already law in California, at least for appellate review).
- Allows for an objection after jeopardy has attached [“The objection shall be made before the jury is sworn, *unless information becomes known that could not have reasonably been known before the jury was impaneled.*”] (CCP § 231.7(b).)

Excerpt from

**Legislative
Digest**



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

Code of Civil Procedure

C.C.P. 197
(Amended)
(Ch. 230) (SB 592)
(Effective 1/1/2021)

Expands the list of potential trial jurors beyond the Dep't of Motor Vehicles (DMV) and voter registration databases, to also include the list of resident state tax filers. Requires the Franchise Tax Board to annually furnish the jury commissioner of each county with a list of resident state tax filers for that county, starting on November 1, 2021. Defines "list of resident state tax filers" as a list that includes the name, date of birth, principal residence address, and county of principal residence of persons who are 18 years of age or older and have filed a California resident income tax return for the preceding taxable year. Provides that beginning January 1, 2022, the list of resident state tax filers, the list of registered voters, and the DMV list of licensed drivers and identification cardholders shall be considered inclusive of a representative cross section of the population

According to the legislative history, the purpose of the bill is to expand jury pools so that they are more representative of the community. The legislative history claims that "California's justice system consistently fails ... to produce potential jury pools that are truly representative of the community" and claims that obtaining jurors only from DMV and voter databases tends to produce jurors who "appear to be more affluent and whiter than the general population of California."

[This bill also creates new Revenue & Taxation Code 19548.4 and 19585 to require the Franchise Tax Board to furnish each jury commissioner with that county's list of resident state tax filers, and to revise the California resident income tax return to include a space for the taxpayer's principal residence address and county of principal residence.]

C.C.P. 231.7
(New)
(Ch. 318) (AB 3070)
(Effective 1/1/2021)
(Operative 1/1/2022)

Overview

Adds new provisions changing the system for claims of bias in the exercise of peremptory challenges, by creating a list of reasons that are presumptively invalid, by eliminating the requirement that objecting counsel make a prima facie case of discrimination, and by providing that the court need not find purposeful discrimination in order to find a peremptory challenge improper. These changes apply to all jury trials in criminal cases in which jury selection begins on or after

continued

January 1, 2022. Provides that the new rules will apply to civil cases beginning January 1, 2026.

This bill makes major changes to peremptory challenge procedures that have long been in place pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, *People v. Wheeler* (1978) 22 Cal.3d 258, and their progeny.

Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the juror's race, ethnicity, gender, gender identity, sexual orientation, nation origin, religious affiliation, or the perceived membership of the prospective juror in any of these groups.

[Existing C.C.P. 231.5 prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased merely because of a characteristic listed in Gov't Code 11135 (sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation).]

Who May Object to a Peremptory Challenge

Permits a party, or the trial court on its own motion, to object to the improper use of a peremptory challenge.

Timing

Requires that an objection to a peremptory challenge be made before the jury is sworn, *unless* "information becomes known that could not have reasonably been known before the jury was impaneled."

[This is contrary to long-standing California Supreme Court precedent. Existing law requires that an objection to a peremptory challenge be made *before* the jury is sworn. (*People v. Cunningham* (2015) 61 Cal.4th 609, 662, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1154 and *People v. Thompson* (1990) 50 Cal.3d 134, 179.)]

Making the Objection and Stating Reasons For a Challenge

Provides that when an objection is made to a peremptory challenge, the party exercising the challenge must state the reasons the challenge was exercised. Does **not** require the

continued

objector to make a prima facie case of discrimination. The objection itself triggers the requirement to state the reasons for the peremptory challenge.

[Existing law requires the objector to make a prima facie case of discrimination, and if successful, the burden then shifts to opposing counsel to explain why the challenge is not discriminatory.]

Evaluating an Objection to a Peremptory Challenge

Requires the trial court to evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. Requires the court to consider only the reasons actually given and prohibits the court from speculating on, or assuming the existence of, other possible justifications.

If the court determines there is a substantial likelihood that an “objectively reasonable person” would view race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of these groups as a factor in the peremptory challenge, the objection must be sustained, **even if** the court does not find purposeful discrimination. Specifically provides that, “The court need not find purposeful discrimination to sustain the objection.”

Requires the court to explain the reasons for its ruling on the record.

Provides that an “objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.”

Provides that “unconscious bias” includes implicit and institutional biases.

Defines “substantial likelihood” as “more than a mere possibility but less than a standard of more likely than not.” [This low standard permits the innocent exercise of a peremptory challenge that is **not** discriminatory to be found improper, because it permits a court to find a challenge improper even when the judge determines it is more likely than not that there was **no** discrimination.]

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Circumstances the Court May Consider

Provides that the court may consider a number of factors in determining whether a peremptory challenge is discriminatory, including, but not limited to:

1. Whether any of the following circumstances exist:
 - (a) The objecting party is a member of the same perceived cognizable group as the challenged juror.
 - (b) the alleged victim is not a member of that perceived cognizable group
 - (c) witnesses or the parties are not members of that perceived cognizable group.
2. Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.
3. The number and types of questions posed to the prospective juror, including, but not limited to, any of the following:
 - (a) Consideration of whether the party exercising the peremptory challenge failed to question the juror about the concerns later stated as a reason for the challenge.
 - (b) Whether the party exercising the challenge engaged in cursory questioning of the challenged juror.
 - (c) Whether the party exercising the challenge asked different questions of the challenged juror in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic, or whether the party phrased those questions differently.
4. Whether other prospective jurors, who are not members of the same cognizable group as the challenged juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

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5. Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups.
6. Whether the reason given by the party exercising the challenge was contrary to or unsupported by the record.
7. Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, C.C.P. 231.5, or this new section.

[Note that pursuant to the first part of this circumstance, the mere exercise of the challenge in the past could be considered, even if there was nothing improper or discriminatory about it. And no definition of "disproportionate" is provided.]

Reasons For Peremptory Challenges That Will Be Presumed to Be Invalid

Lists a number of reasons for peremptory challenges that will be presumed to be invalid, unless the party exercising the challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as **unrelated** to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, nation origin, religious affiliation, or perceived membership in any of these groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case. A list of the 13 reasons that will be presumed invalid:

1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
4. A prospective juror's neighborhood.
5. Having a child outside of marriage.

continued

6. Receiving state benefits.
7. Not being a native English speaker.
8. The ability to speak another language.
9. Dress, attire, or personal appearance.
10. Employment in a field that is disproportionately occupied by members listed in any of the cognizable groups or that serves a population disproportionately comprised of members of a cognizable group.
11. Lack of employment or underemployment of the prospective juror or prospective juror's family member.
12. A prospective juror's apparent friendliness with another prospective juror of the same cognizable group.
13. Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror in order for a peremptory challenge relying on this justification to be considered presumptively invalid.

[Note how one-sided these presumptively invalid reasons are. The challenge by a prosecutor of a juror who has had a negative experience with, or distrusts, law enforcement is presumptively invalid, but this rule does not apply to a defense attorney who exercises a peremptory challenge against a juror who has had a positive experience with, or trusts, law enforcement.]

Defines "clear and convincing," which is the standard for overcoming a presumption that a reason for a peremptory challenge is not valid:

Clear and convincing refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

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Additional Presumptively Invalid Reasons for Peremptory Challenges That Have Historically Been Associated With Improper Discrimination in Jury Selection and That Must Be Observed By the Court or Objecting Counsel

Lists the following reasons for peremptory challenges that have historically been associated with improper discrimination:

1. The prospective juror was inattentive, or staring, or failing to make eye contact.
2. The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
3. The prospective juror provided unintelligent or confused answers.

Provides that these three reasons are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or on the observations of counsel for the objecting party (i.e., the attorney who is objecting to the exercise of the peremptory challenge.) Even if the behavior is confirmed, the attorney offering one of these reasons for a challenge must "explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions *matters to the case to be tried.*" (Emphasis added.)

Remedies

Provides that when a judge finds that a peremptory challenge was exercised improperly, the court shall do one or more of the following:

1. Quash the jury venire and start jury selection anew. (Requires that this remedy be provided if requested by the objecting party.)
2. If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.
3. Seat the challenged juror.
4. Provide the objecting party additional challenges.
5. Provide another remedy as the court deems appropriate.

Appellate Review

Sets forth how the denial of an objection to a peremptory challenge shall be reviewed by an appellate court by providing that review shall be de novo, with the trial court's

continued

express factual findings reviewed for substantial evidence. Prohibits the appellate court from imputing to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. Requires the appellate court to consider only reasons actually given for a peremptory challenge and prohibits the court from speculating as to, or considering, reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who were not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. *Provides that if the appellate court determines that the objection was erroneously denied, the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.*

Opponents of this bill pointed out a number of things, including these:

1. The bill is premature. The California Supreme Court Chief Justice appointed members of a working group in early 2020 to undertake a thoughtful and inclusive study of how jury selection operates in practice in California. This group has not yet finished its work or made public any findings.
2. The bill infers ill intent, and mandates evidentiary presumptions, without any basis or evidence.
3. The bill may be unconstitutional by creating a list of challenges that are intentionally and clearly tailored to make it difficult for the prosecution to excuse jurors, but not the defense. Skewing challenges in this way destroys the balance needed for a fair trial as required by due process and by Section 29 of Article One of the California Constitution, which provides that in a criminal case, "the people of the State of California have the right to due process of law and to a speedy and public trial."

C.C.P. 340.16
(Amended)
(Ch. 246) (AB 3092)
(Effective 1/1/2021)

Revives time-barred claims for damages resulting from sexual assault that was committed between January 1, 1983 and January 1, 2019 by a physician employed by or associated with the University of California at Los Angeles (UCLA). Even if the statute of limitations has expired, a civil suit is permitted to be brought for sexual assault or other inappropriate contact, communication, or activity of a sexual

continued

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 eliminate 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

9

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, schwartzs, 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, butyou'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.

Takeway: 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 sanctioned 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

Takeaways: (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

27

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.

28

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

29

How do we answer the call for
Racial Justice?

Sophia Roach
San Diego County

30

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

31

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

32

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

33

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)

34

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.

35

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.
Latino 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.

36

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.

37

Good Cause

- *Pitchess v. Superior Ct.* (1974) 11 Cal. 3d 954: Materiality + reasonable belief in possession.
- *Murquiza 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.

38

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!

39

Hearings, Post-Judgment Procedure & Remedies

Thienvu Ho
Sacramento County

40

PC 745 Hearing

41

PC 745 Hearing

Statistical Evidence

Aggregate Data

Expert Testimony

Sworn Witnesses

Court Expert

42

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

45

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

46

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

47

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

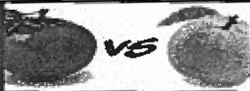
48

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.

49



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.

50

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

51

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

52

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

53

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

55

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.

56

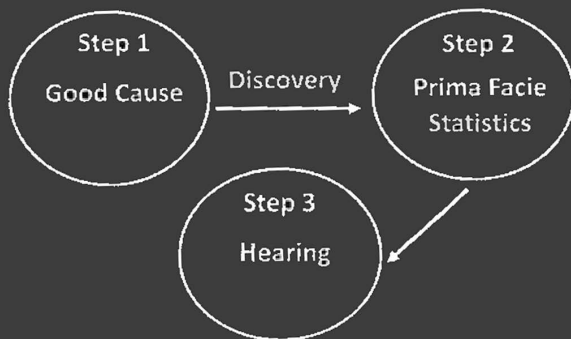
Example: Juror

- 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.

57

Post-Judgment Motions

58



59

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

60

Habeas Corpus

61

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.

63

The Role of Data

Chuck Hughes
Ventura County

64

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

65

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

66

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

67

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

69

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

70

3. Collect Data

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

71

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 racial discrepancies?
- Feasibility of further case file analysis?

72

5. Discovery

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

73

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

75

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

77

Q & A

78

1 X
2 District Attorney
3 X
4 Deputy District Attorney, SBN X
5 Street
6 City, CA ZIP
7 Tel. ()
8 Fax ()
9 Email

10 Attorneys for Plaintiff

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF X

13 THE PEOPLE OF THE STATE OF CALIFORNIA,
14 Plaintiff,

15 v.

16 X X,

17 Defendant.

No. X
DA X

**PEOPLE'S
OPPOSITION/RESPONSE TO
DEFENDANT'S MOTION FOR
DISCOVERY PURSUANT TO
PENAL CODE SECTION 745,
SUBDIVISION (d)**

OR

**PEOPLE'S MEMORANDUM ON
PENAL CODE SECTION 745,
SUBDIVISION (A)**

Date: January 1, 2021
Time: AM/PM
Dept.: X

18 INTRODUCTION

19 On September 30, 2020, Governor Gavin Newsom signed Assembly Bill No. 2542 (AB
20 2542) into law, also known as the California Racial Justice Act (hereafter "the Act"). The Act
21 prohibits the state from seeking or obtaining a criminal conviction or from imposing a sentence
22 based upon race, ethnicity, or national origin. (Pen. Code¹, § 745, subd. (a).) The Act also

23
24
25
26
27
28
¹ All further statutory references are to the Penal Code unless otherwise specified.

1 applies to adjudications and dispositions in juvenile delinquency court. (Pen. Code, § 745, subd.
2 (f).) The Act only applies prospectively to cases where judgment has not been entered prior to
3 January 1, 2021. (Pen. Code, § 745, subd. (j).)

4 Key components of the Act include the right to: 1. Discover evidence relevant to
5 potential violations, upon a showing of good cause (Pen. Code, § 745, subd. (d)); 2. Move for
6 hearing in a court of competent jurisdiction, which can be granted upon a prima facie showing
7 the Act was violated (Pen. Code, § 745, subd. (b)); 3. Present evidence at an evidentiary hearing,
8 which requires judicial findings if a preponderance of evidence shows a violation occurred (Pen.
9 Code, § 745, subd. (c)); and 4. A right to remedies for adjudicated violations (Pen. Code, § 745,
10 subd. (e)).

11 STATEMENT OF THE CASE

12 [INSERT THE PROCEDURAL HISTORY OF THE CASE. BE SURE TO INCLUDE
13 WHEN THE ALLEGED VIOLATION OCCURRED AND STAGE OF PROCEEDINGS.]

14 STATEMENT OF RELEVANT FACTS

15 [INSERT STATEMENT OF FACTS REGARDING THE CIRCUMSTANCES OF THE
16 ALLEGED VIOLATION. IF DISCOVERY HAS BEEN ORDERED, INCLUDE DETAILED
17 REFERENCES TO DATA AND DIFFERENTIATION OF CASES WHERE APPLICABLE.]

18 POINTS AND AUTHORITIES AND ARGUMENT

19 [USE APPLICABLE ARGUMENTS BASED ON STAGE OF PROCEEDINGS.]

20 I.

21 RELIEF UNDER PENAL CODE SECTION 745 IS PROSPECTIVE ONLY AND MUST 22 BE DENIED IF JUDGMENT WAS ENTERED BEFORE JANUARY 1, 2021

23 The entirety of the Racial Justice Act applies prospectively to cases where judgment has
24 not been entered prior to January 1, 2021. (Pen. Code, §§ 745, subd. (j) and 1473, subd. (f).) In a
25 criminal case, the trial court's oral pronouncement of a sentence constitutes the judgment.
26 (*People v. Villatoro* (2020) 44 Cal.App.5th 365, 369.)
27
28

1 In this case judgment was pronounced on X. Because judgment was entered before
2 January 1, 2021, Defendant's DISCOVERY REQUEST/MOTION cannot be granted pursuant
3 to section 745.

4 II.

5 THE ACT AUTHORIZES DISCOVERY ONLY UPON A SHOWING OF GOOD CAUSE

6 The express language of section 745, subdivision (d) allows a person to file a motion
7 requesting disclosure of relevant evidence, upon a showing of good cause:

8 A defendant may file a motion requesting disclosure to the defense
9 of all evidence relevant to a potential violation of subdivision (a)
10 in the possession or control of the state. A motion filed under this
11 section shall describe the type of records or information the
12 defendant seeks. Upon a showing of good cause, the court shall
13 order the records to be released. Upon a showing of good cause, and
14 if the records are not privileged, the court may permit the
15 prosecution to redact information prior to disclosure. (Emphasis
16 added.)

17 Good cause for discovery does not automatically exist in every case. (*Hill v. Superior*
18 *Court* (1974) 10 Cal.3d 812, 819; *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 804.) Without
19 adequate factual allegations, the court is prevented from exercising its discretion in making an
20 independent assessment of good cause. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138,
21 1150.) Based on settled law and the Act's own requirement that requested discovery be relevant
22 and fully described, the defense must make a factual showing in at least three areas to establish
23 good cause.

24 First, the defense must establish a plausible justification for the material requested. (*Hill*
25 *v. Superior Court, supra*, 10 Cal.3d at p. 817; *People v. Navarro* (1978) 84 Cal.App.3d 355,
26 359.) It must appear that the information sought will assist in the preparation of the defense.
27 (*Hill v. Superior Court, supra*, 10 Cal.3d at p. 817.) A 'plausible factual foundation' requires a
28 declaration by defendant's counsel or other evidence and documentation that supports the
motion. (*People v. Moreno* (2011) 192 Cal.App.4th 692, 701.)

1 In this context, a plausible factual foundation must show a potential violation of section
2 745, subdivision (a). [INSERT SPECIFIC ALLEGATIONS HERE AND ADDRESS IE:
3 Isolated violations of Penal Code section 745, subdivision (a)(2), such as a juror's use of racially
4 discriminatory language, should not create a right to discovery of expansive aggregate data or
5 time consuming case file reviews without nexus to relevant conduct on the part of a prosecution
6 office. OR Defendant fails to make a plausible argument that their race, ethnicity, or national
7 origin resulted in discriminatory treatment when compared with others with different
8 characteristics, who are similarly situated and have been charged with, convicted of, or
9 sentenced to similar offenses.]

10 Second, the defense must request the information with adequate specificity to preclude
11 the possibility that they are on a "fishing expedition." (*Pitchess v. Superior Court* (1979) 11
12 Cal.3d 531, 538.) In a motion pursuant to section 745, subdivision (d), the evidence must be
13 relevant to a violation of the Act, meaning that common sense restrictions must be placed on the
14 scope of the request. Discovery orders should be limited to relevant time frames as legislative
15 changes, prosecution practices, disposition policies and significant events, such as a global
16 pandemic, may significantly affect charges sought, convictions obtained, and the length or
17 severity of sentences.

18 [INSERT RELEVANT OFFICE POLICIES ON PERTINENT TIME FRAMES FOR
19 DATA COMPARISON IF ESTABLISHED, ALSO PROVIDE RATIONALE FOR
20 ESTABLISHMENT OF SUCH POLICIES, IE: UNIFORM TERM THAT MINIMIZES
21 MANIPULATION OF DATA AND COMPARES HISTORICALLY RELEVANT DATA.]

22 [(INSERT SIMILAR OFFENSE ANALYSIS IF WARRANTED BY BREADTH OF
23 DEFENSE REQUEST. IE: While assaults may be committed on a continuum from the most
24 basic misdemeanor to murder, the court must limit orders to that which is "relevant" based on
25 the number of victims, weapons, injury and other concrete, non-race factors.)]

26 [INSERT DISTINGUISHING FACTORS PERTAINING TO THE OFFENDER TO
27 NARROW COMPARISON TO THOSE SIMILARLY SITUATED. IE: When defendant has a
28 prior criminal history as here: XX OR is charged with multiple cases as here: XX.]

1 Third, the defense must show they cannot readily obtain the information through their
2 own efforts. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 537; *Hill v. Superior Court*,
3 *supra*, 10 Cal.3d at p. 817.)

4 [INSERT RELEVANT ARGUMENT IF APPLICABLE]

5 Other factors which the court may review include whether the requested material is
6 “reasonably available to the governmental entity from which it is sought,” and if “production of
7 the records containing the requested information would violate (i) third party confidentiality or
8 privacy rights or (ii) any protected governmental interest,” the timeliness of the request
9 including time for production, necessity of delay in proceedings and whether the request places
10 an unreasonable burden “on the governmental entity involved”. (*Facebook, Inc. v. Superior*
11 *Court* (San Francisco) (2020) 46 Cal.App.5th 109, 119 [Additional factors derived from *City of*
12 *Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118 in assessment of right to third party
13 culpability evidence from police agency in homicide prosecution. See also *Facebook, Inc. v.*
14 *Superior Court* (San Diego) (2020) 10 Cal.5th 329: Failure to use *Alhambra* factors in denying
15 motion to quash third party evidence required remand to trial court.]

16 [INSERT RELEVANT ARGUMENT IF APPLICABLE]

17 Resolution of these discovery issues is addressed to the sound discretion of the trial court.
18 (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535.)

19 III.

20 (OPTIONAL REPLY IF STATE LACKS POSSESSION/CONTROL)
21 DISCOVERY MUST BE IN THE POSSESSION AND CONTROL OF THE STATE

22 Section 745, subdivision (d) limits defendant’s motion for disclosure of evidence to that
23 which is in, “the possession or control of the state.” For purposes of the section, the “State”
24 includes the Attorney General, a district attorney, or a city prosecutor. (Pen. Code, § 745, subd.
25 (h)(4).) Here, the state does not possess and/or control [INSERT INFORMATION RELATED
26 TO INABILITY TO SEARCH FOR OR PRODUCE REQUESTED RECORDS. IE: VICTIM
27 RACE DATA NOT CAPTURED OR LACK OF COMPUTERIZED RECORDS MAKE
28 COLLECTION OF AGGREGATE DATA OVERLY BURDENSOME. PROVIDE

1 ALTERNATIVE SEARCH PARAMETERS IF APPROPRIATE. NOTE: State was defined in
2 the statute to include prosecution offices and may limit the breadth of "possession and control"
3 in a more limited way than defined by *Brady* and its progeny, but due to the remedies available
4 and their potential impact to reduce sentences or reverse convictions, *Brady* may still trump this
5 limitation and include the more expansive "prosecution team" approach].

6 IV.

7 PRIVILEGES AND STATUTORY OR CONSTITUTIONAL RESTRICTIONS
8 ON CRIMINAL DISCOVERY APPLY

9 Even if discovery is ordered under section 745, this does not entitle defendant to all
10 discovery materials. Section 745, subdivision (d) does not authorize discovery of information
11 that is privileged or protected by statute or constitution. The Act also permits the prosecution to
12 redact information prior to disclosure. (Pen. Code § 745, subd. (d).)

13 [INSERT SPECIFIC AUTHORITY AND ARGUMENTS REGARDING PRIVILEGED
14 OR RESTRICTED INFORMATION AND/OR NEED FOR REDACTION.]

15 V.

16 PENAL CODE SECTION 745 IDENTIFIES SPECIFIC VIOLATIONS
17 QUALIFYING FOR RELIEF UNDER THE SECTION

18 "The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a
19 sentence on the basis of race, ethnicity, or national origin."² (Pen. Code § 745, subd. (a).) To
20 that effect, while criminal proceedings are pending and before judgment has been imposed, a
21 defendant may file a motion in the trial court pursuant to section 745, subdivision (a). (Pen. Code, §
22 745, subd. (b).) After judgment is imposed, if defendant is in custody, a writ of habeas corpus
23 alleging violations of the Act can be brought in any court of competent jurisdiction. (Pen. Code, §§
24 745, subd. (b) and 1473, subd. (f).) If the defendant is out of custody after a judgment has been
25 imposed, then a motion to vacate a conviction or sentence is authorized by section 1437.7,
26

27 ² However, the statute does not prevent the prosecution of hate crimes pursuant to sections
28 422.6 to 422.865, inclusive. (Pen. Code, § 745, subd. (g).)

1 subdivision (a)(3). (Pen. Code, §§ 745, subd. (b) and 1473.7, subd. (a)(3).)

2
3
4 A violation of the Act is established if the defendant proves, by a preponderance of the
5 evidence, any of the following occurred:

6 (1) The judge, an attorney in the case, a law enforcement officer
7 involved in the case, an expert witness, or juror exhibited bias or
8 animus towards the defendant because of the defendant's race,
ethnicity, or national origin.

9 (2) During the defendant's trial, in court and during the proceedings,
10 the judge, an attorney in the case, a law enforcement officer involved
11 in the case, an expert witness, or juror, used racially discriminatory
12 language about the defendant's race, ethnicity, or national origin, or
13 otherwise exhibited bias or animus towards the defendant because of
14 the defendant's race, ethnicity, or national origin, whether or not
15 purposeful. This paragraph does not apply if the person speaking is
16 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.

17 (Pen. Code, § 745, subds. (a)(1)-(2).)

18 For purposes of section 745, subdivision (a)(2), the Act expressly defines "racially
19 discriminatory language" as:

20 Language that, to an objective observer, explicitly or implicitly
21 appeals to racial bias, including, but not limited to, racially charged
22 or racially coded language, language that compares the defendant to
23 an animal, or language that references the defendant's physical
24 appearance, culture, ethnicity, or national origin. Evidence that
25 particular words or images are used exclusively or
26 disproportionately in cases where the defendant is of a specific race,
ethnicity, or national origin is relevant to determining whether
language is discriminatory.

27 (Pen. Code, § 745, subd. (h)(3).)

1 Relief can also be sought under the Act when defendant proves, by a preponderance of
2 evidence, any of the following:

3 (3) The defendant was charged or convicted of a more serious
4 offense than defendants of other races, ethnicities, or national origins
5 who commit similar offenses and are similarly situated, and the
6 evidence establishes that the prosecution more frequently sought or
7 obtained convictions for more serious offenses against people who
8 share the defendant's race, ethnicity, or national origin in the county
9 where the convictions were sought or obtained.

10 (4) (A) A longer or more severe sentence was imposed on the
11 defendant than was imposed on other similarly situated
12 individuals convicted of the same offense, and longer or more
13 severe sentences were more frequently imposed for that offense
14 on people that share the defendant's race, ethnicity, or national
15 origin than on defendants of other races, ethnicities, or national
16 origins in the county where the sentence was imposed.

17 (B) A longer or more severe sentence was imposed on the
18 defendant than was imposed on other similarly situated
19 individuals convicted of the same offense, and longer or more
20 severe sentences were more frequently imposed for the same
21 offense on defendants in cases with victims of one race,
22 ethnicity, or national origin than in cases with victims of other
23 races, ethnicities, or national origins, in the county where the
24 sentence was imposed.

25 (Pen. Code, § 745, subds. (a)(1)-(4)(B).)

26 The Act defines "more frequently sought or obtained" or "more frequently imposed" as
27 requiring "statistical evidence or aggregate data demonstrate a significant difference in seeking
28 or obtaining convictions or in imposing sentences comparing individuals who have committed
29 similar offenses and are similarly situated, and the prosecution cannot establish race-neutral
30 reasons for the disparity." (Pen. Code, § 745, subd. (h)(1).)

31 If defendant believes that a violation of the Act has occurred, they must file a motion in a
32 court of competent jurisdiction to request an evidentiary hearing.

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34 ///

1 VI.

2 **TO ALLEGE A VIOLATION OF THE ACT, DEFENDANT MUST FILE A MOTION IN**
3 **A COURT OF COMPETENT JURISDICTION**

4 Pursuant to section 745, subdivision (b), "defendant may file a motion in the trial court
5 or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under
6 Section 1473.7 in a court of competent jurisdiction, alleging a violation of subdivision (a)."
7 However, the defendant must make a prima facie showing of a violation of subdivision (a),
8 before the trial court orders a hearing. (Pen. Code, § 745, subd. (c).) Section 745, subdivision
9 (h)(2) expressly defines what is required to make a prima facie showing of a violation of
10 subdivision (a):

11 "Prima facie showing" means that the defendant produces facts that,
12 if true, establish that there is a substantial likelihood that a violation
13 of subdivision (a) occurred. For purposes of this section, a
14 "substantial likelihood" requires more than a mere possibility, but
less than a standard of more likely than not.

15 (Pen. Code, § 745, subd. (h)(2).)

16 **[INSERT ARGUMENT HERE IF DEFENDANT HAS NOT MADE A PRIMA FACIE**
17 **CASE JUSTIFYING A HEARING]**

18 If a hearing is ordered, either party may present evidence which includes, but is not
19 limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of
20 witnesses. (Pen. Code, § 745, subd. (c)(1).) Since a defendant may share a race, ethnicity, or
21 national origin with more than one group, they may aggregate data among groups to
22 demonstrate a violation of subdivision (a). (Pen. Code, § 745, subd. (i).) The court may also
23 appoint an independent expert. (Pen. Code, § 745, subd. (c)(1).) To prevail on the motion, the
24 defendant must prove a violation of subdivision (a) by a preponderance of the evidence. (Pen.
25 Code, § 745, subd. (c)(2).) At the conclusion of the hearing, the court shall make findings on the
26 record. (Pen. Code, § 745, subd. (c)(3).)

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VII.

REMEDIES ARE AUTHORIZED UPON PROOF OF VIOLATION

If the court finds a violation by a preponderance of evidence, section 745, subdivision (e) mandates remedies:

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.

(Pen. Code, § 745, subds. (e)(1) and (e)(2).)

Additionally, section 745, subdivision (e)(3) provides that when the court finds there has been a violation of section 745, subdivision (a), the defendant shall not be eligible for the death

1 penalty. Subdivision (e)(4) also states that remedies available under this section do not foreclose
2 any other remedies available under the United States Constitution, the California Constitution,
3 or any other law.

4 VIII.

5 A WRIT OF HABEAS CORPUS IS AUTHORIZED FOR VIOLATIONS OF THE ACT 6 WHEN JUDGMENT HAS BEEN IMPOSED AND DEFENDANT IS IN CUSTODY

7 Pursuant to section 745, subdivision (b), a defendant, whose judgment has already been
8 imposed, may file a petition for writ of habeas corpus alleging a violation of section 745,
9 subdivision (a). AB 2542 also amended section 1473 to add subdivision (f), which provides
10 specific procedures relating to a post-judgment claim based on a violation of section 745,
11 subdivision (a). The new subdivision states:

12 (f) Notwithstanding any other law, a writ of habeas corpus may also be
13 prosecuted after judgment has been entered based on evidence that a
14 criminal conviction or sentence was sought, obtained, or imposed in
15 violation of subdivision (a) of Section 745 if judgment was entered on
16 or after January 1, 2021. A petition raising a claim of this nature for
17 the first time, or on the basis of new discovery provided by the state or
18 other new evidence that could not have been previously known by the
19 petitioner with due diligence, shall not be deemed a successive or
20 abusive petition. If the petitioner has a habeas corpus petition pending
21 in state court, but it has not yet been decided, the petitioner may amend
22 the existing petition with a claim that the petitioner's conviction or
23 sentence was sought, obtained, or imposed in violation of subdivision
24 (a) of Section 745. The petition shall state if the petitioner requests
25 appointment of counsel and the court shall appoint counsel if the
26 petitioner cannot afford counsel and either the petition alleges facts
27 that would establish a violation of subdivision (a) of Section 745 or the
28 State Public Defender requests counsel be appointed. Newly appointed
counsel may amend a petition filed before their appointment. The
court shall review a petition raising a claim pursuant to Section
745 and shall determine if the petitioner has made a prima facie
showing of entitlement to relief. If the petitioner makes a prima facie
showing that the petitioner is entitled to relief, the court shall issue an
order to show cause why relief shall not be granted and hold an
evidentiary hearing, unless the state declines to show cause. The
defendant shall appear at the hearing by video unless counsel indicates

1 that their presence in court is needed. If the court determines that the
2 petitioner has not established a prima facie showing of entitlement to
3 relief, the court shall state the factual and legal basis for its conclusion
4 on the record or issue a written order detailing the factual and legal
5 basis for its conclusion.

(Pen. Code, § 1473, subd. (f).)

6 To seek relief under section 1473 based on a violation of section 745, subdivision (a), the
7 petitioner must be "A person unlawfully imprisoned or restrained of their liberty..." (Pen. Code,
8 § 1473, subd. (a).) The judgment being challenged must have been entered on or after January 1,
9 2021. (Pen. Code, § 1473, subd. (f).) The petitioner must make a prima facie showing that their
10 criminal conviction or sentence was sought, obtained, or imposed in violation of section 745,
11 subdivision (a). (Pen. Code, § 1473, subd. (f).)

12 Generally, under section 1473, a petition must be timely and not procedurally barred. (*In*
13 *Re Clark* (1993) 5 Cal.4th 759; *In Re Robbins* (1998) 18 Cal.4th 770; Pen. Code, § 1473 subd.
14 (f).) Section 1473, subdivision (f), however, provides that a petitioner raising a violation of
15 section 745, subdivision (a) for the first time, or on the basis of new discovery provided by the
16 state or other new evidence that could not have been previously known by the petitioner with due
17 diligence, shall not be deemed a successive or abusive petition. Further, a petitioner, who already
18 has a habeas corpus petition pending in state court, may amend the existing petition with a claim
19 that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of section
20 745, subdivision (a). (Pen. Code, §1473, subd. (f).)

21 Section 1473, subdivision (f) also expands a petitioner's right to counsel in habeas corpus
22 proceedings. In their petition, the petitioner can request counsel be appointed. The court shall
23 appoint counsel if the petitioner cannot afford counsel and the petition alleges facts that would
24 establish a violation of section 745, subdivision (a) or the Public Defender requests counsel be
25 appointed. (Pen. Code, § 1473, subd. (f).) Further, newly appointed counsel can amend the
26 petition if it was filed before their appointment. (Pen. Code, § 1473, subd. (f).)

27 If the court determines the petitioner has not made a prima facie showing of entitlement to
28 relief, the court shall state the factual and legal basis for its conclusion on the record or issue a
written order detailing the factual and legal basis for its conclusion. (Pen. Code, § 1473, subd. (f).)

1 If, however, the court determines the petitioner has made the requisite prima facie showing,
2 it shall issue an order to show cause why relief should not be granted and hold an evidentiary
3 hearing. (Pen. Code, § 1473, subd. (f).) After issuing the order to show cause, the state can decline
4 to show cause or file a Return. (Pen. Code, §§ 1473, subd. (f) and 1480). If the state elects to file a
5 Return, then the defendant may file a Traverse in response. (Pen. Code, § 1484.)

6 At the evidentiary hearing, the petitioner must appear via video unless counsel indicates the
7 petitioner's presence is necessary. (Pen. Code, § 1473 subd. (f).) The rules of evidence apply at the
8 hearing. (*In Re Fields* (1990) 51 Cal.3d 1063, 1070.) The petitioner must prove by a preponderance
9 of the evidence facts that establish a violation of section 745, subdivision (a) and entitle them to
10 relief. (*In Re Viscotti* (1996) 14 Cal.4th 325, 351.) If the petitioner succeeds in meeting their
11 burden, the court has the available remedies provided in section 745, subdivisions (e)(2)(A),
12 (e)(2)(B), (e)(3), and (e)(4).³ Section 745, subdivisions (e)(2)(A) and (B) state:

13 (2)(A) When a judgment has been entered, if the court finds that a
14 conviction was sought or obtained in violation of subdivision (a),
15 the court shall vacate the conviction and sentence, find that it is
16 legally invalid, and order new proceedings consistent with
17 subdivision (a). If the court finds that the only violation of
18 subdivision (a) that occurred is based on paragraph (3) of
19 subdivision (a) and the court has the ability to rectify the
20 violation by modifying the judgment, the court shall vacate the
21 conviction and sentence, find that the conviction is legally
22 invalid, and modify the judgment to impose an appropriate
23 remedy for the violation that occurred. On resentencing, the court
24 shall not impose a new sentence greater than that previously
25 imposed.

26 (B) When a judgment has been entered, if the court finds that
27 only the sentence was sought, obtained, or imposed in violation
28 of subdivision (a), the court shall vacate the sentence, find that it
is legally invalid, and impose a new sentence. On resentencing,

³ As discussed above, section 745, subdivision (e)(3) provides that when the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty. Subdivision (e)(4) also states that remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

1 the court shall not impose a new sentence greater than that
2 previously imposed.

3 **IX.**

4 **A MOTION IS AUTHORIZED FOR VIOLATIONS OF THE ACT WHEN JUDGMENT**
5 **HAS BEEN IMPOSED AND DEFENDANT IS OUT OF CUSTODY**

6 Section 745, subdivision (b) allows a petitioner to file a motion under section 1473.7 in a
7 court of competent jurisdiction alleging a violation of section 745, subdivision (a). AB 2542 also
8 amended section 1473.7, subdivisions (a) and (c) to provide specific procedures relating to a
9 post-judgment claim based on a violation of section 745, subdivision (a) for those persons no
10 longer in criminal custody. Section 1473.7, subdivision (a)(3) reads in relevant part: "A person
11 who is no longer in criminal custody may file a motion to vacate a conviction or sentence for
12 any of the following reasons: ... [] A conviction or sentence was sought, obtained, or imposed
13 on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745."
14 Subdivision (c) was amended to provide that: "A motion pursuant to paragraph (2) or (3) of
15 subdivision (a) shall be filed without undue delay from the date the moving party discovered, or
16 could have discovered with the exercise of due diligence, the evidence that provides a basis for
17 relief under this section or Section 745."

18 All motions filed pursuant to the statute are entitled to a hearing. (Pen. Code, § 1473.7,
19 subd. (d).) However, if the prosecution has no objection to the motion, the court may grant the
20 motion without a hearing. (Pen. Code, § 1473.7, subd. (d).) If there is a contested hearing, the
21 petitioner's presence may be waived upon request of the petitioner and a showing of good cause as
22 to why they could not be present. (Pen. Code, § 1473.7, subd. (d).) At the hearing, the petitioner
23 must establish by a preponderance of the evidence the existence of grounds for relief specified in
24 section 1473.7, subdivision (a). (Pen. Code, § 1473.7, subd. (e)(1).) In other words, in the context
25 of a challenge based on racial bias, the petitioner must prove any of the stated bases listed in
26 section 745, subdivision (a) occurred.

27 If the court finds the petitioner has proved by a preponderance of the evidence that their
28 motion is timely, the petitioner is no longer in criminal custody, and their conviction or sentence

1 was sought, obtained or imposed on the basis of race, ethnicity, or national origin in violation of
2 section 745, subdivision (a), then the court must vacate the conviction and reinstate criminal
3 proceedings or vacate the sentence and resentence the petitioner as outlined in section 745,
4 subdivision (e).

5 **CONCLUSION**

6 **[INSERT CONCLUSION]**

7 Dated: XXX XX, 2020 Respectfully Submitted,

8 X X
9 District Attorney

10 X X
11 Deputy District Attorney

12 Attorneys for Plaintiff (The People)