

**The California Racial Justice Act
2020 Landmark Legislation
2022 Clarifying Changes
Introduction and Overview
October 26, 2023**



INTRODUCTIONS

The Prosecutors Alliance of California is an organization committed to reforming California's criminal justice system through smart, safe, modern solutions that advance, not just public safety, but human dignity and community well-being.

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University of San Francisco School of Law, Racial Justice Clinic trains students to become lawyers by litigating real-life cases, while defending and advocating for those who have suffered discrimination, marginalization, and oppression based on race.

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PAC's RJA Implementation Activities:

Conduct in-person RJA implementation trainings for prosecutor offices statewide

Create internal model RJA policies for prosecutor offices

Host monthly RJA workgroup for prosecutor staff working on RJA claims

Maintain shared drive with RJA resources for prosecutor offices, including caselaw, briefbank, experts, model policies, etc.



UNIVERSITY OF
SAN FRANCISCO

School of Law
Racial Justice Clinic's
Role in Implementation

- Facilitate biweekly statewide implementation working group meetings.
- Provide limited direct representation.
- Act as clearinghouse for mailed requests for attorneys to represent incarcerated people with RJA claims.
- Organize case consultations with trial & appellate attorneys evaluating potential RJA claims.
- Conduct trainings on RJA for those affected by incarceration, practitioners, and experts.

PRESENTATION OVERVIEW

1. Understand the Underpinnings of the RJA
2. Overview of the RJA and Legislative Intent
3. Remedies
4. Challenges Faced by Prosecutors and the Defense Bar
5. Questions?



What does the RJA do?

- The California Racial Justice Act (RJA) prohibits bias based on race, ethnicity, or national origin in charges, convictions, and sentences.
- The RJA supplants *McCleskey v. Kemp*.
- If a violation of the RJA is shown, it is a miscarriage of justice, and the “harmless error” rule does not apply.

The
legislative
intent:

[T]o 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, [and] is a miscarriage of justice ...

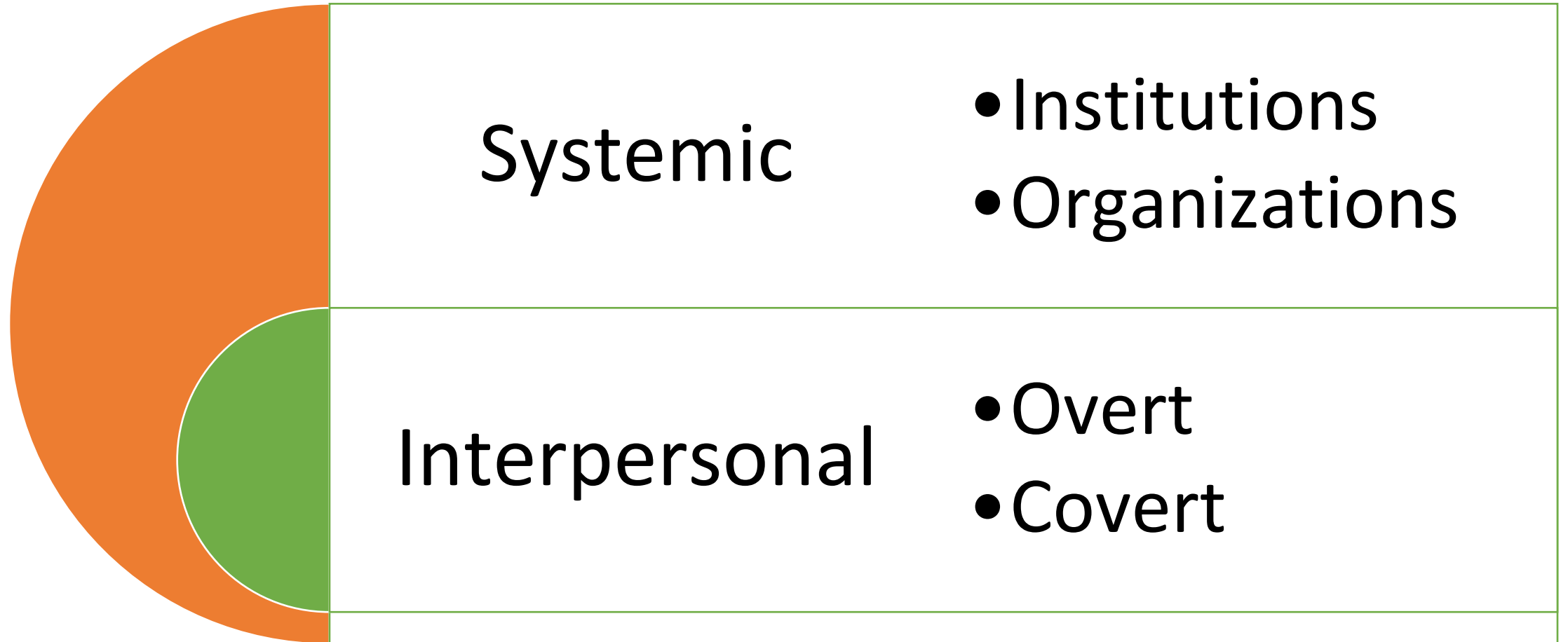
Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias.



The
legislative
intent:

[T]o 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.**

FORMS OF RACISM/BIAS



The RJA identifies four forms of racial discrimination which can be challenged:

1) A judge, juror, expert witness, law enforcement officer, or attorney **exhibited bias or animus towards the defendant** because of the defendant's race, ethnicity, or national origin. *(PC 745(a)(1))*

2) A judge, juror, expert witness, law enforcement officer, or attorney **used racially discriminatory language** in court, during trial. *(PC 745(a)(2))*

Forms of
racial
discrimination
continued:

3) Racial disparities in charges or convictions based on the race, ethnicity, or national origin of the **defendant**. (*PC 745(a)(3)*)

4) Racial disparities in sentencing based on the race, ethnicity, or national origin of the **defendant** or **victim**. (*PC 745(a)(4)*)

Procedural Issues:

- Applies in juvenile cases, including transfer cases to adult court
- If defendant makes a prima facie showing, entitled to a hearing
- Burden on the defendant to prove violation by preponderance
- May file a motion at any time in the superior court, not limited to trial motions
- Adds clear statement intentional discrimination not required

Amendment to Racial Justice Act

- **AB 256 (Kalra) California Racial Justice Act for All:** Retroactive application of the California Racial Justice Act, which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin. Also makes clarifying changes. (**Penal Code sections 745 and 1473**).

AB 256 (Kalra) – RJA Retroactivity

Retroactivity Phase-In (for cases that are already final):

January 1, 2023	individuals facing deportation or sentenced to death, <i>regardless of when judgment or dispo became final</i>
January 1, 2024	individuals currently incarcerated for a felony, including juvenile cases, <i>regardless of when judgment or dispo became final</i>
January 1, 2025	others not incarcerated but with a felony conviction <i>entered on or after 2015</i>
January 1, 2026	all others with a felony conviction, including juvenile, <i>regardless of when judgment or dispo became final.</i>

Challenges to Constitutionality of Racial Justice Act

People v. Simmons (10/12/23) 2023 WL 6631578 (B309921, 2nd DCA, Div. 6).

- Majority holds that the RJA does not violate article VI, sec. 13 of the California Constitution. The Legislature has the authority to determine that a violation of the RJA is a miscarriage of justice, which forecloses any traditional case-specific harmless error analysis.
- Dissent finds the Legislature has usurped the judiciary's authority to determine what constitutes a miscarriage of justice, and thereby violated the Cal. Const.'s separation of powers clause.

Deeper Dive Into PC 745(a)(1) and (a)(2) Claims

PC 745(a)(1) Refresher

(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:

Who is “the state”?

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror

Prove that they did what?

exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin

#1 Exhibited bias or animus towards the defendant:

- Key element is exhibited bias or animus towards **the defendant**.
- Does **not** have to be in court or during trial – but it can be.
- Examples:
 - Donald Ames, racist defense attorney.
 - Judge saying Latino grandfathers are more likely to commit child molestation.
 - DA saying “we want him deported” as basis for plea offer.

Additional cases where courts have found violations of (a)(1):

People v. Buggs

- The elected prosecutor in Orange County brought up the accused person's race in internal office discussions about whether to seek the death penalty.
- Prosecutors present said this violated the RJA and later disclosed the information publicly.
- Held: RJA violated, no additional remedy imposed because OC DA had already removed possibility of death sentence.

CLAIMS UNDER
PENAL CODE
SECTION 745
SUBD. (a)(2)

Subd. (a)(2) Refresher:

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.**

#2

Used racially discriminatory language in court, during trial:

Must be in **court** and during **the proceedings**.

Definition *(PC 745(h)(4))*:

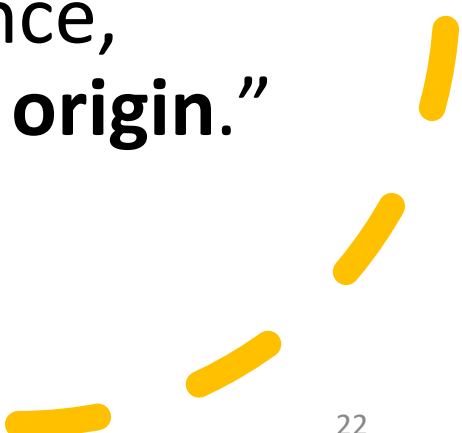
“Racially discriminatory language” means language that, **to an objective observer, explicitly or implicitly appeals to racial bias...**



Definition
continued:

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."**



Examples of racially discriminatory language:

- Juror saying during voir dire that people of Indian descent are more likely to commit crime.
- Judge saying during voir dire that Black women don't make good jurors in death penalty cases.
- DA referring to the defendant as an animal in closing argument.
- Judge calling the defendant a monster at sentencing.

Limited
Exception:
Does not
include:

- (a)(2) Prohibition for Racially Coded Language - does not apply “if the person speaking is **relating** language used by another that is relevant to the case.” Previously, did not apply if the person was “**describing**” language used by another.
 - This language was clarified in AB 256. Intended to be a narrow exception, for example, to allow use of language relevant to hate crimes prosecutions.
- *Physical description* of suspect: “if person speaking is giving a racially neutral and unbiased physical description of the suspect”

*People v. Bryant
Jr. & Jackson*
(October 3,
2022)
Contra Costa
County Superior
Court Decision
(Unpublished)

OVERVIEW OF FACTS

- Defendants Bryant and Jackson, both Black men, were convicted of first-degree murder with gang enhancements.
- In addition to other evidence, among the exhibits introduced at trial to establish Bryant's and Jackson's gang affiliation were: two music videos in which Jackson appeared using lyrics that included certain gang-related slang and coded language determined by the prosecution's gang expert to indicate his gang affiliation.
- On direct appeal the convictions were affirmed but remanded for possible resentencing in light of recent sentencing reforms.
- While pending a hearing for resentencing, the men filed a joint motion for retrial asserting violations of PC Section 745 (a)(2).
- The court found a prima facie showing had been made and ordered an evidentiary hearing as to the RJA violations.

DEFENSE PC SECTION 745 (A)(2) ASSERTIONS

- (i) The prosecutor and gang expert **used racially discriminatory language** at trial—specifically:
 - (i) The prosecutor and gang expert used racially coded phrases implicating stereotypes of Black men as criminals and having a propensity for serious violence, including the prosecution’s repeated use of racially coded phrases during closing argument.
 - (ii) The prosecution’s repeated use of the “n-word” during examination of the gang expert.
- (ii) Use of their **rap lyrics as criminal evidence was racially discriminatory** because:
 - (i) It improperly introduced racially discriminatory language at trial.
 - (ii) The gang expert lacked any expertise in the conventions of rap music, and his opinion was based on racial stereotypes of Black men.
 - (iii) The gang expert’s testimony that defendants’ lyrics were literal statements, in the face of ambiguous evidence as to their true meaning, primed jurors’ implicit bias regarding Black men as violent.

All of which, Bryant and Jackson asserted would have prejudiced the **jury’s evaluation** of Bryant’s **credibility** when he testified he was not a gang member and had no gang affiliations.

PROSECUTION'S RESPONSE

There was no evidence that the prosecutor's use of "slang" was racially coded or that the use of rap music videos violated PC Section 745 (a)(2).

Rap lyrics were not barred as they were "relevant to proving the gang enhancement."

Evidentiary Hearing:

- Three experts testified at the evidentiary hearing in the following areas:
 - Implicit Bias and Legal Rhetoric
 - Rap History, culture and the use of rap lyrics in criminal courts
 - Rap music: content analysis and stereotypes

Expert Testimony Demonstrated:

- The prosecutor's and gang expert's use of such coded language as "pistol whip" and "drug whip" and the use of nicknames **primed the entirely non-African American jury for implicit bias** against the defendants and **activated racial stereotypes** of dishonesty, violence, and criminality against them because of their race, whether or not purposeful.
- The **more exposure to and repetition** of the coded language (the "stimuli"), the **more it facilitated subconscious judgment in the jury.**
- **Rap is a form of artistic expression**, and here, in interpreting the lyrics and terms literally, the gang expert failed to examine the possibility of multiple meanings of terms and failed to recognize that **stories being depicted in songs may or may not be the personal experiences of the defendants**—indicating **gang expert was not qualified to interpret the lyrics.**
- Studies support there is an **implicit association of rap music and "blackness,"** demonstrated by an **implicit negative bias** by subjects against Black authors of rap lyrics. Therefore, rap and race together are **likely to elicit negative stereotypes that could be potentially harmful.**

Convictions were reversed after court held:

- “the use of defendants' rap lyrics and videos at their criminal trial, though not done to purposefully invoke racial bias, more likely than not triggered the jury's Implicit racial bias against African American men and was in violation of § 745(a)(2) . . .”
- This was consistent with the intent of the legislature which declared that “[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.”


Deeper Dive Into Disparity Claims

#3

Racial
disparities in
charges and
convictions:

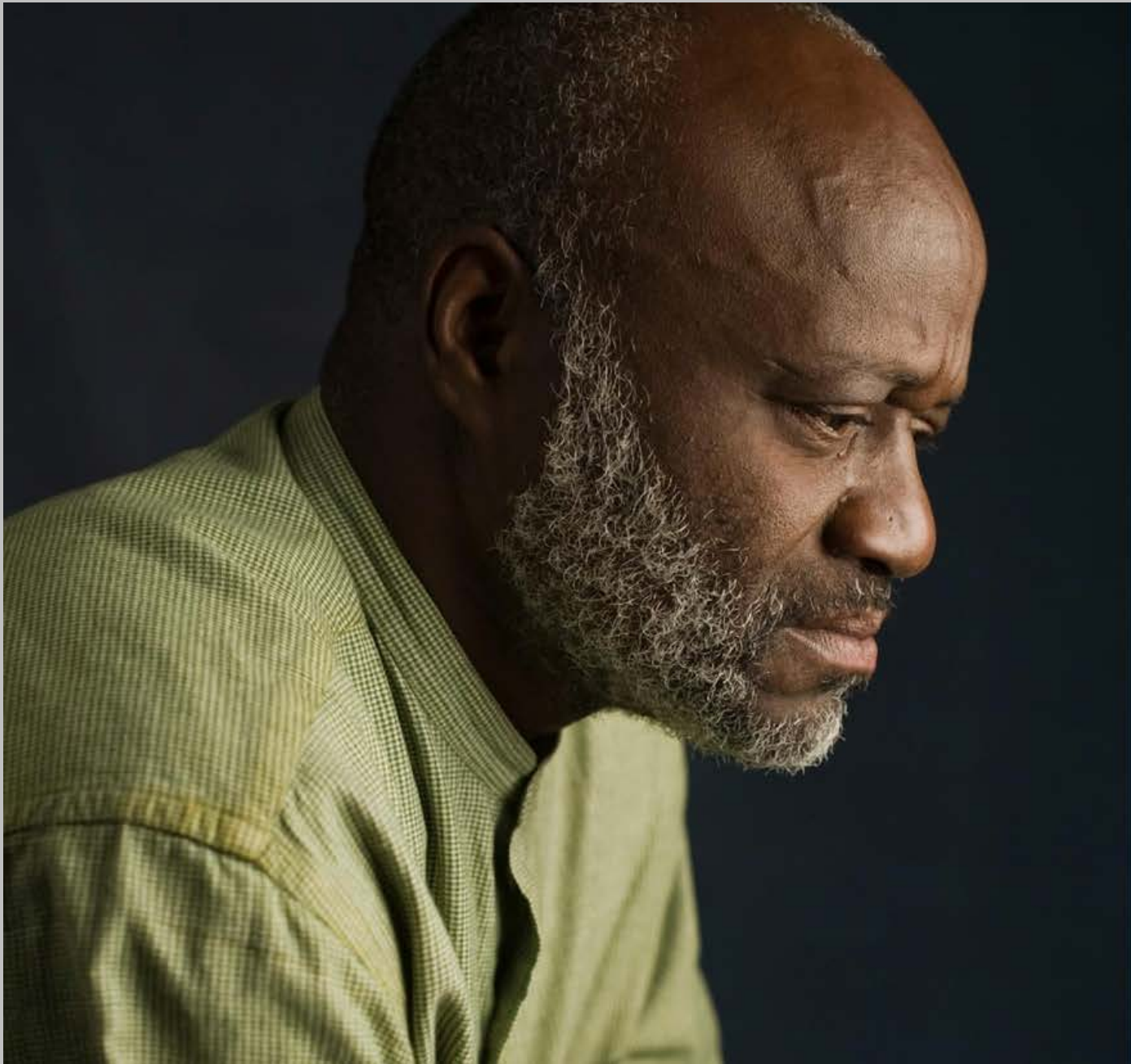
As modified by AB 256

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...

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Racial disparities in charges and convictions continued:

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.



Did You Know...

**Blacks and Latinx
make up more than**

90%

**of adults charged with
gang enhancements in
a state prison.**

Pass AB 2542

RACIAL JUSTICE ACT

#4

Racial disparities in sentences:

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 [or victim's] race,** ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

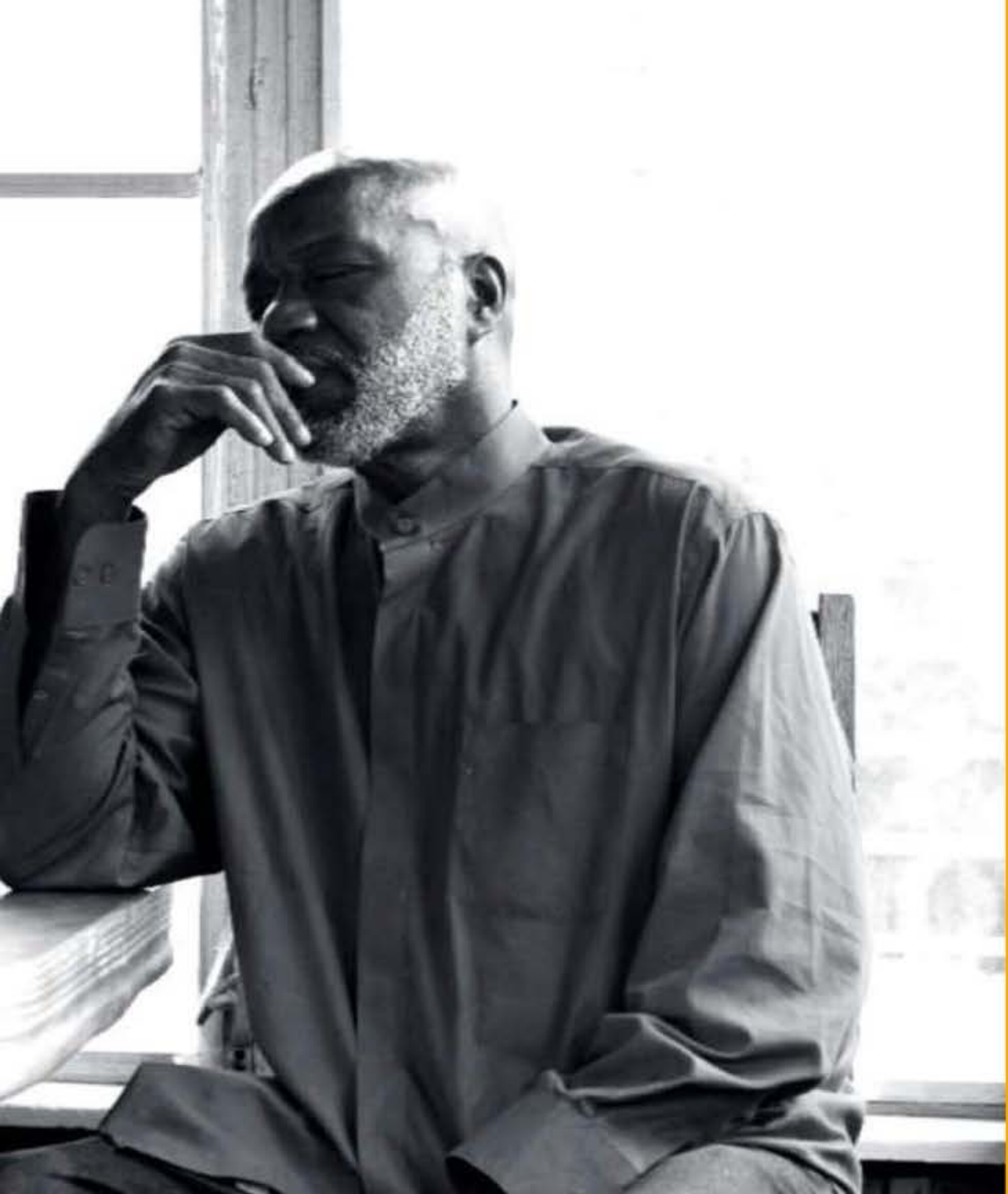


Racial
disparities in
sentences
continued:

Standards and terms are the same as with disparities in charges and convictions.

Key difference: disparities in sentences based on race of victim may also be challenged.





Did You Know...

More than

50%

of people currently on
death row are Black,
Latinx, Asian or
Native American

Pass AB 2542

RACIAL JUSTICE ACT

As Modified by AB 256 (Kalra)

- The overall standard is whether
“**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.**”
- Provides that **nonstatistical evidence** may be considered.
- Provides that the “statistical significance” of the data is a factor the court may consider but **is not necessary** to establish a significant difference.

“Disparity”:

Defense must show:

- A significant difference in charges, convictions or sentences between people of different races, comparing individuals who have engaged in similar conduct, and
- The comparison considers individuals who are similarly situated based on legally relevant factors.

The defendant does NOT have to show intentional bias in their specific case or explain what caused the disparity.

“Disparity” continued:

Keep in mind:

- The comparison pool is people who have engaged in similar conduct – not who is convicted versus the population as a whole.
 - AB 256: changed “committed similar offense” to “have engaged in similar conduct” to broaden comparison pool.
- The disparity must be shown within the county, not statewide.

Key issue is establishing the comparison pool: individuals who engaged in similar conduct and are similarly situated.

- Defines “similarly situated” for comparisons in disparity claims to mean the **factors that are relevant in charging and sentencing are similar** but does not require that all individuals in the comparison group are identical.
- “Relevant factors” in sentencing to mean **“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.”
- Criminal history “may be a relevant factor for the court’s determination, and if so, the defense may provide evidence that **the conviction history may also have been impacted by racial profiling or historical patterns of racially biased policing** such that the court shall consider the evidence in totality in making its determination.”

Example:

In death penalty studies:

- Relevant pool is those who commit homicides that are death eligible.
- Factors relevant to establish similarly situated individuals:
 - Number of special circumstances
 - Types of specials
 - Number of victims
 - Vulnerable victims involved
 - Past violent acts

Prosecution Can Attempt to Explain:

If a disparity is proven, the prosecution has an opportunity to explain it using **race-neutral reasons**.

AB 256 provides additional clarification.

- “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.”
- The explanation must address the observed disparity, not case-specific reasons that justify the outcome.


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Areas of
concern:

Gang Enhancements: 92% of people in CDCR custody with a gang enhancement are Black or Latino.

Disparities in Wobblers: Are white people more often given misdemeanors while Black and Latino people face felonies?

Level of Charge: Consider simple possession vs. possession for sale; assault vs. disturbing the peace.

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Areas of
concern:

Death Penalty and LWOP: Research shows significant racial disparities in use of these sentences in California.

Probation and Diversion: Are some people given probation less often based on race, ethnicity or national origin?

CASES
INTERPRETTING
PENAL CODE
SECTION 745
SUBD. (c) –
APPLICATION TO
DISPARITY CLAIM

Subd. (c) Refresher:

(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.

Contra Costa
Case with
finding of
disparity:

People v. Windom, Pugh, McGee and Trent (May 2023)

Defense compared:

- cases with special circumstance for gang involvement and
- homicides cases in which a gang enhancement was alleged but **not** the special circumstance.

Finding: showing of disparity based on race.

San
Francisco
case with
prima facie
finding of
disparity:

People v. Decuir and Mims (June 12, 2023)

Defense compared:

- cases with special circumstance for felony murder and
- first degree felony murder cases where **no** specials.

Finding: prima facie showing of disparity based on race. Denied after evidentiary hearing.

Remedies, Trial Court:

If a violation is found at the trial court level, **a remedy must be imposed.** (Pen. Code 745(e).)

(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.

(D) 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.

Remedies, Post- Conviction:

For cases where judgment entered after Jan 1, 2021:

If a violation is found post-conviction, “the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a).” (Penal Code section 745(e)(2).

Remedies, Post- Conviction:

- If only violation is disparity in conviction under PC 745(a)(3), court may vacate the conviction and impose sentence on a lesser included offense.
- If only violation is disparity on sentence under PC 745(a)(4), court may vacate sentence and resentence.

AB 256 (Kalra)

Limits Reversals in Some Retroactive Cases

- For retroactive claims based on bias directed at the accused (PC 745(a)(1)) or racially discriminatory language in court (PC 745(a)(2)), provides that a person is entitled to relief unless the prosecution proves that **the violation did not contribute to the conviction or sentence**.
- This reversal standard does not apply to retroactive claims based on racial disparities in charges or convictions (PC 745(a)(3)), or racial disparities in sentencing (PC 745(a)(4)), and does not apply to post-conviction claims for cases after Jan 1, 2021.

Challenges of Implementation to Prosecutors

- Lack of/poor quality of data
- Training needed to litigate claims in new area of law
- Scarcity of qualified experts to evaluate disparity claims
- Adversarial nature of criminal legal system requires shift in perspective/role of prosecutor
- Lack of resources to help victims/survivors navigate re-litigation of old cases

Challenges of Implementation to Defense Bar

- Preparing to bring and litigate RJA claims as they become ripe in unprecedented field of law
- Obtaining proper data from government agencies
- Retaining qualified experts (statisticians, social scientists, etc.) and orienting them to court procedure and ever-changing jurisprudence

Questions?

