

# Impact of AB 256 (Kalra) Racial Justice for All Act on the RJA

Changes effective January 1, 2023

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## SUMMARY OF SIGNIFICANT CHANGES TO THE RACIAL JUSTICE ACT, PC SECTION 745 AND PC SECTION 1473, SUBDIVISION (F), FOLLOWING THE PASSAGE OF AB 256 (SEE ALL ADDITIONAL TECHNICAL CHANGES IN THE “NEW TEXT” SECTION):

- **Retroactivity**: Racial Justice Act (RJA) claims now can be filed for cases in which judgment was entered prior to January 1, 2021, and in cases in which a juvenile disposition resulted in a commitment to the Division of Juvenile Justice. However, please note there will be phased retroactivity, as specified below in [PC Section 745 subdivision \(j\)](#).
- **Prejudice Showing Required for Retroactive (a)(1) and (a)(2) Claims**: For petitions that are filed in cases for which judgment was entered before January 1, 2021, if the petition is based on a violation of paragraph (1) or (2) of subdivision (a), the petitioner shall be entitled to relief, unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment. This requirement does not apply for all judgments entered on or after January 1, 2021 or to (a) (3) and (a) (4) claims.
- **Recusal of Judge**: If a motion under RJA is based on the conduct or statements by the judge, the law will now require the judge to disqualify themselves from those proceedings.
- **Privileged Material**: For PC section 745, subdivision (d) motions, the court will now be required, upon a showing of good cause, to order disclosure of relevant materials but may redact or subject the materials to a protective order in order to protect a privacy right or privilege. Disclosure can be prohibited if a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order.
- **Establishing Disparities**: For PC section 745, subdivision (a) (3) and (a) (4) claims, existing law requires these claims be established based on statistical evidence or aggregate data, as specified. However, evidence to support these claims can now include nonstatistical evidence and would require the court to consider the totality of the evidence in determining whether a significant difference in seeking or obtaining convictions or in imposing sentences has been established. The law now requires the court to consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. The “statistical significance” of the data is a factor the court may consider, but is not necessary to establish a significant difference.
- **Broader Comparison for Disparities**: For PC section 745, subdivision (a) (3) claims the petitioner can now demonstrate that they were charged or convicted of a more serious offense than defendants of other races, ethnicities, or national originals who have engaged in similar conduct, rather than more narrowly compared to those who have committed similar offenses.
- **Waiving a Violation in Trial**: An RJA motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.

- **Broad discretion to consider evidence beyond evidence code:** For the limited purpose of determining whether a violation has occurred, the court may consider evidence including out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data.
- **Intentional Discrimination is not required:** While the impetus for the RJA was always to confront racism in all forms, capturing both explicit and implicit bias and racism, the law now explicitly instructs courts that the petitioner need not establish that the discrimination demonstrated was intentional.
- **“Similarly Situated” Defined:** For PC section 745 (a) (3) and (a) (4) claims which require demonstrating the petitioner was similarly situated to others, similarly situated is now defined to mean that factors that are relevant in charging and sentencing are similar but does not require that all individuals in the comparison group are identical. It further explains that a defendant’s prior conviction history may be a relevant factor for the court’s determination, and if so, the defense may provide evidence that the conviction history may also have been impacted by racial profiling or historical patterns of racially biased policing such that the court shall consider the evidence in totality in making its determination.
- **“More frequently sought or obtained” or “more frequently imposed” Definition Further Clarified:** For PC section 745 (a) (3) and (a) (4) claims, the court must engage in a totality of the evidence inquiry to determine if the charges, conviction or sentence, respectively, has been more frequently sought, obtained, or imposed. The court may evaluate the following relevant factors in making this determination: 1) statistical evidence 2) aggregate data and 3) nonstatistical evidence. The court shall consider whether 1) systemic and institutional racial bias 2) racial profiling, and 3) historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Lastly, race-neutral reasons are also relevant factors that shall be considered by the court.
- **Clarifies Available Remedies on Appeal:** The law permits the court to change a sentence or conviction, to a lesser included or lesser-related offense, as a remedy for a violation of the RJA.

**NEW TEXT**  
~~**STRICKEN LANGUAGE**~~  
**NEW LANGUAGE**

**SECTION 1.**

*It is the intent of the Legislature to apply the California Racial Justice Act of 2020 retroactively, to ensure equal access to justice for all.*

**PENAL CODE SECTION 745.**

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

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

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

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

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

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

(b) A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction, alleging a violation of subdivision (a). *If the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings under this section.*

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of subdivision (a), the trial court shall hold a hearing. *A motion made at trial shall be made as soon as*

*practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.*

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

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

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

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

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

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

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

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

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

(2) (A) ~~When~~ *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) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and~~ *(a), the court may* modify the judgment to ~~impose an appropriate remedy for the violation that occurred.~~ *a lesser included or lesser related offense.* On resentencing, the court shall not impose a new sentence greater than that previously imposed.

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

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

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

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

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

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

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

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

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

~~(3)~~ (4) “Racially discriminatory language” means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

~~(4)~~ (5) “State” includes the Attorney General, a district attorney, or a city prosecutor.

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

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

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

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

*(2) Commencing January 1, 2023, to all cases in which, at the time of the filing of a petition pursuant to subdivision (f) of Section 1473 raising a claim under this section, the petitioner is sentenced to death or to cases in which the motion is filed pursuant to Section 1473.7 because of actual or potential immigration*

*consequences related to the conviction or sentence, regardless of when the judgment or disposition became final.*

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

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

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

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

**PENAL CODE SECTION 1473.**

(f) Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section ~~745 if judgment was entered on or after January 1, 2021.~~ 745, *if that section applies based on the date of judgment as provided in subdivision (j) of Section 745.* A petition raising a claim of this nature for the first time, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed a successive or abusive petition. If the petitioner has a habeas corpus petition pending in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. The court shall review a petition raising a claim pursuant to Section 745 and shall determine if the petitioner has made a prima facie showing of entitlement to relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant ~~shall~~ *may* appear ~~at the hearing by video~~ *remotely, and the court may conduct the hearing through the use of remote technology,* unless counsel indicates that ~~their~~ *the defendant's* presence in court is needed. If the court determines that the petitioner has not established a prima facie showing of entitlement to relief, the court shall state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion.