



CDAALegislation Committee Recommendation Form 2020

Bill No.: AB 2200

Author: Assemblyperson Kalra

Bill Date: Amended March 10, 2020

I. Description of Bill:

New Penal Code section 745

This bill creates a new statute which prohibits the “State”* from seeking or obtaining a criminal conviction, juvenile commitment, or sentence “on the basis of race, ethnicity, or national origin.”

(Proposed Pen. Code, § 745(a)&(f).)

*The “State” includes the Attorney General, a district attorney, a city prosecutor, *or a superior court judge.*

(Proposed Pen. Code, § 745(h)(3).)

The bill then defines what needs to be proved to establish a violation of the statute – albeit in a way that *largely ignores* the race, ethnicity, or national origin of the victims or witnesses to the crimes, deprives *all* members of society of justice notwithstanding indisputable and overwhelming evidence of a defendant’s guilt, and upends convictions *despite a lack of any* showing the state actually sought or obtained a conviction based on race, ethnicity or national origin.

The violation of the statute can be 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 was biased against a defendant because of the defendant’s race, ethnicity, or national origin.”

“(2) In court and during the criminal 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* or otherwise demonstrated bias or animus based on race, ethnicity, or national origin, whether or not purposeful or directed at a defendant.”*

*“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 a person of color or of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.” (Proposed Pen. Code, § 745(h)(3).)]

(3) Race, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant *need not show that purposeful discrimination occurred* in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).

(4) The prosecution sought or obtained a conviction for an offense for which convictions are more *frequently sought or obtained** against people who share the defendant’s race, ethnicity, or national origin than for defendants of other races, ethnicities, or national origins in the state or in the county where the convictions were sought or obtained.

*“More frequently sought or obtained” or “more frequently imposed” is defined as meaning “statistical evidence or aggregate data [which] demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences and the prosecution cannot establish race-neutral reasons for the disparity.” (Proposed Pen. Code 745(h)(3).) And because “[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).” (Proposed Pen. Code, § 745(h)(i).)

(5) (A) “A longer or more severe sentence was imposed on the defendant than was imposed on other 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 state or the country where sentencing occurred.

(5) (B) A longer or more severe sentence was imposed on the defendant than was imposed on other 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 another race, ethnicity, or origin, in the state or in the county where the sentence was imposed.” (Proposed Pen. Code, § 745(b)(1)-(5).)

Pending Cases

The bill would allow a defendant to file a motion in the trial court alleging a violation of section 745 in a pending case. (Proposed Pen. Code, § 745(c).) Either before or after filing the motion, the defendant can file a written request for discovery. The request (without any further showing) would *automatically* require the prosecution to “disclose to the defense all evidence relevant to a potential violation of subdivision (a).” (Proposed Pen. Code, § 745(d).) And, “if the prosecution has reason to believe that relevant evidence is in the possession of *another* law enforcement agency, the prosecution [would be required to] request that information and disclose it to the defense.” (*Ibid*, emphasis added.) The prosecution could potentially redact the information but only after a hearing in which the prosecution establishes good cause for the redaction. (*Ibid*.)

Without the defendant having to do anything more than file a motion (i.e., no preliminary showing of discriminatory conduct would be necessary), the court would be required to “hold a hearing and make findings on the record.” (Proposed Pen. Code, § 745(c).)

At the hearing, the defendant would “have the burden of proving a violation of subdivision (a) by a preponderance of the evidence.” (Proposed Pen. Code, § 745(c).) The rules of evidence may or may not apply at the hearing. The statute states: “[e]vidence may be presented in the form of statistical evidence, aggregate data at the state or county level, the sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system, *or in any other form* the court deems relevant and appropriate.” (*Ibid*.) The prosecution may offer evidence in rebuttal of the defendant’s evidence, including statistical evidence or evidence of training and policies to address explicit or implicit bias. (*Ibid*.)

The bill allows a court to “appoint an independent expert” but does not identify any limitations on who can be appointed an expert, what the expert could attest to, or even what kind of expert may be appointed. (*Ibid*.)

If the court finds ANY of the circumstances identified in subdivision (a) (see pp. 1-2 of this analysis), it states the following remedies *shall* be imposed when there has not been a final conviction: “the court may reseal a juror removed by use of a peremptory challenge, declare a mistrial, discharge the jury panel and empanel a new jury, or dismiss or reduce charges. Monetary sanctions and training alone are not sufficient as a remedy.” (Proposed Pen. Code, § 745(e)(1).) If the case is a capital case, and “the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.” (Proposed Pen. Code, § 745(e)(1).)

Post-Conviction and (Apparently) Even Final Cases

This bill would be retroactive, allowing defendant with final judgments to “file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction based on evidence of a violation of subdivision (a).” (Proposed Pen. Code, § 745(c).)

It is not clear whether the rules governing writs of habeas corpus or motions made pursuant to section 1473.7 would govern or whether the showing would be the same as when the motion was made in a pending case (see Proposed Pen. Code, § 745(c)). Language proposed in the newly amended Penal Code section 1473 *suggests* that the defendant would have to make a prima facie showing to obtain a hearing (see Proposed Pen. Code, § 1473(f)) but there is some ambiguity.

It is likely that the defendant could file a written request for discovery in the post-conviction context that, without any further showing, would *automatically* require the prosecution to “disclose to the defense all evidence relevant to a potential violation of subdivision (a).” (Proposed Pen. Code, § 745(d).) And, “if the prosecution has reason to believe that relevant evidence is in the possession of *another* law enforcement agency, the prosecution [would be required to] request that information and disclose it to the defense.” (*Ibid*, emphasis added.) The prosecution could potentially redact the information but only after a hearing in which the prosecution establishes good cause for the redaction. (*Ibid*.)

At the post-conviction hearing, the defendant would “have the burden of proving a violation of subdivision (a) by a preponderance of the evidence.” (Proposed Pen. Code, § 745(c).) The rules of evidence may or may not apply at the hearing. The statute states: “[e]vidence may be presented in the form of statistical evidence, aggregate data at the state or county level, the sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system, *or in any other form* the court deems relevant and appropriate.” (*Ibid*.) The prosecution may offer evidence in rebuttal of the defendant’s evidence, including statistical evidence or evidence of training and policies to address explicit or implicit bias. (*Ibid*.)

The bill allows a court to “appoint an independent expert” but does not identify any limitations on who can be appointed an expert, what the expert could attest to, or even what kind of expert may be appointed. (*Ibid*.)

If the court finds ANY of the circumstances identified in subdivision (a) (see pp. 1-2 of this analysis), when there has been a final conviction or sentence, then court must “vacate the conviction and sentence, find that it is legally invalid, and remand the case for new proceedings consistent with

subdivision (a).” (Proposed Pen. Code, § 745(e)(2)(A).) However, if the case is a capital case, and “the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.” (Proposed Pen. Code, § 745(e)(3).)

If the court finds ANY of the circumstances identified in subdivision (a) (see pp. 1-2 of this analysis), when there has been a final conviction or sentence, but “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 remand the case for resentencing consistent with subdivision (a). On remand, the court shall not impose a new sentence greater than that previously imposed.” (Proposed Pen. Code, § 745(e)(2)(B).) However, if the case is a capital case, and “the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty.” (Proposed Pen. Code, § 745(g).)

Without specifying whether a prosecutor could seek or obtain a criminal conviction, juvenile commitment, or sentence in violation of subdivision (a) if the prosecution was for a “hate crime”, the bill states: “This section shall not prevent the prosecution of hate crimes pursuant to Sections 422.6 to 422.865, inclusive.” (Proposed Pen. Code, § 745(e)(3).)

Amended Penal Code section 1473

The bill also amends Penal Code section 1473, which defines when a person may proceed on a writ of habeas corpus, to add a new basis for the writ. Specifically, it adds a new subdivision that allows a writ of habeas corpus to “be prosecuted based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745.” (Proposed Pen. Code, § 1473(f).)

“A petition raising a claim of this nature for the first time, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed successive.” (Proposed Pen. Code, § 1473(f).)*

*This provision is included to circumvent the general bar against successive writs of habeas unless the petitioner justifies the delay in seeking relief or demonstrates that “a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence.” (*Gomez v. Superior Court* (2012) 54 Cal.4th 293, 308.)

“If the petitioner already has a habeas corpus petition on file in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner’s conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. (Proposed Pen. Code, § 1473(f).)

“The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if requested. Newly appointed counsel may amend a petition filed before their appointment.” (Proposed Pen. Code, § 1473(f).)

“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.” (Proposed Pen. Code, § 1473(f).)

“If the court determines that the petitioner has not established a prima facie showing of entitlement to 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.”

II. Position Recommendation:

D. This is an absolutely must oppose at all costs even though proponents may attempt to distort the reasons for the opposition. The judges need to be made aware of this.

III. Basis of Recommendation:

1. The statute purports to prohibit the state from seeking or obtaining convictions, commitments and sentences based on race, ethnicity, or national origin. If this is what the statute *genuinely* did, then it would be superfluous because the equal protection component of the Due Process Clause of the Fifth Amendment already precludes basing the decision to prosecute on “an unjustifiable standard such as race, religion, or other arbitrary classification[.]” (*United States v. Armstrong* (1996) 517 U.S. 456, 464.) And “[t]he Fourteenth Amendment of the federal Constitution, and article I, section 7, subdivision (a) of the California Constitution [already] prohibit all state action which denies to any person the ‘equal protection of the laws.’” (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294, bracketed information added.)

Criminal defendants already have a remedy to prevent a prosecution if they can “demonstrate that the administration of a criminal law is ‘directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive’ that the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.” (*Ibid*; see also *United States v. Christopher* (9th Cir. 1983) 700 F.2d 1253, 1258 [“A defendant cannot stand convicted if there is unconstitutional discrimination in the administration of the penal statute.”].) Moreover, prosecutors are barred by state rules of professional conduct from charging a defendant with

crimes that the prosecutor knows are not supported by probable cause. (CA ST RPC Rule 3.8(a).)

The use of peremptory challenges to strike prospective jurors on the basis of group bias is already prohibited because it violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79; see also Code Civ. Proc., § 231.5; *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1165 [prohibiting removal of jurors even if prosecutor has mixed motives if one motive for challenge is discriminatory in purpose].)

2. **Proposed Penal Code section 745(a)** prohibits the *state* from seeking or obtaining a criminal conviction, juvenile commitment, or sentence “on the basis of race, ethnicity, or national origin.” However, the section defines the “state” to include “*a superior court judge.*” (Proposed Pen. Code, § 745(h)(3).)

Whether or not this reflects an unfamiliarity with the criminal justice system or a warped worldview of the system, *judges* do not seek or obtain criminal convictions. And grouping the executive branch in with the judicial branch in this manner likely runs afoul of the separation of powers doctrine. (See *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1542-1543 [discussing why prosecution's authority to charge “is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.”].)

In any event, the law already prevents convictions when a judge is shown to be biased based on harboring prejudices that prevent a fair trial. The due process right to an impartial judge is violated when a judge holds preexisting biases or prejudices against the class of persons. (See e.g., *Berger v. United States* (1921) 255 U.S. 22, 28 [judge's expressed belief that “German-Americans [...] ... hearts are reeking with disloyalty” barred judge from presiding over espionage trial against German-American defendants]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [noting due process prohibits sentencing based on race, religion, political affiliation, or other factors that are constitutionally impermissible or irrelevant to the sentencing process]; see also Code of Judicial Ethics, Canon 3(B)(5) [requiring judges “to perform judicial duties without bias or prejudice” and prohibiting judges from “engaging in speech, gestures, or other conduct

that would reasonably be perceived as bias, prejudice, or harassment, including, but not limited to bias, prejudice, or harassment based on race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, political affiliation, or sexual harassment”].)

3. The bill purports to prevent the state from seeking or obtaining a conviction on the basis of race, ethnicity, or national origin. But the state is not seeking or obtaining a conviction on this basis when it is the *defense counsel* or a *juror* who is biased.

In any event, setting aside this disconnect, section 1(d) in the “Declarations and Findings” portion of AB 2200 alleges that “[e]xisting precedent has provided no recourse for a defendant whose own attorney harbors racial animus towards the defendant’s racial group, or toward the defendant, citing to *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915.) This is incorrect. The law already provides effective remedies when a defendant is harmed as a result of a defense attorney being racially biased. (See e.g., *Frazer v. United States* (9th Cir. 1994) 18 F.3d 778, 784 [Sixth Amendment right to appointed counsel violated when attorney “explicitly assaults his client with racial slurs and makes threatening and improper statements to the client capable of overriding the client’s own judgment as to how he should exercise his various rights”]; *Ellis v. Harrison* (9th Cir. 2020) 947 F.3d 555, 556 [granting habeas relief based, inter alia, on claim *same* defense counsel in *Mayfield* was biased against client and concession from the Attorney General].)

Note: Based on a global Westlaw search, cases involving claims that a *defense attorney* was racially or ethnically biased against his client are extraordinarily rare.

Similarly, the law already provides for removal of a juror when a juror is determined to be biased against a defendant based on race, ethnicity or nationality. (See *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 78 [“Although jurors are entrusted to evaluate the credibility of witnesses, they may not do so based on prejudice or stereotype. Nor may they apply differing standards to the consideration of different witnesses.”]; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 111 [new trial based on concealment of racial bias by juror].)

4. Proposed **Penal Code section 745(b)(1)**, in conjunction with proposed **section 745(e)(1)**, would *require* either the granting of a mistrial, the dismissal of a case, or a reduction in charges* if a judge, attorney, law enforcement officer involved in the case, expert witness, or juror was biased against a defendant because of defendant’s race, ethnicity, or national origin - ***without any showing*** that the defendant suffered any prejudice as a result of the bias, that

the bias has any impact whatsoever on the outcome of the trial, or that the defendant was deprived of a fair trial!

*Note: The bill also authorizes the reseating of a juror removed by use of a peremptory challenge or discharge of the jury panel as a remedy, but presumably those sanctions would not be applicable as a sanction for bias not reflected in jury selection.

These remedies would be imposed if the biased participant was a law enforcement officer even if the officer was never called as a witness!!

This is inconsistent with the current standard for granting a mistrial or reversing a conviction for prosecutorial misconduct which requires a showing based on *actual* misconduct resulting in actual prejudice and not merely on harboring a bias that does not manifest itself in any objectionable conduct or prejudice to the defendant. (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 564 [“Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice.”]; *People v. Zapien* (1993) 4 Cal.4th 929, 966-967 [although prosecutor engaged in improper conduct in destroying cassette prepared by defense counsel that had inadvertently been left in a county car, dismissal of case unjustified where no showing defendant suffered prejudice as a result of the misconduct].)

A standard that does not require some showing the bias prejudiced the defendant is illogical and can produce horrific results. For example, under this bill, if there is a mass shooting and it comes to light that a law enforcement officer (who merely took an undisputed videotaped statement from a witness or helped serve a search warrant in the case that did not turn up evidence) was biased against the defendant, there would have to be a mistrial or dismissal and capital punishment could not be imposed regardless of whether 50 people observed the defendant doing the shooting, the law enforcement officer did not even testify, and all the people murdered belonged to the same group as the defendant. This is insanity!

Similarly, if an expert witness who testifies in that same hypothetical case to *undisputed* scientific conclusions turns out to be biased against the defendant because of defendant’s ethnicity, what benefit does it serve (other than to produce a windfall for an incontrovertibly guilty defendant) to require a mistrial or dismissal.

5. Proposed **Penal Code section 745(b)(2)**, in conjunction with proposed **section 745(e)(1)**, would require either the granting of a mistrial, the dismissal of a case, or a reduction in charges* if, “[i]n court and during the criminal 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 or otherwise demonstrated bias or animus based on race, ethnicity, or national origin, whether or not purposeful or directed at a defendant.”

*Note: See note, top of page 9.

This provision is largely duplicative of subdivision (b)(1) because it *also* permits sanctions based on a showing a participant in the trial “otherwise demonstrated bias or animus based on race, ethnicity, or national origin . . .” (Proposed Pen. Code, § 745(b)(2).) And all the reasons for why subdivision (b)(1) would *unnecessarily* disrupt the justice system (e.g., the existence of law that already can remedy bias and the failure to require a showing of prejudice to the defendant arising from bias) apply with equal force to subdivision (b)(2). However, subdivision (b)(2) is even more far-reaching and irrational than subdivision (b)(1).

Under subdivision (b)(2), if it is shown a judge, attorney, law enforcement officer, expert witness or juror used racially discriminatory language during criminal proceedings *regardless of whether that language had anything to do with the defendant or the group to whom the defendant belongs*, the drastic remedies would have to be imposed. What makes this aspect even more of a nightmare is that the definition of “racially discriminatory language” is not confined to easily identified racially or ethnically based slurs or epithets or even statements endorsing obviously negative entrenched stereotypes. Rather, it can be 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 a person of color or of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.” (Proposed Pen. Code, § 745(h)(3), *emphasis added*.)

This provision effectively assumes that language that analogizes a defendant to an animal or language that references the defendant’s physical appearance, culture, ethnicity, or national origin is racially discriminatory language even though the reference **reflects no bias (implied or express) whatsoever**.

Section 1 (e) of the bill states that “[b]ecause 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.” This ignores the fact that the English language is

replete with sayings, parables, and comparisons to animals – many of which are legitimately and commonly used in closing argument by all attorneys.

For example, to illustrate why a defendant committed a crime even though it might not benefit the defendant, the defendant is sometimes compared to a scorpion who after arranging a deal with a frog to get across a river on the back of a frog stings the frog before they reach the other side because that is just what a scorpion does. To rebut a defendant's claim that while on prior occasions he may have raped a victim, he did not do so in the pending incident, a prosecutor may refer to the fact that a tiger cannot change its stripes. To explain why a jury should not reach a decision based on the calm appearance of a defendant in a controlled setting like a courtroom, prosecutors may explain that how a lion acts in captivity is very different than how a lion acts in the wild. (This is an argument that asks the jury *not* to consider defendant's physical appearance.) When discussing how a defendant who ambushed a victim concealed himself and acted in a stealthy manner, the defendant can be compared to a panther or shark. To describe the tactic of a child molester who groomed a child victim under the guise of being a helpful teacher or coach, a prosecutor may describe the molester as a wolf in sheep's clothing. When describing the *behavior of* defendants who murder, torture, or mutilate innocent victims, prosecutors will routinely compare a defendant to beasts who lack a conscious or moral code in the penalty phase of a trial. These are all proper rhetorical devices that if disallowed (or unused out of fear the statements will be twisted into a false accusation of express bias or from fear of having to endure a lengthy hearing on whether this argument reflects implied bias) will act to unfairly dissuade and handicap prosecutors in making legitimate arguments. (See *People v. Young* (2005) 34 Cal.4th 1149, 1195 ["A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury."]; *People v. Williams* (1997) 16 Cal.4th 153, 221 ["prosecutor's "laughing hyenas" epithet does not seem beyond the pale, in light of evidence that the occupants of the van were laughing and joking about doing injury to the victim just prior to his death"].) And this bar against use of such terms is a one-way street – the bill does not prohibit even blatantly racist defense arguments or appeals based on the race, ethnicity, or nationality of the victims!

References to a defendant's physical appearance, culture, ethnicity, or national origin may be necessary to explain conduct and behavior on the part of the victim and the defendant. For example, in a sexual assault case, a description of the defendant's size and weight in comparison to the victim's size and weight can help explain why the victim did not resist

intercourse despite the lack of threat. If the defendant and victim belong to the same culture and there is a greater stigma attached to being a victim of sexual assault in the particular culture, reference to the cultural background can help explain why the defendant would believe the crime would go unreported. More commonly, references to a defendant's physical appearance, race, ethnicity, or national origin must be made when discussing the validity of an identification of the defendant.

Moreover, as any linguist will tell you, the meaning of words *in general* is constantly in flux. (See A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at p. 78 [“Words change meaning over time, and often in unpredictable ways”].) In particular, the language of race -- constructed variously in science, law, politics and culture -- has always been a moving target. Thus, it is easy to find articles espousing disputed opinions that “particular words” are racially coded or “are used exclusively or disproportionately in cases where the defendant is a person of color or of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.” For example, a quick search on the internet will turn up opinions alleging that the word “thug” (a term commonly used to describe someone who engages in a lot of criminal behavior without reference to race, ethnicity, or national background) is a “coded” (i.e., superficially neutral but implicitly racial) term. Whether or not this is true, the word can still be used without any such intent.

Imagine how the hearing will proceed when the question is whether a juror who, during jury deliberations, stated a reluctance to believe a witness because the witness is a “just a thug” or when the question is whether a prosecutor's quoting a witness who testified he did not originally come forward because he knew the defendant hung out with thugs who would retaliate against him. First, there would likely have to be expert testimony that the term is, in fact, a coded racial term. Second, since “[e]vidence that particular words or images are used exclusively or disproportionately in cases where the defendant is a person of color or of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory,” there would have to be expert testimony in this regard as well – especially as to terms that may not have previously had a hidden meaning but are in the process of evolving into coded terms. Expert testimony might then be needed to counter the defense expert testimony. (The bill's drafters likely anticipated this - which may be one of the reasons that section 745(c) specifically allows a court to “appoint an independent expert”.) Third, unless the juror or prosecutor stated that he or she used the term with a racial intent, there would have to be an exploration of the juror's or prosecutor's hidden intent and alleged implicit bias to help

assess whether an “objective” observer would view use of the term as an explicit or implicit appeal to racial bias. The hearing could easily go on longer than the trial itself.

*Note: From a purely technical drafting perspective, the language of proposed section 745(h)(2) is confusing. It defines “racially discriminatory language” as language that “appeals to racial bias” but then describes such language as including references to, inter alia, the defendant’s “culture, ethnicity, or national origin. It would make more sense to simply use the term “discriminatory language” and define it more broadly to preclude appeals to racial or other forms of bias the drafters want to prohibit.

Another troubling aspect of subdivision (h)(2) is the reference to “people of color.” That subdivision states, inter alia, “Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant *is a person of color* or of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.” Since everyone belongs in whole or in part to some specific race, ethnicity, or national origin, why is there a reference to a “person of color.” It appears superfluous. If a “person of color” refers to individuals who do not belong to a “specific” race, ethnicity or national origin, then perhaps it was meant to refer to individuals who do not belong to a *single* race, ethnicity, or nationality. But if that is case, then the term “person of color” seems an odd turn of phrase to use. (See *People v. Neuman* (2009) 176 Cal.App.4th 571, 579-580 [rejecting defense claim that “people of color” is a cognizable group under *Batson* or *Wheeler* and pointing out that in portions of California, “combining all members of minority groups may obliterate their status as members of a group that is in the minority”]; *People v. Davis* (2009) 46 Cal.4th 539, 583 [rejecting defendant’s contention that the trial court erred by ruling that “people of color” is not a cognizable group for *Wheeler* analysis].) Moreover, use of the term is controversial. (See <https://slate.com/human-interest/2019/02/people-of-color-phrase-history-racism.html>; <https://www.latimes.com/opinion/op-ed/la-oe-widatalla-poc-intersectionality-race-20190428-story.html>.)

The term “people of color” is not defined in the proposed statute. But the Oxford English Dictionary defines “person of color” as “a person who is not white or of European parentage.” (See <https://www.insider.com/the-internet-is-debating-who-to-call-people-of-color-2018-11>.) If that is the intended meaning, then the statute would be providing disparate protection against discrimination based on whether the defendant was a member of one group versus another. Perhaps the term was included based on the implicit assumption of the drafters that only certain groups merit protection from discrimination? If so, then a statute purportedly designed to eliminate bias, including implied bias, from the criminal justice system would (ironically) not only indisputably violate the equal protection clauses of the federal (see

U.S.C.A. Const. Amend. 14) and state constitution (see Cal. Const. Art. 1, § 7(a) & § 31), it arguably reveals some implied bias on the part of the drafters.

6. Proposed **Penal Code section 745(b)(3)**, in conjunction with proposed **section 745(e)(1)**, would require the reseating of a juror removed by use of a peremptory challenge, discharge of the jury panel, the granting of a mistrial, or dismissal or reduction of the charges if “[r]ace, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).” (Proposed Pen. Code, § 745(b)(3).)

- It is not clear what it means for race, ethnicity or national origin to be a “factor in the exercise of peremptory challenges.” If a juror is challenged because the juror provides answers indicating the *juror* could not be fair due to the racial or ethnic background of the defendant, a victim, or a witness, will “race or ethnicity” be deemed to be a “factor” in the exercise of the challenge. If what the drafters mean to do is to prevent an attorney from exercising a challenge based on improper grounds even if there may be other legitimate reasons for challenging the juror, then this aspect is unnecessary as that is already the law in California. (See *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1164.)
- More disconcerting is the elimination of the requirement of *purposeful* discrimination. Under this new standard, society, victims of crimes, and prosecutors must suffer sanction even without any intentional discrimination!*

*Note: It is worthwhile mentioning that such a standard is at odds with one of the basic equitable principles built into our justice system: the requirement of mens rea on the part of the actor before imposition of sanctions. “Generally, “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence.’ ...” [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. [Citations.] “So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication.” (*In re Jennings* (2004) 34 Cal.4th 254, 267, quoting *In re Jorge M.* (2000) 23 Cal.4th 866, 872.) It is true that, in some instances, the legislature will create strict liability offenses, usually when necessary for the protection of the public health and safety, e.g., traffic and food and drug regulations. (*Ibid.*) But the modern trend is not to impose strict liability. (*Ibid.*) And, in any event, “[t]hese offenses usually involve *light penalties and no moral obloquy or damage to reputation.* (*Ibid.*, emphasis added.) This is not the case when it comes to findings that a prosecutor engaged in discriminatory jury selection.

The current purposeful discrimination standard is not only well established but has been repeatedly exercised over the years in California and across the nation to ferret out

discriminatory jury selection and reverse cases. The standard not only renders impermissible challenges based on racial, ethnic, religious, nationality or gender bias of the attorneys but challenges based on attorneys' assumptions that jurors hold certain views based on their membership in a group, i.e., equal protection principles preclude the State from striking jurors who share the racial identity of the defendant based on assumptions that those jurors will be biased towards their own race. (See *Flowers v. Mississippi* (2019) 139 S. Ct. 2228, 2241-2242.)

In *Miller-El v. Dretke* (2005) 545 U.S. 231, the United States Supreme Court reversed a Texas death penalty conviction on the basis of prosecutorial racial bias against African Americans in jury selection. The opinion established a clear set of bases upon which to evaluate, and ultimately prove, purposeful discrimination; moreover, it created new factors to use in this process, such as disparate questioning of different racial groups of jurors, and historical practices of the entire prosecutorial office. *Miller-El's* clear and robust authority has been established law now for 15 years. More recently, the California Supreme Court in *People v. Gutierrez* (2017) 2 Cal.5th 1150, *unanimously reversed* a conviction, holding that the prosecutor's explanation of a strike of a Hispanic juror was insufficient to show the strike was not improperly racially motivated. In *Gutierrez*, the state's High Court took "an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*Id.* at p. 1154.) The opinion reaffirmed the standard of purposeful discrimination. (*Id.* at p. 1158.) In doing so, it noted that this final step of *Batson-Wheeler* jurisprudence "focuses on the subjective genuineness of the reason, not the objective reasonableness [citing *People v. Reynoso* (2003) 31 Cal.4th 903, 924]." (*Gutierrez* at p. 1158.) To toss such a well-established federal and California subjective standard for an objective one would not only upend decades of clear authority (that has worked to correct and deter discriminatory behavior by either side), but would create such a vague new standard as to require (as AB 2200 specifically contemplates) expert testimony in nearly every trial court motion attacking jury selection. And such a change is also intellectually illogical: if a lawyer's subjective bias is impermissible, and being sought to be discovered and corrected, then the natural focus of an investigation of it must begin and end with that lawyer's subjective attitudes, based on the trial record and court inquiry.

This bill, read in conjunction with AB 3070, would replace the long-established state and federal precedent standard of purposeful discrimination with an objective standard, e.g., whether an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge. (That is the express standard noted in AB 3070, along with its attempt to disallow many long-established racially neutral bases for juror challenges – such as negative

experience with law enforcement – as being pretextual reasons for implicit bias.) The switch to an objective standard in both bills, as well as AB 3070’s express exclusion of many long-established bases for juror challenges, appears to directly stem from a change in Washington state procedure (Wash.Gen.R.37). (See *State v. Jefferson* (2018) 429 P.3d 467).

- The drafters assert that established case law requiring a showing of purposeful discrimination to prove racial bias in jury selection is too high a standard that is “nearly impossible to establish.” (AB 2200, section 1(c).) This claim is false.

Indeed, the two most recent cases before the United States Supreme Court involving claims of discriminatory use of jury challenges found *Batson* violations under the *current* standard. (See e.g., *Flowers v. Mississippi* (2019) 139 S.Ct. 2228, 2243; *Foster v. Chatman* (2016) 136 S.Ct. 1737; see also *Snyder v. Louisiana* (2008) 552 U.S. 472; *Miller-El v. Dretke* (2005) 545 U.S. 231.) Although the California Supreme Court has issued only one *recent* opinion finding a *Batson-Wheeler* violation (*People v. Gutierrez* (2017) 2 Cal.5th 1150), it has previously issued multiple opinions reversing cases for *Batson* or *Wheeler* violations (see e.g., *People v. Silva* (2001) 25 Cal.4th 345; *People v. Fuentes* (1991) 54 Cal.3d 707; *People v. Snow* (1987) 44 Cal.3d 216; *People v. Turner* (1986) 42 Cal.3d 711; *People v. Trevino* (1985) 39 Cal.3d 667; *People v. Motton* (1985) 39 Cal.3d 596; *People v. Hall* (1983) 35 Cal.3d 161; and *People v. Johnson* (1978) 22 Cal.3d 296.) And, in any event, there is a good reason for why *reversals* by the California Supreme Court are not common. As explained in *People v. Harris* (2015) 57 Cal. 4th 804:

“In response to the general comments in Justice Liu’s concurring opinion about this court’s *Batson/Wheeler* jurisprudence, and his suggestion that trial judges and appellate courts, or at least this court, have not adequately addressed racial discrimination that is occurring during jury selection in California’s courts, it is true that this court has rejected most claims of *Batson/Wheeler* error during the last two decades. We note, however, that ***trial court rulings sustaining a Batson/Wheeler objection rarely if ever see appellate review or even mention in an appellate opinion; only trial court rulings finding no improper use of peremptory challenges are reviewed in appellate opinions.*** As the high court observed in *Batson*, “We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” (*Batson, supra*, 476 U.S. at p. 97, 106 S.Ct. 1712.) Each case raising a *Batson/Wheeler* issue is considered on its own merits. As here, we have carefully reviewed the record and considered the question closely in every case before us raising this issue.” (*Harris* at p. 838, emphasis added.)

Significantly, it is not uncommon for lower California appellate courts to reverse cases for *Batson-Wheeler* violations under the current standards. (See e.g., *People v. Douglas* (2018) 22

Cal.App.5th 1162; *People v. Arellano* (2016) 235 Cal.App.4th 1139; *People v. Cisneros* (2015) 234 Cal.App.4th 111; *People v. Long* (2010) 189 Cal.App.4th 826; *People v. Gonzales* (2008) 165 Cal.App.4th 620; *People v. Allen* (2004) 115 Cal.App.4th 542; *People v. Turner* (2001) 90 Cal.App.4th 413; *People v. Cervantes* (1991) 233 Cal.App.3d 323; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186; *People v. Granillo* (1987) 197 Cal.App.3d 110; *People v. Fuller* (1982) 136 Cal.App.3d 403; *People v. Dixon* (unreported) 2019 WL 1553053.) And a quick survey of very recent opinions from other courts across this country reflect a similar plethora of cases finding *Batson-Wheeler* violations. (See e.g., *Hogan v. State* (Ga. 2020) 839 S.E.2d 651; *Beasley v. United States* (D.C. App. 2019) 219 A.3d 1011, 1018; *Daniels v. State* (Ga. 2019) 832 S.E.2d 372, 379; *State v. Jones* (La. 2019) 285 So.3d 1074, 1080; *State v. Kirk* (Ohio) 2019 WL 4702027; *State v. Curry* (Or. Ct. App. 2019) 447 P.3d 7; *Comm. v. Edwards* (Pa. Super. Ct. 2018) 177 A.3d 963.)*

*This list of cases finding violations from the California appellate courts and other jurisdictions is **not** comprehensive. It represents just a small sample of the multitude of cases across the nation where violations have been found. It would take extensive Westlaw research to find them all and that research would not even capture the decisions of the trial court judges in finding such violations. On the other hand, it is not our intent to exaggerate the amount of discrimination that occurs in jury selection nor even to assert that every finding of a violation is justified. This catalog of cases should not be used as evidence of widespread *Batson-Wheeler* violations occurring in California. True *Batson-Wheeler* violations are a rarity. (There is a catch-22 aspect to locating these cases because proponents of the bill can latch on to these numbers to argue that discrimination is still prevalent.) But contrary to the claims of those who believe that the increasingly integrated, multiethnic, and multiracial state of California needs a *higher* standard to ferret out alleged discrimination in prosecutorial jury selection, these cases clearly belie the allegation the current standard is insufficient to deter and capture such discrimination.

- This bill would upend the long-standing and necessary presumption adopted in *People v. Wheeler* (1978) 22 Cal.3d 258 “that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground.” (*Id.* at p. 278.) This presumption was adopted in order to, inter alia, “encourage their use in all proper cases, and out of respect for counsel as officers of the court.” (*Ibid*; see also *Batson v. Kentucky* (1986) 476 U.S. 79, 99 [“The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes.”]; cf., Evid. Code, § 664 [“It is presumed that official duty has been regularly performed.”].)

- Proposed Penal Code section 745(e)(1) would authorize a sanction of *dismissal of a case* for a *Batson-Wheeler* violation occurring during jury selection, rather than dismissal of the jury panel, reseating the juror, or monetary sanction. That it is inconsistent and far beyond what both the United States Supreme Court and the California Supreme Court believe is an *appropriate* sanction for a *Batson-Wheeler* violation. (See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Willis* (2002) 27 Cal.4th 811; *People v. Wheeler* (1978) 22 Cal.3d 258.)
- There are practical reasons as well why the current standard works. Drafters undoubtedly have never sat down with members of prosecutor’s offices in California to discuss the very real fear prosecutors have that their reputation will be permanently besmirched by a false accusation or the loss of a job based on an erroneous finding that they were exercising their challenges in a discriminatory fashion. This fear is not unwarranted. (See e.g., *Castellanos v. Small* (9th Cir. 2014) 766 F.3d 1137, 1149-1150 [finding *Batson* violation for excusing one Hispanic juror – even though *seven* Hispanic jurors sat on final jury and prosecutor had more than enough challenges to remove them all if he so desired].) A finding of a violation follows a prosecutor. (See e.g., *Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 610-611 [prosecutor’s personal history of prior *Batson* violation in earlier trial of same case and in another case treated as evidence of pretext].) Moreover, not all judges can be counted upon to understand the nuances of jury selection (see *Davis v. Ayala* (2015) 135 S.Ct. 2187 [judgment calls as to which juror to keep “may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors’ demeanor”]; *People v. Krebs* (2019) 8 Cal.5th 265, 294 [“Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable.”]) and may engage in superficial comparisons between challenged and unchallenged jurors in reaching to find *Batson-Wheeler* violations.

This fear, coupled with the rules of ethics, the statutory bar against discriminatory challenges (Code of Civ. Proc., § 231.5), the increased diversity in California prosecutor’s offices, additional training on the proper use of jury challenges, and sheer common sense*, **strongly disfavors** the use of discriminatory challenges.

*We say common sense because it is self-defeating and just plain tactically stupid for a prosecutor to challenge jurors for discriminatory purposes regardless of the juror’s other personal characteristics revealing the juror would be favorably disposed to the prosecution. No prosecutor who does this will last long in any district attorney’s office.

- It is interesting to observe that prosecutor’s offices throughout the state recently received CPRA requests for information on jury selection training in prosecutor’s offices from the ACLU (perhaps in the hopes of finding evidence to support the assumptions and assertions built into AB 2200). We strongly suspect that the information received undermined the claims being made by the drafters of AB 2200.

- On a different note, AB 2200 does not apply the new standard even-handedly so that it does not capture discrimination in jury selection committed by defense counsel or in civil cases. (See Proposed Pen. Code, § 745(b) [“A violation of subdivision (a) is established if the *defendant* proves, by a preponderance of the evidence, any of the following: . . . (3) The *defendant* need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a).”], emphasis added.)

This approach contrasts with the current law, which applies the *Batson-Wheeler* rules *even-handedly* to both the prosecution and the defense (see *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *People v. Wheeler* (1978) 22 Cal.3d 258, 280, 283, fn. 29) as well as to civil attorneys (see *Flowers v. Mississippi* (2019) 139 S.Ct. 2228, 2243; *Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199). (See also Code Civ. Proc., § 231.5 [“A *party* shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.”], emphasis added.)

Members of disadvantaged groups (including victims of police brutality) are not well-served by a new standard that would allow defense counsel to discriminatorily excuse jurors of the same race, ethnicity, or nationality as the victim without being subject to the same scrutiny and sanction as prosecutors.*

* Candid discussions with prosecutors would quickly reveal that while prosecutors do not allege *Batson-Wheeler* challenges at the same rate as defense counsel (for a variety of reasons including wishing to avoid reseating an entire panel and a general reluctance to make an accusation unless it is patently obvious), it is considerably more common for *defense counsel* to exercise challenges in a discriminatory manner.

Make no mistake about the intent behind AB 2200. It is to *punish* the individual prosecutor for the wrong of discriminatory jury selection, not only directly by requiring the specified remedies, but indirectly by effectively branding the prosecutor a bigot or racist (and potentially subjecting them to state bar discipline), without *ever having to establish the prosecutor intentionally acted in a bigoted or racist manner*. Under section 745(b)(3), sanctions must be

imposed for exercising a challenge where the prosecutor did not intend to factor race, ethnicity, or national origin into the decision to challenge a juror. *It is a brave new world where one can be sanctioned for one's **subconscious** bias or thoughts.*

7. **Proposed Penal Code section 745(b)(4)**, in conjunction with proposed section **745(e)(1)**, would require either the granting of a mistrial, the dismissal of a case, or a reduction in charges if “the prosecution sought or obtained a conviction for an offense for which convictions are more *frequently sought or obtained* against people who share the defendant’s race, ethnicity, or national origin than for defendants of other races, ethnicities, or national origins in the state or in the county where the convictions were sought or obtained.” (Emphasis added.) The term “More frequently sought or obtained” or “more frequently imposed” is defined as meaning “that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences and the prosecution cannot establish race-neutral reasons for the disparity.” (Proposed Pen. Code, § 745(h)(1).) There are numerous and outrageous flaws with this aspect of AB 2200.

- This provision of the bill is premised on the assumption that different racial, ethnic, or other cognizable groups commit the same types of crime in exactly the same proportions and thus any disparities in prosecution are presumptively due to charging policies. That is a patently false assumption. There are numerous sociological, economic, political, cultural, and often random reasons why different crimes are committed disproportionately by one group or another. If prosecutors are doing their job fairly *and without taking race or ethnicity into account*, there will be a corresponding statistical disproportion in the number of convictions or prosecutions of individuals belonging to the group. Yet this bill punishes the prosecution and ultimately the victims and society for taking a *nondiscriminatory* approach to prosecuting and convicting criminals because of potentially disproportionate outcomes.

- How can the prosecution possibly prove up all the reasons for why one group disproportionately commits one crime or another? Under this bill, if hypothetically, 90% of major fraud is committed by persons who are white and thus 90% of the prosecutions or convictions are of persons who are white, then the statistical evidence or aggregate data will demonstrate a significant difference in seeking or obtaining convictions if the defendant is white since only 10% of the prosecutions are of non-whites. The white defendant can now bring a motion claiming a violation of section 745.

How far does the disparity have to go back in time?

Will the prosecution in every case involving major fraud have to establish race-neutral reasons for the disparity every time a white person is charged with major fraud?

Will every prosecutor who has ever charged or tried a major fraud case have to come in to testify that the reason they prosecuted the case was because the evidence they had in front of them showed the person was guilty of the offense?

Can offenses be grouped or will there have to be separate statistics for every different penal code section?

What qualifies as an ethnicity or national origin? Are there even statistics kept on the percentage of individuals committing each kind of crime who are of Greek, Italian, Armenian, Guatemalan, Swedish, descent, or of sub-groups of broadly defined ethnic or racial categories?

A “white” defendant can belong to a single sub-group of national origin or ethnicity. Hypothetically, if 90% of the defendants charged with major fraud are white but 10% of the defendants charged with major fraud are white of Armenian national origin and Armenian-Americans make up 10% of the county population, can an Armenian-American defendant bring the motion?

What is the relevant group for comparison? Two defendants charged with major fraud can be of same ethnicity but of different national origin or race. Or two defendants charged with major fraud can be of the same race but of different national origin or ethnicity? Is there a violation if the defendant belongs to an ethnic group for which convictions are disproportionately over-sought but a racial group for which convictions are disproportionately under-sought?

- What is going to stop EVERY SINGLE DEFENDANT NO MATTER WHAT THEIR RACIAL, ETHNIC OR NATIONAL BACKGROUND from making such a claim? This is a free ticket to disrupt, delay, and thwart justice that has nothing to do with actual guilt or innocence. No matter how you slice it, this is going to INCREASES COSTS at both the county level and the state level (because of appeals). The budget shortfalls due to the pandemic will only heighten the negative impact of this bill.
- The statute allows for a violation to be shown if, inter alia, the “statistical evidence or aggregate data demonstrate a *significant* difference in seeking or obtaining convictions” unless the prosecution can establish race-neutral reasons for the disparity. There is no definition of

“significant.” What does it mean for a disparity to be significant? In some fields, a difference between two groups (such as an experiment vs. control group) is considered statistically significant if it cannot be explained by chance alone. But is statistical significance a “significant” difference under the statute? And a measure of statistical significance must be based on two similarly situated groups or it has no meaning. How can one come up with a realistic equation that controls for all the myriad of different factors that potentially impact whether a member of one group is more likely to commit a particular crime than a member of any other group so that even a statistically significant number can be assessed?

- The definition of “significant” becomes even more confusing because the numbers and percentages can change based on whether the group being measured by the numbers of prosecutions against the group in the county **or** the state. If members of the group in the county commit and are convicted of crimes at disproportionately low rates but members of the group in the state are convicted of crimes in disproportionately high rates, what statistic is used?
- Under subdivision (i) of proposed section 745, “[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).” (Proposed Pen. Code, § 745(i).) Thus, if a defendant is multiracial, multiethnic, or a descendant of persons from different national origins, the data can be “aggregated?” “With estimates ranging from 2.6% to 7%, there is little dispute that the fastest growing population in the United States is mixed. In fact, it is growing at three times the rate of the general population. California is home to the largest multiracial population in America. And interethnic marriage is becoming the norm. In 2015, for example, 39% of U.S.-born Hispanics and almost half (46%) of U.S.-born Asian newlyweds were intermarried.

Trying to aggregate data when the defendant is descended (as many if not most Californians are) from persons of different nationalities, ethnicities, or races is ridiculous. If a defendant whose father is of Russian descent and whose mother is an African-American commits a particular crime and it is shown that the population of the state is 6% African-American but African-Americans make up 12% of the persons prosecuted for those crimes and the population of the state is 50% Caucasian but Caucasians make up 25% of the persons prosecuted for those crimes, and the population of the state of Russian-Americans is .05 percent but they commit .01 percent of the crimes, of what conceivable use is the final aggregate statistic?

- This bill anticipates (indeed, *requires*) hearings ***without any preliminary showing other than the mere filing of a motion.*** (See Proposed Pen. Code, § 745(c) [“Notwithstanding any other law, a defendant may file a motion in the trial court or, if final 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 based on evidence of a violation of subdivision (a). The court *shall* hold a hearing and make findings on the record . . .”], emphasis added.) In comparison, consider that even to obtain discovery to support a *constitutionally*-based claim of discriminatory prosecution (let alone *require a hearing*), there must be a showing “by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination” in the case of the defendant. (*People v. Montes* (2014) 58 Cal.4th 809, 829; see also *People v. Luttenberger* (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent “some preliminary showing ‘other than a mere desire for all information in the possession of the prosecution’” plus “[t]he request must be ‘with adequate specificity to preclude the possibility that defendant is engaging in a “fishing expedition””]; *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214 [mere speculation that a report or file might contain something useful for impeachment purposes is insufficient to demonstrate it constitutes *Brady* material triggering court involvement].)

There are very good reasons for requiring such showing: the **system needs to be able to function.** Holding hearings potentially entailing massive amounts of statistical evidence, aggregate data at the state or county level, the sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system (see Proposed Pen. Code, § 745(c)) can grind the system to a halt. As pointed out by the High Court in *Wayte v. United States* (1985) 470 U.S. 598, “Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. All these are *substantial* concerns that make the courts properly hesitant to examine the decision whether to prosecute.” (*Id.* at pp. 607-608, emphasis added; accord *United States v. Armstrong* (1996) 517 U.S. 456, 465.)

- Moreover, any fair assessment must control for and consider the many factors that go into the decision to charge a crime, to go forward with a prosecution, and to make an offer. As pointed out in a unanimous opinion from the United States Supreme Court in 2002, shallow and crude comparisons that do not take into consideration factors which render defendants similarly situated **prove nothing.** In *United States v. Bass* (2002) 536 U.S. 862, a case **upholding** the refusal of the government to respond to a request for discovery of information

relating to the Government’s capital charging practices, the High Court observed there must be a showing that the defendant is, in fact, similarly situated, to all the other defendants about whom statistics are sought: “raw statistics regarding overall charges say nothing about charges brought against similarly situated defendants.” (*Id.* at p. 864.) Moreover, the High Court found the request for statistics regarding whether the “United States enters into plea bargains more frequently with whites than it does with blacks” was properly denied because the defendant had been offered a plea bargain but declined it. (*Ibid.*)

These factors must include “the strength of the case [which would include the willingness, availability, and credibility of witnesses], the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan. . .”. (*Wayte v. United States* (1985) 470 U.S. 598, 607–608 [bracketed information added].) But, as pointed out by the High Court, such factors “are not readily susceptible to the kind of analysis the courts are [even] competent to undertake.” (*Wayte v. United States* (1985) 470 U.S. 598, 607–608.) Yet, **if they are not taken into consideration, there will be an inference of discrimination where none exists or a failure to identify discrimination where it does exist.** This is unfair to society, defendants, victims, and participants in the judicial system. To do such a comparison then is and will always be extremely time-consuming if it is to be done fairly. To delay a criminal proceeding and force testimony from hundreds of prosecutors based merely on an accusation of racism absent some initial showing both “that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose” (*Wayte v. United States* (1985) 470 U.S. 598, 608) reflects an ideological “ends justify the means” approach that is oblivious to practical concerns.

*Note: Another purely technical drafting error arises from the contrast between the violation described in proposed Penal Code section 745(b)(4) and (b)(5) and the definition of “more frequently sought or obtained” or “more frequently imposed” in subdivision (h)(1) of that section. The former sections apply when the conviction or sentence is more frequently sought or imposed against people who share the defendant’s “*race, ethnicity, or national origin . . .*” while the definition in the latter section means establishing a “significant difference in seeking or obtaining convictions or imposing sentences when the prosecution cannot “establish *race-neutral* reasons for the disparity.” (Emphasis added.) What if the alleged bias involved is bias against defendants based on ethnicity or national origin? Shouldn’t the prosecution be able to show ethnic or nationality-neutral reasons for the disparity instead of race-neutral reasons?

8. Proposed **Penal Code section 745(b)(5)(A)**, in conjunction with proposed section **745(e)(2)(A)&(B)**, would require a court to hold a hearing and “vacate the conviction and sentence, find that it is legally invalid, and remand the case for new proceedings consistent

with subdivision (a)”, or require resentencing (when only the sentence was imposed in violation of section 745(a)), if “[a] longer or more severe sentence was imposed on the defendant than was imposed on other 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 state or the country where sentencing occurred.” This subdivision suffers from many of the same problems that arise from trying to enforce subdivision (b)(4) (see this memo at pp. 19-24) **but is a terrible idea for a whole set of other reasons as well.**

- First, under this new law, a sentence would be overturned not only if the judge was shown to be biased against defendant because of the defendant’s race, ethnicity, or national origin (see proposed section 745(b)(1)), and not only if the judge “demonstrated bias or animus based on race, ethnicity, or national origin” in general - regardless of whether the judge was biased against defendant based on these reasons or even knowingly biased against anyone- (see proposed section 745(b)(2)), but **even if the judge was not consciously or subconsciously biased** – if longer or more severe sentences were “more frequently” imposed on other members of the same race, ethnic origin, or nationality as defendant than on defendants who were not members of the same race, ethnic origin, or nationality.

To make this clear: a judge could be deemed to have engaged in discrimination in sentencing (and be potentially subject to judicial discipline) **even though** the judge imposed the sentence strictly in accordance with the sentencing factors and had no intention to discriminate.

- Second, because sentencing is imposed by the judge, this would require additional judicial resources because a judge could not sit in judgment on whether he or she engaged in judicially discriminatory sentencing. A different judge would have to make that determination.
- Third, even though the sentence is imposed by the judge and the sentence differs from the sentence requested by the prosecution, the *prosecution* would be responsible for responding to the defense claim that more severe sentences are more frequently imposed on defendants belonging to the group in question. (See Proposed Pen. Code, § 745(c).)
- Fourth, this bill essentially wants to overturn long-standing principles that laws, including sentencing laws, do not violate equal protection unless that is the intended consequence of the law. (See *Hernandez v. New York* (1991) 500 U.S. 352, 362 [“Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not

violate the principle of race neutrality.”]; *United States v. Coleman* (9th Cir. 1994) 24 F.3d 37, 38–39 [disparate impact on groups of sentencing laws do not violate equal protection unless discriminatory purpose is intended].) What this bill does is open every single one of the thousands of criminal laws identifying sentences for different criminal behavior to scrutiny without any preliminary showing those laws were either created or being used with discriminatory intent. Before requiring **hundreds of thousands of cases of individual litigation**, shouldn't the *drafters* of the law have to come up with some solid statistics (rather than assumptions) that any alleged disparities are due to discrimination on the part of the government actors and not to other factors beyond the control of judicial system.

- Fifth, the hearings to determine (i) whether the sentence imposed on defendant was longer or more severe than imposed on other defendants for the same offense (which incidentally can be shown by simply coming up with one other defendant who received a lesser sentence than the defendant) and (ii) whether that the sentence was more frequently imposed on defendants who share defendant's membership in the relevant group will require testimony from *judges* explaining why they did or did not impose a sentence.

- Sixth, the dozens of relevant factors that go into deciding how to sentence a defendant (see Pen. Code, § 1170(a)(3); Cal. Rules of Court, Rules 4.408 - 4.409, 4.413-4.452) are even more expansive than the relevant factors that go into deciding whether to charge a defendant (see this memo at p. 23-24). In order to show unfair sentencing practices, it would be necessary to show that the group of defendants who receive more severe sentences are receiving more severe sentences even though the quantum of evidence and the ability to prove the crime is the same; the average criminal history of the groups are the same; the number of crimes with which the defendants are charged is the same; the manner in which the crime was committed is the same; the damage or loss is the same; the victims are equally vulnerable; the attitude and openness to rehabilitation of the defendants are the same; there is the same overall willingness to make restitution; the job and military histories are comparable; the average age of the defendants is comparable; the nature of the injuries inflicted are comparable, etc. Thus, trying to find do an accurate comparison between groups of defendants *who are similarly situated* is going to be a monumental task -either to prove or disprove discriminatory intent.

PLEASE SEE THE LAST PAGE OF THIS MEMO FOR A ONE PAGE “SCRIPT” THAT SHOULD ILLUSTRATE FOR JUDGES HOW THIS BILL WILL PLAY OUT WHEN IT COMES TO ACCUSATIONS OF BIAS IN SENTENCING.

9. Proposed **Penal Code section 745(b)(5)(B)**, in conjunction with proposed section **745(e)(2)(A)&(B)**, would require a court to hold a hearing and “vacate the conviction and sentence, find that it is legally invalid, and remand the case for new proceedings consistent with subdivision (a)”, or require resentencing (when only the sentence was imposed in violation of section 745(a)), if (i) a “longer or more severe sentence was imposed on the defendant than was imposed on other individuals convicted of the same offense” and (ii) “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 another race, ethnicity, or origin, in the state or in the county where the sentence was imposed.” (Pen. Code, § 745(b)(5)(B).) This aspect of the bill suffers from many of the same infirmities that arise from trying to enforce subdivision (b)(4) (see this memo at pp. 20-24) and infect subdivision (b)(5)(A) (see this memo at pp. 24-26), but, it too, has its own unique flaws.

- First, it assumes that the statistical data on the race, ethnicity, or origin of *victims* is kept and easily available. This is not the case.

- Second, it is doubly onerous because the hearing would require collecting statistics not only on the defendant and identifying all the relevant factors to show the defendants are comparably situated but also data relevant to showing that victims are comparably situated. And what makes victims comparably situated is even more elusive and *untracked* than data on defendants.

- Third, under subdivision (b)(5)(B), a sentence would have to be reversed if, hypothetically, a defendant was Hispanic and the data showed that Hispanic defendants who committed sexual assault disproportionately received more severe sentences than all other groups, but the data also showed that Hispanic defendants received more severe sentences when the victims of the sexual assault were Hispanic victims. And, under the specific language used in subdivision (b)(5)(B), the sentence imposed would only have to be more severe than the sentences imposed on Hispanic defendants when the victim was a member of *any* other specified group - not just all the other groups in aggregate, i.e., if more severe sentences were disproportionately imposed when the sexual assault victim was Native American even if it wasn't more severe than the average sentence imposed in a sexual assault case in general. **Bottom line:** this bill could easily result in a Hispanic defendant being entitled to reversal and a lesser sentence *because* his victim was Hispanic! (And the same would potentially hold true for a defendant in any group when the victim is of the same group.)

10. This bill ignores discrimination in sentencing *against victims* based on the race, ethnicity, or origin of the victim. To fairly address that discrimination, the bill should require a judge to resentence a defendant to a *higher* sentence if it can be shown that a shorter or less severe sentence was imposed on the defendant than was imposed on other individuals in other groups convicted of the same offense and shorter or less severe sentences were more frequently imposed for the same offense on defendants in cases with victims of the same race, ethnicity or origin as the victim in the pending case.
11. **Proposed section 745(e)(3)**, which precludes the death penalty if the court finds there has been a violation of subdivision (a), may be unconstitutional. By precluding the death penalty or overturning a death penalty verdict, the bill may impermissibly amend prior initiatives, including Proposition 7 (1978) which created California’s current version of the death penalty and several subsequent initiatives which have expanded or strengthened the death penalty over the years, including Proposition 115 (1990) and Proposition 66 (2016).*

* Proposition 7 was approved by the voters in 1978. The initiative increased the penalties for first and second degree murder (Ballot Pamp., Gen. Elec. (Nov. 7, 1978) text of Prop. 7, § 2, p. 33), expanded the list of special circumstances requiring that a defendant convicted of first degree murder be sentenced to death or life imprisonment without the possibility of parole (text of Prop. 7, § 6, pp. 42–43), and provided that if aggravating circumstances outweighed mitigating circumstances, the jury must return a sentence of death (text of Prop. 7, § 8, pp. 43–44). (*People v. Solis, supra*, 46 Cal.App.5th at 772-73.)

Proposition 115 expanded the definition of first degree murder by amending section 189 to include murders occurring during the commission or attempted commission of kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289. (Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 115, § 9, p. 66.) (*People v. Solis, supra*, 46 Cal.App.5th at 773.)

Proposition 66 includes a series of findings and declarations to the effect that California's death penalty system is inefficient, wasteful, and subject to protracted delay, denying murder victims and their families justice and due process. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) § 2, p. 212.) The measure enacts a series of statutory reforms, which may be grouped into three general categories: (1) provisions to expedite review in capital appeals and habeas corpus proceedings; (2) provisions governing the confinement of prisoners sentenced to death and the administration of the death penalty; and (3) provisions pertaining to California's Habeas Corpus Resource Center. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 823.)

The California Constitution provides that the “Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors’ approval.” (Cal. Const., Art. II, sec. (10)(c), emphasis added.) Proposition 7 did not authorize amendment by the

Legislature without voter approval. (*People v. Solis* (2020) 46 Cal. App. 5th 762, 772-73 [not final].)

“The purpose of California's constitutional limitation on the Legislature’s power to amend initiative statutes is to “protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025, citations omitted.) This prohibition is not absolute, however. The Legislature may enact legislation that concerns the same subject matter as an initiative so long as it addresses a “related but distinct area” or a matter that an initiative measure “does not specifically authorize or prohibit.” (*People v. Solis, supra*, 46 Cal.App.5th at 771-72.) By contrast, legislation amends an initiative if it “change[s] an existing initiative statute by adding or taking from it some particular provision.” (*Id.* at 771.) When considering whether a particular provision amends an initiative, courts need to ask whether it prohibits what the initiative authorizes or authorizes what the initiative prohibits. (*Id.* at 772.) Doubts should be resolved in favor of the initiative power. (*Ibid.*)

Because proposed section 745(e)(3) would completely eliminate the death penalty as an option if a violation of subdivision (a) is found -- regardless of the circumstances, magnitude or prejudice to a defendant -- the bill could be viewed as effectively amending Proposition 7 and related death penalty initiatives and thus run afoul of the California Constitution.

12. **Proposed Penal Code section 745(d)** would require, pursuant to a written request from the defense, the prosecution to “disclose to the defense all evidence relevant to a potential violation of subdivision (a).” (Pen. Code, § 745(d).) In addition, “[i]f the prosecution has reason to believe that relevant evidence is in the possession of another law enforcement agency, the prosecution shall request that information and disclose it to the defense.” (*Ibid.*) This section is unnecessary and troublingly burdensome.

First, any information or material in the possession of the prosecution that negatively impacts a defendant’s constitutionally protected rights, including due process and equal protection rights, must be discovered to the defense under long standing legal precedent. (See Pen. Code § 1054.1(e); *Brady v. Maryland* (1963) 373 U.S. 83). This duty also applies to material possessed by the prosecution team, which includes the law enforcement agency that investigated the case. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1314-1315 (emphasis added); *accord Barnett v. Superior Court* (2010) 50 Cal.4th 890, 902-903; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.) But proposed section 745(d) goes well

beyond this longstanding precedent and requires the prosecution to request and seek out information in the possession of other law enforcement agencies, including those not part of the prosecution team. It is well settled that “information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.” [Citation.]” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133; *In re Steele* (2004) 32 Cal.4th 682, 697; *accord Barnett v. Superior Court* (2010) 50 Cal.4th 890, 902; *People v. Ervine* (2009) 47 Cal.4th 745, 768.) Simply put, “the prosecution is under no obligation to turn over materials not under its control.” (*United States v. Aichele* (9th Cir.1991) 941 F.2d 761, 764.)

Furthermore, proposed section 745(d) does not require any showing of good cause or balancing of competing interests prior to requiring the prosecution to seek out information, other than including a general “reason to believe that relevant evidence” exists clause. Generally, a party seeking third party discovery must make a plausible justification or a good cause showing of the need therefor. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074; see also *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1318 [“A criminal defendant has a right to discovery by a subpoena duces tecum of third party records on a showing of good cause—that is, specific facts justifying discovery”].)

This limited but essential requirement permeates discovery in criminal cases (including discovery requests for information to support a discriminatory prosecution claim) and is necessary to the effective functioning of the criminal justice - since the possibility that evidence having some potential bearing in a defendant’s case will be found in any given location is small but infinite. Whereas the time and resources available to law enforcement to search for records and to the courts to review such records are decidedly finite. (See *People v. Montes* (2014) 58 Cal.4th 809, 829 [identifying the standard of “plausible justification” for discovery relating to a discriminatory prosecution claim as requiring “a defendant to ‘show by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination in his case’”]; *People v. Luttenberger* (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent “some preliminary showing ‘other than a mere desire for all information in the possession of the prosecution’” plus “[t]he request must be ‘with adequate specificity to preclude the possibility that defendant is engaging in a “fishing expedition’”]; *People v. Navarro* (2006) 138 Cal.App.4th 146, 166 [when seeking an in camera review of police records concerning a confidential informant as part of a *Franks* challenge to a search warrant, “the defendant must make a preliminary showing that describes the

information sought with some particularity and that is supported by a plausible justification” and noting the “defendant must offer some evidence casting reasonable doubt regarding either the existence of the informant or the truthfulness of the affiant's statements]; *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214 [mere speculation that a report or file might contain something useful for impeachment purposes is insufficient to demonstrate it constitutes *Brady* material triggering court involvement].)

Moreover, with all other discovery requests, the party from whom discovery is sought “may defend against a [request for information or documents] by establishing that, for example, the proponents can obtain the same information by other means, or that the burden on the third party is not justified under the circumstances.” (*Facebook, Inc. v. Superior Court* (2018) 4 Cal.5th 1245, 1290 citing to *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1134 and cf.’g *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-1075, 1078, emphasis added; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 957 [it is proper to deny a request to search for police reports where “the burdens placed on government and on third parties substantially outweigh the demonstrated need for discovery.”]; *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1134, fn. 16 [noting a request for broadly described information “may be so inadequate as to make the discovery and location of such information an unreasonable burden on the governmental entity”].) No similar means to respond to a burdensome request are authorized under section 745(d)

Proposed section 745(d) does not require any consideration of the enormous burden placed on the prosecution or a balancing of competing interests (i.e., the need for the information, likelihood that materials exists, resources needed to undertake search, etc.). As pointed out by the High Court in *United States v. Armstrong* (1996) 517 U.S. 456 in discussing a discovery request for materials to support a selective prosecution claim: “If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant’s claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors’ resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.” (*Id.* at p. 468.) And there are other good reasons for why a mere accusation of improper prosecution does not justify the work entailed in providing discovery. (See *United States v. Sellers* (9th Cir. 2018) 906 F.3d 848, 852.) Such a flimsy standard “unnecessarily impair[s]” the prosecutor’s “constitutional function.” (*Id.* internal quotation marks omitted; see also *United States v.*

Hare (4th Cir. 2016) 820 F.3d 93, 99 (“The standard for obtaining discovery in support of a selective prosecution claim is only slightly lower than for proving the claim itself.” (internal quotation marks omitted)].)

13. **This bill is retroactive to ALL cases. Practically every single conviction that has ever occurred in California can now be re-opened.** All the defendant needs to do is allege one of the five grounds described in section 745(b) were present at trial or sentencing. Moreover, the defendant may be able to mandate a hearing without any showing at all or based on no more than a prima facie showing. With the exception of the delay caused by having to hear such a motion while a case is pending, all the problems arising in applying the bill to pending cases will arise in applying the bill to past cases. However, the difficulties in trying to defend against the allegation and the ramifications of dismissal are compounded because statistics will be more difficult to find, relevant witnesses (i.e., judges, attorneys, prosecutors, officers, etc.,) may be dead, and retrying the cases after years or decades may be impossible. And if the motion is successful, the **conviction must be vacated.**

• **Proposed Penal Code section 745(c)**, in conjunction with proposed **Penal Code section 745(e)(2)** and proposed **Penal Code section 1473(f)**, permits a defendant in **any** case (whether or not the defendant remains in custody) where there has been a “final judgment” to file “a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction based on evidence of a violation of subdivision (a)” of section 745. The court then is required to hold a hearing without the defendant having to establish a prima facie case if filed pursuant to Penal Code section 1473.7 and likely with a prima facie showing if filed pursuant to Penal Code section 1473.

It is not entirely clear how proposed Penal Code section 745(c) will interface with Penal Code section 1473.7 (which permits post-conviction motions when a defendant is no longer in custody) because while section 745(c) authorizes motions being made pursuant to section 1473.7, the language of section 1473.7 has not been amended to reference or accommodate section 745(c). And section 1473.7 currently only authorizes motions to vacate based on a finding (i) prejudicial error damaging a defendant’s ability to “meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere” or (ii) the existence of “[n]ewly discovered evidence of actual innocence . . . that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.” (Pen. Code, § 1473.7(a)(1)&(2).) It is reasonable to believe that courts will interpret AB 2200 as implicitly allowing for a motion to be brought on the grounds

identified in proposed Penal Code section 745(a) utilizing the mechanism of section 1473.7 regardless of the lack of amendment to section 1473.7. Moreover, because subdivision (d) of section 1473.7 states that “[a]ll motions shall be entitled to a hearing”, the mere making of the motion will require a hearing.

AB 2200 does amend Penal Code section 1473 to specifically permit a writ of habeas corpus to be based on any of the grounds identified in subdivision (b) of Proposed Penal Code section 745 (which lays out the grounds upon which a violation of section (a) of that section may be based). And section 1473(f) requires a court to review the petition to determine whether a prima facie showing has been made but would require the court to “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” if no prima facie case is found. (Proposed Pen. Code, § 1473(f).)

It is unclear what a prima facie case would look like when the basis for vacating the conviction is premised on one or more of the grounds identified in subdivision (b) of proposed Penal Code section 745, but all a “prima facie” standard requires is to make an allegation, which if assumed to be true, would entitle the petitioner to relief. (*In re Figueroa* (2018) 4 Cal.5th 576, 587 [“This court evaluates a petition ‘by asking whether, assuming the petition’s factual allegations are true, the petitioner would be entitled to relief.’”].) In other words, all a defendant would have to do is allege, for example, that he was convicted of an offense for which members of his racial, ethnic, or nationality were more frequently prosecuted or convicted than were persons who did not belong to defendant’s relevant group and that the prosecution will not be able to establish race neutral reasons for the disparity.

- Proposed section 745 provides almost entirely new grounds for vacating a conviction. Thus, unlike with many other habeas petitions, a habeas petition based on a violation of proposed section 745(a) will not usually be a bar to bringing the writ of habeas based on a lack of timeliness. (Cf., *In re Robbins* (1998) 18 Cal.4th 770, 778.) But even if a prior petition was brought on a grounds claiming bias, unless the grounds were identical to those identified in proposed Penal Code section 745, the petition would likely not be viewed as “successive” such that relief would be barred. And if the evidence of the bias was newly discovered or could not have been previously known to the defendant through the exercise of due diligence, the petition will not be barred either. (See Proposed Pen. Code, § 745(f).)

14. With other habeas petitions, there must be a showing that what occurred in the case resulted in actual prejudice to the defendant. (See e.g., *In re Roberts* (2003) 29 Cal.4th 726, 744–745 [to

establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show . . . that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.”]; Pen. Code, § 1473(b)(1) [petition based on introduction of false evidence at trial must show evidence was “substantially material or probative on the issue of guilt or punishment”]; (b)(2) [petition based on existence of false physical evidence, “believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty” be “*a material factor directly related to the plea of guilty by the person*” emphasis added]; (b)(3) [requiring that petition based on new evidence show the evidence was “of such decisive force and value that it would have more likely than not changed the outcome at trial”].) **A habeas petition based on a violation of section 745 requires no showing of prejudice!** The conviction is vacated regardless of the fact there is zero evidence defendant is not guilty of the offense.

- It is utter madness to permit a defendant convicted beyond a reasonable doubt of murder, torture, sexual assault or any heinous crime to have his or her conviction and/or sentence overturned when there has been no showing that the violation of Penal Code section 745 had any bearing on the outcome of the trial or plea (see proposed Pen. Code, § 745(b)(1)-(5)) nor that there was any intentional discrimination involved in the case (see proposed Pen. Code, § 745(b)(3), (4), and (5)).

Under the proposed law, a defendant’s guilty plea and conviction would have to be vacated where the defendant committed a crime witnessed by numerous individuals belonging to defendant’s same race or ethnicity or nationality and the defendant confessed to committing the crime against a victim belonging to the same group as the defendant just because the officer who videotaped the statement of one of the witnesses was biased against the defendant or just because the judge who took the plea was biased against the defendant or the group to which the defendant belonged. This is absurdly unjust!

15. Imposing the remedy of dismissal and/or vacating of a conviction described in proposed Penal Code section 745(e)(1)&(2) and Penal Code section 1473(f) and 1473.7 for one or more of violations listed in subdivision (b) of Proposed Penal Code section 745 without a showing of prejudice *may* run afoul of California Constitution, article VI, section 13.

Section 13 provides, in pertinent part: “No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the

entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” This section has been interpreted to require application of the *Watson* standard of review, which only permits a reversal for the errors described in section 13 if it is reasonably probable the defendant would have obtained a more favorable result had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Breverman* (1998) 19 Cal.4th 142, 174.)

16. A final word about the declaratory portion of AB 2200, section 1: Anyone can cherry pick a random dissent here or a concurrence there; but the rules of all these cases make clear that outright, purposeful racial bias causing prejudice to a defendant is already (AND SHOULD BE) intolerable in the law and legally sanctionable. But, if as the legislative intent section declares, “all persons possess implicit biases” (Section 1(g)), and if, as proposed Penal Code section 745 allows, any racial bias (even not purposeful) is grounds for a motion, a hearing, and reversal, then, ipso facto, all trials will have such motions and hearings and we will be faced with judicial gridlock, if not unprecedented levels of mandated reversals. That is chaos, not justice.

We include the following **so it will be easy for judges to understand exactly how this is going to play out:**

Defense Counsel: Judge, you just sentenced my client to the mid-term for a robbery. In doing so you violated section 745 and I am entitled to a hearing.

Judge: What do you mean, section 745 prohibits the *state* from obtaining a sentence based on race, ethnicity, or national origin. The state did not obtain a sentence, I, as a member of the judicial branch, imposed sentence.

Defense Counsel: For purposes of section 745, Judge, you *are* the state.

Judge: Are you saying I gave the sentence I did because I was personally biased against your defendant? Because even if I was biased against your defendant (and I am not), the sentencing factors I am required to look at dictated that sentence.

Defense Counsel: Well, *if* you were biased, my client would be entitled to a resentencing regardless of whether you strictly followed the sentencing factors, but I am not claiming you were personally biased against the defendant.

Judge: Are you saying I gave the sentence I did because I was biased against the group your defendant belonged to or some other group? Because even if I was biased against members of the defendant's group or some other group (and I am not), the sentencing factors I am required to look at dictated that sentence.

Defense Counsel: Well, judge, my client is a Thai-American and I have noticed that when I previously represented a Thai-American in another case, you seem to treat that defendant with less solicitation than you normally treat other defendants, but I am not currently claiming you are biased against Thai-Americans or any other group at this juncture.

Judge: Not to go off on a tangent, but I remember your previous client and he was extraordinarily rude to the court so that might explain the difference in treatment. But exactly what is the basis for your claim that the "state" obtained a sentence because of defendant's race, ethnicity, or national origin?

Defense counsel: Well, I have been speaking to other attorneys and it appears that you imposed a sentence on my client for robbery that exceeds the average sentenced imposed for robbery and that Thai-Americans more frequently receive longer or more severe sentences for robbery than members of other groups in this state. That is why I am demanding a hearing on whether you violated section 745.

Judge: Well, before I then dump this on some other judge to decide, do you have any statistics to back up your claim?

Defense Counsel: Nothing more than what I just said, but section 745 does not require any preliminary showing before a hearing is required. And, by the way, if all I show is some *unrebutted* anecdotal evidence that there is a "significant difference" in sentences imposed, I am likely to prevail.

Judge: So, we now must hold a hearing. How is the court going to be able to respond to the allegation? We do not keep statistics on the nationality of defendants. And what is a "significant difference" anyway?

Defense Counsel: Well, you do not have to respond. That is the prosecution's job. Although they will have to call you and maybe all the other judges who sentenced defendants on robbery cases to establish the defendants in the other groups who received more lenient sentences were not similarly situated to the Thai-American defendants in the cases I will be relying on. The statute does not define "significant difference."

Judge: How is that fair? The prosecutors do not keep such statistics either and they did not even ask for the mid-term, they were satisfied with a low-term sentence. The types of dueling battles of experts on the relevant statistics and what is a "significant difference" is going to be a nightmare.

Defense Counsel: So sad. Too bad.