SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 2542	**Hearing Date:**	August 7, 2020
Author:	Kalra		
Version:	August 1, 2020		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal Procedure: Discrimination***

HISTORY

Source: American Friends Service Committee
Anti-Death Penalty Coalition
Asian Americans Advancing Justice – California
California Coalition for Women Prisoners
Californians United for Responsible Budgets
Ella Baker Center on Human Rights
League of Women Voters California
Nextgen Policy
UDW/AFSCME Local 3930

Prior Legislation: AB 1798 (Levine), held in Asm. Approps. 2019

Support: 8th Amendment Project; A New Path; A New Way of Life Re-entry Project; Alianza for Youth Justice; Alliance for Boys and Men of Color; American Civil Liberties Union of California; Anti-recidivism Coalition; Asian Law Alliance; Bend the Arc: Jewish Action; Black Leadership Kitchen Cabinet; California Attorneys for Criminal Justice; California Federation of Teachers; California Immigrant Policy Center; California Innocence Coalition; California Labor Federation, AFL-CIO; California League of United Latin American Citizens; California Nurses Association; California Public Defenders Association; California Teachers Association; Californians for Justice; Californians for Safety and Justice; Centro Binacional Para El Desarrollo Indígena Oaxaqueno; Clergy and Laity United for Economic Justice; Communities United for Restorative Youth Justice (CURYJ); Community Agency for Resources Advocacy and Services; Consumer Attorneys of California; Disability Rights California; Empowering Marginalized Asian Communities; Empowering Pacific Islander Communities (EPIC); Ensuring Opportunity Campaign to End Poverty in Contra Costa County; Equal Justice Society; Equal Justice USA; Equal Rights Advocates; F.U.E.L - Families United to End LWOP; Felony Murder Elimination Project; Friends Committee on Legislation of California; Huckleberry Youth Programs; Human Impact Partners; Inland Empire - Immigrant Youth Collective; If/when/how: Lawyering for Reproductive Justice; Immigrant Legal Resource Center; Indivisible Sausalito; Indivisible South Bay LA; Indivisible Yolo; Initiate Justice; Innercity Struggle; Insight Center for Community Economic Development; Insight Garden Program; Japanese American Citizens League - Pacific Southwest District; Japanese American Citizens League, San Jose

Chapter; Justice LA; Latinos United for A New America; Lawyers' Committee for Civil Rights; League of Women Voters of California; Legal Aid At Work; Legal Services for Prisoners With Children; Long Beach Immigrant Rights Coalition; Lutheran Office of Public Policy – California; Mid-city Community Advocacy Network; Monarch Services; National Association of Social Workers, California Chapter; National Center for Lesbian Rights; National Center for Youth Law; National Immigration Law Center; Nextgen California; North East Medical Services; Oakland Privacy; Pacific Juvenile Defender Center; Partnership for the Advancement of New Americans; Peace Over Violence; People's Pottery Project; Pilipino Workers Center; Prevention At the Intersections; Project Kinship; Project Rebound Consortium; Re:store Justice; San Francisco Public Defender; San Jose Nikkei Resisters; San Jose/Silicon Valley NAACP; Santa Cruz Barrios Unidos Inc.; Secure Justice; Services, Immigrant Rights and Education Network; Showing Up for Racial Justice (SURJ) Bay Area; Smart Justice CA; South Bay People Power; Southeast Asia Resource Action Center; Stonewall Democratic Club; Showing Up for Racial Justice (SURJ) Marin; The Justice Collaborative; The Sentencing Project; The W. Haywood Burns Institute; The Women's Foundation of California; Transforming Justice OC; Unapologetically Hers; Uncommon Law; Underground Scholars Initiative Berkeley; United Food and Commercial Workers, Western States Council; University of California Student Association; USC Suzanne Dworak Peck School of Social Work's Unchained Scholars; Voices for Progress; White People 4 Black Lives; Women For: Orange County; Young Women's Freedom Center

Opposition: California District Attorneys Association; California State Sheriffs' Association

Assembly Floor Vote: Not relevant

PURPOSE

The purpose of this bill is to prohibit the state from seeking or upholding a conviction or sentence that is discriminatory based on race, ethnicity, or national origin as specified.

Existing law allows a person who is unlawfully imprisoned or restrained of his or her liberty to prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint. (Pen. Code, § 1473, subd. (a).)

Existing law states that a writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

- False evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to his incarceration;

- False physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person.

- New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at

trial. Specifies that "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

(Pen. Code, § 1473, subd. (b).)

Existing law provides that 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. (Pen. Code, § 1473 subd. (c).)

Existing law states that nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies. (Pen. Code, § 1473 subd. (d).)

Existing law specifies "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 later scientific research or technological advances. (Pen. Code, § 1473, subd. (e)(1).)

Existing law provides that a writ of habeas corpus may also be prosecuted on the basis that evidence relating to intimate partner battering and its effects, as defined, was not introduced at the trial relating to the prisoner's incarceration for a conviction of a violent felony, as defined, and was of such substance that had the substantial and competent expert evidence been introduced, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction or sentence, that the result of the proceedings would have been different. (Pen. Code, § 1473.5, subds. (a) & (b).)

Existing law specifies that habeas corpus is the exclusive procedure for collateral attack on a judgment of death. (Pen. Code, § 1509.)

Existing law creates an explicit right for a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence based on a prejudicial error damaging to 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, or based on newly discovered evidence of actual innocence, as specified. (Pen. Code, § 1473.7.)

Existing law specifies what the prosecution is required to disclose to the defense, including exculpatory evidence in the prosecution's possession or known to be in the possession of investigating agencies. (Pen. Code, § 1054.1.)

Existing law provides that a new trial may be granted for specified grounds including when material new evidence is discovered and could not, with reasonable diligence, have been discovered and introduced at trial. An application for new trial must be made and decided before judgment. (Pen. Code, §§ 1180, 1181, 1182.)

Existing law provides the trial court broad authority to dismiss a case in the interests of justice, except as specified. (Pen. Code, § 1385.)

Existing law allows parties an unlimited number of challenges to prospective jurors for cause. (Code Civ. Proc., § 226.)

Existing law states that challenges for cause may be based on general disqualification, implied bias, or actual bias. (Code Civ. Proc., § 225, subd. (b)(1).)

Existing law defines implied bias as occurring when there is "[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party." (Code Civ. Proc., § 229, subd. (f).)

Existing law defines actual bias as the "state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).)

Existing law allots each party a number of peremptory challenges to jurors – an objection to a juror for which no reason need be given. (Code Civ. Proc., § 231.)

This bill prohibits the state from seeking or obtaining a criminal conviction or seeking, obtaining or imposing a sentence on the basis of race, ethnicity, or national origin.

This bill states that a defendant may file a motion in the trial court, or if judgement had been imposed, may file a petition for writ of habeas corpus or a motion to vacate a conviction or sentence in a court of competent jurisdiction alleging a violation of the above provision.

This bill states that if a motion is filed in the trial court and the defendant makes a prima facie showing of a violation, the court shall hold a hearing.

This bill provides that 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.

This bill states that the defendant shall have the burden of proving the violation by a preponderance of the evidence and at the conclusion of the hearing, the court shall make findings on the record.

This bill states that a violation of a discriminatory conviction or sentences may be established if the defendant proves, by a preponderance of the evidence, any of the following:

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

- During the trial, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness or juror, used racially discriminatory language or otherwise exhibited bias or animus based on race, ethnicity, or national origin, whether or not purposeful or directed at a defendant.

- 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 challenge to demonstrate a violation of this provision.

- 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 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 origins in the county where the convictions were sought or obtained.

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

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

This bill states that pursuant to a written request, the prosecution shall disclose to the defense all evidence relevant to a potential violation. Upon a showing of good cause, the court may permit the prosecution to redact information prior to disclosure.

This bill states that, notwithstanding any other law, if the court finds by a preponderance of evidence that a violation of seeking a discriminatory conviction or sentence, the following remedies shall be imposed:

- Before a judgment has been entered, the court may reseat a juror removed by use of a peremptory challenge, declare a mistrial, discharge the jury panel and empanel a new jury, or dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges. Monetary sanctions and training alone are not sufficient as a remedy.

- When a judgement has been entered, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings.

- Prohibit the imposition of the death penalty.

This bill specifies that remedies available under the provisions of this bill do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

This bill specifies that its provisions applies to adjudications and dispositions in the juvenile justice system.

This bill provides that its provisions do not prevent the prosecution of hates crimes.

This bill provides the following definitions:

- "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 the prosecution cannot establish race-neutral reasons for the disparity.

- "Prima facie showing: means that the defendant produces fact that, if true, establish that the defendant is a member of one or more of the classes covered by the provisions of the bill and raise an inference of a violation.

- "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 the language is discriminatory.

- "State" includes the Attorney General, a district attorney, a city prosecutor, or a superior court judge.

This bill states that a defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregated data among groups to demonstrate a violation of the bill's provisions.

This bill specifies that a writ of habeas corpus may also be prosecuted based on evidence that a criminal conviction or sentence was sought, obtained, or imposed discriminatorily:

- A petition raising such a claim, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed successive.

- If the petitioner already has a habeas corpus petition on file in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained or imposed in violation of this bill's provisions.

- The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if requested.

- The court shall review the petition and if the court determines that the petitioner makes a prima facie showing of entitlement 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.

This bill states that if the Legislature adopts AB 3070 and it is chaptered and enrolled, then the provisions of this bill related to peremptory challenges shall only apply to cases in which jury selection was completed prior to January 1, 2021.

This bill makes a number of Legislative findings and declarations including the following:

- 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, 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.

- 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.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> One year ago, Governor Gavin Newsom imposed a moratorium on executions, stating that it is a racist system perpetuating inequality. As person of color and a former deputy public defender, I have seen racial discrimination in the court system first hand. We must confront racism in the courts. We can no longer accept racial bias in the criminal justice system as unfixable. The California Racial Justice Act will help us take an important step in prohibiting the use of race and ethnicity as a factor in the state's justice system across the board.
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> The California Racial Justice Act is a countermeasure to a widely condemned 1987 legal precedent established in the case of McCleskey v. Kemp. Known as the McCleskey decision, the U.S. Supreme Court has since required defendants in criminal cases to prove intentional discrimination when challenging racial bias in their legal process. This 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. The Court's majority, however, also observed that State Legislatures concerned about racial bias in the criminal justice system could act to address it.
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> Regarding the unprecedented times we are facing in the fight against COVID-19, this bill is more needed today than it was prior to the appearance of the virus. Prejudiced and discriminatory treatment does not stop because of COVID-19. It continues and those impacted by the socio-economic disparities in the application of the law have historically been and continue to be disproportionately people of color. This plays a distinct role in how and when a person is charged with a crime and how they pursue their due process in the courts. Without acting now, we continue to allow rulings such as the McCleskey precedent to guide the application of race and racism in courts.

2. McClesky v. Kemp

In *McClesky v. Kemp*, (1987) 481 U.S. 279, the defendant, a black man, was sentenced to death for the murder of a white police officer during the course of a robbery. The defendant filed a habeas petition challenging his sentence on the grounds that the death penalty is administered in a discriminatory manner in Georgia in violation of the equal protection clause and cruel and unusual punishment clause under the 14th and 8th Amendments to the U.S Constitution. In support of his claim, the defendant proffered a statistical study indicating that, even after taking into account nonracial variables, defendants who were charged with killing whites 4.3 times more likely to receive the death penalty in Georgia as opposed to killing blacks, and in general black defendants were 1.1 times more likely to receive a death sentence than other defendants. The District Court denied his petition and the Court of Appeals affirmed the District Court. Both courts assumed the validity of the study.

The U.S. Supreme Court granted certiori and in reviewing the case, the Court also assumed the validity of the study which conducted an extensive examination of over 2,000 murder cases that occurred in Georgia during the 1970s. The study indicated that black defendants who kill white victims have the greatest likelihood of receiving the death penalty. (*McClesky v. Kemp*, *supra*, 481 U.S. at p. 287.)

The defendant claimed that the Georgia capital punishment statute violates the equal protection clause of the 14th Amendment because a defendant's race and the race of the victim has an impact on the likelihood of being sentenced to death, as evidenced by the study. The Court began its analysis with the principal that a defendant who alleges an equal protection violation has the burden of proving purposeful discrimination that had a discriminatory effect on the defendant. (*Ibid*.) While statistical evidence had been accepted by the Court to prove an equal protection violation in the selection of the jury venire in a particular district, the Court reasoned that the nature of the capital sentencing decision is fundamentally different than venire-selection.

> Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. . . . . Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection. . . . In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

(*Id*. at p. 294.) The Court thus held that the study is insufficient to support an inference that any of the decisionmakers in defendant's case acted with discriminatory purpose to establish a violation of the equal protection clause. The defendant's argument that the study proves that the State as whole acted with discriminatory purpose by adopting a criminal punishment statute despite its allegedly discriminatory application also failed because there was no evidence that the statute was enacted to further a racially discriminatory purpose. (*Id*. at p. 298.)

The defendant's claim that Georgia's capital sentencing system violates the Eighth Amendment was also rejected by the Court. The Court found that the defendant's sentence was not disproportionate to other death sentences imposed in the state and the fact that the capital

sentencing statute gives jurors discretion does not make the application of the law arbitrary and capricious because focused discretion is fundamental in the criminal justice system. (*Id*. at p. 311-312.)

According to background information provided by the author's office, the ruling in *McClesky* requiring proof of intentional or purposeful discrimination established a legal standard nearly impossible to meet.

This bill allows racial bias to be shown by, among other things, statistical evidence that convictions for an offense were more frequently sought or obtained against people who share the defendant's race, ethnicity or national origin than for defendants of other races, ethnicities or national origin in the county where the convictions were sought or obtained; or longer or more severe sentences were imposed on persons based on their race, ethnicity or national origin or based on the victim's race, ethnicity or national origin. This bill does not require the discrimination to have been purposeful or to have had prejudicial impact on the defendant's case.

3. Bias by Judicial Officers

This bill provides that 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 defendant may prove a violation of this section by showing, by a preponderance of the evidence (more likely than not standard), that a judge or attorney, among other listed persons associated with the defendant's case, exhibited bias towards the defendant, or used racially discriminatory language or otherwise exhibited bias or animus, based on the defendant's race, ethnicity or national origin. There is not a requirement that the racially discriminatory language be purposeful or directed at the defendant. Under the bill's provisions, if a prosecutor, judge or defense attorney is found to have used racially discriminatory language or exhibited racial bias during trial, the remedies could include ordering a new trial or potential dismissal or reduction of charges.

a) Judicial Bias

A judge can be disqualified from a case if "it is established that the judge is prejudiced against party or attorney of the interest of a party or attorney appearing in the action or proceeding. (Code Civ. Proc., § 170.6, subd. (a)(1).)

The due process clause of the Fourteenth Amendment requires "a 'fair trial in a fair tribunal' (*Withrow v. Larkin* (1975) 421 U.S. 35, 46, 43 L.Ed.2d 712) before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905; see e.g., (See *Berger v. U.S*. (1921) 255 U.S. 22, 28 [judge's expressed belief that "German-Americans['] . . . hearts are reeking with disloyalty" barred judge from presiding over espionage trial against German-American defendants].) Generally, a party can move to disqualify a judge prior to the start of trial. (Code Civ. Proc. §170.6, subd. (a)(2).)

b) Prosecutor Bias

A defendant may move to disqualify a district attorney. (Pen. Code, § 1424.) "The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen. Code, § 1424, subd. (a)(1).) Under the statute, the mere appearance of impropriety is not an independent ground for prosecutorial disqualification. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.) The statutory language

presumes a motion for disqualification will be filed before trial. (Pen. Code, § 1424, subd. (a)(1).)

Generally, a trial court may find a prosecutor in contempt of court, issue a fine or reprimand, or recommend to bar associations to take disciplinary action. During trial, a prosecutor's misconduct can result in the trial court ordering a new trial. (Pen. Code, § 1181.)

c) Defense Attorney Bias

A defendant is entitled to new appointed counsel if the record shows the first appointed attorney is not providing adequate representation or that there is such an irreconcilable conflict or complete breakdown in the attorney-client relationship that ineffective representation is likely to result. (*People v. Valdez* (2004) 32 Cal.4th 73, 95; *People v. Williams* (1970) 2 Cal.3d 894, 905.)

In the context of a writ of habeas, the standard of ineffective counsel in violation of a defendant's constitutional rights is shown by the following: 1) counsel's performance fell below an objective standard of reasonableness; and 2) counsel's performance gives rise to a reasonable probability that if counsel had performed adequately, the result would have been different. (*Strickland v. Washington* (1968) 466 U.S. 668.)

4. **Disclosures by Prosecution**

In *Brady v. Maryland* (1963) 373 U.S. 83, the United States Supreme Court held that federal constitutional due process creates an obligation on the part of the prosecution to disclose all evidence within its possession that is favorable to the defendant and material on the issue of guilt or punishment. *Brady* evidence includes evidence that impeaches prosecution witnesses, even if it is not inherently exculpatory. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155.) Further, the prosecution's disclosure obligation under *Brady* extends to evidence collected or known by other members of the prosecution team, including law enforcement, in connection with the investigation of the case. (*In re Steele* (2004) 32 Cal.4th 682, 696-697, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437.) In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles, supra*, 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)

Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The prosecution's duty to disclose exists whether or not the defendant specifically requests the information. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Failure to disclose evidence favorable to the accused violates due process irrespective of the good or bad faith of the prosecution. (*Brady, supra*, 373 U.S. at p. 87.)

This bill would require the prosecution, pursuant to a written request, to disclose to the defense all evidence relevant to a potential violation of this bill's prohibition against seeking a conviction or sentencing based on race, ethnicity or national origin. Upon a showing of good cause, the court may permit the prosecution to redact information prior to disclosure.

5. Racial Discrimination in Jury Selection

Challenges to a juror for cause are constitutionally guaranteed under the Sixth Amendment to the U.S. Constitution as well as under our state Constitution, both of which confer the rights to a fair trial and an impartial jury. (*People v. Black* (2014) 58 Cal.4th 912, 916.) In California, criminal defendants and prosecutors are allowed an unlimited number of challenges to prospective jurors for cause. (*Ibid*; Code Civ. Proc., § 226.) Challenges for cause may be based on "[g]eneral disqualification," "[i]mplied bias," or "[a]ctual bias." (*Black, supra*, at p. 916; see Code Civ. Proc., § 225, subd. (b)(1).) Implied bias occurs when there is "[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party." (Code Civ. Proc., § 229, subd. (f).) Actual bias is defined as the "state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).)

In addition to challenges to jurors for cause, depending on the offense and number of defendants tried in a case, each side is allotted a number of peremptory challenges – an objection to a juror for which no reason need be given. The court is required to excuse jurors challenged peremptorily. (Code Civ. Proc., § 231.) "Although challenges for cause are constitutionally guaranteed, the right to peremptory challenges is statutory." (*People v. Black, supra*, 58 Cal.4th at p. 916; Code Civ. Proc., § 231, subd. (a).) In other words, "'[p]eremptory challenges are not of constitutional dimension,' but are merely 'a means to achieve the end of an impartial jury.'" (*Black, supra*, at pp. 916-917.)

Though no reason need be given when exercising a peremptory challenge against a prospective juror, use of a peremptory challenge to exclude jurors based on membership in a cognizable group – e.g., racial, religious, ethnic -- violates both the federal and state Constitutions. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276 [decision based on California Constitution representative cross-section rule]; *Batson v. Kentucky* (1986) 476 U.S. 79, 84 [decision based on Equal Protection Clause of Fourteenth Amendment]; *People v. Chism* (2014) 58 Cal.4th 1266, 1313.) *Batson-Wheeler* applies to both the defense and the prosecution. (*Georgia v. McCollum* (1992) 505 U.S. 42, 59; *People v. Willis* (2002) 27 Cal.4th 811.)

The question of whether a peremptory challenge has been improperly exercised requires a three-step *Batson* inquiry. (*Chism, supra,* 59 Cal.4th at p. 1313.) "'First, the trial court must determine whether the defendant has made a prima facie showing [". . . the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race." *Batson*, *supra*, 476 U.S. at 81] that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims.' [Citation.]" (*Ibid*.; see also *People v. Johnson* (2019) 8 Cal.5th 475, 506)

If a jury "has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges," one remedy is for the trial court to dismiss the selected jurors and the remaining venire. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282.) "Under such circumstances, and with the assent of the complaining party, the trial court should have the

discretion to issue appropriate orders short of outright dismissal of the remaining jury, including … reseating any improperly discharged jurors if they are available to serve." (*People v. Willis* (2002) 27 Cal.4th 811, 821.)

On January 29, 2020, the California Supreme Court announced it will form a new work group to study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection.

> For more than 30 years, courts have applied the legal framework set forth in *Batson/Wheeler* for ferreting out impermissible discrimination in the use of peremptory challenges. In recent years, some states have adopted or begun to consider additional measures designed to address perceived shortcomings in the practical application of the Batson framework and to better ensure that juries represent a cross-section of their communities. Today we join this dialogue with the creation of the California Jury Selection Work Group.
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> The purpose of this work group is to undertake a thoughtful, inclusive study of how *Batson/Wheeler* operates in practice in California and whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection.

(< https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group > [as of Aug. 3, 2020].)

This bill would provide the defendant with a more favorable standard to trigger relief where peremptory challenges are used based on race. It would require the defendant to show by a preponderance of the evidence that race, ethnicity, or national origin was a factor in the exercise of a peremptory challenge and does not require a showing of purposeful discrimination.

A separate pending bill, AB 3070, would prohibit racial discrimination in the selection of juries. This bill provides that if AB 3070 is enacted, this bill's provisions would apply retroactively, while AB 3070's provisions would apply prospectively.

6. Writ of Habeas Corpus

Habeas corpus, also known as "the Great Writ", is a process guaranteed by both the federal and state constitutions to obtain prompt judicial relief from illegal restraint. The functions of the writ is set forth in Penal Code section 1473, subdivision (a): "Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Penal Code section 1473, subdivision (d) specifies that "nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted." A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

a) False evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to his incarceration;

b) False physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and

which was a material factor directly related to the plea of guilty by the person; and,

c) 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. (Pen. Code, § 1473, subd. (b).)

A habeas corpus claim of false testimony requires proof that false evidence was introduced against petitioner at his or her trial and that such evidence was *material or probative on the issue of his or her guilt*. (*In re Bell* (2007) 42 Cal.4th 630, italics added.) False evidence introduced at trial against a defendant is substantially material or probative if there is a reasonable probability that, had the false evidence not been introduced, *the result would have been different*. (*In re Roberts* (2003) 29 Cal.4th 726, italics added.) A reasonable probability that the result would have been different if false evidence had not been introduced against defendant is a chance great enough, under the totality of circumstances, to undermine the court's confidence in the outcome. (*Ibid*.)

A writ of habeas corpus may also be prosecuted based on newly discovered evidence. The new evidence must be "credible, material, presented without substantial delay, and of such decisive force and value that it would have *more likely than not changed the outcome at trial*." (Pen. Code, § 1473, subd. (b)(3)(A), italics added.)

This bill would provide that writ of habeas corpus may be prosecuted where the state violates the bill's prohibition against seeking or obtaining a criminal conviction or sentence on the basis of race, ethnicity, or national origin. Unlike existing habeas provisions, the bill's habeas provision does not require a showing that the bias was prejudicial to the criminal proceedings. If the petitioner is successful in their habeas claim, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings that are consistent with the bill's prohibitions against racial bias.

7. Remedies

This bill specifies the remedies available for a violation of its provisions. Specifically, if a person has not yet been sentenced (during pretrial or trial proceedings), the bill provides that the court may "reseat a juror removed by use of a peremptory challenge, declare a mistrial, discharge the jury panel and empanel a new jury, or dismiss or reduce one or more charges. Monetary sanctions and training alone are not sufficient as a remedy."

When judgment of guilt has already been entered, and the court finds that the conviction was sought in violation of the new law, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings. If the court finds that only the sentence was sought in violation of the bill's provisions, 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.

If a violation of the new law is found, the defendant shall not be eligible for the death penalty.

California Judges Association, who is not opposed to the bill, but has concerns, writes:

> Current law balances the importance of the finality of valid judgment against the need to provide a mechanism for challenging invalid judgements by providing for a

> "screening" mechanism in many areas. For example, California Rules of Court, Rule 4.551, sets forth the manner in which habeas corpus proceedings shall occur, and only provides for a full evidentiary hearings once a court has determined that the petitioner has made a prima facie showing that the petitioner is entitled to relief. This permits evidentiary hearings, and the extensive court resources that they entail, to be reserved for cases that a court has found are not frivolous.

The prima facie showing required in this bill is an "inference of a violation." Is this a high enough standard considering there is no required showing of prejudicial impact on the case, i.e. without the violation there is a reasonable probably that the result would have been different? Could the court be required to order a remedy such as a new hearing or order a new trial or reduce sentencing, even if the result of the new proceedings would likely be the same as the original proceedings?

8. Argument in Support

According to Ella Baker Center for Human Rights, a co-sponsor of this bill:

> This bill is needed because of a widely condemned 1987 legal precedent established by the U.S. Supreme Court in the case of *McCleskey v. Kemp*. The *McCleskey* decision has the functional effect of requiring that criminal defendants prove intentional discrimination when challenging racial bias in their legal process. This is an unreasonably high and is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted.
>
> Californians have relied on state or federal constitutional provisions to challenge discrimination in the criminal justice system. However, these provisions are insufficient to address persistent racial discrimination in the criminal legal system, because courts have concluded that, due to the *McCleskey* case and others, proof of purposeful discrimination is required. As a result, California convictions and sentences are routinely upheld despite:
>
> • Blatantly racist statements by attorneys, judges, jurors and expert witnesses;
>
> • The exclusion of all, or nearly all Black, Brown, Native, Indigenous, and people of color from serving on a jury; and
>
> • Stark statistical evidence showing systemic bias in charging and sentencing.
>
> The *McCleskey* majority observed that state legislatures concerned about racial bias in the criminal legal system could act to address the problem. We agree. Just as California's Unruh Civil Rights Act currently prohibits racial discrimination in employment, housing and public accommodation, we need a statewide policy that makes it unlawful to discriminate against Black and Brown people in the state's criminal legal system. It's time to take a stand against racial discrimination in our criminal legal system.

9. Argument in Opposition

According to the California District Attorneys Association:

> First, under proposed Penal Code section 745(d), a court will be required to hold lengthy and costly evidentiary hearings involving the testimony of attorneys, law enforcement officers, jurors, experts, or other members of the criminal justice system . . . . These hearings will necessarily involve massive amounts of statistical evidence which must take into account numerous and intangible factors in order to be valid and will grind the system to a halt at a time when the court system is already facing tremendous delays and burdensome costs in holding trials due to the pandemic. To delay a criminal proceeding and force testimony from innumerable witnesses based merely on an accusation of bias absent some initial showing "that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose" (*Wayte v. United States* (1985) 470 U.S. 598, 608) reflects an ideological "ends justify the means" approach that is oblivious to practical concerns.
>
> Second, this bill is retroactive to ALL cases. Practically every single conviction that has ever occurred in California can now be re-opened and potentially reversed. All the defendant needs to do is allege one of the five grounds described in section 745(b) were present at trial or sentencing. Moreover, the defendant may be able to mandate a hearing without any showing at all or based on no more than a prima facie showing. The difficulties in trying to defend against the allegation and the ramifications of dismissal are compounded because relevant statistics are more likely to be absent, relevant witnesses (i.e., judges, attorneys, prosecutors, officers, etc.,) may be dead, and retrying the cases after years or decades may be impossible.
>
> Third, a successful motion to overturn a conviction or obtain habeas relief based on a violation of section 745 requires no showing of prejudice! Together, proposed Penal Code sections 745(b)(1) and 745(e)(1) would require either the granting of a mistrial, the dismissal of a case, or a reduction in charges if a judge, attorney, law enforcement officer involved in the case, expert witness, or juror was biased against a defendant because of defendant's race, ethnicity, or national origin - without any showing that the defendant suffered any prejudice as a result of the bias, that the bias has any impact whatsoever on the outcome of the trial, or that the defendant was deprived of a fair trial!

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