

The Racial Justice Act on Appeal Challenging Implicit Bias

Anna L. Stuart Staff Attorney, Sixth District Appellate Program May 30, 2025 anna@sdap.org

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Agenda

Challenging Implicit Bias on Direct Appeal

- Quick overview of the RJA
- Pre-briefing Considerations
- Analyzing how to raise a claim based on implicit bias
 - The *People v. Stubblefield* opinion analyzed [judicial notice, forfeiture, "Objective observer," "about the defendant," and a possible structure]
- Recent issues:
 - Requests for relevant information, "during the defendant's trial" (*Wagstaff*), invited error can defense counsel violate the RJA (*Midell*), different approach needed for IAC claims?,
- Federalization
- Examples of briefing structures
- Trends in the Courts of Appeal in the unpublished sphere
- Case summaries, and the history of the legislation [separate handout]

Appellate Project Contacts for the RJA

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FDAP:

- Deborah Rodriguez
 - drodriguez@fdap.org
- Kaiya Pirola
 - kpirolo@fdap.org
- Brad O'Connell
 - jboc@fdap.org

CAP-LA:

- Sydney Banach
 - sydney@lacap.com

CCAP:

- Jon Roberts
 - jroberts@capcentral.org

ADI:

- Cindi Mishkin
 - cbm@adi-sandiego.com

SDAP:

- Anna Stuart
 - anna@sdap.org
- Mi Kim
 - mi@sdap.org

RJA on Direct Appeal

Brief Overview of The Racial Justice Act (§ 745)

Legislative Intent

• The Legislature clarified that it intended "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." (Stats. 2020, ch. 317, § 2, subd. (i).)



Legislative Findings – Implicit Bias "[T]he RJA was expressly intended to provide remedies for harms caused by implicit bias, which is 'often unintentional and unconscious' (Assem. Bill 2542 (2019–2020 Reg. Sess.) § 2, subd. (i)), and '[t]he Legislature has acknowledged that all persons possess implicit biases' (id., subd. (g))." (Mosby v. Superior Court (2024) 99 Cal. App. 5th 106, 138.)

Express Bias & Implicit Bias

Resources:

OSPD SharePoint:

https://www.ospd.ca.gov/whatwe-do/indigent-defenseimprovement-division/defenderresources/

Handout materials

- Explicit bias "beliefs that people consciously possess and intentionally express"
- Implicit bias "well-learned associations that reside below conscious awareness and can automatically drive behavior in a manner that is inconsistent with one's personal attitudes"
- Information adapted from SDAP's Nov. 30, 2023 RJA Presentation by Professor Mary Nicol Bowman, Arizona State University

Jurisdiction

§ 745, subd.
(b)
Mechanisms
For Bringing
a Claim

- (b)
- A defendant may file a [a § 745 motion, writ of habeas corpus, or [§]1473.7 (motion to vacate)], 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."

Four Pathways to Establish an RJA Violation

Pen. Code, § 745, subd. (a)(1)-(4)

- The RJA creates a "broad scheme . . . which covers every stage of the prosecutorial process—from investigation through charging, trial, conviction, and sentencing"
- (a)(1)-(4) "are not isolated pathways to proving a violation" but "may work in tandem."
 - Young v. Superior Court (2002) 79 Cal.App.5th 138

§ 745's "escalating burdens of proof"

(Young v. Superior Court (2022) 79 Cal. App. 5th 138, 160-161)

Note: "request for relevant information" v. "discovery"

- Request for Relevant Information (§ 745, subd. (d): plausible justification standard: Whether the defendant makes a plausible case, based on specific facts, that any of the four enumerated violations of § 745 (a) could or might have occurred.
- Adjudicating motions: § 745, subd. (c): the court "shall hold a hearing" if the defendant makes "a prima facie showing of a violation" of the RJA
 - "'[p]rima 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." (§ 745, subd. (h)(2).)
 - A "substantial likelihood' requires more than a mere possibility, but less than a standard of more likely than not."
 - Lower threshold than a prima facie showing in the habeas context. (See *Finley v. Superior Court* (2023) 95 Cal.App.5th 12)
- To prove a violation at an evidentiary hearing below or on direct appeal (e.g., *Stubblefield*): preponderance of the evidence.

§ 745, subdivision (a)(1): Out of Court Bias

§ 745, subdivision (a)(2): In Court Bias

(a)(1):

- The judge, attorney, law enforcement officer, expert witness, or juror
- exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

(a)(2):

- During trial and in court
- the judge, attorney, law enforcement officer, 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 whether or not purposeful.

Legislative Updates

- AB 1071, by Assemblymember Kalra. Here:
 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260AB
 1071 This bill would revise & clarify the remedy provisions and change & clarify procedures & standards for litigating retroactive claims via habeas corpus.
 - Currently there are two mechanisms for post judgment RJA relief (habeas corpus and/or § 1473.7 motion)
 - AB 1071 would add § 1473.2 with a procedure to allow standalone petitions to function as post-conviction motions
- SB 734, by Senator Caballero. Here:

 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB
 734 Current version: (3) If the defendant is represented by an attorney and the motion alleges a violation of paragraph (1) or (2) of subdivision (a), based in whole or in part on the conduct of one or more law enforcement officers, the attorney shall serve a copy of the motion on the law enforcement agency or agencies that employed the officer or officers.
 - As originally written: (3) Any person accused of bias or racial animus in a proceeding pursuant to this section shall be provided notice of the allegations by the defendant, and be given the right to representation during the hearing, including, but not limited to, the right for their representative to test the sufficiency of the evidence by asking questions of the witnesses

RJA on Direct Appeal

Pre-Briefing Considerations

Ensuring an Adequate Record for Appeal



Contact Trial Counsel



Augment Motion

Voir Dire & Jury Questionnaires:Only time when we hear directly from jurors.

Opening Statements

Hearing transcripts for any time the "RJA" is mentioned on a minute order PX Transcript (if not already)



Settling the record

Makeup of jury panel and seated jurors

Race, Ethnicity, National Origin information?

- Legislative history suggests broad application of stay procedure
- Appellate courts have broad discretion to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." (§ 1260; see *People v. Awad* (2015) 238 Cal.App.4th 215, 222.)
- People v. Wilson (2024) 16 Cal.5th 874 [a stay under § 745 requires good cause, which "depends on a case-specific consideration of the reasons proffered for delaying the adjudication of the appeal"]; but see People v. Frazier (2024) 16 Cal.4th 814 [majority finds that the defendant's claim was "not intertwined with the issues on appeal"; his counsel, OSPD, was available to file a limited-purpose writ petition; remand at this late stage would cause significant delay]
- See e.g., *People v. Harmon*, F085237. Stay and remand granted Jan. 2, 2024, by 5th DCA, after state failed to oppose the motion in a timely manner.

Stay & Remand

§ 745(b):

"the defendant may also move to stay the appeal and request remand to the superior court to file a motion pursuant to this section."

Stay & Remand Requests under Wilson and Frazier



Wilson's factors test: to show "good cause" for a stay, which "depends on a case-specific consideration of the reasons proffered for delaying the adjudication of the appeal."



Frazier application of the Wilson factors to deny stay/remand: The majority found that the defendant's claim was not intertwined with the issues on appeal; his counsel OSPD was available to file a limited-purpose writ petition; remand at this late stage would cause significant delay.



Make the claim with reference to the dissent in Wilson.

Sample Structure for good cause: Stay and Remand Motion (§ 745, subd. (b)

A. Appellant can demonstrate "good cause"; this Court should stay the appeal and order a limited remand.

- a. Appellant has a "nonfrivolous" claim under the RJA [Wilson, dissent]
- b. Appellant faces legal or practical obstacles to pursing RJA relief that would be avoided by stay/remand [Wilson]
- c. The balance of the interests favor granting the request for a stay [Wilson]
- d. The RJA claim is intertwined with appellate issues [Wilson]
- e. If appellant successfully established a violation of the RJA, he would be eligible for release [Wilson]
- f. Appellant cannot raise his RJA claims on direct appeal because they require presentation of evidence outside the record on appeal.
- g. A writ of habeas corpus is not a reasonable alternative [prob. of successive petitions, etc.)
- h. Stay and limited remand would support judicial economy and protect appellant's habeas rights
- i. Granting this request for a stay/remand would be "just under the circumstances." [Wilson, dissent]



People v. Wilson (2024) 16 Cal.5th 874 [Aug. 5, 2024]

Motion for stay & remand denied in death penalty direct appeal. Motion based on potential juror bias and charging & sentencing disparities in San Bernardino County.

Continued on next slide ...

MAJORITY: The stay-and-remand procedure of § 745, subd. (b), was unnecessary because a habeas petition under § 1473, subd. (e), was an effective means to seek RJA relief. Explanation:

A stay under section 745 requires good cause, which "depends on a case-specific consideration of the reasons proffered for delaying the adjudication of the appeal." Whether defendant is potentially eligible is an important threshold consideration.

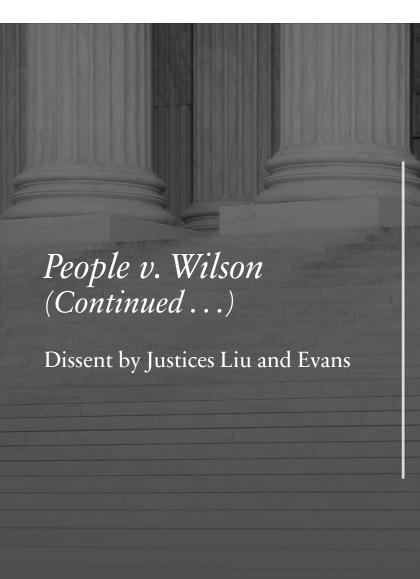
The defendant raised a plausible RJA claim, but he must also show he faces legal or practical obstacles to pursuing RJA relief that would be avoided by stay/remand.

Interests on "the other side of the balance" favor denial, including the interests of victims' families, witnesses, and the public.

"[O]ur holding today is limited," and the Court did not suggest stay & remand "is categorically unavailable."

Fn. 23: in other cases, the RJA claim may be intertwined with appellate issues; utility of stay/remand may be greater, including in noncapital cases where violations may lead to the possibility of release; and preservation of evidence is a concern.

Majority did not to resolve the claim that the harmless error standard applies only to habeas petitions, (not motions).



- Majority "effectively deprives capital litigants of access to the procedure [the RJA] expressly provides for seeking timely relief. and "supplants the Legislature's demand to swiftly rid the criminal justice system of racism with a novel and unnecessary RJA-specific habeas path" that is "riddled with delay because of the difficulty of appointing habeas counsel and processing capital habeas claims." This "approach is untethered to the statute's text or legislative history, and undermines the Legislature's stated purpose."
- Since "Mr. Wilson sets forth nonfrivolous RJA claims that require further factual development, he has established good cause"
- "Even if more than presenting a nonfrivolous claim requiring factual development is required, Mr. Wilson has good cause, that stay/remand is 'just under the circumstances.' The fact that success on either of his claims would render him ineligible for the death penalty "weighs heavily" in favor of stay/remand.
- In passing AB 1118, the "Legislature was responding to and accounting for the significant and serious obstacles capital defendants face in securing qualified counsel."

People v. Frazier (2024) 16 Cal.5th 814

[Aug. 5, 2024]

Automatic appeal in a capital case. No RJA claims were raised on direct appeal, but the defendant sought a stay/remand under § 745, subdivision (b).

MAJORITY: In a footnote, and after applying the factors identified in *Wilson*, the majority found that the defendant had not established good cause for a stay/remand, and denied the request without prejudice to file a writ of habeas corpus. The majority found that the defendant's claim was not intertwined with the issues on appeal; his counsel OSPD was available to file a limited-purpose writ petition; remand at this late stage would cause significant delay.

DISSENT: by Justice Evans, joined by Justice Liu.

- Frazier alleged significant disparities in capital sentencing based on victim race under PC 745(a)(4)(B). His expert's preliminary findings show homicides of White victims in Contra Costa County were twice as likely to end in a death sentence as were homicides of Black or Latino victims. The majority does not dispute he has identified a plausible claim for relief under the RJA.
 - "In my view, when the Legislature has spoken in a clear voice that courts must promptly address what is widely understood to be this country's original sin, we should heed its call."

Advantages of Filing for a Stay and Remand Under § 745(b) include:



No successive habeas concerns. Won't preclude client's chance to develop other claims in future habeas



Will allow § 745(b) motion to be made in superior court. Chance to fully litigate claim, seek discovery, present additional evidence (experts, statistics, etc.). Denial of that motion can then be challenged in pending appeal. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 729 ["In those cases where a stay is granted and . . . the petition is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision."])



No need to expand appointment. May be advantageous in DCA districts that are habeas-hostile



Timing considerations: May be most expeditious path to relief. With prior *Awad* stays, courts sometimes act quickly. BUT: Some stays drag on for months as hearing gets repeatedly continued in trial court; appellate counsel must keep DCA updated with status.

Appealability

§ 1237, subd. (b): An appeal may be taken by the defendant from:

"(b) From any order made after judgment, affecting the substantial rights of the party."

- Argue that § 745(a) or (d) motions are appealable under § 1237, subdivision (b):
 - *People v. Caldwell* (2018) 29 Cal.App.5th 180, 189 [denial of petition for factual innocence affects substantial rights];
 - *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600 [orders under § 1170.126 and the Three Strikes Reform Act of 2012 "create a substantial right to be resentenced" and are appealable];
 - *People v. Mena* (2012) 54 Cal.4th 146, 152–153 [order denying lineup motion affected "substantial right of the defendant" allowing an appeal];
 - *People v. Gamache* (2010) 48 Cal.4th 347, 375, fn. 13 [where appellate review authorized by § 1259, a claimed error may affect the defendant's "substantial rights"];
 - *People v. Totari* (2002) 28 Cal.4th 876, 887 [denial of immigrant defendant's § 1016.5 motion affected their "substantial rights"];
 - *People v. Loper* (2015) 60 Cal.4th 1155, 1159 [denial of pro per request for compassionate release affected defendant's "substantial rights" even though he had no statutory authority to file a pro per request].)
 - The caveat is that the AG will almost certainly argue that the order(s) are not appealable because § 745 does not provide an express ability to appeal, but the above authority cuts against that.

Appealability

Continued ...

- The appellate courts and appealability:
 - In re Montgomery (2024) 104 Cal.App.5th 1062, review granted on whether the defendant must establish a prima facie case for RJA relief before a § 745(d) motion can be granted
 - Majority: denial of a § 745(d) motion is not appealable
 - Concurrence: agreeing with majority, but noting that a § 745(d) denial could be reviewed via writ of mandate, or on habeas
 - *People v. Hodge* (2024) 107 Cal.App.5th 985 [a post judgment RJA motion was not appealable because the defendant was still in custody and could access habeas corpus relief]
 - *People v. Serrano* (2024) 106 Cal.App.5th 276 [denial of a post judgment motion under § 745(d) is an interlocutory order and not appealable]

RJA on Direct Appeal

Analyzing *People v. Stubblefield* (2024) 107 Cal.App.5th 896

People v. Stubblefield (2024) 107 Cal.App.5th 896 Analyzing the Court of Appeal's Opinion

Background:

Appellant was charged with rape with the use of a firearm, and even though the complaining witness had reported the incident the day it was alleged to have occurred, the police never searched the defendant's house for a gun.

At trial, the prosecutor argued that in fact the police could not have searched the house for the gun, because appellant was a famous African American man, and a "storm of controversy" would have ensued. This argument was made two months after George Floyd was murdered, while the protests that followed Mr. Floyd's death were still gripping the nation.



Analyzing the Stubblefield Opinion

Standard of review

- •Statutory construction (de novo)
- •Application of the facts to the preponderance of the evidence standard in § 745(c)(2)

Judicial notice

- •Describes what a court may take judicial notice of
- •Describes how the judicially noticed facts demonstrate implicit bias of the statements

"Objective observer" standard: defined and applied

Explained how the prosecutor's statements *appealed* to racial bias

Explained how the challenged statements met the elements for a \$ 745, subd. (a)(2) violation

•Prosecutor an attorney in the case, statements defied "any racially neutral interpretation," relevance of the statements (were they based on facts/evidence?), the statements invited the listener to consider race, the statements were "about the defendant's race," etc.

Held that its findings were supported by a preponderance of the evidence

Required remedy: reversal

Stubblefield & Judicial Notice

One claim turned on the prosecutor's argument that the police initially declined to investigate appellant because he was Black, and A "storm of controversy" would have ensued.

The Court considered four propositions related to the murder of George Floyd.

Quotes from the opinion)

- Evidence Code section 459 provides for judicial notice by a court of review.
- "A court of review shall take judicial notice of each matter the trial court was required to notice under Evidence Code section 451. (Evid. Code, § 459, subd. (a).)"
- "A court of review may take judicial notice of matters on its own motion."
- "The fact of Floyd's killing and the fact of the post-Floyd conflict fall well within the scope of judicial notice under [Evid. Code §§] 451 and 459."
- "As a general matter, it has long been established that courts will take judicial notice of "contemporaneous events of general knowledge and repute." [Citation.]
- "At the time of closing arguments in this case, the occurrence of Floyd's killing and the ensuing conflict were facts of 'generalized knowledge' so 'universally known' that they could not 'reasonably be the subject of dispute,' requiring judicial notice of those facts by the trial court and hence this court. (Evid. Code, §§ 451, subd. (f), 459, subd. (a).)"

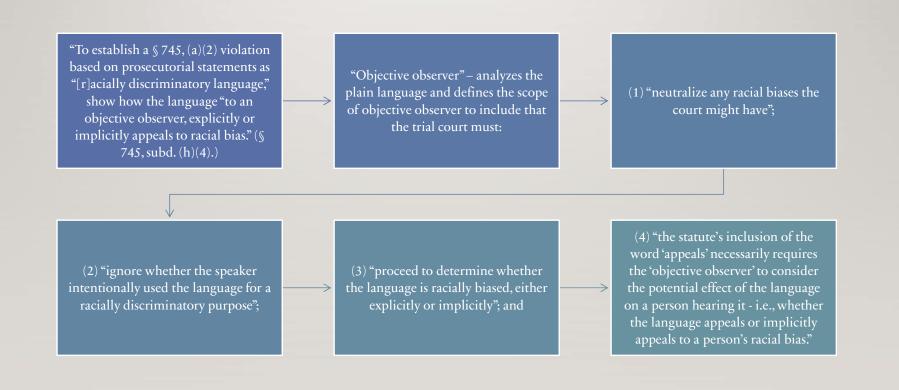
Stubblefield & Judicial Notice

Continued ...

Quotes from the opinion

- "Given that this claim is raised for the first time on direct appeal, we approach the question of judicial notice with caution."
- "Less extraordinary public events or facts would give us pause, but the prominence and undeniable nature of the basic facts concerning these events make them an appropriate matter for this court to acknowledge, as other courts of this state have done as well as federal courts."

The Stubblefield Opinion & The "Objective Observer" Quotes from the opinion



The *Stubblefield* opinion and the "objective observer"

Continued ...

Quotes from the opinion

- "The RJA's reference to 'racially charged or racially coded language' requires context and could include evidence relevant to a person's knowledge or awareness of certain facts or events. 'In some cases, the contextual basis for an implicit appeal to racial bias may consist of facts or events so commonly known-e.g., the historical fact of slavery-that it may be reasonable to assume a listener is aware of them.'"
- §§ 745(a)(2) & (h)(4) "don't expressly require a defendant to show how an appeal to racial bias could have affected a juror and there is no requirement the juror must hear the language. "[T]he focus is on whether the challenged language would appeal to the racial bias of a person who simply hears the language."

The *Stubblefield* opinion's structure

- A. The Racial Justice Act
- **B. Principles of Statutory Interpretation**
- C. Interpretation and Application of the Racial Justice Act
- **1. Factual Background** Facts about the case, the gun, and the prosecutor's related and problematic closing arguments
- 2. Judicial Notice of the Killing of George Floyd and Subsequent Events
- 3. Application of the Racial Justice Act to the Prosecution's Statements: Before turning to the merits, the DCA considered how the judicially noticed facts to determine whether and how they factor into the analysis under the applicable legal standards.
- a. Relevance of the Events Following Floyd's Killing: Since the comments were not explicitly referencing race, the analysis turns on whether the "statements might be understood as an implicit reference to the post-Floyd conflict."

Objective Observer standard defined; then approached "Stubblefield's claim with the assumption that a person listening to the prosecution's statements would be aware of the post-Floyd conflict and aware that the central dispute underlying the conflict concerned the use of force by police in encounters with Black persons."

The *Stubblefield* opinion's structure

C. b. The Prosecution's Statements Violated the Racial Justice Act

- The Court went through the various ways the prosecutor's argument appealed to racial bias
 - E.g., The Court explained how the prosecutor's statements "invited the listener to consider the fact that appellant was a Black man in weighing the evidence" which under were the statements "to an objective observer, explicitly or implicitly appeal[] to racial bias," under § 745, subdivision (h)(4).
- The Court explained how the elements under § 745(a)(2) were met:
 - The prosecutor was "an attorney in the case,"
 - The statements were "[d]uring the defendant's trial, in court and during the proceedings."
 - the prosecutor was not "relating language used by another that is relevant to the case."
 - "Nor can the statements be characterized as 'giving a racially neutral and unbiased physical description of the suspect."
 - The prosecutor's statements defied "any racially neutral interpretation" such as "evidence supporting a witness's identification of a suspect."
 - The record does not explicitly show that law enforcement's decision not to search the house was race-based, thus there was no relevance to the prosecutor's statements they were not based on the facts or evidence

The *Stubblefield* opinion's structure

Court of Appeal's findings – which it held were all supported by a preponderance of the evidence:

- The prosecutor's statements identified "race as a factor in law enforcement's decisionmaking," which "to an objective observer, explicitly or implicitly appeals to racial bias," making it "racially discriminatory language" within the meaning of §§ 745, subdivisions (a)(2) and (h)(4).
- The court found the "storm of controversy" language "enabled a potent appeal to racial bias in the context of the prosecution's statements as a whole."
 - First, a person with a basic awareness of the post-Floyd conflict could easily and naturally perceive the prosecutor's statements to be a reference to that conflict.
 - Second, the racial aspects of the post-Floyd conflict generated strong feelings and opinions among many members of the public.
- This meant any brief or vague reference sufficient to evoke such images could be emotionally charged by them with no overt mention of the conflict or any details about it. Referring to the post-Floyd conflict in that way could effectively produce a high decibel "dog whistle."
- "about the defendant's race" (§ 745(a)(2)): a broad definition is required

D. The Required Remedy – reversal without showing prejudice: referencing *People v. Simmons* (2023) 96 Cal.App.5th 323 ["The statute forecloses any traditional case-specific harmless error analysis"]

The Stubblefield Opinion

Takeaways

Example of how to frame a claim challenging improper appeals to bias (implicit bias) on direct appeal

Judicial Notice

Objective observer: what information would the observer in your case have when being exposed to the language/conduct

Describe all the conceivable ways the listener may be affected. For example, describe how it might conjure/invoke inappropriate images (e.g., riots here) and ideas.

Argue each element is met under <math> <math>

Preponderance of the evidence standard to support findings

Remember to explain why § 745, subd. (k) does not apply (prejudice) Pay attention to the remedy you are requesting (reversal, conditional reversal in the alternative, etc.)

Stubblefield is on review

Attorney General's petition for review was on a narrow issue – whether harmless error review under § 745, subd. (k) is confined exclusively to RJA claims brought via habeas.

The California Supreme Court granted review and deferred the matter pending the decisions in two capital appeals:

- People v. Bankston direct appeal claim under §745(a)(2) for DA's calling the defendant a "Bengal tiger," a "thug" and "killing machine," and "expert" testimony from a gang officer about the violence-prone nature of Black "hardcore gang members." Oral Argument was on May 7, 2025;
- (2) *People v. Barrera* direct appeal claim concerning the use of anti-Latinx racialized language throughout voir dire and trial when prospective jurors expressed bias against non-European immigration ("illegal immigrants"), Latino prospective jurors were singled out for questioning, emphasis of the irrelevant fact that the defendant's children helped him sell corn on the streets, and the DA's use of racialized and dehumanizing language {defendant was lower than an animal) and otherized immigrants, and by defense expert's testimony that being an illegal immigrant made it more likely that the defendant abused his children.

RJA on Direct Appeal

Analyzing the statutory language of \$745, subd. (a)(1) & (a)(2)

Definitions of Relevant Terms:

- "Exhibit" "to present to view" such as "to show or display outwardly especially by visible signs or actions." (Exhibit, Merriam-Webster.com.)
- "Bias" "[a] mental inclination or tendency; prejudice; predilection." (Bias, Black's Law Dictionary (11th ed. 2019).) Black's Law Dictionary differentiates among various types of bias, including actual bias, implied bias, and inferable bias
- "Animus" (a) means "ill will" or "animosity." (Animus, Black's Law Dictionary (11th ed. 2019).) Black's Law Dictionary specifically provides as an example, class-based animus, i.e. "[a] prejudicial disposition toward a discernible, usu[ally] constitutionally protected, group of persons." (*Ibid.*)

- "Towards the Defendant" The term "towards" denotes "in the direction of" or "in relation to." (Toward, Merriam-Wesbter.com.)
- "Because of the Defendant's Race, Ethnicity, or National Origin" reflects that there must be a causal link between the bias or animus exhibited towards the defendant and the defendant's race, ethnicity, or national origin. (See *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 21.)

- "§ 745(a)(2)'s 'about the defendant's race' should not be narrowly construed."
- "[T]he prepositional phrase "about the defendant's race" in subdivision (a)(2) implies a certain degree of focus, requiring more than just a passing reference."
- Citing dictionary definitions, the court found that "Looking to the plain meaning of "about" as a preposition, various dictionary definitions include: "In reference to; relating to; concerned with" (Citation) "Concerning, regarding, with regard to, in reference to" (Citation) and, "with regard to," "concerned with," and "fundamentally concerned with or directed toward," (Citation)."
- Race was a critical factor in the prosecution's case

"about the defendant's race" (§ 745, subd. (a)(2))

From *People v*.

Stubblefield (2024)

107 Cal.App.5th 896

- Statements need not be to the defendant they could be to another person about the defendant
- Similarly, an actor can "exhibit" bias towards a defendant by a statement to another e.g., officer says to a fellow officer that he dislikes the defendant because of his race, he is still exhibiting animus towards the defendant
- Argue it is a question of fact
- Consider also arguing a § 745(a)(2) violation: (a)(2)

"Towards the defendant" (§ 745, subd. (a)(1))

"- the term
"towards" denotes
"in the direction of"
or "in relation to."
(Toward, merriamwesbter.Com.)

"During the Defendant's Trial" (§ 745, subd. (a)(1))

6DCA recently posed the following question in a request for supplemental briefing:

"Does the phrase '[d]uring the defendant's trial' as used in §745 (a)(2) include the use of language by the judge in court during a defendant's sentencing hearing; and (2) If not, did the trial court violate § 745 (a)(1) at appellant's sentencing hearing?"

With thanks to attorney Nancy Brandt and the excellent briefing in People v. Wagstaff, 6DCA, H050597 [decision pending]

Possible responses:

- We should not let the courts narrow (a)(2) by parsing "during the defendant's trial"; (a)(2) is broader than (a)(1) and it should apply to anything that occurs during the court process.
- Because the intent of the RJA is to "remedy the harm to the defendant's case" from racial bias (A.B. No. 2542, § 2(I) [emphasis added]), "eliminate racial bias from California's criminal justice system" (*id.* at § 2(j)), and apply retroactively (§ 745(j)), the RJA is a remedial statute. Thus, "courts should liberally construe remedial statutes in favor of their protective purpose." (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 532 [emphasis added]; accord In re J.S. (2024) 100 Cal.App.5th 246, 253; *People v. Zeigler* (2012) 211 Cal.App.4th 638, 658.)
- For comments at a hearing other than the day of trial: How can we "eliminate racial bias from California's criminal justice system" if officers/attorneys/judges/etc. are allowed to say racist things so long as it is not on the day of trial? Very few cases go to trial.

Can defense counsel can violate § 745(a)

Yes. The RJA does not only target violations made by judges, prosecutors, and law enforcement – it also targets any violations made by defense counsel

- Pretrial, DA filed a motion alleging that during plea negotiations, the deputy public defendant made remarks that may created a conflict of interest between defense counsel and the defendant. In a hearing without the DA present, the remarks were read and defendant affirmed that he wanted to keep his counsel.
- Defense counsel denied the DA's version and said the comment he made was sarcastic and in pursuit of his client's best interests. In a hearing on the DA's motion, the trial court ordered that a new attorney be appointed because the remarks at least raised a potential RJA issue.
- The defendant sought writ relief, and an OSC issued.

Sanchez v. Superior Court of San Bernadino County (2024) 106 Cal.App.5th 617

[Oct. 22, 2024]

- **HELD:** DCA affirmed, finding the trial court did not abuse its discretion. The original defense attorney could not impartially investigate whether an RJA violation had occurred, which created a conflict of interest. Even apart from a conflict, the trial court had the discretion to remove counsel to insulate the proceedings from a future RJA claim.
- See dissent: "A deputy public defender sought a more favorable plea offer and expressed the view that the criminal justice system is biased against Hispanic defendants like his client." "The record contains no evidence of a potential RJA claim against the deputy public defender. The trial court's ruling was therefore erroneous and prejudicial, depriving defendant [] of an attorney whom he wanted to keep and who was zealously representing him."
- **NOTE:** This opinion was originally unpublished but the court published it in response to the DA's request for publication.

Sanchez v. Superior Court of San Bernadino County (2024) 106 Cal.App.5th 617

[Oct. 22, 2024]



"



In certain contexts, the Attorney
General has argued that claims
that defense counsel violated the
RJA are not cognizable under the
doctrine of "invited error."

The argument goes that by allowing RJA claims to be brought against defense counsel raises the risk that defense attorneys will intentionally violate the RJA to remedy a case going poorly for the defendant.

As troubling as this suggestion may be, this argument may come up. Indeed, this was a question/concern posed by a justice during oral argument very recently in *People v. Bankston* – capital appeal raising claim under \$745(a)(2) for DA's calling the defendant a "Bengal tiger," a "thug" and "killing machine," and "expert" testimony from a gang officer about the violence-prone nature of Black "hardcore gang members."

A Troubling Argument:

Invited Error

Response:

The invited error doctrine is inapplicable in this context.

With thanks to the excellent briefing by Kelly C. Martin in the pending case of *People v. Midell* (1DCA, A168758)







The doctrine applies when the complaining party "intentionally caused the trial court to err and clearly did so for tactical reasons." (People v. Souza (2012) 54 Cal.4th 90, 114, internal quotes omitted; People v. Wickersham (1982) 32 Cal.3d 307, 330 [explaining that the invited error doctrine prevents an accused obtaining a reversal because of an error made by the trial court at his behest"], disapproved on another ground in People v. Barton (1995) 12 Cal.4th 186, 200-201.)

Thus, the 'error' a party must have 'invited' is the court's error, not its own. "Error is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness." (People v. Tapia (1994) 25 Cal.App.4th 984, 1031, internal quotes omitted; People v. Duncan (1991) 53 Cal.3d 955, 969.)

"The rule that the record must show counsel did not act out of 'ignorance or mistake' was developed so that an appellate court finding invited error could be confident that counsel in fact acted intentionally." (People v. Cooper (1991) 53 Cal. 3d 771, 830; People v. Walker (2015) 237 Cal. App.4th 111, 118-119 [same].)

A Troubling Argument:

Invited Error

Response:

The invited error doctrine is inapplicable in this context.

With thanks to the excellent briefing by Kelly C. Martin in the pending case of *People v. Midell* (1DCA, A168758)

RJA on Direct Appeal

Approaches

Considerations Before, During, and After Record Review

- Consider the entire prosecution pre-arrest on
- Is the evidence relevant to the case?
- Was it evidence? Or if comments during argument was the words or ideas in evidence?
- Use of analogy
- Use of stereotypes
- Use of/repetition of certain words/ideas/concepts
- Was it necessary for the prosecutor/judge to verbalize a statement verbatim?
- Were specific ideas/words/evidence emphasized in argument?
- What images/concepts might the language invoke?
- Contextualize: judicial notice (e.g., George Floyd killing, protests), cite to historical facts, explain meaning of words, etc.)



Trial court ruling that prima facie burden not met below: **de novo** standard of review. (See *Jackson v. Superior Court* (2025) 109 Cal.App.5th 372, 382 (2025))



The trial court's ruling that appellant failed to prove racial bias by a preponderance of the evidence is a legal question reviewed **de novo**. (See *People v. Howard* (2024) 104 Cal.App.5th 625, 650.)



Direct appeal based on the trial record where the court of appeal is the court of first impression on the RJA claim: de novo approach under § 745's stated standard – **preponderance of the evidence**. (See *People v. Stubblefield* (2024) 107 Cal.App.5th 896,913-924.)



"An issue of statutory interpretation is subject to **de novo** review." (*People v. Watson* (2021) 64 Cal.App.5th 474, 484; *People v. Burgess* (2022) 86 Cal.App.5th 375, 382.) The facts underlying this issue are not in dispute; the issue raises a pure question of law.

Standards of Review

§ 745, Subd. (a)(1) Outside The Courtroom Claims

"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"

- 1. Identify the scenario (players, circumstances, utterance(s), conduct, etc.)
- 2. Explain why using existing case law, social science research, law reviews, judicially noticed facts, historical facts, etc. the scenario and any language used was the product of explicit and/or implicit bias (i.e., was based on stereotypes, invoked racist tropes, used racially coded language, constitutes a "dog whistle," etc.)
- 3. Argue why, in the context of the case it was more likely than not, that the scenario was the product of explicit and/or implicit bias of the player(s)

§ 745, subd. (a)(2)

In court use of "racially discriminatory language" or "otherwise exhibited racial bias or animus"

- 1. Identify the language (inc. circumstances around its utterance(s))
- 2. Establish who the objective observer would be explain why using existing case law, social science research, law reviews, judicially noticed facts, historical facts, etc. the language used was the product of explicit and/or implicit bias (i.e., was based on stereotypes, invoked racist tropes, used racially coded language, constitutes a "dog whistle," etc.) and that the objective observer/listener would be aware of those things
- 3. Argue why, in the context of the case (including the facts of the case, the use of rhetorical techniques such as repetition, links to the credibility determination, etc.) an objective observer would conclude by a preponderance of the evidence that the language implicitly or explicitly appealed to racial bias.

Cognizability – Ways Around Forfeiture

[No Motion or Objection Below]

- Objection would have been futile, especially if discriminatory act was by trial court or defense counsel. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)
- Court has the inherent discretion to reach the issue. (*In re P.O.* (2016) 246 Cal.App.4th 288, 297–98, *People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.)
- Claim "fundamentally affects the validity of the judgment [citation], [and] ... important issues of public policy are at issue [citation]." (*In re J.C.* (2017) 13 Cal.App.5th 1201, 1206.)
- The RJA serves "an important public purpose" that precludes an effective waiver. (See *Sanchez v. Superior Court* (2024) 106 Cal.App.5th 617, 622-623, citing, among others, *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 ["An accused may waive any rights in which the public does not have an interest and if waiver of the right is not against public policy"].
- Backup ineffective assistance of counsel argument, as in Simmons.
- Argue it's a pure legal question resolvable with only the appellate record, and it is therefore cognizable on appeal. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

Cognizability – Ways Around Forfeiture

[No Motion or Objection Below]

- Argue that *Lashon* was wrongly decided and that even so, the court should rule on the merits.
- Further, a reviewing court may "decline to penalize" a defendant when counsel has not preserved an issue for review. (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1032, fn. 10 [declining to find forfeiture when the defendant's trial and appellate counsel failed to adequately preserve or present an issue for review].)

Ineffective Assistance of Counsel (IAC)

People v. Simmons (2023) 96 Cal.App.5th 323

People v. Quintero (2024) 107 Cal.App.5th 1060

People v. Corbi (2024) 106 Cal.App.5th 25

People v. Singh (2024) 103 Cal.App.5th 76

- Defense counsel is required to make proper objections. (See, e.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 222; *People v. Mozinga* (1983) 34 Cal.3d 926.)
- *People v. Centeno* (2014) 60 Cal.4th 659, 675 [the record discloses no rational tactical justification for counsel's failures where their decision "cannot conceivably be viewed as beneficial to the defense"].)
- People v. Simmons (2023) 96 Cal.App.5th 323, 337: "[t]he 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." (Citations.) ¶ ...[O]nce a violation of the RJA has been established, the ...plain language of the statute [] mandates that a remedy be imposed without requiring a show of prejudice."
- Strickland v. Washington (1984) 466 U.S. 668

Ineffective Assistance of Counsel (IAC)

Continued ...

People v. Simmons (2023) 96 Cal.App.5th 323

People v. Quintero (2024) 107 Cal.App.5th 1060

People v. Corbi (2024) 106 Cal.App.5th 25

People v. Singh (2024) 103 Cal.App.5th 76

- Argue a split of authority on demonstrating IAC claims on direct appeal under the RJA: *Simmons* v. *People v. Singh* (2024) 103 Cal.App.5th 76, *People v. Corbi* (2024) 106 Cal.App.5th 25, *People v. Quintero* (2024) 107 Cal.App.5th 1060.
- Defense counsel themselves could violate the RJA or fail to make a proper objection. (See § 745, subd. (a)(1)–(2); *Sanchez v. Superior Court* (2024) 106 Cal.App.5th 617, 628–630 [trial court did not abuse its discretion when it removed a specific deputy public defender due to the potential for an RJA violation].)
- If everyone harbors implicit biases, no single person can be entrusted with the power to identify and call out bias in the trial courtroom thus, in order to properly serve the legislative intent, defense counsel alone cannot be entrusted with the responsibility to object to RJA violations
- The public's overarching interest in eliminating racial bias from the criminal legal system, there can be no reasonable "tactical" reason for allowing racial discrimination and racial disparities to continue. (See A.B. 2542 (2019–2020 Reg. Sess.) § 2, subd. (i); Sanchez, supra, 106 Cal.App.5th at pp. 632–633; cf. Singh, supra, 103 Cal.App.5th at pp. 116–118 [court "discern[ed] multiple reasonable tactical reasons" why defense counsel may not have made RJA objection].)

IAC & the RJA:

Is a different approach needed?

- With thanks to Jyoti M. Malik and the briefing in *People v. Perez*, 5DCA, F087344:
- 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." (Assem. Bill No. 2542, §2, subd. (i).) Article VI, section 13 does not prohibit the Legislature from making this presumptively constitutional determination. (See also *Simmons*, *supra*, 96 Cal.App.5th 323.)
- The structural nature of the RJA statute also raises the question of whether an RJA based violation may be assessed solely through a *Strickland* lens,.... (see *Weaver v. Massachusetts* (2017) 582 U.S. 286, 299: ["while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint"])

Constitutional Claims

Due Process/IAC

Federalization

- The [use of discriminatory language; invocation of racial stereotypes; exhibition of racial animus/bias] violated the federal and state Constitution.
- [The RJA violation] denied defendant the constitutional rights to due process and a fair trial under both the federal and state constitutions. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Buck v. Davis* (2017) 580 U.S. 100, 121-122; *McCleskey v. Kemp* (1987) 481 U.S. 279, 309, fn 30; *Batson v. Kentucky* (1986) 476 U.S. 79, 87-88; *Bush v. Vera* (1996) 517 U.S. 952, 985; see 2020 Cal. Stats ch. 317, § 2, subds. (b) and (c).)

Prejudice

§ 745, subd.
(a)(1) & (a)(2)
claims

- For cases on direct appeal irrespective of the date of judgment, no prejudice showing is required under state law. (See e.g., *People v. Stubblefield* (2024) 107 Cal.App.5th 896.)
- § 745, subd. (k) applies only to "petitions that are filed in cases for which judgment was entered before January 1, 2021." (See *Stubblefield*, *supra*, 107 Cal.App.5th at pp. 927-928 [holding that § 745, subd. (k) applies only to "petitions"]
- (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. (2020 Cal ALS 317, 2020 Cal AB 2542, 2020 Cal Stats. ch. 317.)
- Constitutional Claims: Due process claims may require prejudice showing under *Chapman v. California* (1967) 386 U.S.18.

The State's Position

Forfeiture

- No contemporaneous objection or RJA motion below
- Incorrect procedural format (requires motion/habeas)
- Counter
 - The statute is unambiguous: a defendant may raise an RJA claim on direct appeal. (§ 745, subd. (b).)
 - Refer to COGNIZABILITY slides herein
- (a)(2) claim the evidence was relevant and any racial overtone was incidental
 - Counter
 - The RJA provides no carveout for incidentally discriminatory language.
 - Insufficient probative value relative to prejudicial impact both because of the implicit bias the evidence carries and the inherent prejudice established by the Legislature
 - Race plays no role in criminal justice system. (See 2020 Cal Stats. ch. 317, § 2, subd. (i) [AB 2542].)

The State's Position

- Prosecutorial comment was in response to defense arguments. (See e.g., *People v. Bryden* (1998) 63 Cal.App.4th 159, 184 ["Rebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel"].)
- Counter
 - A prosecutor may not argue facts that are not in evidence. (*People v. Woods* (2006) 146 Cal.App.4th 106, 113 ["A prosecutor may not suggest the existence of 'facts' outside of the record by arguing matters not in evidence."]
 - Such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Rodriguez* (2020) 9 Cal.5th 474, 480.)
- The defense said it first.
- 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).)
- Counter
 - Check the record who actually said it first.
 - Relevance
 - Probative value v. prejudicial impact

The State's Position

Concession?

Statutory Remedies: BEFORE judgment entered (§ 745, subd. (e)(1)):

Statutory Remedies: AFTER judgment entered (§ 745, subd. (e)(2)):

- 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
- 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:
- (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.

Arguing the Remedy

- Remedial statutes are liberally construed to promote the general object sought to be accomplished. (*Viles v. California* (1967) 66 Cal.2d 24, 31; *People v. Martinsen* (1987) 193 Cal.App.3d 843, 847; *People v. Fulk* (1974) 39 Cal.App.3d 851, 855.)
- Whenever the meaning of a remedial statute is doubtful, "it must be so construed as to extend the remedy." (*Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 Cal.2d 423, 434-435, quoting *White v. Steam-Tug Mary Ann* (1856) 6 Cal. 462, 470; *People v. White* (1978) 77 Cal.App.3d Supp. 17, 21.) Put another way, when the Legislature has attempted to "remove [the] snares" of problematic laws with a remedial statute, "[c]ourts should not rebuild them by a too narrow interpretation of the new enactments." (*Hobbs v. Northeast Sacramento* County Sanitation Dist. (1966) 240 Cal.App.2d 552, 556.)

Appellate Remedy [it depends]

- Straight reversal under the RJA if violation shown by preponderance of the evidence/a prima facie case made:
- AB1118 based on the record
- If fully litigated below
- At a minimum, request reversal and remand for
- Opportunity to bring a motion (to make a prima facie showing)
- Order an evidentiary hearing (prima facie showing made on appeal)
- Order a hearing specifically for the remedy (violation shown on appeal)
- Conditional reversal and remand. (See *People v. Howard* (2024) 104 Cal.App.5th 625 [where trial court erred in denying defendant's motion below, the DCA conditionally reversed with directions to hold an evidentiary hearing under the RJA]

RJA on Direct Appeal

Structuring the Brief

Framework Idea #1: raised below

First, the background ...

With thanks to panel attorney Nancy Brandt for the permission to use her briefing from the pending *People v. Wagstaff*, 6DCA, H050597

Background: throughout appellant's trial, defense counsel raised objections under the RJA:

- 1. At sentencing, the judge referred to appellant, a Black man, as a "strong young buck"
- 2. Following a defense objection under the RJA to the lack of diversity among the jury venire (i.e., just one Black individual), the judge rejected the idea stating, "In fact, just an observation on the court's part that we were fortunate to have a higher number of Asian-Americans in this venire and much higher than I think is representative of their percentage in this community ..."
- 3. The DA exercised a peremptory challenge on said sole Black potential juror, the defense challenged under *Batson-Wheeler*, Code of Civil Procedure § 231.7, and the RJA, which were all denied.

Framework Idea #1:

With thanks to panel attorney Nancy Brandt for the permission to use her briefing from the pending People v. Wagstaff, 6DCA, H050597 I. The Use of Racially Discriminatory Langes During Appellant's Trial Renders His Conviction and Sentence Invalid under the Racial Justice Act, and Violates their Constitutional Rights to Due Process and a Fair Trial.

- A. Argument summary
- B. Facts implicating the Racial Justice Act
 - A. Comments by the trial court
 - B. The jury venire
 - C. The peremptory challenge
- C. The Racial Justice Act
- D. The issue is cognizable on direct appeal
- E. Appellant has not forfeited the issue
- **F.** Standard of review [de novo]
- G. The trial court's characterization of appellant as a "strong young buck" evokes offensive racial stereotypes and hearkens back to the time of slavery, where the term was used freely in referring to and demeaning Black men
- H. Allusions to appellant as a "boy" evokes racist tropes
- I. Racially discriminatory language during appellant's trial violated the RJA and necessitates reversal
- J. Alternatively, the trial court's statement constituted structural error requiring reversal
- K. This court may craft a remedy for appellant consistent with the RJA

Framework Idea #2a:

Cognizable Without Raising Below

Prosecutorial statements

Argument: Prosecutor's use of language violated the RJA and Due Process

No objection under the RJA below; no motion filed under the RJA below

See II – next slide – Backup IAC

I. Based on the trial record, the prosecutor's statements during closing argument exhibited racial bias and invoked racial stereotypes in violation of the RJA, and deprived appellant of due process under the Fourteenth Amendment.

- A. Argument summary.
- B. The Racial Justice Act
- C. Standard of review: de novo
- D. The proceedings in the trial court
- E. Cognizability ["based on the trial rec." + Forfeiture discussion]
- F. The record demonstrates to a preponderance of the evidence that the prosecutor used racially discriminatory language in violation of the Racial Justice Act.
- G. The prosecutor's comments violated the Fourteenth Amendment to the United States Constitution
- H. A violation of the RJA constitutes a per se miscarriage of justice [no need to argue prejudice]
- I. Conclusion [remedy]

Framework Idea #2b:

Not raised below, so after raising a "based on the trial record" claim, include a backup IAC claim

Prosecutorial statements

Argument: Prosecutor's use of language violated the RJA, and Due Process

No objection under the RJA below; no motion filed under the RJA below

Roman Numeral I: RJA violation based on the trial record [previous slide]

Roman Numeral II: Backup IAC claim

II. Appellant was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments if defense counsel's failure to effectively raise an objection to the prosecutor's statements under the RJA.

- A. Argument summary [to the extent the RJA claim is forfeited for want of an effective objection by the defense, appellant received IAC]
- B. Legal principles (IAC & Racial Justice Act)
- C. The proceedings in the trial court
- D. Defense counsel's failure to adequately argue the prosecutor's language violated the RJA was ineffective assistance without tactical justification [see *Simmons*, which assumed the failure to raise a viable RJA challenge was deficient performance].
- E. Because a showing of prejudice is not required under the RJA, reversal is required [to serve the intent of the legislation, which states prejudice is inherent when racial bias is shown, a different approach to prejudice than straight *Strickland* is warranted]
- **F.** If a prejudice analysis applies, the error was prejudicial [Simmons]
- G. Conclusion: Remedy

Framework Idea #3: raised below – implicit bias re: national origin

Argument: National origin based claim under the RJA, direct appeal based on the trial record

With thanks to attorney Michael C. Sampson for the briefing structure

- III. The Trial Court Erred When it Denied Appellant's Motion Under The Racial Justice Act. Appellant Proved By a Preponderance Of The Evidence That a Detective Witness Exhibited Bias Against Appellant Based on Appellant's National Origin When the Detective Testified, in Violation of a Prior Court Order, that Appellant Did Not Have a Social Security Number.
- A. Procedural Background and summary of argument
- B. Standard of review de novo
- C. The Racial Justice Act
- D. Detective Perez's testimony regarding appellant's lack of a Social Security number exhibited bias based on appellant's national origin. Contrary to the trial court's ruling, there was no legitimate, non-biased reason for the testimony.
- E. Reversal is required without a showing of prejudice

Framework Idea #4:

Raised below

Argument: Over defense objection, the trial court allowed the prosecutor to show the jurors an exhibit of a photo array that used darker images of appellant, as well as a lighter image of the informant

With thanks to SDAP Staff Attorney Julie Caleca for the briefing structure

IV. Trial court error for admitting exhibit evidence that appealed to implicit racial biases in violation of the RJA and appellant's right to due process.

- A. Argument summary
- B. Relevant procedural/factual background
- C. The Racial Justice Act
- D. The prosecutor's use of an exhibit, which depicted dark images of appellant, while at the same time depicting lighter images of an informant, appealed to implicit racial biases associating darker skin with criminality
- E. The error violated due process
- F. Automatic reversal is required

Framework Idea #5:

Raised below

RJA motion filed and denied before judgment

Prosecutorial statements

Argument: Prosecutor's use of language violated the RJA and Due Process

V. The prosecutor's statements during closing argument exhibited racial bias and invoked racial stereotypes in violation of the RJA, and deprived appellant of due process under the Fourteenth Amendment.

- A. Argument summary
- B. The Racial Justice Act
- C. The proceedings in the trial court
- D. The record demonstrates appellant met his burden to show a violation of the RJA when the prosecutor used racially discriminatory language or otherwise exhibited bias
- E. The trial court should have vacated appellant's conviction or, at a minimum, held an evidentiary hearing because appellant demonstrated a prima facie case for relief
- F. The prosecutor's comments violated the Fourteenth Amendment to the United States Constitution and were prejudicial
- G. Conclusion: Remedy

Framework Idea #6:

Raised below

Issue: whether the jury's questions during witness examination violated the RJA

RJA motion filed below raising first, (a)(1) and (a)(2) claims, and then another one raising (a)(3) and (a)(4) claims (all denied)

Questions about whether the defendant had a green card, some asking about whether the defendant conformed to certain stereotypes about Latino men

(a)(3) and (a)(4) claims concerned charging and sentencing disparity
With thanks to attorney Matthew A. Siroka for the briefing in *People v. Arias* (2024) 101
Cal.App.5th 1163 [reversed for *Batson/Wheeler* error]

VI. The Trial Court Erred in Denying Appellant's Racial Justice Act Claims, Thereby Denying Him Due Process of Law

- A. Background
- B. Legal Standard
 - A. The Racial Justice Act
 - B. Establishing a Prima Facie Case
 - C. The Court applies de novo review
- C. The trial court erred in both finding no prima facie case for the (a)(1) and (a)(2) claims and when it denied appellant the ability to present supporting evidence
- D. Appellant met his burden to demonstrate disparate sentencing under the RJA; the trial court erred in finding otherwise
- E. Appellant demonstrated a prima facie case for relief under (a)(4) at the time of sentencing; the trial court erred in finding otherwise
- F. The errors require reveirsal and a new trial, or alternatively, remand for an evidentiary hearing on the claims
- G. The errors constituted a federal due process violation

Implicit Bias & The Jurors

- "Jurors should be encouraged to guard against the possibility that their decisions will be affected by bias, implicit or otherwise." [G] iven that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors." (Kang et al., Implicit Bias in the Courtroom (2012) 59 UCLA L.Rev. 1124, 1144.) Thus, not only does recognizing implicit bias "not make a person unfit to serve as a juror" (*People v. Thompson* (2022) 83 Cal.App.5th 69, 127 [298 Cal. Rptr. 3d 665] (conc. opn. of Lie, J.)), it arguably makes a person a better juror."
- (*People v. Arias* (2024) 101 Cal.App.5th 1163, 1182.)

Summary

Challenging Implicit Bias on Direct Appeal

- Quick overview of the RJA
- Pre-briefing Considerations
- Analyzing how to raise a claim based on implicit bias
 - The *People v. Stubblefield* opinion analyzed [judicial notice, forfeiture, "Objective observer," "about the defendant," and a possible structure]
- Recent issues:
 - Requests for relevant information, "during the defendant's trial" (Wagstaff), invited error can defense counsel violate the RJA (Midell), different approach needed for IAC claims?,
- Federalization
- Examples of briefing structures
- Trends in the Courts of Appeal in the unpublished sphere
- Case summaries, and the history of the legislation [separate handout]

RJA on Direct Appeal

Thank You!

Check out the forthcoming materials for resources, case summaries, and more