“CALIFORNIA RACIAL JUSTICE ACT OF 2020”

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I. INTRODUCTION

Assembly Bill 2542 (2019-2020 Reg. Leg. Sess.) (AB 2542) enacted the "California Racial Justice Act of 2020 (the Act)." The legislation has three operative provisions:[1]

- **The enactment of Penal Code section 745**[2] which directs the "state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." (§ 745, subd. (a).) Section 745 identifies five statutory violations, defines the process for determining violations, and establishes the remedies available to the court if it finds a violation. The measure is intended to address discriminatory conduct by all persons involved in the defendant's case, including judges.

- **The amendment of Section 1473** which adds a violation of section 745 as a basis for seeking and obtaining relief from a conviction by writ of habeas corpus.

- **The amendment of section 1473.7** which adds a violation of section 745 as a basis for a person no longer in custody to file a motion to vacate a conviction or sentence.

This memorandum will review the technical provisions of each of the three primary divisions of the Act, and, where possible, offer practical suggestions for implementing their provisions.

A. Declaration of legislative intent

In enacting AB 2542, the Legislature observed racial discrimination has a deleterious effect on both the individual defendant and our justice system – that *any* "[d]iscrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law." (AB 2542, § 2, subd. (a).) "We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals." (AB 2542, § 2, subd. (b).)

The Legislature further observed even though racial bias is intolerable in our criminal justice system, it persists because courts generally focus on racism only in its extremes. "Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish." (AB 2542, § 2, subd. (c).) The Legislature found existing precedent has failed to protect criminal defendants from racially tinged testimony, including expert opinion. There has been an inadequate handling of inflammatory argument of counsel and comments by the court. (AB 2542, § 2, subd. (d), (e).)

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[1] The complete text of AB 2542 is set out in Appendix I, *infra*, including subsequent amendments to section 745 and related statutes.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

The Legislature observed when it comes to racial bias, existing precedent identifies an aspect of "inevitability." "In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively." (AB 2542, § 2, subd. (g).) The Legislature concluded "[t]here is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised." (AB 2542, § 2, subd. (h).)

In enacting SB 2542, the Legislature was concerned with elimination of explicit bias. But it also stated implicit bias negatively impacts the fairness of the criminal justice system and expressed its intent to address that problem in the legislation. It declared: "The Legislature has acknowledged that all persons possess implicit biases [citation], that these biases impact the criminal justice system [citation], and that negative implicit biases tend to disfavor people of color [citation]." It further declared: "It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them." (AB 2542, § 2, subd. (i).)

"It is the further intent of the Legislature to provide remedies that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination. It is the further intent of the Legislature to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences." (AB 2542, § 2, subd. (j).)

B. Effective date

1. Penal Code, section 745

When originally enacted, the Act contained a savings clause, making it applicable "*only prospectively* in cases in which *judgment has not been entered prior to January 1, 2021*." (§ 745, subd. (j); italics added.) Assembly Bill 256 (2021-2022 Reg. Leg. Sess.) (AB 256) amended subdivision (j) to provide for the following staggered effective dates, making the Act ultimately fully retroactive:[3]

[3] The amendment of the Act's effective date is consistent with the Legislature's statement of intent: "In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must

This section applies as follows:

(1) To all cases in which judgment is not final.

(2) Commencing January 1, 2023, to all cases in which, at the time of the filing of a petition pursuant to subdivision (f) of Section 1473 raising a claim under this section, the petitioner is sentenced to death or to cases in which the motion is filed pursuant to Section 1473.7 because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final.

(3) Commencing January 1, 2024, to all cases in which, at the time of the filing of a petition pursuant to subdivision (f) of Section 1473 raising a claim under this section, the petitioner is currently serving a sentence in the state prison or in a county jail pursuant to subdivision (h) of Section 1170, or committed to the Division of Juvenile Justice for a juvenile disposition, regardless of when the judgment or disposition became final.

(4) Commencing January 1, 2025, to all cases filed pursuant to Section 1473.7 or subdivision (f) of Section 1473 in which judgment became final for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice on or after January 1, 2015.

(5) Commencing January 1, 2026, to all cases filed pursuant to Section 1473.7 or subdivision (f) of Section 1473 in which judgment was for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice, regardless of when the judgment or disposition became final.

***Estrada* is inapplicable to section 745**

The discussion of the effective date of amendments to criminal laws generally begins with the seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). As explained by the Supreme Court in *People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*): "'Generally, statutes are presumed to apply only prospectively. [Citation.] However, this presumption is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Accordingly, 'the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication.' [Citation.] Courts look to the Legislature's intent in order to determine if a law is meant to apply retroactively. [¶] In *Estrada* [(1965)] 63 Cal.2d 740, we held that amendatory statutes that lessen the punishment for criminal conduct are ordinarily intended to apply retroactively." (*Frahs*, *supra*, 9 Cal.5th at p. 627.) ' " 'Estrada stands for the proposition that, "where the amendatory statute mitigates punishment and there is no saving[s] clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed. [Citations.] If there is no express savings clause, the statute must demonstrate contrary indications of

act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, *both prospectively and retroactively.*" (AB 2542, § 2, subd. (g); italics added.)

legislative intent ' " 'with sufficient clarity' " ' in order to rebut the *Estrada* rule.' " ' (*Id*. at p. 628.)

Although AB 256 eliminated the unitary savings clause originally specified in the Act, it replaced it with the staggered effective dates now outlined in section 745, subdivision (j). Although the provisions of the Act ultimately will be fully retroactive, the provisions of subdivision (j) act as a limited savings clause that prevents application for relief until the relevant date specifically authorized by the Legislature.

2. Penal Code, Section 1473

Section 1473, subdivision (f)[4], as originally enacted, provided: "Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745 *if judgment was entered on or after January 1, 2021*." (Italics added.) AB 256 deleted the reference to the effective date and added that the motion may be brought "if [section 745, subdivision (a)] applies based on the date of judgment as provided in subdivision (j) of Section 745."[5] (§ 1473, subd. (e).) Accordingly, the effective date of the changes to section 1473 has been aligned with the effective date of section 745.

3. Penal Code, Section 1473.7

Unlike sections 745 and 1473, section 1473.7 contains no express reference to the date judgment was entered. Because of the cross-reference in section 1473.7 to section 745, however, it can be said the effective dates in section 745 have been incorporated by reference. The amendment to section 1473.7 provides a motion may be brought when "[a] conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin *in violation of subdivision (a) of Section 745*." (§ 1473.7, subd. (a)(3); italics added.) Not only does this cross-reference incorporate the prohibited acts listed in section 745, subdivision (a), it also incorporates the provisions of section 745, subdivision (j), which provide for a staggered effective date of the Act depending on the circumstances of the defendant's case.

The Legislature has clearly expressed its intent to apply all the Act's provisions retroactively, but on a staggered schedule. As noted above, sections 745 and 1473.7 each contain express effective dates. There is nothing in section 1473.7 that indicates its effective date should be different than the other two code sections. Objectively, there appears no reason to give persons who are no longer in custody on a conviction greater access to relief than those who remain in custody. Taking the Act as a whole, it appears the Legislature intended all provisions apply retroactively in accordance with the schedule it established. Because section 745 and the changes made to section 1473 are effective only as scheduled, and the changes made to section

[4] Section 1473, subdivision (f), has subsequently been changed to subdivision (e).
[5] Section 745, subdivision (k), has subsequently been changed to subdivision (j).

1473.7 are part of the same legislative package, there appears an intent to make the changes to section 1473.7 effective on the same schedule as the other two statutes.

C. Operative version of section 745

AB 2542 contains two versions of section 745. The two versions are nearly identical except the version in section 3 of the Act contains provisions related to bias in the exercise of peremptory challenges. (See, *e.g*., AB 2542, Sec. 3, § 745, subd. (a)(3), and § 745, subd. (e)(1)(A).) To avoid potential confusion or conflict with Assembly Bill 3070 (2019-2020 Reg. Leg. Sess.) (AB 3070), which in some ways is inconsistent with the provisions of section 3 of AB 2542 and more fully addresses bias in the exercise of peremptory challenges, the Legislature enacted section 7 of AB 2542: "Section 3.5 of this bill shall only become operative if Assembly Bill 3070 is enacted and becomes effective on or before January 1, 2021, *in which case Section 3 of this bill shall not become operative*." (Italics added.) AB 3070 was signed by the Governor on September 30, 2020, and became effective on January 1, 2021. AB 3070, however, contains two operative dates: January 1, 2022, for criminal matters, and January 1, 2026, for civil matters.

The various dates referenced in AB 2542 and AB 3070 reflect the difference between the "effective date" and "operative date" of legislation. The distinction is explained in *People v. Jenkins* (1995) 35 Cal.App.4th 669, 673-674[6] (*Jenkins*): " 'Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner. [Citation.] In the usual situation, the "effective" date and "operative" date are one and the same, and with regard to ex post facto restrictions, a statute has no force and effect until such effective-operative date. [Citation.]' [Citation.] [¶] In some instances, the Legislature may provide for different effective and operative dates. [Citations.] '[T]he operative date is the date upon which the directives of the statute may be actually implemented. The effective date, then, is considered that date upon which the statute came into being as an existing law.' [Citations.]"

According to *Jenkins*, therefore, AB 3070 "came into being" on January 1, 2021, but is to be implemented on January 1, 2022, for criminal cases and January 1, 2026, for civil cases. Based on the directive in section 7 of AB 2542, section 3.5 contains the operative version of section 745 and "Section 3 of [AB 2542] *shall not become operative*." (Italics added.) Since section 3 never becomes operative, it may not be used for trials or any other proceedings, including matters occurring between January 1, 2021, and January 1, 2022, when AB 3070 became operative in criminal cases. Until AB 3070 became operative, traditional *Batson/Wheeler* procedures applied.

[6] *Jenkins* was abrogated on other grounds by *People v. Robinson* (1998) 63 Cal.App.4th 348, 352, fn. 2.

II. Penal Code section 745

A. Prohibited conduct

Section 745, subdivision (a), provides the baseline prohibition against racial bias in criminal proceedings: "The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." Any of the following conduct constitutes a violation of the prohibition:

(1) **"The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin."** (§ 745, subd. (a)(1).) The prohibition is sufficiently broad to refer to conduct before, during or after the defendant's trial and sentencing. For example, this would include bias or animus exhibited during a police investigation. The violation requires the proof of three elements:

- First, there must be an exhibition of bias or animus because of the defendant's race, ethnicity or national origin. (*Ibid.*) "A defendant may share a race, ethnicity, or national origin with more than one group." (§ 745, subd. (i).) Although "exhibit" is not further defined in the statute, the term suggests there must be some outward manifestation or display of the bias.

- Second, the prohibited act must be by a designated person connected with the defendant's case: the judge, an attorney, a law enforcement officer, an "expert witness," or a juror. (*Ibid.*) "Juror" is not further defined in the statute. The term clearly includes sworn trial jurors. The term may include alternate jurors who take the oath for that position, participate throughout the trial (except for deliberations), and are subject to the instructions of the court. (See Code of Civ. Proc., § 234 [alternate jurors have the same qualifications and power as jurors already sworn].) Likely the plain meaning of the term does not include prospective jurors who do not become a "juror" until administered the oath as such.

- Third, the racial bias must be exhibited toward the defendant. Whether a particular comment or action is exhibited toward the defendant will be a question of fact. The defendant does not need to prove that the racial discrimination was intentional. (§ 745, subd. (c)(2).)

People v. Coleman (2024) 98 Cal.App.5th 709, found no violation of subdivision (a)(1) by defense counsel based on counsel's advice to the defendant that when she testifies, she should "speak how you speak." Counsel acknowledged giving such advice to avoid the defendant appearing inauthentic to the jury.

(2) **"During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used**

racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect." (§ 745, subd. (a)(2).) There are three elements necessary to establishing a violation of the Act under this provision, the third element being capable of two types of proof:

- First, the prohibited act must be by a person connected with the defendant's case: the judge, an attorney, a law enforcement officer, an "expert witness," or a juror. "Juror" is not further defined in the statute. The term clearly includes sworn trial jurors. The term may include alternate jurors who take the oath for that position and are subject to the instructions of the court. Likely the plain meaning of the term does not include prospective jurors who are not become a "juror" until administered the oath as such.
- Second, the identified conduct must occur "[d]uring the defendant's trial, in court and during the proceedings." (*Ibid*.) This portion of the Act appears to focus on bias that occurs in open court. It is not necessary that the conduct occur in the presence of the jury. Potentially actionable conduct occurring outside the courtroom and not during the court proceedings would not qualify as a violation under this portion of the Act, but may qualify under section 745, subdivision (a)(1), *supra*.

- The third element is subject to proof in either of two ways:

  (a) A violation occurs when a designated person uses "racially discriminatory language about the defendant's race, ethnicity, or national origin." (*Ibid.*) A violation may occur even if not directed to the defendant personally; it is sufficient if the comment is about defendant's race or ethnicity in general.

  "Racially discriminatory language" is defined in the Act as "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory." (§ 745, subd. (h)(3).)

  Because the "objective observer" test is being used to determine whether particular words are racially discriminatory, the subjective intent of the speaker is irrelevant – it is irrelevant whether it was purposeful.

  (b) A violation occurs when a designated person "exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (*Ibid.*) This provision addresses all forms of expressing bias,

whether or not the bias was "purposeful." The bias must be exhibited toward the defendant. However, section 745, subdivision (c)(2), provides "[t]he defendant does not need to prove intentional discrimination."

- A defendant may share a race, ethnicity, or national origin with more than one group. (§ 745, subd. (i).)

Note this section provides there is no violation "if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect." An example of such a circumstance may be found in *People v. Quartermain* (1997) 16 Cal.4th 600, wherein the Supreme Court observed at page 628: "The trial court did not abuse its discretion in refusing to exclude defendant's racial epithets. Contrary to defendant's conclusion, his use of the epithets was not irrelevant. (See Evid. Code, § 210.) Defendant used them to describe the victim specifically in two instances and to describe members of the victim's race generally in the third instance. As defendant puts it in his brief, these statements showed that he 'despised [Ewing] and mocked [Ewing] for the color of his skin.' Expressions of racial animus by a defendant towards the victim and the victim's race, like any other expression of enmity by an accused murderer towards the victim, is relevant evidence in a murder or murder conspiracy case. Among other things, it is evidence of the defendant's prior attitude toward the victim, a relevant factor in deciding whether the murder was deliberate and premeditated because it goes to the defendant's motive."[7]

People v. Coleman (2024) 98 Cal.App.5th 709, found no violation of subdivision (a)(2) by defense counsel based on counsel's advice to the defendant that when she testifies, she should "speak how you speak." Counsel acknowledged giving such advice to avoid the defendant appearing inauthentic to the jury.

(3) **"The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained."** (§ 745, subd. (a)(3).) This portion of the Act is intended to address bias resulting in disparate charging practices by a prosecutor's office in the county where the defendant is being prosecuted. Two elements are necessary to establish a violation:

- First, the defendant was charged with or convicted of more serious offenses than defendants of other races, ethnicities or national origin who committed similar crimes and are "similarly situated." (*Ibid*.) " 'Similarly situated' means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's conviction history may be a relevant factor to the severity

[7] *Quartermain* is offered simply as an example of a situation where otherwise actionable conduct may be relevant in the context of the criminal proceeding. AB 2542 does not prohibit cognizable group bias or animus by a criminal defendant.

of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence."

Because this violation has a character very much like a denial of equal protection, "similarly situated" most likely will be viewed in the same context. For example, *People v. Cruz* (2012) 207 Cal.App.4th 664 (*Cruz*), discusses the general concepts of equal protection of the law: "Broadly stated, equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. [Citation.].... Thus, ... a threshold requirement of any meritorious equal protection claim is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.] This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. [Citations.]" (*Cruz*, *supra*, 207 Cal.App.4th at p. 674.) "The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not ... require absolute equality. [Citations.] [. . .]" [Citations.] Equal protection ... require[s] that a distinction made have some relevance to the purpose for which the classification is made. [Citation.]" (*Cruz*, *supra*, 207 Cal.App.4th at p. 675.) Presumably, "similarly situated" for the purposes of the Act will require the comparison of such things as the defendant's criminal record and the circumstances of the crime (such as whether weapons were used, great bodily injury inflicted, number of victims) with the criminal record and circumstances of similar crimes committed by persons of all other races, ethnicities, and national origin. The element would be established if the defendant was charged with or convicted of more serious charges than defendants of other races, ethnicities, or national origin who committed similar crimes and who have similar backgrounds.

- Second, the evidence establishes the prosecutor's office in the county where the defendant is being prosecuted "more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin." (*Ibid*.) The phrase "more frequently sought or obtained convictions" begs the question, "more frequently than what?" Likely this element is similar to the first element in that it requires the court to examine the practices of the prosecution by comparing such things as the defendant's criminal record and the circumstances of the crime (such as whether weapons were used, great bodily injury inflicted, number of victims) with the criminal record and circumstances of similar crimes committed by persons of all other races, ethnicities, and national origin. The element would be established if the prosecution sought or obtained a higher level of violation for persons of the defendant's race, ethnicity, or national origin "more frequently" than persons of all other races, ethnicities, or national origin. The defendant does not need to prove intentional discrimination. (§ 745, subd. (c)(2).)

- "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)." (§ 745, subd. (i).)

" 'More frequently sought or obtained' . . . means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).) The defendant will not establish a prima facie basis for relief, for example, if the motion simply alleges a majority of the people prosecuted for defendant's crime are of defendant's race. The defendant must also compare his or her case with the cases of defendants of *different* races who commit similar offenses. The defendant must show that defendants of his or her race are being prosecuted more than defendants of other races even though the offenses are similar, and all defendants are "similarly situated" except for race, ethnicity, or national origin.

To be entitled to relief, the defendant must establish that there is a "significant difference" in seeking or obtaining convictions. Statistical evidence may serve as a basis for relief under the Act, but such data is not required to establish a "significant difference." "Significant difference" is not further defined in the statute. Likely the court will have discretion to make that determination, based on testimony of experts and other evidence presented at the hearing on the violation.

"Race-neutral reasons" for the disparity "shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).) It will be a question of fact whether reasons tendered by the prosecution are "race-neutral."

The Act does not address how the prosecution establishes "race-neutral reasons for the disparity." It appears clear the prosecution has the initial burden of producing evidence of such reasons. Presumably, the prosecution would offer evidence in support of the reasons, and the defendant would have an opportunity to offer evidence in response. Likely it will be left to the discretion of the court to then determine, after considering the evidence offered by the prosecution, whether the defendant ultimately has met their burden of proof to establish the violation by a preponderance of the evidence.

It is unlikely that the reasons why the *defendant* was charged in a particular way will have any relevance to the determination of whether there has been a violation of section 745, subdivision (a)(3). Subdivision (a)(3) gives the prosecution the opportunity to show why county-wide charging practices were based on race-neutral factors, not that there are race-neutral reasons for the defendant's charge.

It is important to stress that AB 2542 has changed how statistical evidence can serve as the basis for establishing a constitutional violation. Caselaw previously accepted statistical evidence as relevant to the issue but was insufficient by itself to establish a violation. In *McCleskey v. Kemp* (1987) 481 U.S. 279 (*McCleskey*), for example, the U.S. Supreme Court rejected an equal protection claim, based solely on statistical disparities, that Georgia's death penalty law was being applied in a discriminatory fashion. The high court found there must be an additional showing the discrimination was purposeful. "Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.' [Citation.] A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the [statistical] study. McCleskey argues that the [statistical] study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black." (*McCleskey*, *supra*, 481 U.S. at pp. 292-293; footnotes omitted; italics original.)[8] AB 2542, however, provides such statistical evidence *is* sufficient alone to establish a violation so long as the difference is "significant" and the defendants in the comparable cases are "similarly situated." (§ 745, subd. (h)(1).)

"Statistical significance" is not the same as "significant difference. The Act specifies "[s]tatistical significance is a factor the court may consider, but is not necessary to establish a significant difference." (*Ibid*.)

(4) **"A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed."** (§ 745, subd. (a)(4)(A).) This provision seeks to address bias resulting in disparate sentencing based on the defendant's group identity. The violation has two elements:

[8] *McCleskey* was specifically mentioned by the Legislature in its preamble to AB 2542 as establishing an impossibly high standard for obtaining relief from discriminatory conduct. (AB 2542, § 2, subd. (f).)

- First, "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense." (*Ibid*.) Although this provision is somewhat vague, in evaluating whether the element has been established, the court presumably will be required to compare the defendant's sentence, crimes, circumstances and criminal backgrounds against the sentence imposed on defendants with similar crimes, circumstances and criminal backgrounds who are of a different race, ethnicity, or national origin. The element will be satisfied if the defendant establishes their sentence is more severe than imposed on persons of other races, ethnicities, or national origin who commit similar crimes under similar circumstances. Although not expressly provided in this portion of the act, it appears the comparison will be limited to cases in the county where the crime was sentenced.

  Second, "longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed." (*Ibid*.) The second element involves a county-wide comparison of all persons sentenced for the crime to determine whether persons of the defendant's race, ethnicity or national origin received a more severe sentence than defendants of any other races, ethnicities, or national origin. This element is not confined to the sentences imposed by a particular judge but examines the sentencing practice of the entire court within the county. There is no indication of the relevant timeframe to be examined. Presumably the period must be sufficiently long to be statistically relevant. Because of the reference to sentences "more frequently imposed," the court will be required to compare "similarly situated" defendants, by examining crimes, circumstances, and criminal backgrounds of each defendant, rather than simply doing a gross conviction offense-to-sentence comparison. . The defendant does not need to prove intentional discrimination. (§ 745, subd. (c)(2).)

- "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)." (§ 745, subd. (i).)

" '[M]ore frequently imposed' means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).)

To be entitled to relief, the defendant must establish that there is a "significant difference" in the sentencing practices of the court. Statistical evidence may serve as a basis for relief under the Act, but such data is not required to establish a "significant difference." "Significant difference" is not further defined in the statute. Likely the court will have discretion to make that determination, based on testimony of experts and other evidence presented at the hearing on the violation.

"Statistical significance" is not the same as "significant difference. The Act specifies "[s]tatistical significance is a factor the court may consider, but is not necessary to establish a significant difference." (*Ibid*.)

"Race-neutral reasons" for the disparity "shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).) It will be a question of fact whether such information is "race-neutral."

"'Relevant factors,' as that phrase applies to sentencing, means the factors in the California Rules of Court that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions." (§ 745, subd. (h)(3).)

The Act does not address how the prosecution establishes "race-neutral reasons" for the disparity. It appears clear the prosecution has the initial burden of producing evidence of such reasons. Presumably, the prosecution would offer evidence in support of the reasons, and the defendant would have an opportunity to offer evidence in response. Likely it will be left to the discretion of the court to then determine, after considering the evidence offered by the prosecution, whether the defendant ultimately has met their burden of proof to establish the violation by a preponderance of the evidence.

(5) **"A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed."** (§ 745, subd. (a)(4)(B).) This provision requires the court to determine whether the race, ethnicity, or national origin of the victim of the defendant's crime played a role in the sentencing. There are two elements for the violation:

- First, "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense." (*Ibid*.) This provision is the same as the first element discussed in paragraph (4), *supra*. Although this provision is somewhat vague, in evaluating whether the element has been established, the court presumably will be required to compare the defendant's sentence, crimes, circumstances, and criminal backgrounds against the sentence imposed on defendants with similar crimes,

circumstances, and criminal backgrounds who are of a different race, ethnicity or national origin.[9] The element will be satisfied if it is established the defendant's sentence is more severe than imposed on persons of other races, ethnicities or national origin who commit similar crimes under similar circumstances. Although not expressly provided in this portion of the act, it appears the comparison will be limited to cases in the county where the crime was sentenced.

- Second, "longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed." (*Ibid*.) The second element involves a county-wide comparison of all persons sentenced for the defendant's crime to determine if the victim was of one race, ethnicity, or national origin it resulted in the defendant more frequently receiving a more severe sentence than if the victim had any other race, ethnicity, or national origin. This element is not confined to the sentences imposed by a particular judge but examines the sentencing practice of the entire court. There is no indication of the relevant timeframe to be examined. Presumably the period must be sufficiently long to be statistically relevant. In determining whether the sentences are "more frequently imposed," the court will be required to compare "similarly situated" defendants, by examining crimes, circumstances, and criminal backgrounds of each defendant, rather than simply doing a gross conviction offense-to-sentence comparison. This element does not require the victim to have any particular race, ethnicity, or national origin, or that it be different than the defendant's race, ethnicity or national origin. It appears this element is satisfied if it is established in the county defendants receive a more severe sentence based on the race, ethnicity, or national origin of the victim. The defendant does not need to prove intentional discrimination. (§ 745, subd. (c)(2).)

- "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).) (§ 745, sub. (i).)

" '[M]ore frequently imposed' means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have

[9] A literal reading of the first element would require the inclusion of people of defendant's own race, ethnicity, or national origin in comparing the sentence. Since the purpose of the legislation is to address disparity in sentencing, to include people of defendant's own demographics likely would produce an absurd result. The first element must be read in connection with the second element which does require a comparison between people of different demographics.

contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).)

For statistical evidence to serve as a basis for relief under the Act, the data must demonstrate a "significant difference" in imposing sentences. "Significant difference" is not further defined in the statute. Likely the court will have discretion to make that determination, based on testimony of experts and other evidence presented at the hearing on the violation.

"Statistical significance" is not the same as "significant difference. The Act specifies "[s]tatistical significance is a factor the court may consider, but is not necessary to establish a significant difference." (*Ibid*.)

"Race-neutral reasons" for the disparity "shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin." (§ 745, subd. (h)(1).) It will be a question of fact whether such information is "race-neutral."

"'Relevant factors,' as that phrase applies to sentencing, means the factors in the California Rules of Court that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions."

The Act does not address how the prosecution establishes "race-neutral reasons for the disparity." It appears clear the prosecution has the initial burden of producing evidence of such reasons. Presumably, the prosecution would offer evidence in support of the reasons, and the defendant would have an opportunity to offer evidence in response. Likely it will be left to the discretion of the court to then determine, after considering the evidence offered by the prosecution, whether the defendant ultimately has me their burden of proof to establish the violation by a preponderance of the evidence.

B. Procedure for determining a violation of Section 745, subdivision (a)

1. Filing of motion or petition

Persons seeking relief based on a violation of section 745, subdivision (a), "may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7, in a court of competent jurisdiction, alleging a violation of subdivision (a). For claims based on the trial record, a defendant may raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence. The defendant may also move to stay the appeal and request remand to the superior court to file a motion pursuant to this section." (§ 745, subd. (b).) For a discussion of relief by writ of habeas corpus, see Section III, *infra*. For a discussion of relief under section 1473.7, see Section IV, *infra*.

2. Filing of motion on direct appeal

AB 1118 amended section 745, subdivision (b), by adding: "For claims based on the trial record, a defendant may raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence. The defendant may also move to stay the appeal and request remand to the superior court to file a motion pursuant to this section." The plain language of the amendment makes it clear that a motion under the Act based on the trial court record need not be first filed in the trial court but may be raised for the first time on appeal. The author's intent of the amendment was expressed in the Senate Floor Analysis of AB 1118:

> Under existing law, defendants can file a motion for an RJA violation through a trial court, or if a judgment has been imposed, they can file a petition for a writ of habeas corpus. However, questions have been raised as to whether habeas petitions are the exclusive avenue for a post-conviction RJA challenge or whether individuals can file claims on direct appeal if the violation is apparent on the trial record. In this scenario, the case would be more efficiently decided through the appeals process as opposed to the habeas route, which requires more litigation and judicial resources.
>
> In other cases already on appeal, counsel may identify an RJA issue that requires additional evidence outside the record and may wish to pursue this claim before the appeal is decided. In these cases, it is more efficient to stay the appeal and remand the case to the trial court for an RJA motion to be filed rather than require a new habeas petition. This is particularly important for individuals with death sentences, as it can take a decade or more for their direct appeal to be decided. These individuals are also unlikely to have AB 1118 habeas attorneys assigned to them due to the unavailability of qualified counsel, making it nearly impossible to litigate their RJA claims in a timely fashion.
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> (Senate Rules Committee, Senate Floor Analysis – Third Reading, June 7, 2023, pages 4-5.)

Similarly, an Assembly Bill Policy Committee analysis states that this bill "[c]larifies that a defendant can raise a claim alleging a violation of the California Racial Justice Act (CRJA) on direct appeal. Specifically, this bill . . . [c]larifies that a CRJA motion, which must be filed in a court of competent jurisdiction, does not have to be filed during trial." (Assembly Committee on Public Safety, March 27, 2023, p. 1.) The Assembly analysis further observed: "This bill would also clarify that a CRJA motion does not have to be filed during trial, in particular." (*Id*., at p. 6.)

Trial court record

It should be noted that the change made by AB 1118 will only apply to violations of the Act that appear in the "trial record." Although the reference is simply to the "trial record," nothing in the Act or comments by the author suggest that the record is limited to the record of the actual trial. Undoubtedly the Legislature meant to include any violation that is reflected in the trial court record, including pre and post-trial proceedings. Support for such an interpretation may

be found in an Assembly Policy Committee analysis. AB 1118 "would specify that a CRJA claim based on the trial record may be raised on direct appeal from the conviction or sentence, not just in a habeas petition. (*In re Carpenter* (1995) 9 Cal.4th 634, 646 ["Appellate jurisdiction is limited to the four corners of the record on appeal . . . ."].) (Assembly Committee on Public Safety, March 27, 2023, p. 5.) The reference to the "record on appeal" in the Committee report and in the citation to *Carpenter* seems to signal an intent to include the entire trial court record within the scope of the amended statute, not just the portion of the trial court record pertaining to the trial.

Since the violations must be reflected in the trial court record, the ability to raise a violation for the first time on appeal will be limited to the grounds specified in Section 745, subdivisions (a)(1) [a designated person exhibited racial animus towards the defendant, as reflected in the trial court record], and subdivision (a)(2) [during the defendant's trial in open court a designated person committed a prohibited act]. Violations based on circumstances in section 745, subdivision (a)(1), to the extent not completely supported by the trial court record, subdivision (a)(3) [the defendant was charged or convicted of a more serious crime than defendants of other races], and subdivision (a)(4) [the defendant received a more serious sentence than similarly situated persons of other races], necessarily involve facts existing beyond the trial court record.

Procedure in the appellate court

Although allegations under section 745, subdivisions (a)(1) and (2), if reflected in the trial court record, may be raised for the first time on appeal, the comments of the author suggest there was no intent to require the appellate court to conduct any evidentiary hearings under the Act. If it is possible to determine a violation solely from the trial court record, the appellate court now has the jurisdiction to find it. But when the matter cannot be resolved within the four corners of the trial court record, the defendant has the option of requesting a stay of the appellate proceedings and remand of the case to the trial court to address a motion under section 745, subdivision (a).

The AB 1118 amendments do not address the standard of evaluation of evidence by the appellate court and who has the burden of proof. Appellate courts are accustomed to determining claims of insufficiency of the evidence, but not sufficiency of the evidence in the first instance. Typically, claims of insufficiency of the evidence are resolved by applying the substantial evidence standard. In the AB 1118 context, when an RJA claim is made for the first time on appeal, likely the appellate court stands in the shoes of the trial court and must determine (based only on the trial court record) whether the defendant has proven a violation by a preponderance of the evidence.

If the appellate court finds a violation based on a review of the trial court record, presumably it is the intent of AB 1118 that the court will also determine the appropriate remedy. It appears that the only remedy under these circumstances is specified in section 745, subdivision (e)(2). Subdivision (e)(2)(A) provides, in part: "After a judgment has been entered, if the court finds

that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). . . . On resentencing, the court shall not impose a new sentence greater than that previously imposed."[10] However, if the appellate court finds only the sentence was "obtained or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed." (§ 745, subd. (e)(2)(B).) Because evidence outside the trial court record will be necessary to establish RJA sentencing violations under section 745, subdivision (a)(4), sentencing violations cognizable for the first time on appeal will likely be limited to section 745, subdivision (a)(1), where bias or animus towards the defendant is exhibited by a designated person during the sentencing process. In such situations, the appellate court should leave the conviction undisturbed but remand the matter for resentencing. If the person who violated section 745, subdivision (a)(1), was the sentencing judge, the appellate court should order that a different judge impose the new sentence.

It seems unlikely that the appellate court is equipped to handle the resentencing, even if the violation is apparent from the trial court record. Most cases will not present a situation where there is only one legal sentence that can be imposed. And indeed, in some cases, a resentencing court could exercise its discretion to impose the same sentence. An appellate court is not equipped to impose sentences in this context. Aggravating and mitigating circumstances relating to the crime and circumstances pertinent to the defendant will not necessarily be apparent in the trial court record. Nor is there a mechanism in place to allow for a sentencing hearing, which could involve a new probation report, testimony of witnesses, the presence of a custody defendant, victim impact statements, and provide an opportunity for a victim to be present.

A plethora of unresolved issues

There are a number of issues awaiting appellate resolution or legislative action. It is not clear what should happen when an appellant does not request a stay of the appellate proceedings, maintains that the appellate court can decide an RJA violation based on the trial court record, but the appellate court determines it cannot. If the appellate court finds there is a missing evidentiary piece not reflected in the trial court record, may it issue its opinion on all the other issues raised on appeal, but in that opinion sua sponte order a limited remand to allow a full hearing in the trial court? Or to preserve the opportunity for remand, must an appellant request a remand in the alternative? Or does the appellate court's determination that there is an evidentiary gap mean that the appellant has not carried their burden of establishing a violation by a preponderance of the evidence, and that determination ends the matter? Or after the appellate court issues its opinion in which the appellant does not prevail on any

[10] Section 745, subdivision (e)(2)(A), also provides: "If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a), the court may modify the judgment to a lesser included or lesser related offense." It is unlikely this provision will be applicable to a violation found by an appellate court since the underlying facts supporting the claim under section 745, subdivision (a)(3), necessarily are beyond the trial court record.

issues, may the appellant in a petition for rehearing request a stay of the appellate proceedings and remand to the trial court based on the AB 1118 amendment? Or if an appellate court determines there is insufficient evidence to support the violation, may a defendant later seek habeas relief in an attempt to develop new evidence not in the trial record or will the defendant be barred from seeking habeas relief based on collateral estoppel principles?

3. Forfeiture of claim on appeal

People v. Lashon (2023) 95 Cal.App.5th 136 (*Lashon*), held the defendant forfeited her claim under the Act on direct appeal by failing to first file a motion under section 745 in the trial court. *Lashon* did not discuss the exact nature of the alleged violation but did make a general reference to the judge's conduct allegedly being in violation of section 745, subdivision (a)(2). "Because no CRJA motion premised on Lashon's claim of implicit racial bias by the trial judge was filed in the trial court during either the trial or sentencing phases, we deem forfeited her CRJA claim for purposes of direct appeal." (*Lashon*, *supra*, 95 Cal.App.5th at p. 139.) To the extent violations alleged under section 745, subdivisions (a)(1) and (2), are reflected in the trial court record, however, *Lashon* appears to have been abrogated by the amendment of section 745, subdivision (b), by AB 1118.[11]

4. Timeliness of motion

Nothing in section 745 requires the motion be filed at a particular time. Subdivision (c)(2), however, specifies "[a] motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court." The provision is ambiguous. It is not clear whether the provision speaks only to grounds discovered while the defendant's trial is actually under way, or to all grounds regardless of when discovered. It seems the intent of the Legislature is to require the expeditious resolution of the motion on all grounds "as soon as is practicable." Clearly it would be well for cautious defense counsel to consider the waiver language in subdivision (c)(2) when deciding whether to bring the matter to the court's attention. It is also advisable for the court to take up any potential motion under section 745 during *in limine* discussions of the case.

The relationship between subdivision (c)(2) and the provisions of subdivision (b) permitting the raising of a claim under the Act for the first time on appeal is unclear. Specifically, was it the intent of AB 1118 to permit the filing of a claim for the first time on appeal even though the grounds of the claim were fully known to the defendant during the time the trial court had jurisdiction over the case? AB 1118 appears to allow defendants to wait to raise the claim on appeal or ask for a stay and remand to the trial court even if it was practicable to have made the motion in the trial court. For example, when a prosecutor uses language during closing argument that meets the definition of racially discriminatory language, AB 1118 appears to

[11] Like *Lashon*, *People v. Simmons* (2023) 96 Cal.App.5th 323, observes there was no previous provision in the Act permitting the defendant to raise a challenge under the Act for the first time on direct appeal. Now there is.

allow the defendant to make an RJA claim on appeal without objecting to the prosecutor's argument at trial or filing and litigating the claim during the trial. In other words, instead of making the motion when "practicable upon the defendant learning of the alleged violation" as required by subdivision (c)(2), in this scenario a defendant could wait to see if the jury convicts and then make the claim on appeal. It remains to be seen how an appellate court will address these apparently contradictory provisions. Indeed, because the Legislature did not also amend subdivision (c), an argument could be made that the Legislature did not intend to abolish longstanding appellate rules concerning preservation of issues for appeal and forfeiture by amending the statute to allow making the claim on appeal without first raising it in the trial court. Might subdivisions (b) and (c)(2) be harmonized by allowing a claim for the first time on appeal only in circumstances where the defendant demonstrates that first raising the matter in the trial court was not "practicable?" The resolution of the issue will require further appellate or legislative attention.

5. Procedural requirements

The procedural requirements of a hearing to determine a violation of the Act are outlined in section 745, subdivision (c):

> If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing. A motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.
>
> (1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred.
>
> (2) The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence. The defendant does not need to prove intentional discrimination.
>
> (3) At the conclusion of the hearing, the court shall make findings on the record.

a. Prima facie showing

It is clear from the provisions of section 745, subdivision (c), that the court is directed to hold a hearing under the Act only if the moving party makes a prima facie showing that a violation has occurred. The requirement was discussed in *Finley v. Superior Court* (2023) 95 Cal.App.5th 12 (*Finley*): "The defining feature of the prima facie standard is that it creates

an initial burden on a moving party to proffer evidence that would support a favorable ruling without a court's consideration of conflicting evidence put forth by the opponent. ' "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." ' [Citation.] ' "Prima facie evidence is that which will support a ruling in favor of its proponent if no controverting evidence is presented. [Citations.] It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences." ' [Citation.].) (*Finley*, *supra*, 95 Cal.App.5th at pp. 21.)

Finley additionally held that although the prima facie showing under the Racial Justice Act is similar to the prima facie showing in a habeas proceeding, the burden on the moving party under the Act is less. "Although we agree that the type of information a defendant should present at the prima facie stage of a Racial Justice Act case is similar to the information a defendant should present in a habeas petition, the standard by which a court assesses the information is somewhat different. In a habeas proceeding, 'the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] The standard is not as stringent in a Racial Justice Act case. Under the Racial Justice Act, the court does not ask if the defendant proffered facts sufficient to demonstrate actual entitlement to relief. Rather, the court asks if a defendant has proffered facts sufficient to show a 'substantial likelihood'–defined as 'more than a mere possibility, but less than a standard of more likely than not'–that the Racial Justice Act has been violated. [Citation.] The prima facie threshold is thus lower than the preponderance of the evidence standard required to establish an actual violation of the Racial Justice Act. [Citation.] [¶] Furthermore, imposing a 'heavy burden' at the prima facie stage in a Racial Justice Act case would be contrary to the Act's structure and purpose. By enacting the Racial Justice Act, the Legislature intended 'to depart from the discriminatory purpose paradigm in federal equal protection law,' a standard that was ' "nearly impossible to establish." ' [Citation.] The Legislature also imposed 'escalating burdens of proof' within the statutory scheme, with a lower standard of proof at the prima facie stage ('substantial likelihood') than at an evidentiary hearing ('preponderance of the evidence'). [Citation.] The Legislature could not have intended to place a 'heavy burden' on a defendant at the prima facie stage of a Racial Justice Act case." (*Finley*, *supra*, 95 Cal.App.5th at pp. 22; italics in original.)

The court, however, is not required to accept the allegations under the Act without limitation. "The principles that apply to a defendant's prima facie showing extend to expert declarations and statistical information that accompany a motion under the Racial Justice Act; a court should not accept the truth of this evidence if it is 'conclusory' and 'made without any explanation.' [Citation.] In this regard, the court serves a 'gatekeeping role' to exclude expert opinions and statistics that are speculative or unsupported, similar to the role a court serves during trial and other evidence-based proceedings when a party presents expert evidence. [Citations.]) The court's gatekeeping function aligns with its assessment of whether a defendant has made a prima facie showing for relief, as '[t]he trial court's gatekeeping role does not involve choosing between competing expert opinions.' Rather,

the focus ‘ “must be solely on principles and methodology, not on the conclusions that they generate.” ’ [Citation.]” (*Finley*, *supra*, 95 Cal.App.5th at pp. 22-23.)

“To summarize, a defendant seeking relief under the Racial Justice Act must state fully and with particularity the facts on which relief is sought, and include copies of reasonably available documentary evidence supporting the claim. The court should accept the truth of the defendant's allegations, including expert evidence and statistics, unless the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by the court's own records. [Citation.] And again, the court should not make credibility determinations at the prima facie stage.” (*Finley*, *supra*, 95 Cal.App.5th at p. 23; footnote omitted.) In determining whether the defendant has made a prima facie showing under the Act, the court “should not weigh the evidence or make credibility determinations, except in the rare case where the record ‘irrefutably establishes’ that a defendant's allegations are false. [Citation.]” (*Finley*, *supra*, 95 Cal.App.5th at p. 23-24.)

Mosby v. Superior Court (2024) 99 Cal.App.5th 106 (*Mosby*), discusses the prima facie showing necessary to establish a violation of section 745, subdivision (a)(3), discrimination in filing. “As stated, the language of section 745 does not clarify what must be shown at the prima facie stage and what should be decided at the evidentiary hearing. However, it is clear from the language that to prove a prima facie case of a violation under section 745, subdivision (a)(3), the evidence must establish that Petitioner was *similarly situated* and engaged in *similar conduct* with other nonminority defendants who were charged with lesser crimes, and that there was racial disparity in the District Attorney's capital charging system. Petitioner's counsel conceded at oral argument that factual evidence of similar conduct could support a prima facie case. The evidence presented by Petitioner in the Second Motion of other current cases involving nonminority defendants was proper evidence of similar conduct. Based on this factual evidence, we need not determine if mere statistical evidence that compares groups who are engaged in similar conduct and similar situations may be enough to make a prima facie showing under section 745.” (*Mosby*, supra, 99 Cal.App.5th at p. 130, italics in original.) *Mosby* agreed with the burden of proof as articulated in *Finley*. (*Mosby*, *supra*, 99 Cal.App.5th at p. 131.)

“The statute provides that evidence of race-neutral reasons for racial disparity is to be presented by the District Attorney, not Petitioner. As such, it follows that the presentation of evidence of race-neutral reasons is a defense after the prima facie case has been shown. It is not entirely clear if the burden also falls on the District Attorney to show the relevant factors that were used in deciding to charge both the nonminority defendants and Petitioner. As defined, race-neutral reasons “shall be relevant factors to charges, ... that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.” (§ 745, subd. (h)(1).) [¶] Based on the foregoing, if a defendant provides statistical evidence showing a racial disparity in the charging of nonminority defendants and African-American defendants, and provides evidence of nonminority defendants who engage in similar conduct and are similarly situated but were charged with lesser crimes than the

charged African-American defendant, this is sufficient to show there was more than a mere possibility that a violation of section 745, subdivision (a), has occurred. As such, a defendant has met his burden of establishing a prima facie case. An evidentiary hearing should be ordered at that point to consider all of the relevant factors in charging and allow the District Attorney to present race-neutral reasons for the disparity in seeking the death penalty." (*Mosby*, *supra*, 99 Cal.App.5th at p. 132.)

Applying the foregoing rule to the facts of this case, *Mosby* observed: "While we cannot establish a bright-line rule of what constitutes sufficient evidence of 'similar conduct' in all cases, here, Petitioner in the Second Motion provided the facts of several cases that shared many of the same characteristics as this case, including other drive-by shootings and multiple murders committed by nonminority defendants who were not charged with the death penalty. In addition, Petitioner presented ample evidence that the District Attorney's capital system more frequently sought convictions for more serious offenses against African-American defendants. This was enough to provide more than a 'mere possibility' that a violation of section 745, subdivision (a)(3), had occurred. The trial court erred by finding Petitioner did not establish a prima facie showing of a violation. Once Petitioner presented this evidence, the trial court should have ordered an evidentiary hearing at which the burden shifted to the District Attorney to show the race-neutral reasons for the disparity in seeking the death penalty against Petitioner, which include the relevant factors to charges that were not influenced by implicit or systemic racial bias. The trial court, after receiving such evidence, could then make a decision based on the totality of the evidence." (*Mosby*, *supra*, 99 Cal.App.5th at p. 133.)

6. Discovery related to a motion to establish a violation of the Act

Apart from the provisions of sections 1054, *et seq*., regarding the general discovery obligation in a criminal case, the Act contains discovery provisions granting the defense the ability to obtain evidence relevant to the determination of a violation of subdivision (a). "A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and in order to protect a privacy right or privilege, the court may permit the prosecution to redact information prior to disclosure or may subject disclosure to a protective order. If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records." (§ 745, subd. (d).)

a. Motion for discovery

The discovery obligation is triggered by a motion filed by the defense requesting specified material. Based on section 745, subdivision (d), the motion should contain the following elements:

- A reasonably specific description of the material sought by the defendant;

- A statement of the violation under section 745, subdivision (a), being pursued. If the motion to determine a violation has not actually been filed, the motion for discovery likely must include the nature of the violation to be established. Without such information, the court would not be able to determine the relevancy of the material being sought;

- Sufficient information about the nature of the violation and the information being sought for the court to determine the relevance of the material being requested;

- An allegation that the information is in the possession of a particular entity of the state; and

- A showing of good cause for ordering the discovery. "Good cause" is not further defined by the Act but is addressed in *Young v. Superior Court* (2022) 79 Cal.App.5th 138 (*Young*). *Young* found the closest analogy to what constitutes "good cause" is found in the standard applicable to discovery of police officer records in a *Pitchess* motion. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) As explained in *Young*: "We agree that a discovery-triggering standard similar to the standard applicable to *Pitchess* discovery motions under Evidence Code section 1043, subdivision (b), applies to section 745, subdivision (d) motions under the Racial Justice Act. These two discovery provisions share a similar purpose, as each is designed to provide a defendant access to information that is uniquely in the possession of government officials. We can presume that the Legislature was aware how courts have interpreted the meaning of good cause for *Pitchess* discovery and intended a similar standard to apply under the Racial Justice Act. Thus, *we conclude that in order to establish good cause for discovery under the Racial Justice Act, a defendant is required only to advance a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case*. [Citation.] This minimal standard, in effect, restores the discovery regime that was in place under *Murgia* and *Griffin* prior to 1990, but without any need to make a prima facie showing of violation of the equal protection clause. [¶] While the plausible justification standard we announce here is similar to the threshold showing that must be made for *Pitchess* discovery, it is in some respects even more relaxed than the 'relatively relaxed standard[ ]' under Evidence Code section 1043, subdivision (b). [Citation.] Good cause for *Pitchess* purposes must be supported by an affidavit setting forth a reasonable belief that the requested discovery is material to the subject matter of the case. The *Pitchess* materiality requirement also places a burden on the movant to 'propose a defense or defenses to the pending charges' and a 'logical link between the defense proposed and the pending charge.' [Citation.] There is no comparable affidavit requirement for a discovery motion under section 745, subdivision (d). And there is no materiality requirement, at least not in the sense that the defendant must show a 'logical link' between some defense and a pending charge. [¶] The Racial Justice Act counterpart to *Pitchess* materiality is 'relevan[ce] to a potential violation of section 745,

subdivision (a).' (§ 745, subd. (d).) Since a section 745, subdivision (a) violation may be proved up in several different ways based on a variety of direct or circumstantial evidence of discrimination under subdivision (a)(1)–(4), the threshold showing for good cause must be commensurately broad and flexible. The limiting factor is 'relevance' in the discovery sense—that is, *each request for disclosure must be reasonably calculated to lead to discovery of admissible evidence probative of a section 745, subdivision (a) violation.* This subject matter limitation on the scope of discoverable material creates an outer boundary that, if crossed, may justify an order narrowing or otherwise limiting the obligation to respond. And as always in the context of discovery, the trial court has ample discretion to manage where the discovery-relevance boundary lies." (*Young*, supra, 79 Cal.App.5th at pp. 159-160; italics added, footnote omitted.)

Young held there is no requirement that the defendant offer some showing of charging disparity to obtain discovery for an alleged violation of section 745, subdivision (a)(3). "Preventing a defendant from obtaining information about charging decisions without first presenting that same evidence in a discovery motion is the type of a Catch-22 the Act was designed to eliminate." (*Young*, *supra*, 79 Cal.App.5th at p. 162.)

Offering general guidance to the trial court in exercising its discretion to grant discovery, *Young* referenced the seven factors discussed in *City of Alhambra v. Superior Court (Rodriguez)* (1988) 205 Cal.App.3d 1118. "Distilling common law discovery principles that were developed in criminal cases before the enactment of Chapter 10, a Second District panel in *Alhambra . . .* enunciated a list of seven discretionary considerations trial courts should 'consider and balance' in evaluating pretrial discovery requests from the defense. . . . [¶] The full list of seven *Alhambra* factors is as follows: '(1) whether the material requested is adequately described, (2) whether the requested material is reasonably available to the governmental entity from which it is sought (and not readily available to the defendant from other sources), (3) whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest, (4) whether the defendant has acted in a timely manner, (5) whether the time required to produce the requested information will necessitate an unreasonable delay of defendant's trial, (6) whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and (7) whether the defendant has shown a sufficient plausible justification for the information sought.' [Citation.]" (*Young*, *supra*, 79 Cal.App.5th at p. 168.)

Finally, *Young* observed that if the seventh factor is satisfied – a plausible justification is shown – "it will likely be an abuse of discretion to 'totally foreclose []' discovery. [Citations [' "The trial courts in exercising their discretion should keep in mind that the Legislature has suggested that, where possible, the courts should impose partial limitations rather than outright denial of discovery." '].]" (*Young*, *supra*, 79 Cal.App.5th at pp. 168-169.) "If, on remand, Young persuades the trial court that he has a plausible justification for alleging racial bias in connection with his arrest, the Attorney General's

argument that that is insufficient to warrant discovery concerning prosecutorial charging, at the end of the day, will go to the form, scope, and timing of discovery, not to whether discovery should be ordered at all. Young seeks disclosure of five years' worth of data, and data concerning not just the drug offense at issue in this case, but drug offenses under many related statutes, together with a wide range of associated information. Even if he meets the threshold standard for entitlement to discovery that we set forth in this opinion, how much of this requested data may be ordered disclosed, when, and in what form, is for the trial court to consider, in an exercise of its discretion, weighing probative value against burden." (*Young*, *supra*, 79 Cal.App.5th at p. 169.)

Continuance to obtain discovery

People v. Garcia (2022) 85 Cal.App.5th 290 (*Garcia*), reversed the trial court's order denying a motion by the defendant for a continuance of the sentencing proceedings to obtain foundational information necessary for a motion under section 745. After observing that a motion under section 745 must be "based on specific facts," *Garcia* stated that "preparing a discovery motion under the CRJA necessarily entails a fairly thorough review of the trial record for any remarks or conduct by the trial judge, attorneys, experts, jurors, and law enforcement officers that may plausibly support the conclusion that a CRJA violation ' "could or might have occurred" in [the] case.' [Citation.] For these reasons, we conclude defendant should have been given a reasonable opportunity to review the trial record and gather relevant information to prepare a motion for discovery under the CRJA. The error was not harmless under any standard because, as indicated, nothing in the record indicates either way whether defendant's counsel could have discovered facts plausibly supporting a motion for CRJA discovery had she been given a reasonable opportunity to do so." (*Garcia*, *supra*, 85 Cal.App.5th at p. 297.)

b. Discovery of material in possession of the state

The motion may seek records or information "in the possession or control of *the state*." (§ 745, subd. (d); italics added.) The "state" as defined in the Act "includes the Attorney General, a district attorney, or a city prosecutor." (§ 745, subd. (h)(4).) It should be noted the court is not listed as part of "the state." Discoverable information obviously includes information in the possession of the prosecution. Based on the plain meaning of the statute, it does not include information in the possession of law enforcement or an expert witness. In the absence of statutory mandate, the Act does not obligate the state to collect and synthesize data. Likely the only obligation is to disclose the raw data or make the source of the data available to the defense to review.

The scope of the discovery will be established by the court in its order to the state. The order will be based on the identification of the materials being sought and their relevance to the alleged violation of section 745, subdivision (a). Good cause must be shown for the "records and information "sought." Depending on the nature of the alleged violation, a discovery

request may include historical data that precedes the effective date specified in section 745, subdivision (j). For example, to establish biased prosecution under section 745, subdivision (a)(3), it may be necessary for the defendant to offer statistical data from several years prior to the Act's effective date. The necessity of discovering such data, its scope, and how far back the state must go in disclosing data, will be a matter within the court's discretion based on the discovery motion and the defendant's showing of good cause.

c. Disclosure obligation based on motion, not general criminal discovery (§§ 1054, et seq.)

Unlike general criminal discovery under section 1054.1, unless the material is so significant that it triggers the *Brady* duty, there is no sua sponte obligation of the state to disclose information related to the enforcement of the Act. The duty to release information comes only after the hearing on the motion for disclosure and the court enters an order of disclosure based on a showing of good cause by the defendant. (§ 745, subd. (d).)

The discovery procedures outlined in section 745, subdivision (d), appear to be apart from and in addition to the general discovery obligation in criminal cases contained in sections 1054, *et seq*. There is no cross-reference between the two sets of statutes. Furthermore, under section 745, subdivision (d), the discovery obligation is entirely on the state; it is reciprocal under section 1054.3. The timing of the request for discovery is different: 30 days prior to trial for general discovery under section 1054.7; there is no specific time limitation for discovery related to violations of section 745, subdivision (a). Violations of section 745, subdivision (a)(1), may occur at any time before, during, or after trial; violations of section 745, subdivision (a)(2), can only occur during trial; violations of section 745, subdivision (a)(3), depending on the violation, may become evident before or after trial; and violations of section 745, subdivision (a)(4), only occur after trial. The timing of the knowledge or occurrence of the violations under section 745, subdivision (a), is totally inconsistent with the 30-days-prior-to-trial obligation under section 1054.7.

d. Redaction of discovery

"Upon a showing of good cause, and in order to protect a privacy right or privilege, the court may permit the prosecution to redact information prior to disclosure or may subject disclosure to a protective order. If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records." (§ 745, subd. (d).)

The showing of good cause under this portion of the Act falls on the prosecution. Presumably, the redaction referenced in the statute concerns any information where the interests of the public in confidentiality outweigh the right of the defendant to disclosure. Redaction most often will relate to information related to the victim.[12] It may also include such things as

[12] Article I, § 28, subd. (b)(4), of the California constitution provides, in part, that the victim of a crime has a right "to prevent disclosure of confidential information or records to the defendant . . . which could be used to locate or harass the

information that may lead to the identification of a confidential informant. Although not directly applicable to motions for discovery under section 745, subdivision (d), section 1054.7 offers additional guidance in determining "good cause" why disclosure should be "denied, restricted, or deferred:" " 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."

The scope of the prosecutor's ability to redact information should be clearly outlined in the court's order. To facilitate the court's review of the prosecution's request for redaction, it may be appropriate to conduct proceedings *in camera* and on the record. In any case, the court should preserve the record under seal, in such a manner that there can be meaningful appellate review of the court's actions.

e. Failure to comply with discovery order

Section 745 does not specify a sanction for failure of the state to comply with a discovery order. There is no indication in the statute that failure to comply with the order will trigger any of the remedies listed in section 745, subdivision (e), nor any of the discovery sanctions authorized by section 1054.5, subdivision (b).

f. Section 745, subdivision (d), is not a substitute for restricted discovery statutes

Section 745, subdivision (d), provides a means of discovery of information relative to the proof of a violation under section 745, subdivision (a). These discovery provisions, however, should not be viewed as an alternative or exception to other statutes which restrict discovery. For example, conduct by a law enforcement officer may trigger an inquiry for additional information under section 745, subdivision (d). It may also warrant pursuit of information in connection with a *Pitchess* motion. Nothing in section 745, subdivision (d), suggests its provisions apply "notwithstanding any other provision of law." If certain sources of information are protected by special statutes, the parties and the court will need to observe those protections in considering requests for information under section 745, subdivision (d).

7. Hearing to determine a violation

a. Timing of the hearing

The Act does not specify when the hearing on an alleged violation must be held. For the most part, timing of the hearing will depend on the nature of the violation and when it was discovered.

victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment or which are otherwise privileged or confidential by law."

- Violations under section 745, subdivision (a)(1), can occur and/or be discovered before, during or after trial.

- Violations under section 745, subdivision (a)(2), can occur only during trial.

- Violations under section 745, subdivision (a)(3), can occur before trial; they can be discovered before, during or after trial.

- Violations under section 745, subdivision (a)(4), can only occur after trial; they may be discovered during or after sentencing.

To the extent violations occur and are discovered prior to trial, there will be strong incentive to resolve the matter prior to jury selection and attachment of jeopardy. A portion of any pretrial conference should include an inquiry into the existence of any violation. The trial court should ask whether defense counsel is aware of any potential section 745, subdivision (a), violations prior to trial.

A violation occurring or discovered during trial presents obvious logistical challenges. Nothing in the Act requires the court to immediately adjourn the proceedings to resolve the alleged violation. Conversely, delaying resolution of a violation may restrict the remedy options available to the court if a violation is ultimately proven, particularly if jeopardy has attached. "Jeopardy attaches in a jury trial when the trial jury is sworn and in a court trial when the first witness is sworn." (*Perryman v. Superior Court* (2006) 141 Cal.App.4th 767, 774.) Prior to completion of jury selection, the court may discharge the jury panel and empanel a new one. After jury selection has been completed, declaring a mistrial requires the defendant's consent. If the determination of the violation does not occur until after sentencing, there is only a limited right to amend the sentence. When scheduling section 745 proceedings during trial, the court must balance the right of all parties to a reasonably prompt determination of the violation, with the right of all parties to a trial that is efficient and concludes within time estimates understood by the parties and the jury.

b. The judge who hears the motion

Nothing in the Act specifies who is to hear the motion to establish a violation under section 745, subdivision (a). Except for allegations of bias by a judge in the case, the trial judge should hear all matters in determining whether a violation of the Act has occurred, and, if a violation is shown, the remedy to be employed. Indeed, it may be the trial judge, or a judge assigned for all purposes, who is in the best situation to determine whether an expression of bias has occurred, and, if so, the proper remedy given its context in the case.

An allegation of racially biased conduct against the judge, however, requires the court to "disqualify themselves from any further proceedings under [section 745]." (§ 745, subd. (b).)

Likely the best source of procedural guidance is some of the law and procedure outlined in Code of Civil Procedure section 170.3 related to challenges against a judge for cause under Code of Civil Procedure, section 170.1. As with any motion brought under section 745, whatever process is selected must account for the status of the case at the time the motion is brought and provide for an expeditious resolution of the allegations. Drawing on the procedures outlined in the Code of Civil Procedure for disqualification of a judge, the process could have the following components:

- Upon the filing of a motion challenging the conduct of the court, the court should self-disqualify from further substantive action on the motion. The trial judge should not decide the matter of their own potential violation of the Act. Because of the uncertainties of interpretation attendant section 745, the trial judge should not rule on the question of whether the motion has stated legal grounds for relief. Because the timing of the motion can influence the available remedies, the trial court should not decide whether the motion should be heard before proceeding in the case. However, nothing in the Act suggests the court must suspend all criminal trial proceedings or any involvement in the underlying case until the motion is resolved.

- The motion should be served on the trial judge and all parties in the case.

- The motion should be forwarded immediately to the presiding judge of the court for assignment to a judge to determine the matter. (Calif. Rules of Court, rule 10.603, subd. (b)(1)(B) and 10.603, subd. (c)(1)(D).)

- The judge assigned to the motion should determine whether the defendant has established a prima facie basis for relief. If a prima facie basis has been established, the judge assigned to the motion should conduct the hearing on the violation as soon as practicable. If a violation is found, the judge assigned to the motion should determine the remedy in accordance with section 745, subd. (e). If the remedy includes a resentencing of the defendant, such resentencing would be done by the judge assigned to the motion.

It is important to stress the procedures outlined in section 745, subdivisions (b) – (e), and Code of Civil Procedure section 170.3 produce decidedly different outcomes. If the judge is found to have committed a violation of section 745, subdivision (a), a remedy is imposed, but not on the judge.[13] If the judge is found to be biased under Code of Civil Procedure section 170.3, the judge is disqualified from further participation *in the case*. Depending on the circumstances and severity of the expression of bias, actions or comments expressing bias or animus of the judge toward the defendant, a violation may be pursued under either or both statutes. At all times the court must observe the appearance of propriety as required by Code of Civil Procedure, section 170.1, subdivision (a)(6)(iii).

[13] Depending on the circumstances of the violation, the judge may be subject to proceedings before the Commission on Judicial Performance.

c. Evidence at the hearing

Both sides are permitted to present evidence at the hearing, "including, but not limited to statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred." (§ 745, subd. (c)(1).) AB 2542 did not pass with separate funding for experts. Presumably the parties will need to access traditional sources within the county for such funding. If the expert is appointed by the court as the court's witness under Evidence Code, section 730, likely the court will be obligated to pay the witness fees.

In *Bonds v. Superior Court* (2024) 99 Cal.App.5th 821 (*Bonds*), the prosecution argued that " '[g]eneral statistics about the prosecuting agency are appropriate when the alleged violation concerns the charged crime or penalty sought. The same is not true when looking at an individual police officer, or an individual attorney or individual judge or individual expert.' They claim that Bonds 'should have obtained statistics concerning the stops this officer made.' " (*Bonds*, *supra*, 99 Cal.App.5th at p. 830.) In rejecting such a limitation, Bonds observed: "The problem with . . . the argument is that in section 745, subdivision (c)(1), the Legislature has specifically provided that 'reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred.' The provision makes no distinction between the various subparts of subdivision (a), so there is no basis to say that such evidence is only admissible to prove certain types of violations but not others. This is not to say that in this case, aggregate data about SDPD practices in making traffic stops would be sufficient by itself to show that Officer Cameron's stop of Bonds was the product of racial bias. But by the express terms of the statute, this is admissible evidence the trial court is entitled to consider in determining whether a violation of the Racial Justice Act has occurred." (*Bonds*, *supra*, 99 Cal.App.5th at pp. 830-831.)

d. Conduct that constitutes bias and animus towards the defendant because of the defendant's race, ethnicity, or national origin

Central to establishing a violation under section 745, subdivisions (a)(1) and (a)(2), is that a designated person "exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin." The violation can occur whether the expression of bias or animus is purposeful. Section 745 does not further define "bias" or "animus." In fact, the Legislature observed that "[e]xamples of the racism that pervades the criminal justice system are too numerous to mention." (AB 2542, § 2, subd. (h).) The Act, however, does identify several types of bias.

The Act prohibits "racially discriminatory language" which "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." (§ 745, subd. (h)(4).)

AB 2542 also offers a non-exclusive list of statements or conduct potentially actionable under the Act as explicit or intentional bias:

- The people of a certain race are "predisposed" to commit a designated crime. (AB 2542, § 2, subd. (d).)

- Bias reflected by the defendant's attorney. (*Ibid*.)

- Use of "racially incendiary or racially coded language, images, and racial stereotypes." (AB 2542, § 2, subd. (e).)

- Comparison of certain races with animals. (*Ibid*.)

An incidence of bias under section 745, subdivision (a)(2), was found in *People v. Simmons* (2023) 96 Cal.App.5th 323 (*Simmons*). "The parties agree that the prosecutor violated the RJA when she stated in her rebuttal argument, '[Appellant] bragged about all the women he was able to fool with his good looks, and he admitted to having an ambiguous ethnic presentation and that people that don't know him think he's something other than Black.' We agree. [¶] The RJA is violated when, 'During the defendant's trial, in court and during the proceedings, ... an attorney in the case ... used racially discriminatory language about the defendant's race, ethnicity or national origin, ... whether or not purposeful.' [Citation.] Racially discriminatory language includes 'language that references the defendant's physical appearance, culture, ethnicity, or national origin.' [Citation.] The comment at issue here violates subdivision (a) because it equates appellant's skin tone and 'ethnic presentation' with deception, implying that he was not a credible witness because the color of his skin fooled women and confused strangers. The suggestion that a witness is lying based on nothing more than his complexion is as baseless as it is offensive. Section 745 targets precisely this sort of racially biased language." (*Simmons*, *supra*, 96 Cal.App.5th at pp. 335-336.)

Implicit bias

The Act also seeks to prohibit and remedy "implicit bias." Judges must be aware of and understand the concept of "implicit bias" in applying the provisions of AB 2542. "Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias." (AB 2542, § 2, subd. (i).)

Bonds v. Superior Court (2024) 99 Cal.App.5th 821 (*Bonds*), addresses the issue of whether the RJA includes consideration of "implicit bias." *Bonds* holds that it does. "Whatever may be uncertain about the Racial Justice Act, there are a few things that are abundantly clear. Perhaps most obvious is that the Racial Justice Act was enacted to address much more than purposeful

discrimination based on race. Indeed, the primary motivation for the legislation was the failure of the judicial system to afford meaningful relief to victims of unintentional but *implicit* bias. In an uncodified section of Assembly Bill No. 2542, the Legislature explained, 'Implicit bias, although often *unintentional and unconscious*, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system.' (Stats. 2020, ch. 317, § 2, subd. (i) [uncodified], italics added [by *Bonds*].) [¶] According to the author of the bill, the Racial Justice Act 'is a countermeasure to a widely condemned 1987 legal precedent established in the [United States Supreme Court] case of *McCleskey v. Kemp*[, which] established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted.' [Citation.] This overriding purpose is emphasized in subdivision (c)(2) of section 745, which defines the defendant's burden of proof on a motion to demonstrate a violation of the Racial Justice Act. It expressly provides that '*[t]he defendant does not need to prove intentional discrimination*.' [Citation, italics added by *Bonds*.] [¶] The trial court seems to have misunderstood this crucial element of the statute. To be sure, section 745 can be used to address a claim of purposeful discrimination. But plainly that is not a statutory requirement, nor is it even the primary object of the statute." (*Bonds*, *supra*, 99 Cal.App.5th at pp. 828-829.)

The concept of implicit bias was discussed in *Woods v. City of Greensboro* (2017) 855 F.3d 639, 651-652: "[I]t is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional. While a company may generally seek to hire women, it may also unfairly deny women positions once they become pregnant. While a school may affirmatively recruit minority students, the race of a student may simultaneously lead to harsher scrutiny when the individual has a disciplinary record. And while a lender may generally grant loans to African-American applicants, it may also view African-American borrowers as less creditworthy and more challenging risks than similarly situated white borrowers under some conditions. [Citation.] [¶] In reaching our conclusion, we note that discrimination claims are particularly vulnerable to premature dismissal because civil rights plaintiffs often plead facts that are consistent with both legal and illegal behavior, and civil rights cases are more likely to suffer from information-asymmetry, pre-discovery. [Citation.] There is thus a real risk that legitimate discrimination claims, particularly claims based on more subtle theories of stereotyping or implicit bias, will be dismissed should a judge substitute his or her view of the likely reason for a particular action in place of the controlling plausibility standard. Such an approach especially treads through doctrinal quicksand when it is undertaken without the benefit of a developed record, one essential to the substantiation or refutation of common sense allegations of invidious discrimination."

Further information regarding implicit bias may be found in the monograph "Implicit Bias – A Primer for Courts," by the National Center for State Courts set out in full in Appendix II of these

materials. Additional information also may be found on the CJER website in the Unconscious Bias and Cultural Responsiveness Toolkit at http://www2.courtinfo.ca.gov/cjer/judicial/3723.htm. Finally, Appendix III offers a bibliography of materials on implicit bias.

e. Burden of proof

The defense bears the burden of proving a violation by a preponderance of the evidence. (§§ 745, subd. (a), (c)(2), and (e).)

f. Findings by the court

The court is obligated to make findings on the record at the conclusion of the hearing. (§ 745, subd. (c)(3).) Presumably, findings are required regardless of how the court rules and should be sufficient to permit appellate review of the court's decision on the alleged violation. If a violation is found, the reasons why the court chose a particular remedy should be made explicit. Although the Act does not require the reasons to be entered in the minutes, the best practice would be to prepare a written statement of findings and any order entered based on the reasons. Such written findings and order will greatly assist the parties in understanding and implementing the court's order and will assist appellate review of the court's decision.

C. Remedies for violating section 745, subdivision (a)

1. Remedies are mandatory

Section 745, subdivision (e), provides: "Notwithstanding any other law, except as provided in subdivision (k), or for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), *the court shall impose a remedy specific to the violation found from the following list . . . ."* (Italics added.) The Legislature's directive is clear: subject to limited exceptions, if the court finds a violation, a remedy *shall* be imposed, and the remedy *must* come from the list provided by the Legislature. The imposition of a remedy does not depend on a finding of actual harm or prejudice to the defendant's case. (*People v. Simmons* (2023) 96 Cal.App.5th 323, 337 (*Simmons*).)

Showing of prejudice

Simmons holds nothing in article VI, section 13 of the California Constitution requires a case-specific prejudice inquiry. "Article VI, section 13 of the California Constitution provides, 'No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or 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.' The RJA represents the Legislature's express determination that 'racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI

of the California Constitution, and violates the laws and Constitution of the State of California.' [Citation.] Article VI, section 13 does not prohibit the Legislature from making this presumptively constitutional determination." (*Simmons*, *supra*, 96 Cal.App.5th at p. 338.) "We have concluded that the Legislature acted within its law-making authority when it declared in the RJA that the use of racially discriminatory language in a criminal trial constitutes a miscarriage of justice. . . ." (*Simmons*, *supra*, 96 Cal.App.th at p. 339.)

In a limited context the lack of prejudice may be grounds for denial of the petition. If judgment was entered prior to January 1, 2021, and the request for relief is based on section 745, subdivisions (a)(1) and (2), a lack of prejudice may be grounds for denial of the petition. Section 745, subdivision (k) provides: "For petitions that are filed in cases for which judgment was entered before January 1, 2021, *and only in those cases*, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), *unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment*." (Italics added.)

Exceptions to granting remedy

Section 745, subdivision (e), specifies the court must impose one of the following remedies if a violation of the Act is found, "[n]otwithstanding any other law, except as provided in subdivision (k), or for an initiative approved by the voters. . . ." "For petitions that are filed in cases for which judgment was entered before January 1, 2021, *and only in those cases*, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment." (Italics added.)

The court is to impose the remedies under section 745, subdivision (e) "notwithstanding any other law, except as provided in . . . an initiative approved by the voters." In other words, the remedies authorized under section 745, subdivision (e), may be employed by the court even if the remedy conflicts with some other statute. However, if the other statute is an initiative enacted by the voters, the initiative controls. For example, the provisions authorizing the striking of enhancements or allegations under section 745, subdivision (e)(1)(C), likely do not override section 667.61, subdivision (g), which expressly prohibits the court from striking allegations making a person punishable under the One Strike law. The restrictions in the One Strike law were established, at least in part, by Proposition 83, enacted by the voters on November 7, 2006.

On the other hand, it does not appear the intent of the Legislature to restrict the court from exercising its power to dismiss an allegation merely because it was created by initiative and where the initiative did not expressly prohibit dismissal. Proposition 115, enacted in 1990, for example, created certain special circumstances for the imposition of the death penalty or a life sentence without parole. The initiative included the addition of section 1385.1 which prohibits dismissal of the special circumstances by the court if they have been admitted by plea of the defendant or found true by a jury. Accordingly, the court would have the authority to dismiss a

special circumstance allegation as a remedy for a violation of section 745 so long as the allegation had not been admitted by the defendant or found true by a jury at the time the violation of section 745 was found.

Division of remedies

The statute divides the remedies based on whether judgment has been imposed. Section 745, subdivision (e)(1), provides: "Before a judgment has been entered, the court may impose" one of the remedies listed in subdivision (e)(1); section 745, subdivision (e)(2), provides: "When a judgment has been entered," the court shall impose one of the remedies listed in subdivision (e)(2). It is not entirely clear whether the segregation of remedies will depend on when the violation occurred vis-à-vis the entry of judgment, or on when the court imposes the remedy. Most likely it is the latter. Such an interpretation makes the most sense in the sequence of the case. For example, if a violation of section 745, subdivision (a)(1) or (a)(2), is adjudicated at some point while the jury is being selected, likely the most appropriate remedy is to discharge the jury panel and begin jury selection anew with a different panel. If the violation is adjudicated after the jury is empaneled but before verdict, likely the most appropriate remedy is to declare a mistrial if the defendant consents. If the violation is adjudicated after verdict but prior to imposition of sentence, then the prejudgment remedies related to sentencing must be imposed. If, however, the violation is for a violation of section 745, subdivision (a)(1) or (2), and adjudicated after the imposition of sentence, the only viable remedy is pursuant to section 745, subdivision (e)(2)(A), to vacate the conviction and start over.

It generally is understood that entry of judgment occurs with sentencing of the defendant. "In a criminal case, the sentence is the judgment." (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213; see also *People v. Scott* (2014) 58 Cal.4th 1415, 1422 ["a defendant who has a sentence imposed and suspended has had a final judgment entered;" see § 1207: ["When judgment upon a conviction is rendered, the clerk must enter the judgment in the minutes . . ."].)

2. Remedies that may be imposed before judgment has been entered

The following remedies may be imposed before judgment has been entered. Although the court must select a remedy from the list provided by the Legislature, except for a request for a mistrial in section 745, subdivision (e)(1)(A), the particular remedy may be selected within the court's discretion and does not require the defendant's agreement or consent. The court's discretion likely is not without limitation. Section 745, subdivision (e), for example, directs the court to "impose a remedy specific to the violation found." Likely the remedy should have some relationship to the nature of the violation and in proportion to its seriousness. Whatever remedy is selected by the court, likely it is subject to review under the "abuse of discretion" standard. "If the standard of review is abuse of discretion, the appellate court examines the ruling of the trial court and asks whether it exceeds the bounds of reason or is arbitrary, whimsical or capricious. [Citations.] This standard involves abundant deference to the trial court's rulings. [¶ When the question to be decided is one of law, the appellate court examines

the question de novo, or independently. [Citation.] That is not to say the appellate court disregards the trial court's rationale for its decision. It often is most helpful and illustrates the important role trial courts play in shaping the law. We are not averse to using all the help we can get." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)

a. "Declare a mistrial, if requested by the defendant." (§ 745, subd. (e)(1)(A).)

Note the requirement that the request for mistrial must come from the defendant. If the court grants a mistrial on its own motion without the agreement of the defendant and jeopardy has attached, the defendant cannot be retried. "Article I, section 13, of the California Constitution declares that 'No person shall be twice put in jeopardy for the same offense.' Implementing this constitutional command, the decisions of this court have settled the now familiar rules that (1) jeopardy attaches when a defendant is placed on trial in a court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, and (2) a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it. [Citations.]" (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).) "In California, legal necessity for a mistrial typically arises from an inability of the jury to agree [citations]; or from physical causes beyond the control of the court [citations], such as the death, illness, or absence of judge or juror [citations] or of the defendant [citations]. A mere error of law or procedure, however, does not constitute legal necessity. [[Citation] (prosecutor's question on cross-examination objected to by defendant)]; [citation] (testimony of police officer that he saw defendant talking to two jurors during recess); [citation] (public defender's asserted inability to cross-examine codefendant whom he previously represented)].)" (*Curry*, *supra*, 2 Cal.3d at pp. 713-714.)

The availability of this remedy to the court is conditioned on the defendant asking for it. Such an interpretation likely means that if the defendant does not request a mistrial, whether before or after an invitation from the court, the potential remedy is off the list of options. The refusal to ask for the remedy or consent to the mistrial does not mean the defendant is waiving the right to other listed remedies.

b. "Discharge the jury panel and empanel a new jury." (§ 745, subd. (e)(1)(B).)

The jury panel is not the jury after it has been empaneled and sworn. "A 'panel' is the group of jurors from the venire who are assigned to a courtroom and from which a jury may be selected for a particular case." (*People v. Massie* (1998) 19 Cal.4th 550, 580, fn. 7.) "A 'venire' is the group of prospective jurors summoned from [the master] list and made available, after excuses and deferrals have been granted, for assignment to a 'panel.' " (*Ibid*.) Thus, this remedy can only be imposed at a point in time between the jury panel walking into the court room for jury selection and the time the jury has been empaneled, which means up to the point when the jurors and alternates have been sworn. (See *People v. Scott* (2015) 61 Cal.4th 363, 383 [jury is said to be empaneled after jurors and alternates are sworn]; *People v. McDermott* (2002) 28

Cal.4th 946, 969 [same].) After the jury has been empaneled, discharging the jury before verdict requires a declaration of mistrial.

Consent of the defendant

Section 745 does not condition the discharge of the jury panel as a remedy on the request or consent of the defendant. The omission begs the question whether the requirement of such a request or consent should be *implied.* The commonly accepted criminal practice after the court has determined there is a need to discharge the jury is to request the consent of the defendant, discharge the jury and declare a mistrial based on the lack of a jury. The Legislature, however, created this remedy separately from the declaration of a mistrial without the need for defendant's consent. It is unclear whether the defendant must request or consent to the discharge. On the one hand, it might be argued that in creating this additional remedy without the requirement of the defendant's consent, the Legislature has defined a new "legal necessity" for discharge. (See *Curry*, *supra*, 2 Cal.3d at pp. 713-714.)

On the other hand, the Supreme Court has held the failure to obtain a defendant's consent to discharge the jury violates California's constitutional right to have a jury drawn from a fair cross-section under current case law. (*People v. Mata* (2013) 57 Cal.4th 178, 183, 185 (*Mata*); *People v. Willis* (2002) 27 Cal.4th 811, 823-824; See also *People v. Morris* (2003) 107 Cal.App.4th 402, 410-411.) However, in *Mata*, the court held that consent could be waived. (*Mata*, *supra*, 57 Cal.4th at p. 186.)

Certainly, best practice indicates the consent of the defendant should be obtained on the record prior to the court discharging the jury panel.

c. "If the court determines that it would be in the interests of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges." (§ 745, subd. (e)(1)(C).)

The court may dismiss enhancements, special circumstances, and special allegations, and reduce charges. In addition to finding of a violation of section 745, subdivision (a), to impose this remedy, the court also must find the remedy is "in the interests of justice." "Interests of justice" is not further defined by the statute. Although it relates to the exercise of discretion to dismiss strikes under section 1385, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531, offers considerable guidance on the application of section 745, subdivision (e)(1)(C): " 'From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People,* in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.].' [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] " (Italics original.) The court should engage in an individualized consideration of the nature of the violation, the effect

a particular remedy will have on the prosecution and defense cases, and the extent to which the violation reflects a long-standing practice or product of racial bias.

The court may dismiss enhancements (both conduct and status enhancements), special circumstance allegations (such as for the death penalty or life without the possibility of parole), and special allegations (such as allegations under section 1203.066 making the defendant ineligible for probation in certain sexual assault cases). Section 745, subdivision (e)(1)(C), does not authorize the court to outright dismiss underlying counts or charges, but the court may "reduce one or more charges" – which presumably means the court may find the defendant to have violated a lesser-included or lesser related offense.

3. Remedies that may be imposed after judgment is entered

Post-judgment remedies available to the court will depend on three potential variables:

- Whether the conviction was sought or obtained in violation of any of the reasons listed in section 745, subdivision (a);

- Whether the *only* violation of section 745, subdivision (a), was based on a charging or conviction disparity under section 745, subdivision (a)(3); or
- Whether the *only* violation of section 745, subd. (a), was that the sentence was "sought, obtained, or imposed in violation of subdivision (a)." (§ 745, subd. (e)(2)(B).)

a. Conviction sought or obtained in violation of section 745, subdivision (a)

If the court finds the conviction was sought or obtained in violation of any of the reasons listed in section 745, subdivision (a) (except solely for a violation of subdivision (a)(3), or solely because the sentence was obtained in violation of subdivision (a)(4)), **"the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a)."** In other words, if the violation is of subdivision (a)(1) or (a)(2), or if there are a mixture of violations listed in section 745, subdivision (a), the court must impose the sanction specified in the first sentence of section 745, subdivision (e)(2)(A).

It is unclear what is meant by ordering of "new proceedings consistent with subdivision (a)." Subdivision (a) simply is the list of potential violations. Presumably the provision means nothing more than the court must order the criminal proceedings be started over from the point where the violation of subdivision (a) occurred. For example, if the violation of subdivision (a)(1) occurred during the preliminary hearing, the court would order a new hearing conducted; if the violation occurred during the trial, a new preliminary hearing may not be required depending on the violation. If the violation is specified in subdivision (a)(3), the court would order a new trial. The determination of the proper point to renew criminal proceedings should be a matter calling for input from the parties.

b. The violation was based solely on section 745, subdivision (a)(3)

"If the court finds that the *only violation* of subdivision (a) that occurred is based on paragraph (3) of subdivision (a) [based on discriminatory prosecution] the court may modify the judgment to a lesser included or lesser related offense." (§ 745, subd. (e)(2)(A); italics and emphasis added.)

The court has broad authority to resentence the defendant under section 745, subdivision (e)(2)(A). Not only may the court resentence the defendant to a *lesser included* offense, but also may sentence the defendant to a *lesser related* offense – presumably all without the agreement or consent of the prosecution. The sentencing discretion would include the ability to select the term of imprisonment from the applicable triad, impose consecutive or concurrent sentences, exercise the ability to dismiss enhancements under section 1385, and impose time in the county jail instead of state prison (if authorized for the crime). The only limitation is that the court may not impose a greater sentence than originally imposed. (§ 745, subd. (e)(2)(A).)

c. Only the sentence was obtained in violation of section 745, subdivision (a)

"When a judgment has been entered, if the court finds that *only the sentence* was sought, obtained, or imposed in violation of subdivision (a), the court shall *vacate the sentence*, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a sentence greater than that previously imposed." (§ 745, subd. (e)(2)(B); italics added.)

The remedy for the violation is limited. The underlying conviction remains, but the court must vacate the sentence and impose a new one. Presumably the court will have full sentencing authority as at the original sentencing except that the new sentence may not be longer than the original sentence. (§ 745, subd. (e)(2)(B).) The only direction to the court is to "impose a new sentence." There is no direction to impose a lower sentence, or to impose "an appropriate remedy for the violation that occurred" as directed under section 745, subdivision (e)(2)(A). It is also unclear whether the court would have the authority to reduce charges as provided in section 745, subdivision (e)(1)(C). The ability to reduce charges is only listed as a possible remedy if judgment has not been entered.

4. Death penalty cases

Section 745, subdivision (e)(3), provides: "When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty." It is not clear how the death penalty provision relates to the remedies authorized in section 745, subdivisions (e)(1) – (2). On the one hand, subdivision (e)(3) is part of subdivision (e) which states "the court shall impose a remedy specific to the violation found from the *following list*." (Italics added.) The directive implies the death penalty provision is but one part of the list which the court must use in selecting a remedy "specific to the violation," but which specific remedy is left to the court's discretion.

On the other hand, there are some key differences between the remedies listed in subdivisions (e)(1) – (3). The availability of remedies listed in subdivisions (e)(1) and (e)(2) depend on the timing of the hearing on the violation: remedies in subdivision (e)(1) are available only prior to judgment; the remedies in subdivision (e)(2) are available only after judgment is entered. Subdivision (e)(3) is not limited by the timing of the violation or the hearing on the violation. The selection of remedies in subdivisions (e)(1) and (e)(2) is discretionary; the remedy in subdivision (e)(3) is mandatory. Indeed, no order imposing the remedy is even necessary. If the court finds a violation of subdivision (a), the defendant is rendered ineligible for the death penalty without further action by the court. If the remedy listed in subdivision (e)(3) is simply one among several to be selected by the court, there is no reason to list it separately from the other two subdivisions. Likely it is the intent of the Legislature, where a violation of section 745, subdivision (a), has been found, to categorically bar the use of the death penalty in the case. While certain remedies listed in subdivisions (e)(1) and (e)(2) permit a new trial pursuant to the original pleadings and with the original possible punishment – essentially discharging the violation – subdivision (e)(3) appears to make the defendant ineligible for the death penalty whether or not the case is retried.

Constitutionality of death penalty provision

There may be a question whether section 745, subdivision (e)(3), will conflict with the initiatives enacting the California death penalty. The current death penalty law was enacted in 1978 with the passage of Proposition 7, commonly known as the Briggs Initiative. Proposition 7 was followed thereafter with the passage of several additional initiatives that expanded the number of special circumstances justifying the death penalty or a sentence of life without parole. "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval. [Citation.]" (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) The court is confronted with two potential issues when considering whether AB 2542 amends an initiative passed by the voters. The first issue is whether AB 2542 has amended an initiative or merely has touched on a related but separate subject; if the statute does constitute an amendment, the second issue is whether the Legislature properly followed the procedure to amend the initiative.

The first issue, whether AB 2542 amends an initiative, likely will depend on whether the legislation is merely addressing a related but distinct area not specifically addressed in the initiative. As explained in *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279-280, with respect to accomplice liability for murder: "An issue that often arises in litigation involving the constitutionality of a legislative enactment under article II, section 10 of the California Constitution is whether the legislative enactment in question in fact amends an initiative statute. Our Supreme Court has described an amendment as ' "a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." [Citations.] ([Citations.] ['[F]or purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it.'].) When confronted with the task of determining whether legislation amends a voter

initiative, the Supreme Court has asked the following question: '[W]hether [the legislation] prohibits what the initiative authorizes, or authorizes what the initiative prohibits.' [Citations.] [¶] In undertaking this analysis, the Supreme Court has cautioned that not all legislation concerning 'the same subject matter as an initiative, or event augment[ing] an initiative's provisions, is necessarily an amendment' to the initiative. [Citation.] On the contrary, ' "[t]he Legislature remains free to address a ' "related but distinct area" ' [citations] or a matter that an initiative measure 'does not specifically authorize *or* prohibit.' " ' [Citations.]"

The second issue, if the Act does constitute an amendment of an initiative, is whether the Legislature has followed the correct procedure. The answer to this issue will depend on whether the initiative at issue permits amendment by the Legislature and whether AB 2542 was passed with the required number of votes. With respect to the death penalty law, the issue is complicated by the fact some of the initiatives defining the penalty permit amendment by the Legislature and some do not. Proposition 7, for example, does not authorize amendment by the Legislature. "Article II, section 10, subdivision (c) of the California Constitution provides that '[t]he 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.' Thus, '[t]he Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, "and then only upon whatever conditions the voters attached to the Legislature's amendatory powers." ' [Citation].) 'The evident purpose of limiting the Legislature's power to amend an initiative statute " 'is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." ' " ' [Citation.]" (*People v. Ferraro* (2020) 51 Cal.App.5th 896, 908.)

In contrast, Proposition 115, enacted by the voters in 1990, and which expanded the definition of first-degree murder and the list of "special circumstances" qualifying the defendant for the death penalty, permits amendment by the Legislature: "The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (Prop. 115, § 30.) AB 2542 passed the Assembly by a vote of 49 in favor, 16 opposed, and 14 with no vote registered. It passed the Senate by a vote of 26 in favor, 10 opposed, and 4 with no vote registered. AB 2542 did not pass either house by a vote of two-thirds of the membership.

Finally, it should be noted that even if AB 2542 potentially amends the death penalty law, section 745, subdivision (e), provides: "Notwithstanding any other law, *except for an initiative approved by the voters*, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list . . . ." (Italics added.) The plain meaning of this provision suggests if there is a conflict between a remedy specified in section 745, subdivision (e), and an initiative enacted by the voters, the initiative prevails.

AB 2542 contains a severability clause. Section 6 of the Act provides: "The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not effect other provisions or applications that can be given effect without the invalid provision or application."

5. Other available remedies

Section 745, subdivision (e)(4), provides: "The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law."

D. Additional issues

1. Application to juvenile proceedings

Section 745 is expressly made applicable to juvenile proceedings: "This section also applies to adjudications and dispositions in the juvenile delinquency system and adjudications to transfer a juvenile case to adult court." (§ 745, subd. (f).) Obviously, it will be necessary to interpret the operative provisions of section 745 in a manner that corresponds to the comparable provisions of the juvenile court law. "Adjudication proceedings" would be equivalent to "trial" and "dispositions" would be the same as "sentencing."

2. Hate crimes

Section 745, subdivision (g), provides: "This section shall not prevent the prosecution of hate crimes pursuant to Sections 422.6 to 422.865, inclusive."

3. Application to probation violation proceedings

Depending on the nature of the violation, it is likely the provisions of the Act are sufficiently broad to include proceedings to adjudicate violations of probation. Section 745, subdivision (a), prohibits the state from seeking or obtaining a conviction, or seeking, obtaining, or imposing a sentence in violation of the Act. While it may be open to some dispute whether a "conviction" includes a true finding on an alleged probation violation, certainly courts impose sentences on defendants for violation of probation, a process likely included in the Act.

The violation specified in section 745, subdivision (a)(1), is not limited to time or place. So long as the act of bias was directed to the defendant by one of the designated individuals, likely it is prohibited by the Act, even if it occurs after sentencing. It is beyond dispute that probation officers are considered "law enforcement officers." (§ 830.5, subd. (a).)

Similarly, the violations specified in section 745, subdivision (a)(3) and (a)(4), likely are broad enough to include the prosecution of probation violations and the consequences imposed by the court. Given the desire of the Legislature to address racial bias as a part of the entire justice

system as expressed in their statement of intent, a broader interpretation of the Act appears justified. (See AB 2542, § 2, subd. (i) and (j).)

4. Whether AB 2542 applies to cases resolved by plea

It is likely the Act has some application to cases resolved by plea. Certainly, violations of section 745, subdivision (a)(1), (a)(3) and (a)(4), could occur in cases where there is no trial and the matter is ultimately resolved by plea. The remedies allowed by section 745, subdivision (e)(1)(C), and (e)(2)(A) and (e)(2)(B), could be imposed without the case having a jury. There may be an issue of waiver if the defendant enters a plea *after* the occurrence and discovery of a violation. In most circumstances, entry of a plea acts as a waiver of all objections and defenses that may have been entered. "It is well settled that the right of a criminal defendant to appeal his conviction is purely statutory in California inasmuch as neither the federal nor the state Constitution provides such right. [Citations.] By entering a guilty plea the defendant waives his right to appeal any error in the pretrial proceedings." (*People v. Charles* (1985) 171 Cal.App.3d 552, 557.)

5. Ineffective assistance of counsel

People v. Simmons (2023) 96 Cal.App.5th 323 (*Simmons*), holds the defendant is denied effective assistance of counsel if counsel fails to bring a meritorious motion under section 745. "The RJA violation at issue here occurred during the prosecutor's rebuttal closing argument, before the RJA took effect. Counsel should, however, have raised the issue at the first opportunity after the statute took effect, appellant's sentencing hearing. The failure to do so was both objectively unreasonable and prejudicial within the meaning of *Strickland*. Once a violation of the statute has been established, the trial court is required to 'impose a remedy specific to the violation' from the list of remedies provided. [Citation.] Imposing any one of the enumerated remedies would have changed the result of the proceeding. Accordingly, appellant has established that he received ineffective assistance of counsel because counsel failed to raise the RJA violation at his sentencing hearing. [¶] The statute forecloses any traditional case-specific harmless error analysis. The Legislature's stated intent in adopting the RJA was 'to eliminate racial bias from California's criminal justice system because *racism in any form or amount*, at any stage of a criminal trial is intolerable, inimical to a fair criminal justice system, *is a miscarriage of justice under Article VI of the California Constitution* and violates the laws and Constitution of the State of California.' [Citation.]" (*Simmons*, *supra*, 96 Cal.App.5th at p. 337, italics in original.)

III. PENAL CODE § 1473 – HABEAS PROCEEDINGS

AB 2542 amended section 1473 by adding paragraph (f) to the statute. Senate Bill 97, effective January 1, 2024, amended section 1473 to add additional unrelated grounds for habeas relief. The legislation also redesignated subdivision (f) as subdivision (e). The change in designation was not picked up by

other legislative changes to section 1473, a problem which must be addressed in future cleanup legislation. Reference in these materials will be to subdivision (e).

A. New grounds for habeas relief

Section 1473, subdivision (e), provides, in relevant part: "Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentenced was sought, obtained, or imposed in violation of subdivision (a) of section 745, if that section applies based on the date of judgment as provided in subdivision (k) of Section 745."[14] Thus AB 2542 incorporates by reference each of the violations specified in section 745, subdivision (a):

> (1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.
>
> (2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.
>
> (3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.
>
> (4) (A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.
>
> (B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases

[14] In addition, section 745, subdivision (b), provides "[a] defendant may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7, in a court of competent jurisdiction, alleging a violation of subdivision (a)."

with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

B. Initiation of proceedings

Nothing in the amendment of section 1473 changes the basic procedures for the initiation and pursuit of proceedings for a writ of habeas corpus outlined in sections 1473, *et seq*., nor the procedures outlined in the California Rules of Court, rules 4.545 – 4.552.

1. Contents of the petition

The amendment of section 1473 makes no significant changes to any of the traditional contents of the petition for writ of habeas corpus required by sections 1474 and 1475, or California Rules of Court, rule 4.551, subdivision (a). The amendment does require that petitions for habeas relief based on subdivision (e) state whether the petitioner requests appointment of counsel.

2. Appointment of counsel

Subdivision (e) directs the court to appoint counsel if requested by the petitioner if the petitioner is indigent *and either*:

> "[T]he petition alleges facts that would establish a violation of subdivision (a) of Section 745," or
>
> "[T]he State Public Defender requests counsel be appointed." If the request for counsel comes from the State Public Defender there is no requirement the petition allege facts that would establish a violation of section 745, subdivision (a), prior to the appointment.[15] AB 2542 only requires immediate appointment of counsel if requested by the state public defender.

The timing of the appointment of counsel is not entirely clear. Based on the sequence of steps stated in subdivision (e), however, the proceedings likely should observe the following order:

- The court would determine that the petition requests the appointment of counsel.
- If the request for counsel does not come from the State Public Defender, the court would determine if the petition "alleges facts that would establish a violation of subdivision (a) of Section 745." Subdivision (e) obviously contemplates the court will make a preliminary determination of the sufficiency of the petition before appointment

[15] The court's review of the sufficiency of the pleadings prior to appointment of counsel is to be distinguished from the petitioner's requirement to establish a prima facie basis for relief prior to the issuance of an order to show cause, discussed *infra*.

of counsel solely at the request of the petitioner. There is no indication in subdivision (e) that "facts that would establish a violation" states a standard materially different than the level of proof required for the issuance of an order to show cause. "A court receiving . . . a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. If the court finds that a prima facie case for relief is stated, the court may issue an order to show cause (OSC) or may ask for informal opposition." (*In re Marquez* (2007) 153 Cal.App.4th 1, 11.)

If the court finds the petition "alleges facts that would establish a violation of subdivision (a) of Section 745" for the purposes of appointing counsel, it seems unlikely that it will be necessary for the court to conduct another evaluation for the purposes of issuing an order to show cause. "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." (§ 1473, subd. (e).)

- The court would appoint counsel upon a finding of petitioner's indigency if the request for counsel comes from the State Public Defender, or if requested by petitioner and the petition alleges facts that would establish a violation under section 745, subdivision (a).

- Newly appointed counsel could amend the petition filed prior to counsel's appointment.

- If the request for appointment of counsel comes from the State Public Defender, the court would review the petition to determine if it makes "a prima facie showing that the petitioner is entitled to relief."

- If the prima facie showing has been made, the court would issue an order to show cause why relief should not be granted and hold an evidentiary hearing.

Judicial Council standards for appointment of habeas counsel

Section 1473.1, added by the Legislature and effective June 30, 2023, requires the Judicial Council to establish standards for the appointment of private counsel in non-death penalty habeas cases: "The Judicial Council shall promulgate standards for appointment of private counsel in superior court for claims filed pursuant to subdivision (f)[16] of Section 1473 of the Penal Code by individuals who are not sentenced to death. *These standards shall include a minimum requirement of 10 hours of training in the California Racial Justice Act of 2020.* The training required by this section shall meet the requirements for Minimum Continuing Legal Education credit approved by the State Bar of California. Appointment standards for counsel

[16] In view of other legislative amendments, this reference should be to subdivision (e).

where an individual has been sentenced to death shall be consistent with existing standards set forth in the California Rules of Court." (Italics added.)

The adoption of the standards is on the Judicial Council agenda for 2024. Pending action by the Judicial Council, the court should consider requiring an attorney to meet the training requirements concerning the Racial Justice Act as a condition of appointment in a habeas proceeding raising issues under the Act.

3. Amendment of pending petitions

Subdivision (e) specifies: "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 a successive or abusive petition. If the petitioner has a habeas corpus petition pending 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." It is not clear what is intended by the addition of these provisions. It appears, however, the Legislature wanted to be certain that if a petitioner files a new petition or has an unresolved petition, that such petitions would not be a procedural bar to a new or amended petition challenging a qualified conviction based on a violation of section 745, subdivision (a).

Subdivision (e) also provides "[n]ewly appointed counsel may amend a petition filed before their appointment."

C. Consideration of petitions

1. Review of prima facie basis for relief

Subdivision (e) specifies: "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. [. . .] 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."

Subdivision (e) defines "prima facie relief" differently than for actions bought under section 745. In section 745, subdivision (h)(2), " 'prima facie showing' " means that the defendant produces facts that, if true, establish that *there is a substantial likelihood that a violation of subdivision (a) occurred.* For purposes of this section, a 'substantial likelihood' requires more than a mere possibility, but less than a standard of more likely than not." (Italics added.) California Rules of Court, rule 4551, subdivision (c)(1), for the purpose of habeas proceedings,

states "[t]he court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue the order to show cause."

It is unlikely section 745 changes the burden of proof in a habeas proceeding based on a violation of the Act. The addition of section 1473, subdivision (e), by AB 2542 merely incorporated by reference the grounds listed in section 745, subdivision (a), as a basis for bringing a habeas proceeding: "Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. . . ." Nothing in the amendment addresses the burden of proof.

Finley v. Superior Court (2023) 95 Cal.App.5th 12 (*Finley*), discussed the difference between the burden of proof for a prima facie showing in a motion under section 745 and in a habeas proceeding. *Finley* held that although the prima facie showing under the Racial Justice Act is similar to the prima facie showing in a habeas proceeding, the burden on the moving party under the Act is less. "Although we agree that the type of information a defendant should present at the prima facie stage of a Racial Justice Act case is similar to the information a defendant should present in a habeas petition, the standard by which a court assesses the information is somewhat different. In a habeas proceeding, 'the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] The standard is not as stringent in a Racial Justice Act case. Under the Racial Justice Act, the court does not ask if the defendant proffered facts sufficient to demonstrate actual entitlement to relief. Rather, the court asks if a defendant has proffered facts sufficient to show a 'substantial likelihood'–defined as 'more than a mere possibility, but less than a standard of more likely than not'–that the Racial Justice Act has been violated. [Citation.] The prima facie threshold is thus lower than the preponderance of the evidence standard required to establish an actual violation of the Racial Justice Act. [Citation.] (*Finley*, *supra*, 95 Cal.App.5th at p. 22, italics in original.) Although *Finley* concerned a motion brought under section 745, its discussion of the burden of proof under section 1473 suggests there has been no change to petitioner's traditional burden of proof in a habeas proceeding merely because it is based on grounds listed in section 745, subdivision (a).

Although subdivision (e) only requires a statement of the factual and legal basis when the court makes a finding that the petitioner has not stated a prima facie basis for relief, the better practice would be to also state the reasons when an order to show cause is issued. At the very least, the order should identify the violations under section 745, subdivision (a), that will be subject to the evidentiary hearing.

2. Hearing on the merits of the petition

There is no indication in subdivision (e) that the hearing on the merits of the petition is substantially different than for other forms of habeas relief. The amendment does provide "[t]he defendant may appear remotely, and the court may conduct the hearing through the use of remote technology, at the hearing by video unless counsel indicates that the defendant's presence in court is needed." (§ 1473, subd. (e).)

3. Relief if petition is granted

AB 2542 does not provide for any particular remedy if the habeas petition is granted based on a violation of section 745, subdivision (a). Certainly, the relief will be based in part on what the petitioner requests.

If the error causing the issuance of the writ relates to violations under section 745, subdivision (a)(1) and (a)(2), or in the prosecution of the case under section 745, subdivision (a)(3), likely the appropriate remedy will be to grant a new trial. If the violation relates only to sentencing under section 745, subdivision (a)(4), likely the sentence will be considered "unauthorized" and may be returned to the trial court for resentencing. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "The scope of a court's authority in granting habeas corpus relief is quite broad. '[A] court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy.' ([Citations] *Carafas v. LaVallee* (1968) 391 U.S. 234, 239, 88 S.Ct. 1556, 20 L.Ed.2d 554 [emphasizing the flexible nature of federal habeas corpus remedies ' "as law and justice require" ']; see also *In re Crow* (1971) 4 Cal.3d 613, 619, fn. 7, 94 Cal.Rptr. 254, 483 P.2d 1206 ['Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus'].)" (*In re Duval* (2020) 44 Cal.App.5th 401, 411.)

4. If judicial conduct is the subject of the request for relief

Section 745, subdivision (b), specifies that "[i]f the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings under this section." While the express language of subdivision (b) limits the disqualification to motions brought pursuant to section 745, it would be prudent for the court to disqualify themselves from similar proceedings seeking habeas relief. The court should consider self-disqualification in any situation where "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code of Civ. Pro., § 170.1, subd. (a)(6)(iii).)

IV. PENAL CODE § 1473.7 – PERSONS OUT OF CUSTODY

Section 1473.7 enables persons who are out of custody to file a motion to vacate a conviction based on stated grounds. AB 2542 amends section 1473.7 by adding the grounds listed in section 745, subdivision (a).

A. Grounds for relief

Section 1473.7, subdivision (a), now provides: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons: . . . (3) A conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745." Accordingly, any of the following violations may be the basis for granting relief under section 1473.7:

> (1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.
>
> (2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.
>
> (3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.
>
> (4) (A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.
>
> (B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

B. Initiation and conducting proceedings

Section 1473.7, subdivision (c), specifies "[a] motion pursuant to paragraph . . . (3) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this

section or Section 745." Nothing in AB 2542 amends any other procedural requirement for relief under section 1473.7.

C. Appointment of counsel

Section 1473.7 does not expressly provide for the appointment of counsel to represent indigent petitioners bringing an action for relief under its provisions. *People v. Fryhaat* (2019) 35 Cal.App.5th 969 (*Fryhaat*), holds there is a least a limited right to appointed counsel in proceedings conducted pursuant to section 1473.7. "We agree with the People that neither the federal nor the state Constitution mandates an unconditional right to counsel to pursue a collateral attack on a judgment of conviction. [Citations.] Nevertheless, 'if a postconviction petition by an incarcerated defendant "attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns." ' [Citations.] [¶] As explained by the Supreme Court in *People v. Shipman*, *supra*, 62 Cal.2d at page 231, 42 Cal.Rptr. 1, 397 P.2d 993, 'whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor.' Compliance with the principle that invidious discrimination should be rooted out as unconstitutional, which does not require 'absolute equality to the indigent' [citation], may be effected by requiring the appointment of counsel for an indigent petitioner who, in challenging a judgment of conviction, has set forth 'adequate factual allegations stating a prima facie case' [citation]; otherwise, 'there would be no alternative but to require the state to appoint counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction.' [Citation.] We thus construe amended section 1473.7 to provide the right to appointed counsel where an indigent moving party has set forth factual allegations stating a prima facie case for entitlement to relief under the statute; to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality." (*Fryhaat*, *supra*, 35 Cal.App.5th at pp. 980-981.)

"In light of the fact writs of habeas corpus and writs of *coram nobis*, and likely section 1016.5 motions to vacate, require court-appointed counsel for an indigent petitioner or moving party who has established a prima facie case for entitlement to relief, and given a section 1473.7 motion was intended to fill the gap left by the foregoing procedural avenues for relief, interpreting section 1473.7 to also provide for court-appointed counsel where an indigent moving party has adequately set forth factual allegations stating a prima facie case for entitlement to relief would best effectuate the legislative intent in enacting section 1473.7." (*Fryhaat, supra*, 35 Cal.App.5th at p. 983; footnote omitted.)

D. Entitlement to a hearing

Unless the prosecution has no objection to the motion, the court must set the matter for a hearing. Section 1473.7, subdivision (d), provides: "All motions shall be entitled to a hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing."

E. Relief if motion granted

The premise of section 1473.7 is that if the defendant establishes grounds for relief, either the conviction or sentence may be vacated: "A person who is no longer in criminal custody may file a motion to *vacate a conviction or sentence*" for the reasons stated in the statute. (§ 1473.7, subd. (a); italics added.) Section 1473.7, subdivision (e)(1), further provides, in relevant part: "The court shall grant the motion to *vacate the conviction or sentence* if the moving party establishes by a preponderance of the evidence, the existence of any grounds for relief specified in subdivision (a)." (Italics added.) The relief granted by the court should be specific to the nature of the violation. If the defendant establishes bias in the seeking or obtaining of a *conviction* under section 745, subdivisions (a)(1), (2), or (3), the proper remedy would be to vacate the conviction. If the defendant establishes bias in the seeking, obtaining, or imposing the *sentence* under section 745, subdivision (4), the proper remedy would be to vacate the sentence, but leave the underlying conviction intact.

F. If judicial conduct is the subject of the request for relief

Section 745, subdivision (b), specifies that "[i]f the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings under this section." While the express language of subdivision (b) limits the disqualification to motions brought pursuant to section 745, it would be prudent for the court to disqualify themselves from similar proceedings seeking relief under section 1473.7. The court should consider self-disqualification in any situation where "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code of Civ. Proc., § 170.1, subd. (a)(6)(iii).)

APPENDIX I: AB 2542: CALIFORNIA RACIAL JUSTICE ACT OF 2020

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

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

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

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

(b) A United States Supreme Court Justice has observed, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." (*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*, 572 U.S. 291, 380-81 (2014) (Sotomayor, J., dissenting)). We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals.

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

(d) Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony, including expert testimony, and arguments in

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

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

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

(g) Current law, as interpreted by the courts, stands in sharp contrast to this Legislature's commitment to "ameliorate bias-based injustice in the courtroom" subdivision (b) of Section 1 of Chapter 418 of the Statutes of 2019 (Assembly Bill 242). The Legislature has acknowledged that all persons possess implicit biases (*Id.* at Section 1(a)(1)), that these biases impact the criminal justice system (Id. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (*Id*. at Section (1)(a)(3)-(4)). In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.

(h) There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of

intolerable racism infecting decisionmaking in the criminal justice system. Examples of the racism that pervades the criminal justice system are too numerous to list.

(i) It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.

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

SEC. 3.
Section 745 is added to the Penal Code, immediately following Section 740, to read:

745.
(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

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

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(3) 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 defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained

convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

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

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

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

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

(1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert.

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

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

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

(e) Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list of remedies:

(1) Before a judgment has been entered, the court may impose any of the following remedies:

(A) Reseat a juror removed by use of a peremptory challenge.

(B) Declare a mistrial, if requested by the defendant.

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

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

(2) (A) When a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (4) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

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

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

(4) The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

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

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

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

(1) "More frequently sought or obtained" or "more frequently imposed" means that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.

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

(3) "Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(4) "State" includes the Attorney General, a district attorney, or a city prosecutor.

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

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

SEC. 3.5.
Section 745 is added to the Penal Code, immediately following Section 740, to read[17]:

745.
(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

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

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

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

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

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

[17] The entire text of section 745 was added by AB 2542 and subsequently amended by AB 256 and AB 1118.

(b) A defendant may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under Section 1473.7, in a court of competent jurisdiction, alleging a violation of subdivision (a). For claims based on the trial record, a defendant may raise a claim alleging a violation of subdivision (a) on direct appeal from the conviction or sentence. The defendant may also move to stay the appeal and request remand to the superior court to file a motion pursuant to this section. If the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings under this section.

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing. A motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.

(1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred.

(2) The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence. The defendant does not need to prove intentional discrimination.

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

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and in order to protect a privacy right or privilege, the court may permit the prosecution to redact information prior to disclosure or may subject disclosure to a protective order. If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records.

(e) Notwithstanding any other law, except as provided in subdivision (k), or for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list:

(1) Before a judgment has been entered, the court may impose any of the following remedies:

(A) Declare a mistrial, if requested by the defendant.

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

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

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

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

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

(4) The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system and adjudications to transfer a juvenile case to adult court.

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

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

(1) “More frequently sought or obtained” or “more frequently imposed” means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral

reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.

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

(3) "Relevant factors," as that phrase applies to sentencing, means the factors in the California Rules of Court that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions.

(4) "Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(5) "State" includes the Attorney General, a district attorney, or a city prosecutor.

(6) "Similarly situated" means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's conviction history may be a relevant factor to the severity of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.

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

(j) This section applies as follows:

(1) To all cases in which judgment is not final.

(2) Commencing January 1, 2023, to all cases in which, at the time of the filing of a petition pursuant to subdivision (f) of Section 1473 raising a claim under this section, the petitioner is sentenced to death or to cases in which the motion is filed pursuant to Section 1473.7 because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final.

(3) Commencing January 1, 2024, to all cases in which, at the time of the filing of a petition pursuant to subdivision (f) of Section 1473 raising a claim under this section, the petitioner is currently serving a sentence in the state prison or in a county jail pursuant to subdivision (h) of Section 1170, or committed to the Division of Juvenile Justice for a juvenile disposition, regardless of when the judgment or disposition became final.

(4) Commencing January 1, 2025, to all cases filed pursuant to Section 1473.7 or subdivision (f) of Section 1473 in which judgment became final for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice on or after January 1, 2015.

(5) Commencing January 1, 2026, to all cases filed pursuant to Section 1473.7 or subdivision (f) of Section 1473 in which judgment was for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice, regardless of when the judgment or disposition became final.

(k) For petitions that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.

SEC. 4.
Section 1473 of the Penal Code is amended to read:[18]

1473.

(a) A person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint.

(b) (1) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(A) False evidence that is material on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration.

(B) 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, which was a material factor directly related to the plea of guilty by the person.

(C) (i) New evidence exists that is presented without substantial delay, is admissible, and is sufficiently material and credible that it more likely than not would have changed the outcome of the case.

[18] As amended by section 3 of Assembly Bill No. 256, section 1.5 of Senate Bill No. 467, and Senate Bill No. 97.

(ii) For purposes of this section, “new evidence” means evidence that has not previously been presented and heard at trial and has been discovered after trial.

(D) A significant dispute has emerged or further developed in the petitioner’s favor regarding expert medical, scientific, or forensic testimony that was introduced at trial or a hearing and that expert testimony more likely than not affected the outcome of the case.

(i) For purposes of this section, the expert medical, scientific, or forensic testimony includes the expert’s conclusion or the scientific, forensic, or medical facts upon which their opinion is based.

(ii) For purposes of this section, the significant dispute may be as to the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony.

(iii) Under this section, a significant dispute can be established by credible expert testimony or declaration, or by peer reviewed literature showing that experts in the relevant medical, scientific, or forensic community, substantial in number or expertise, have concluded that developments have occurred that undermine the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony.

(iv) In assessing whether a dispute is significant, the court shall give great weight to evidence that a consensus has developed in the relevant medical, scientific, or forensic community undermining the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony or that there is a lack of consensus as to the reliability or validity of the diagnosis, technique, methods, theories, research, or studies upon which a medical, scientific, or forensic expert based their testimony.

(v) The significant dispute must have emerged or further developed within the relevant medical, scientific, or forensic community, which includes the scientific community and all fields of scientific knowledge on which those fields or disciplines rely and shall not be limited to practitioners or proponents of a particular scientific or technical field or discipline.

(vi) If the petitioner makes a prima facie showing that they are entitled to relief, the court shall issue an order to show cause why relief shall not be granted. To obtain relief, all the elements of this subparagraph must be established by a preponderance of the evidence.

(2) For purposes of this subdivision, “false evidence” includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or

that have been undermined by the state of scientific knowledge or later scientific research or technological advances.

(3) Any allegation that the prosecution knew or should have known of the false nature of the evidence is immaterial to the prosecution of a writ of habeas corpus brought under subparagraph (A) or (B) of paragraph (1).

(4) This subdivision does not create additional liabilities, beyond those already recognized, for an expert who repudiates the original opinion provided at a hearing or trial or whose opinion has been undermined by scientific research, technological advancements, or because of a reasonable dispute within the expert's relevant scientific community as to the validity of the methods, theories, research, or studies upon which the expert based their opinion.

(c) This section does not change the existing procedures for habeas relief.

(d) This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies.

(e) Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745, if that section applies based on the date of judgment as provided in subdivision (k) of Section 745. 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 a successive or abusive petition. If the petitioner has a habeas corpus petition pending 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. The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. The court shall review a petition raising a claim pursuant to Section 745 and shall determine if the petitioner has made a prima facie showing of entitlement to relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant may appear remotely, and the court may conduct the hearing through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed. 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.

(f) If the court holds an evidentiary hearing and the petitioner is incarcerated in state prison, the petitioner may choose not to appear for the hearing with a signed or oral waiver on record, or they

may appear remotely through the use of remote technology, unless counsel indicates that the defendant's presence in court is needed.

(g) For purposes of this section, if the district attorney in the county of conviction or the Attorney General concedes or stipulates to a factual or legal basis for habeas relief, there shall be a presumption in favor of granting relief. This presumption may be overcome only if the record before the court contradicts the concession or stipulation or it would lead to the court issuing an order contrary to law.

(h) (1) If after the court grants postconviction relief under this section and the prosecuting agency elects to retry the petitioner, the petitioner's postconviction counsel may be appointed as counsel or cocounsel to represent the petitioner on the retrial if both of the following requirements are met:

(A) The petitioner and postconviction counsel both agree for postconviction counsel to be appointed.

(B) Postconviction counsel is qualified to handle trials.

(2) Counsel shall be paid under the applicable pay scale for appointed counsel. Otherwise, the court shall appoint other appropriate counsel.

SEC. 5.
Section 1473.7 of the Penal Code is amended to read:

1473.7.

(a) A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons:

(1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party'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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

(3) A conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745.

(b) (1) Except as provided in paragraph (2), a motion pursuant to paragraph (1) of subdivision (a) shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.

(2) A motion pursuant to paragraph (1) of subdivision (a) may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following:

(A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.

(c) A motion pursuant to paragraph (2) or (3) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section or Section 745.

(d) All motions shall be entitled to a hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.

(e) When ruling on the motion:

(1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a). For a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(2) There is a presumption of legal invalidity for the purposes of paragraph (1) of subdivision (a) if the moving party pleaded guilty or nolo contendere pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences.

(3) If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea.
(4) When ruling on a motion under paragraph (1) of subdivision (a), the only finding that the court is required to make is whether the conviction is legally invalid due to prejudicial error damaging the moving party'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. When ruling on a motion under paragraph (2) of subdivision (a), the court shall specify the basis for its conclusion.

(f) An order granting or denying the motion is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party.

(g) A court may only issue a specific finding of ineffective assistance of counsel as a result of a motion brought under paragraph (1) of subdivision (a) if the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor, pursuant to Section 416.90 of the Code of Civil Procedure.

SEC. 6.
The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 7.
Section 3.5 of this bill shall only become operative if Assembly Bill 3070 is enacted and becomes effective on or before January 1, 2021, in which case Section 3 of this bill shall not become operative.

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Implicit Bias: A Primer

Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as

the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias" includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?
Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black- White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light- skinned over dark skin,

youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real- world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
-

implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);

- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self- reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much

greater success. (Goldin & Rouse 2000).

- In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
- In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color- blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude- behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341(1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision- making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have

an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self- esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin Banaji, Implicit social cognition:

attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995).
Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

APPENDIX III: BIBLIOGRAPHY OF MATERIALS ON IMPLICIT BIAS

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