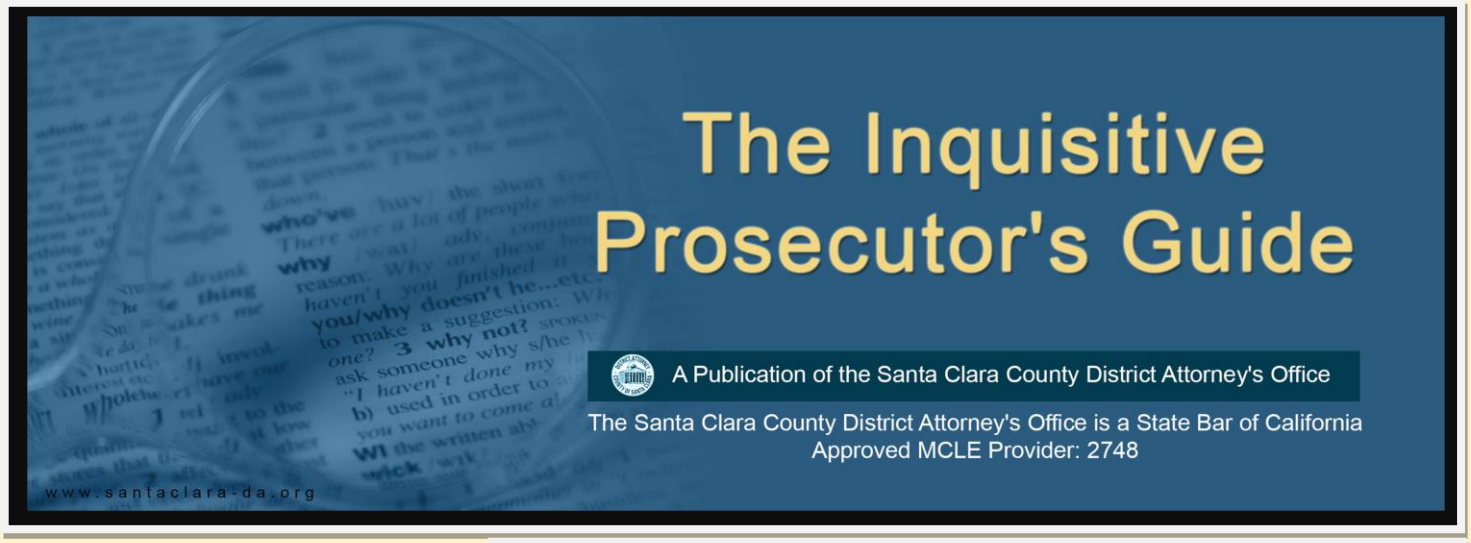

Date: May 5, 2021

2021-IPG-48 (EXISTING & NEW [AB 2542] LAWS ON DISCRIMINATION IN PROSECUTION & SENTENCING)

This IPG provides an overview of the existing law regarding selective prosecution as well as the new law (Penal Code section 745) and amendments to existing laws (Penal Code sections 1473 and 1473.7) enacted by "The California Racial Justice Act" (AB 2542). This IPG is not intended to be a commentary on the merits of the new laws. Rather, it focuses on trying to identify, analyze, and propose possible ways of interpreting those aspects of the law that are vague, ambiguous, undefined, or novel. Among the many issues discussed:

- Which section of AB 2542 is effective on January 1, 2021 (section 3 or 3.5)?
- What must be proven for a violation of Penal Code section 745 to occur?
- What is a sufficient showing to obtain discovery relevant to a motion alleging a violation of section 745, to obtain an evidentiary hearing when the defense is alleging a violation of section 745, or to prevail on a section 745 motion?
- How is a section 745 motion alleging the state sought or obtained a criminal conviction or sentence on the basis of race, ethnicity, or national origin akin to, or different than, a motion alleging the prosecution unconstitutionally engaged in selective prosecution based on race, ethnicity, or national origin or a motion alleging discrimination in other areas of the law based on a disparate impact theory of liability?

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I. Existing Law Prohibiting "Selective Prosecution" Based on Race, Ethnicity, or National Origin in Violation of Equal Protection.

The existing law prohibiting prosecutions based on race, ethnicity, or national origin is included in this IPG for two reasons. First, prosecutors can expect defense counsel filing discovery requests or section 745 motions to simultaneously be filing selective prosecution motions and requests for discovery to support such motions. Second, understanding how the existing law works will provide insight into how the new law enacted by Assembly Bill 2542 ("The California Racial Justice Act" [hereafter "AB 2542"]) relating to discrimination in prosecution should be interpreted. There is significant overlap but also some important differences.

Editor's note**: *Unlike* Penal Code section 745 (the law enacted by AB 2542), the Equal Protection clause of the federal Constitution prohibits selective prosecution based not only on race, ethnicity, and national origin but on other impermissible criteria such as religion, gender, or other arbitrary classification. (**See e.g., *United States* v. *Armstrong (1996) 517 U.S. 456, 464; ***J.E.B.* v. *Alabama ex rel. T.B.*** (1994) 511 U.S. 127, 130–131; ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 290.) When discussing the scope of the prohibition imposed by the Equal Protection clause against selective prosecution, IPG will use the term "race, ethnicity, and national origin" as a shorthand means of referring to all the protected classifications.

1. What are the standards governing claims a defendant was selectively prosecuted based on race, ethnicity, or national origin in violation of the federal and state equal protection clauses?

The Equal Protection clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall … deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. Amend. XIV, § 1.) Moreover, "[t]he liberty protected by the *Fifth Amendment*'s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." (***United States* v. *Windsor*** (2013) 570 U.S. 744, 774, emphasis added.)

The equal protection clause of the California Constitution provides: "A person may not be … denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a); **see also** Cal. Const., art. I, § 7, subd. (b) ["A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens…."].)

Although the state Constitution can be construed independently of the federal Constitution, the "equal protection provisions in the California Constitution 'have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.'" (***Manduley* v. *Superior Court*** (2002) 27 Cal.4th, 571–572.) They are "analyzed in a similar fashion." (***People* v. *Noyan*** (2014) 232 Cal.App.4th 657, 666; ***People* v. *Lynch*** (2012) 209 Cal.App.4th 353, 358; ***People* v. *Leng*** (1999) 71 Cal.App.4th 1, 11.)

"The constitutional guaranty of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness." (***People* v. *Romo*** (1975) 14 Cal.3d 189, 196.) "The concept recognizes that persons similarly situated not be treated differently unless the disparity is justified." (***People* v. *Yanez*** (2019) 42 Cal.App.5th 91, 95; ***People* v. *Leng*** (1999) 71 Cal.App.4th 1, 11.)

A motion claiming a violation of equal protection stemming from "selective prosecution" of a defendant based on race, ethnicity, or national origin, has long been recognized by the High Court as a legitimate basis for challenging a prosecution. "More than a century ago, the Supreme Court observed that the application of laws 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances' constitutes a denial of equal protection." (***United States* v. *Bourgeois*** (9th Cir. 1992) 964 F.2d 935, 938 citing to ***Yick Wo* v. *Hopkins*** (1886) 118 U.S. 356, 373–374.)

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 463–464; **see also *Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 831 ["Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution."].) The claim is premised on the principle that while the decision whether to prosecute and what charges to file *generally* rests entirely in the discretion of the prosecutor (assuming there exists probable cause to bring charges), a prosecutor's discretion is "subject to constitutional constraints." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 464.) "One of these constraints, imposed by the equal protection component of the Due Process Clause of

the Fifth Amendment, . . . is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification . . .'." (***Ibid*** citing to ***Oyler* v. *Boles*** (1962) 368 U.S. 448, 456; **accord *People* v. *Montes*** (2014) 58 Cal.4th 809, 828.)

A defendant may prevent a prosecution based on a claim of selective prosecution by demonstrating that "the administration of a criminal law is 'directed so exclusively against a particular class of persons … with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 464–465.)

"The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" ***(Ibid.)*** The claimant must demonstrate both that the prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." (***Ibid.***) And "[t]o establish a discriminatory effect in a race case, the claimant *must* show that similarly situated individuals of a different race were not prosecuted." (***Ibid***, emphasis added.)*

> ***Editor's note**: "Although the ***Armstrong*** and ***Bass*** Courts focused on similarly situated as part of the discriminatory effect analysis, evidence of differential treatment is also probative of discriminatory intent." ***United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1046; **see also *United States* v. *Smith*** (11th Cir.2000) 231 F.3d 800, 809 ["recogniz[ing] that the nature of the two prongs of a selective prosecution showing are such that they will often overlap to some extent"].) Moreover, it may not be necessary for a defendant to "satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.'" (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 469, fn. 3 [reserving the question]; ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1190; ***United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848, 855, fn. 11.)

As explained by the California Supreme Court, the defendant has the burden of proving: "(1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion'; and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.'" (***Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 832 quoting from ***People* v. *Superior Court (Hartway)*** (1977) 19 Cal.3d 338, 348 and ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 298; **accord *Manduley* v. *Superior Court*** (2002) 27 Cal.4th 537, 568; **see also *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 903 [citing to ***Wayte* v. *United States*** (1985) 470 U.S. 598, 610 for the proposition that the requirement of "discriminatory intent implies that the government

'selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group"].)

Hence, "[t]here must be discrimination and that discrimination must be intentional and unjustified and thus "invidious" because it is unrelated to legitimate law enforcement objectives." (***Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 833; **accord *Manduley* v. *Superior Court*** (2002) 27 Cal.4th 537, 568–569 ["an invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests…."].) "[B]ut the intent need not be to "punish" the defendant for membership in a protected class or for the defendant's exercise of protected rights." (***Ibid*** [overruling a contrary statement in ***People* v. *Smith*** (1984) 155 Cal.App.3d 1103].)

As noted earlier, "[t]o establish a discriminatory *effect* in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 465.) "Generally, in determining whether persons are similarly situated for equal protection purposes, a court must examine all relevant factors." (***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; ***United States* v. *Olvis*** (4th Cir. 1996) 97 F.3d 739, 743.) Courts must "take into account several factors that play important and legitimate roles in prosecutorial decisions." (***Ibid***.) There are "a myriad of potentially relevant factors" and courts have rejected a "narrow approach to relevant factors to be considered when deciding whether persons are similarly situated for prosecutorial decisions." (***Ibid***.) A discussion and description of legitimate and relevant factors is included in this IPG, section IV-8-E at pp. 71-87.

"[A]bsent an appropriate basis for comparison, statistical evidence of racial disparity alone cannot establish *any* element of a discrimination claim." (***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 903; ***United States* v. *Olvis*** (4th Cir. 1996) 97 F.3d 739, 745, emphasis added.) Studies showing an overwhelming percentage of persons belonging to a particular group are prosecuted for a designated crime proves little in the absence of statistical evidence on the number of persons belonging to that group "actually committing" the offense and/or whether a greater percentage of individuals belonging to a different group "could have been prosecuted for such crimes." (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 903; ***United States* v. *Olvis*** (4th Cir. 1996) 97 F.3d 739, 745; **see also *People* v. *Montes*** (2014) 58 Cal.4th 809, 830-831 [defendant's study showing 81 percent of capital prosecutions undertaken by the District Attorney from 1992 to 1994 involved White victims,

whereas Whites constituted only 39 percent of the "willful" homicide victims in Riverside County during that period" was of little value because it "failed to take into account the case characteristics of the homicides, which is a crucial factor for a district attorney's capital charging decisions."].)

In conducting an analysis of whether discrimination in prosecution has been shown, it may not be presumed that criminal violations are committed proportionately by all groups - especially given statistics that contradict this premise. (**See *United States* v. *Armstrong*** (1996) 517 U.S. 456, 463–464.) "Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue." (***Ibid***.) And thus, there is not "a presumption that unexplained statistical evidence of racial disparity proves racial animus." (***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 903; ***United States* v. *Olvis*** (4th Cir. 1996) 97 F.3d 739, 745; **see also *People* v. *Elliott*** (2012) 53 Cal.4th 535, 573 [quoting article on disproportionality in criminal justice system for proposition that "overrepresentation among some classes of offenders is attributable to social and environmental conditions such as poverty, miserable schools, broken families, lack of access to health care, and even lead poisoning"].)

The High Court in ***United States* v. *Armstrong*** (1996) 517 U.S. 456 took "great pains" to explain that the standard for prevailing on a selective prosecution is "a demanding one." (***Id.*** at p. 463.) The standard reflects the fact that "a selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive" (***id***. at p.464) and courts are "properly hesitant to examine the decision whether to prosecute" (***id***. at p. 465). "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." (***Ibid***.)

Accordingly, judicial concerns with "unnecessarily impair[ing] the performance of a core executive constitutional function" in selective prosecution cases means that prosecutors are presumed to be properly discharging their official duties and "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (***Id***. at p. 465.)

The High Court has not determined "whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 461.) However, the California Supreme Court has held that "[w]hen a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement." (***Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 831; **see also *United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1055, fn. 9 [noting that applying the remedy of dismissal is supported by ***Yick Wo* v. *Hopkins*** (1886) 118 U.S. 356 and listing circuit courts acknowledging dismissal is a remedy for a selective prosecution claim].)

A. "Selective prosecution" versus "selective enforcement" cases

"Everyone accepts that a detention based on race, even one otherwise authorized by law, violates the Fourteenth Amendment's Equal Protection Clause." (***Nieves* v. *Bartlett*** (2019) 139 S.Ct. 1715, 1731 (Gorsuch, J., concurring in part, dissenting in part).) "Racially selective law enforcement violates this nation's constitutional values at the most fundamental level[,]" and was "one of the central evils addressed by the framers of the Fourteenth Amendment." (***United States* v. *Alcaraz-Arellano*** (10th Cir. 2006) 441 F.3d 1252, 1263.) In ***Whren* v. *United States*** (1996) 517 U.S. 806, 813, "the Supreme Court held that claims asserting *selective enforcement* of a law on the basis of race are properly brought under the Equal Protection Clause, and that the right to equal protection may be violated even if the actions of the police are acceptable under the Fourth Amendment." (***Marshall* v. *Columbia Lea Regional Hosp.*** (10th Cir. 2003) 345 F.3d 1157, 1166, emphasis added.)

A selective enforcement claim generally requires the defendant to show similarly situated individuals of a difference race or classification were not arrested, investigated, or brought over to the prosecutor by law enforcement for charging. (**See *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 214, fn. 84; ***United States* v. *Hare*** (4th Cir. 2016) 820 F.3d 93, 98–99; ***United States* v. *Brantley*** (11th Cir. 2015) 803 F.3d 1265, 1271; and ***Johnson* v. *Crooks*** (8th Cir. 2003) 326 F.3d 995, 1000.) And that the unequal treatment was done with a discriminatory purpose or intent. (**See *People* v. *Superior Court (Perez)*** (1999) 75 Cal.App.4th 394, 403; ***United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848, 850; ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 214; ***United States* v. *Alcaraz-Arellano*** (10th Cir. 2006) 441 F.3d 1252, 1264.)

The terms "selective prosecution" and "selective enforcement" labels are often used interchangeably. (**See *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 214.) However, in general, the term "selective prosecution" is most often used when defendants are alleging discrimination by district attorneys in the charging and prosecution of cases. Whereas the term "selective enforcement" is used more frequently when defendants are alleging discrimination by law enforcement officers in conducting searches or seizures or in the "investigative phase" of a prosecution. (**See *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 214 ["'Prosecution' refers to the actions of prosecutors (in their capacity as prosecutors) and 'enforcement' to the actions of law enforcement and those affiliated with law-enforcement personnel."]; ***United States* v. *Viezca*** (M.D. Ala. 2008) 555 F.Supp.2d 1254, 1266 ["Selective prosecution is a challenge to the prosecutor's decision whether and how to charge the defendant. Selective enforcement is a challenge to the actions of other state officers in determining against whom to enforce the laws."]; ***United States* v. *Duque-Nava*** (D. Kan. 2004) 315 F.Supp.2d 1144 1152, fn. 15 [when a "race or ethnicity-based selective prosecution claim [is made], a [claimant] must make a credible showing that a similarly-situated individual of another race could have been *prosecuted* for the offense for which the [claimant] was charged. If such a claim is based on the investigative phase of the prosecution, however, the [claimant] must instead make a credible showing that a similarly-situated individual of another race could have been, but was not, ... *referred for* ... prosecution for the offense for which the [claimant] was ... referred."].)

With the possible exception of the showing a defendant must make to obtain discovery (**see** this IPG, section I-3 at pp. 31-35), courts appear to be unanimous in finding that the standards applied to a selective enforcement claim under ***Armstrong*** are essentially the same as those applied to a selective prosecution claim. (**See *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 214 ["Substantive claims of selective prosecution and selective enforcement are generally evaluated under the same two-part test, which is derived from a line of seminal Supreme Court cases about the collision between equal protection principles and the criminal justice system."]; ***Johnson* v. *Crooks*** (8th Cir. 2003) 326 F.3d 995, 1000 [applying ***Armstrong*** standard to claim detention was racially motivated]; ***Chavez* v. *Ill. State Police*** (7th Cir.2001) 251 F.3d 612, 634–636 [applying ***Armstrong*** standard to use of "racial classifications in determining whom to stop, detain, and search"]; ***Gardenhire* v. *Schubert*** (6th Cir. 2000) 205 F.3d 303, 319 applying ***Armstrong*** standard to claim arrest was racially motivated]; **see also *Lacey* v. *Maricopa County*** (9th Cir. 2012) 693 F.3d 896, 920

[noting that the district court referred to claim defendant was singled out for arrest as selective prosecution while defendant identified the claim as one of "selective enforcement" but finding label "irrelevant"].)

California cases do not draw much of a distinction, if any, between the two concepts – even in the standards applied to discovery requests. Rather, each type of claim is treated as being generally subject to the same standards; and courts will often use the terms "selective enforcement" (or "discriminatory enforcement") and "selective prosecution" (or "discriminatory prosecution") interchangeably. (**See *Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 829-837 [relying on principles laid out in ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, a case involving discriminatory prosecution, when addressing standards for determining claim that the *police* engaged in a pattern of discriminatory arrest *and prosecution* (emphasis added)]; ***People* v. *Superior Court (Hartway)*** (1977) 19 Cal.3d 338, 348 [relying on principles laid out in ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286 to find "a criminal defendant may object to the *maintenance of a prosecution* on the ground of deliberate invidious discrimination *in the enforcement of the law*" (emphasis added); **see also *People* v. *Tuck*** (2012) 204 Cal.App.4th 724, 737, fn. 4; ***People* v. *Toomey*** (1984) 157 Cal.App.3d 1, 13; ***People* v. *Gregori*** (1983) 144 Cal.App.3d 353, 360; ***Perakis* v. *Superior Court*** (1979) 99 Cal.App.3d 730, 734; ***People* v. *Milano*** (1979) 89 Cal.App.3d 153, 164-165.)

If a district attorney's office and law enforcement officers are jointly involved in the decision to target, investigate, and prosecute a defendant based on invidious discrimination, the distinction between a claim of selective enforcement and selective prosecution can be blurred. (**See e.g.**, ***People* v. *Garner*** (1977) 72 Cal.App.3d 214, 216-217.) But discrimination by law enforcement agencies may exist in the absence of discrimination by prosecutorial agencies and vice versa – even if the investigation and prosecution exist on the same continuum. (**See *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 213, 216- [drawing distinction in single motion between portions of motion challenging selective enforcement and portions challenging selective prosecution even though defendant claimed law enforcement and the prosecution acted in conjunction]; ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 714-715, 723 [drawing distinction between showing required to obtain discovery for selective enforcement and selective prosecution claims notwithstanding fact defense claimed "the *prosecutor*, the FBI, and the ATF engaged in racial discrimination" (emphasis added)]; ***United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1042, 1055-1056 [in

same case, finding defendants made sufficient showing to obtain discovery in selective enforcement but not of selective prosecution].)

Courts disagree over whether the remedy of dismissal is available in a criminal case when a law enforcement agency engages in selective enforcement, but the *prosecution* does not similarly engage in selective prosecution. (*Compare* ***United States* v. *Alcaraz–Arellano*** (10th Cir. 2006), 441 F.3d 1252, 1263–1266 [assuming that dismissal is proper] and ***United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1042, 1055-1056 [same] *with* ***United States* v. *Nichols*** (6th Cir. 2008) 512 F.3d 789, 794 ["the proper remedy for [a selective-enforcement] violation is a 42 U.S.C. § 1983 action against the offending officers"] and ***United States* v. *Williams*** (8th Cir. 2005) 431 F.3d 296, 299 ["even if there was a due process violation [based on racial profiling], it is uncertain that dismissal is an appropriate remedy"].)

Dismissal may properly be viewed as a form of exclusion of evidence and some courts have been reluctant to authorize exclusion of evidence as a remedy for a violation of the equal protection clause when the violation does not simultaneously run afoul of the Fourth Amendment. (**See e.g.**, ***States* v. *Nichols*** (6th Cir. 2008) 512 F.3d 789, 794; ***United States* v. *Harmon*** (D.N.M. 2011) 785 F.Supp.2d 1146, 1149.)*

> ***Editor's note**: A seizure based solely on the race, ethnicity, or national origin of the defendant, in the absence of any evidence otherwise providing reasonable suspicion, would obviously violate both the Fourth Amendment and the Equal Protection clause. (**See e.g.**, ***United States* v. *Montero-Camargo*** (9th Cir. 2000) 208 F.3d 1122, 1131.)

Nevertheless, it is very likely that dismissal *is* one potential remedy for an equal protection violation. (**See *Yick Wo* v. *Hopkins*** (1886) 118 U.S. 356, 374 [discharging defendants subject to selective enforcement from custody and imprisonment – a remedy akin to dismissal].) Though whether the remedy of dismissal *should* be imposed is a different question, and may turn on the nature of the violation, such as whether a search or seizure is the result of a systemic policy or just the actions of an individual officer.

2. What are the standards governing requests for *discovery* in support of a claim that a defendant was selectively prosecuted based on race, ethnicity, or national origin in violation of the federal and state equal protection clauses?

Upon a sufficient showing, a defendant seeking to prevent a discriminatory prosecution is entitled to "discover information relevant to such a claim." (***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177; ***People* v. *Montes*** (2014) 58 Cal.4th 809, 828; ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 306.)

Under the state law standard adopted in ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, a defendant must "describe the requested information with at least some degree of specificity and [the request] must be sustained by plausible justification." (***Id***. at p. 306; ***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177; ***People* v. *Montes*** (2014) 58 Cal.4th 809, 828.) A showing of "plausible justification" requires a defendant to "show by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination in his case." (***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177; ***People* v. *Montes*** (2014) 58 Cal.4th 809, 829 ***People* v. *Keenan*** (1988) 46 Cal.3d 478, 506.)

In ***United States* v. *Armstrong*** (1996) 517 U.S. 456, the court observed that many of the same reasons that demand "a rigorous standard for the elements of a selective-prosecution claim" also require a correspondingly rigorous standard for discovery in aid of such a claim." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 468.) "If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy." (***Ibid***.)

Because discovery imposes high costs on the government, "the standard for obtaining discovery in support of a selective prosecution claim is only slightly lower than for proving the claim itself." (***United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848, 852; ***United States* v. *Hare*** (4th Cir. 2016) 820 F.3d 93, 99.) "[A] defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent." (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 465; ***United***

States* v. *Bass (2002) 536 U.S. 862, 863.) That standard requires the defendant to make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." (***Armstrong*** at pp. 465, 470; ***Bass*** at p. 863.) The defendant must provide something more than mere speculation or "personal conclusions based on anecdotal evidence." (***Armstrong*** at p. 470.) This standard is supposed to "be a significant barrier to the litigation of insubstantial claims." (***Id***. at p. 464.)

The California Supreme Court has indicated that the current standard for obtaining discovery to support a selective prosecution claim in California is similar to the federal constitutional standard identified in ***United States* v. *Armstrong*** (1996) 517 U.S. 456, which requires the defendant to produce "some evidence" tending to show the existence of both a discriminatory effect and the prosecutor's discriminatory intent. (**See *People* v. *Montes*** (2014) 58 Cal.4th 809, 829; ***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177.) In ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, the court addressed whether the *previous* California standard, as originally laid out in ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, was *different* from the *current* California standard which tracks the standard laid out in ***Armstrong***. (***Id***. at pp. 1187-1190.)

In ***Baez***, the court observed that when the California Supreme Court in ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286 was decided, the general standard for disclosure of discovery required the defendant to "describe the requested information with at least some degree of specificity and must be sustained by plausible justification." (***Baez*** at p. 1188 citing to ***Griffin* v. *Municipal Court*** (1977) 20 Cal.3d 300, 306.) The defendant needed to establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." (***Ibid***.) However, the ***Baez*** court stated this standard was superseded when Penal Code section 1054, subdivision (e) took effect in 1990. This was because section 1054(e) prohibited any discovery in a criminal case which was "not expressly mandated by statute or required by the U.S. Constitution" and no California statute expressly required the prosecution to disclose to the defense information which may support a discriminatory prosecution claim. (***Baez*** at p. 1188; **see also** Pen. Code, § 1054.5, subd. (a).) The ***Baez*** court concluded that the defendant would only be entitled to the discovery to support a discriminatory prosecution claim if the discovery were required by the federal Constitution as that standard was laid out in ***United States* v. *Armstrong*** (1996) 517 U.S. 456. (***Baez*** at p. 1188.) The ***Baez*** court held the burden

imposed on defendant pursuant to ***Armstrong*** could not be met simply by showing a plausible justification for disclosure. Rather, the defendant had to produce "some evidence" in support of his or her discriminatory prosecution claim in order to justify discovery in support of that claim." (***Id***. at p. 1190 [albeit finding the defendant *met* the required showing – **see** this IPG, section I-2-B at pp. 28-30].)

In ***United States* v. *Armstrong*** (1996) 517 U.S. 456, applying the standard it had adopted for disclosure of discovery to support a selective prosecution claim, the High Court held there was an insufficient showing for discovery based on a newspaper article reporting that federal "crack criminals … are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black" and three affidavits - one filed by a paralegal that in every one of the 24 cases prosecuted under 21 U.S.C.A. §§ 841 or 846 cases during 1991, the defendant was black, one filed by one of the defendant's attorneys alleging that "an intake coordinator at a drug treatment center had told her that there are 'an equal number of caucasian users and dealers to minority users and dealers'" and one filed by an unrelated criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses." (***Id***. at pp. 460-461.) The ***Armstron***g court found the showing insufficient because the "study failed to identify individuals who were not black and could have been prosecuted for the offenses for which [the defendants] were charged, but were not so prosecuted." (***Id***. at p. 470.) Moreover, the Court stated "[t]his omission was not remedied" by the "newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, [as it] was not relevant to an allegation of discrimination in decisions to prosecute" nor by the "affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence." (***Id***. at p. 470.)

Editor's note**: In ***Armstrong, the prosecution submitted evidence in the trial court that race played no role in their investigation, that the decision to prosecute met the general criteria for prosecution, and a DEA report documenting "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." (***Id***. at p. 460.) In finding the showing of the defendant to be insufficient, the Supreme Court in ***United States* v. *Armstrong*** (1996) 517 U.S. 456 did not discuss the impact, if any, of the evidence submitted in the lower court by the prosecution.

In ***United States* v. *Bass*** (2002) 536 U.S. 862, the High Court held the showing necessary to require discovery was not met where the defense provided nationwide statistics demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites" and that the United States enters into plea bargains more frequently with whites than it does with blacks." (***Id***. at p. 863.) The Supreme Court observed that "[e]ven assuming that the ***Armstrong*** requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. And the statistics regarding plea bargains are even less relevant, since respondent was offered a plea bargain but declined it." (***Id***. at pp. 863-864, emphasis in original.)

A. Selected examples of post-*Armstrong* California cases finding an insufficient showing to merit discovery

In ***People* v. *Suarez*** (2020) 10 Cal.5th 116, a defendant with a Hispanic surname claimed he was entitled to discovery to support his claim of selective prosecution in seeking the death penalty against him. The defendant argued he made the requisite showing based on two factors. First, the only cases other than his own involving multiple murders and murders of children since 1977 were committed by Caucasians and in each case (there were three), they were offered plea bargains. "Second, in the preceding decade, the District Attorney sought the death penalty at trial against only two defendants, both of whom were African American." (***Id***. at p. 177.) The California Supreme Court upheld the trial court's rejection of the defendant's discovery request. The ***Suarez*** court considered additional information from the prosecution distinguishing the other three cases based on the differing mental states of two of the defendants used for comparison and the fact the third defendant used for comparison was prosecuted by a different district attorney's office. The ***Suarez*** court also mentioned statistics contradicting those provided by the defendant based on representations from the District Attorney showing the defendant used an arbitrary date range that created a misleading impression. (***Id***. at pp. 177-178.)

In ***People* v. *Montes*** (2014) 58 Cal.4th 809, in anticipation of his motion claiming selective prosecution based on the race of the victim, the defendant sought discovery from the prosecution regarding each homicide case prosecuted by the office since 1978 in which special circumstances were alleged and the death penalty sought, homicide cases in which life in

prison without parole was sought, and homicide cases in which special circumstances were not alleged. He also requested "discovery of the race and ethnic background of each defendant and victim in these cases." (***Id***. at p. 827.)

In support of his request "defendant cited instances in taped interviews in which investigating officers referred to the victim as 'the white kid'" and an instance in which an investigator urged a witness "to confirm or deny whether he was present in the victim's car the night of the killing because, as the officer contended, others, including the defendant, were "home boys," who were likely to blame witness because he was a "wet back." (***Id***. at p. 830, 831.) The defendant also claimed the race of the victim was important because "at the hearing on the discovery motion, the prosecutor denied defendant's claim that the interrogating officers' use of racial terms indicated racial animus, and noted that race may have played a part in the case to the extent the codefendants may have carjacked the victim because he was young, White, and vulnerable." (***Id***. at pp. 831-832.) Defendant "submitted a study indicating that, for the period from 1992 to 1994, 81 percent of capital prosecutions undertaken by the District Attorney involved White victims, while Whites constituted only 39 percent of willful homicide victims in the county in that time period." (***Id***. at pp. 827–828.) In addition, defendant submitted an "expert's accompanying declaration contained a summary of studies purporting to demonstrate statistical discrepancies in the charging of the death penalty based on the race of the defendant and the victim based on data collected mainly from jurisdictions in southern states." (***Id***. at p. 830.)

Nevertheless, the California Supreme Court held defendant failed to make a showing sufficient to entitle him to discovery on the issue of discriminatory prosecution and has failed to establish a defense of discriminatory prosecution. (***Id***. at p. 827.) The court did not give credence to the allegation that the use of racial terms by the prosecutor and investigating officer reflected a discriminatory intent - as this claim was undermined by the testimony of the prosecutor at the discovery motion hearing that "the use of 'wet back' by the interrogating officers was not derogatory in context because it was used by individuals on the street to refer to themselves and by defendant himself during his interview with the police." (***Id***. at p. 832.) As to the use of the term 'White boy", the Court did not find it significant since the "defendant himself first described the victim as 'the White guy' in an interview with police and that the interviewers' use of the term followed from that initial identification." (***Ibid***.) Lastly, the court concluded "the prosecutor's observation that Walker's race may have been one reason why defendant and his cohorts targeted him for the carjacking was an unobjectionable comment on his view of the

case, rather than an admission that he engaged in discriminatory prosecution based on the race of the victim." (***Ibid***.)

As to the statistical study, the court stated, "defendant's statistical report was fundamentally flawed and failed to show discriminatory effect, let alone discriminatory intent" because "the study did not indicate what percentage of the non-White-victim homicides would have been eligible to be charged as capital homicides." (***Id***. at pp. 830, 831.) Moreover, the study failed to take into account "case characteristics of the homicides, which is a crucial factor for a district attorney's capital charging decisions." (***Id***. at p. 831.) As to the expert's accompanying declaration, the court said it "did not appreciably strengthen defendant's showing beyond what he presented through the . . . statistical study." (***Id***. at p. 830.)

B. Selected examples of post-*Armstrong* California cases finding a sufficient showing to merit discovery

In ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, the defendant (an AIDs patient) operated a medical marijuana dispensary. He was charged with several counts related to marijuana distribution and one count of grand theft based on misrepresenting his income and assets when receiving housing assistance funds from the Santa Clara County Housing Authority (SCCHA). (***Id***. at pp. 1179-1180.) The defendant sought discovery from the District Attorney's office to support his contention that he was selectively being prosecuted for grand theft. Among the information sought: (i) information pertaining to charging discussions of defendant; (ii) instances of complaints or similar Housing Authority violations that were not prosecuted, prosecuted as misdemeanors, or prosecuted as felonies within the past five years; (iii) "office policies regarding or concerning prosecution of any Housing Authority violations"; and (iv) agreements between the police department, district attorney's office and Housing Authority "with regard to the investigation and/or prosecution of recipients of housing benefits or subsidies." (***Id***. at p. 1181, fn. 3.) The request for discovery was supported by several declarations filed under penalty of perjury as summarized below:

One was a declaration from defendant's attorney claiming, inter alia, that "[s]ubstantially similar allegedly fraudulent claims have been disposed of without criminal prosecution in other cases" and "[t]he criminal prosecution in this case appears to be motivated by the desire of an officer . . . to discredit and demonize the defendant in the eyes of the public." The declaration asserted, on information and belief, the law enforcement and prosecuting agencies had possession or control of the information, that the information was inaccessible to the

defendant, and that the information was "material to defendant's defense of vindictive and discriminatory prosecution." (***Id***. at p. 1181, fn. 5.)

Another declaration was filed by a research assistant documenting an interview with an employee of the Housing Authority who stated that the Housing Authority "does not terminate benefits if the recipient has simply made a mistake or an oversight in reporting income and assets" and that only "'a purposeful attempt by a recipient to hide material information from the Housing Authority' would merit criminal prosecution." (***Id***. at pp. 1182-1183.)

A third declaration was filed by the director of AIDS Legal Services in Santa Clara County and stated the declarant was personally acquainted with three persons also receiving housing benefits whose eligibility was questioned for failure to comply with the requirements for benefits and that none were prosecuted in criminal courts. The declarant also stated he was unaware "of any individual afflicted with [AIDS] who has been prosecuted in the criminal courts for fraud in not reporting income to the Housing Authority." The declarant asserted he had had "spoken with seven attorneys who regularly assist clients who are recipients of subsidized housing benefits through the Housing Authority of Santa Clara County," and that "these attorneys were aware of at least eight cases in which clients were accused of failure to comply with requirements that would affect their eligibility for housing benefits, including two cases in which clients were accused of underrepresenting their income. None of these cases resulted in criminal prosecution." (***Id***. at pp. 1183-1184.)

The final declaration was from a staff attorney at the local Legal Aid Society who stated that he had "represented between 10 and 15 recipients of subsidized housing benefits who were accused of underreporting their income which allegedly made them ineligible for the benefits." (***Id***. at p. 1184.) He stated that none of those people had been criminally prosecuted; rather, their cases "were handled administratively through the Housing Authority, where the recipients were either found not to have underreported their income or if income was underreported, a payment plan was agreed to…." (***Ibid***.)

The prosecution submitted no affidavits in opposition and "simply relied upon excerpts from the transcript of the grand jury proceedings." (***Id***. at pp. 1185.)

In a two-to-one split, the appellate court held it was not an abuse of discretion for the trial court to order discovery. The majority believed the strongest support came from the

declarations filed by the AIDS Legal Services director and the local Legal Aid attorney, and that one (albeit not the only) reasonable inference of discriminatory intent could be drawn from the fact that the District Attorney's office's distributed defendant's personal financial records to SCCHA and the IRS, and that the defendant had been singled out for prosecution "for financial improprieties in order to buttress the marijuana counts with inflammatory evidence of a profit motive." (***Id***. at pp. 1191-1192.)*

*__Editor's note__: If that were the sole basis for the selective prosecution, it would not seem to be a violation of equal protection since the decision to charge a defendant with a crime because defendant, unlike others who commit the crime, has engaged in *additional* criminal behavior should be a legitimate basis for treating the defendant differently. (**See *United States* v. *Smith*** (11th Cir. 2000) 231 F.3d 800, 812 [individuals who commit a different number of crimes are not similarly situated].)

The majority recognized that some portions of the declarations contained hearsay, but that the declarations from the attorneys who had personal knowledge of the facts of the cases they had personally handled were not hearsay. The majority concluded that the declarations still contained *some* evidence that similarly situated clients were not prosecuted for alleged conduct which was substantially similar to the alleged conduct of the defendant absent the hearsay portion. (***Id***. at p. 1193.)

C. Can the People seek review of the granting of a discovery motion? And what is the standard of review when a request for discovery to support a selective prosecution motion is granted or denied?

"Penal Code section 1511 expressly authorizes the People to seek review by a petition for writ of mandate or prohibition of an order granting a criminal defendant's motion for discovery." (***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1186.)

The standard for review when a request for discovery to support a selective prosecution motion is granted or denied is the abuse of discretion standard. (***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1185, 1187.) Under this standard of review, all inferences must be drawn in favor of the trial court's ruling. (***Id***. at p. 1196.)

3. Is there a difference in the standards governing *discovery* when a defendant is claiming selective "enforcement" based on race, ethnicity or national origin as opposed to when a defendant is claiming selective "prosecution" based on race, ethnicity, or national origin?

As discussed above, *California* cases do not draw much of a distinction between "selective enforcement" and "selective prosecution" and apply analogous standards in each context, *including* when determining if a sufficient showing has been made for discovery. (**See** this IPG, section I-1-A at pp. 21-22.)

However, while courts recognize that "selective prosecution" and "selective enforcement" claims have similarities (**see** this IPG, section I-1-A at pp. 20-21), there is a split among federal circuits as to whether the standard for obtaining discovery in support of a selective *enforcement* claim should be as rigid as the standard for obtaining discovery in support of a selective prosecution claim.

Many courts align with California courts in not drawing any distinction between the showing required for discovery for selective prosecution versus selective enforcement claims. (**See *United States* v. *Alcaraz-Arellano*** (10th Cir. 2006), 441 F.3d 1252, 1264; ***United States* v. *Mason*** (4th Cir. 2014) 774 F.3d 824, 829–830; ***United States* v. *Dixon*** (D.D.C. 2007) 486 F.Supp.2d 40, 45 [collecting cases agreeing that "a defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that ***Armstrong*** outlines for selective prosecution claims."]; ***United States* v. *Barlow*** (7th Cir. 2002) 310 F.3d 1007, 1010 ["defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that ***Armstrong*** outlines for selective prosecution claims."]*; ***United States* v. *Mills*** (E.D. Mich. 2019) 389 F.Supp.3d 520, 524 [collecting cases].)

> ***Editor's note**: In ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, the Seventh Circuit seemed to depart from its holding in ***Barlow*** without mentioning nor overruling ***Barlow***.

However, other courts have held the standard for obtaining discovery in a selective enforcement cases can be more flexible than the standard for obtaining discovery in selective prosecution cases – at least when the claim arises based on selective enforcement by the government in conducting "stash house reverse-stings." (**See *United States* v. *Sellers*** (9th

Cir. 2018) 906 F.3d 848, 850; **accord *United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 720; **see also *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 219–221 [declining to adopt the approach in ***Davis*** wholesale, but nevertheless agreeing "with the ***Davis*** court that district judges have more flexibility, outside of the ***Armstrong/Bass*** framework, to permit and manage discovery on claims for discovery in" stash house cases].)

> **Editor's note:** In a stash house reverse sting, "an undercover agent poses as a disgruntled drug courier who is looking for help robbing the house where his employer is stashing (and guarding) a large quantity of drugs." (***United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848, 850.) The agent describes the stash house to persons who have been targeted by confidential informants as individuals who have committed stash house robberies before or are capable of doing so. "The agent conducts a series of meetings with the targets and presents them with the opportunity to rob the stash house, and they devise a plan to do so." (***Id***. at p. 851.) However, "at the last meet-up, just before they are set to leave and carry out the plan, the targets are arrested for conspiracy to commit the robbery and associated crimes." (***Ibid***.)

At least one rationale these cases use to justify departing from the showing required under ***Armstrong*** is questionable: the notion that there is a "presumption of regularity" attendant to prosecutorial decisions that has no counterpart when it comes to conduct engaged in by law enforcement. (**See *United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848, 853 [noting that, unlike prosecutors, police "are not protected by a powerful privilege or covered by a presumption of constitutional behavior"]; ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 720 [same]; ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 216 [agreeing with core aspect of the decision in ***Davis*** that the "special solicitude shown to prosecutorial discretion, which animated the Supreme Court's reasoning in ***Armstrong*** and ***Bass***—and our own reasoning in our pre-***Armstrong/Bass*** case law on the same subject—does not inevitably flow to the actions of law enforcement, or even to prosecutors acting in an investigative capacity"].)

A second, also somewhat questionable, ground for distinguishing between selective prosecution and selective enforcement claims (and thus for departing from the ***Armstrong*** standard) was provided by the majority in ***United States* v. *Sellers*** (9th Cir. 2018) 906 F.3d 848. This second ground was that "the nature of reverse-sting operations means that no evidence of similarly situated individuals who were not targeted exists." (***Id***. at p. 853.) The Ninth Circuit then used language suggesting this rationale could distinguish selective prosecution from selective enforcement claims *in general* when discovery is sought. For example, the majority stated: "In the selective prosecution context, statistical evidence of

differential treatment is ostensibly available. See *Armstrong*, 517 U.S. at 466–67, 470, 116 S.Ct. 1480. For instance, comparing who was arrested with who was prosecuted, or the demographics of those prosecuted in state and federal courts for the same crime, may evince differential treatment of similarly situated individuals. See *id*. That is not the case in the context of selective enforcement." (***Sellers*** at p. 853.)

Whether either of these distinctions truly exist, or even if they do, whether they justify treating the standards for discovery differently is, as the split in case law suggests, highly debatable. At a minimum, the distinction based on fact that decisions by law enforcement officers do not enjoy the same "presumption of regularity" that supports prosecutorial decisions such that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties" (***Armstrong*** at p. 464) may be a distinction without a difference. This because law enforcement officers in California also benefit from a presumption of regularity when their conduct is being assessed. Specifically, there is a "presumption applicable to police officers except in the case of a warrantless arrest, that official duty was regularly performed." (***People* v. *Mai*** (2013) 57 Cal.4th 986, 1039; ***Davenport* v. *Department of Motor Vehicles*** (1992) 6 Cal.App.4th 133, 141; Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."]; ***People* v. *Schulle*** (1975) 51 Cal.App.3d 809, 813 [police officers presumed reliable in assessing probable cause for warrant].) Indeed, even before ***Armstrong*** was decided, the California Supreme Court in ***People* v. *Superior Court (Hartway)*** (1977) 19 Cal.3d 338 expressly relied on "the presumption that official duty has been properly, hence *constitutionally*, performed (Evid.Code, s 664)" to find "the defendant has the burden of proof in establishing the defense of discriminatory *enforcement* of the law" in a case where the defendant claimed gender discrimination in undercover police operations. (***Id***. at p. 1320; **see also *Marshall* v. *Columbia Lea Regional Hosp.*** (10th Cir. 2003) 345 F.3d 1157, 1167 [finding standard of proof for claims of racially discriminatory traffic stops and arrests should be held to the same high standard as claims of racial discrimination in prosecution and analogizing the "broad discretion" vested in executive branch officials to determine when to prosecute to the discretion given to officers in conducting a traffic stop or initiating an arrest]; ***Gardenhire* v. *Schubert*** (6th Cir. 2000) 205 F.3d 303, 319 ["there is a strong presumption that the *state actors* have properly discharged their official duties", emphasis added]; ***Stemler* v. *City of Florence*** (6th Cir. 1997) 126 F.3d 856, 873 [same].)

Similarly, the claim that relevant statistics may not be available to establish the showing required for discovery in selective enforcement is also debatable questionable. (**See e.g.**, ***State* v. *Soto*** (N.J. Super. 1996) 734 A.2d 350 [statistical evidence that blacks were 4.85 times more likely than whites to be stopped for traffic violations established prima facie case of discriminatory effect]; ***United States* v. *Hare*** (D. Neb. 2004) 308 F.Supp.2d 955, 978 [noting law requiring that law enforcement record, retain, and report specific information regarding all traffic stops for the purpose of determining whether Nebraska law enforcement officers were engaging in racial profiling].)

In any event, California courts (as well as many other jurisdictions) have not drawn this distinction between the standards imposed to obtain discovery supporting a claim of selective enforcement and those imposed to obtain discovery supporting a claim of selective prosecution.

It is also worth noting though that even in cases finding the ***Armstrong*** standard does not apply with full force in reverse sting cases, courts "have confirmed the importance of granting discovery only in 'measured steps.'" (***United States* v. *Lopez*** (S.D.N.Y. 2019) 415 F.Supp.3d 422, 427; **see also *United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 217–218 ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 722.)*

Editor's note (Part I of II): In ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, the Seventh Circuit heavily criticized the district court's "blunderbuss" order of discovery as overbroad, rejecting outright the order to produce "all documents" that contain any "information" about how the FBI and ATF manage stings, plus all details concerning how these agencies curtail discrimination" because it would mandate the "disclosure of thousands (if not millions) of documents generated by hundreds (if not thousands) of law-enforcement personnel" and "bog down this case (and perhaps the agencies) for years." (***Id***. at p. 722.) Similarly, it held the district court abused its discretion in ordering the federal agencies to provide "all criteria the agencies employ to decide when and how to conduct sting operations." (***Ibid***.) The ***Davis*** court then went on to describe the steps the district court should take on remand regarding discovery. First, it said the lower court "should decide whether here is any reason to believe that race played a role in the investigation of these seven defendants." (***Ibid***.) Second, if the defendants present additional evidence (beyond that presented to the district court) that could support such a conclusion, the "judge should receive this evidence and then decide whether to make limited inquiries, perhaps including affidavits or testimony of the case agents, to determine whether forbidden selectivity occurred or plausibly could have occurred. If not, there would not be a basis to attribute this prosecution to the defendants' race, and the district court could turn to the substance of the charges." (***Id***. at p. 723.) If this "initial inquiry gives the judge reason to think that suspects of another race, and otherwise similarly situated, would not have been offered the opportunity for a stash-house robbery, it might be appropriate to require the FBI and ATF to disclose, in confidence, their criteria for stash-house stings. [Cont'd next page]

Editor's note (Part II of II):

Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination in this case is justified. Keeping that part of the investigation ***in camera*** would respect the legitimate interest of law enforcement in preventing suspects (and potential suspects) from learning how to avoid being investigated or prosecuted. If after that inquiry the judge continues to think that racial discrimination may have led to this prosecution, more information could be gathered." (***Ibid***, emphasis added.) "Only if information learned during these limited inquiries satisfies the ***Armstrong*** criteria may discovery be extended to the prosecutor's office, and even then the judge should ensure that required disclosures make no more inroads on prosecutorial discretion than are vital to ensuring vindication of the defendants' constitutional right to be free of race discrimination." (***Ibid***.)

In ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, the court agreed with ***Davis*** that "[i]f claims of selective law enforcement are raised, or there are 'mixed' claims that involve prosecutors acting in investigative or other capacities (in short, performing functions that ordinarily would not draw absolute immunity), the standard guiding the district court's discretion is different" than in ***Armstrong***. (***Washington*** at p. 218.) And it agreed with ***Davis*** that a measured approach was required. (***Washington*** at p. 220.) However, it still found "good reasons to be cautious about ***Davis***" because, inter alia, "***Davis*** does not explicitly discuss the discriminatory purpose/intent prong of the traditional ***Armstrong/Bass*** analysis. ***Davis*** might therefore be fairly described as an opinion entirely about discriminatory effect as a gateway to discovery." (***Id***. at p. 218.) Moreover, the ***Washington*** court stated that "discovery on selective enforcement claims must still be guided by the spirit of ***Armstrong/Bass***." (***Washington*** at p. 220.) And while it authorized the district court "to conduct a limited pretrial inquiry into the challenged law-enforcement practice," it also stated a defense proffer has to provide "some evidence" of "discriminatory *effect*" and "must contain reliable statistical evidence, or its equivalent." (***Id***. at p. 221 [albeit noting the proffer "may be based in part on patterns of prosecutorial decisions (as was the case in ***Davis***) even if the underlying challenge is to law enforcement decisions." (***Ibid***, emphasis added.)

In addition, the ***Washington*** court held that although a "defendant need not, at the initial stage, provide 'some evidence' of discriminatory *intent*, or show that (on the effect prong) similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement . . . , the proffer must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement." (***Ibid***, emphasis added.)

Lastly, the ***Washington*** court held that "[i]f a district court finds that the above has been met, it may conduct limited inquiries of the sort recommended in ***Davis***, and cabined to the same considerations of judicial economy and the need to avoid protracted pretrial litigation of matters collateral to the upcoming trial—as well as the need to avoid impinging on other areas of executive privilege. Areas of consideration could include the testimony, in person or otherwise, of case agents or supervisors, and the in camera analysis of policy statements, manuals, or other agency documents. Relevant information, having passed the filter, can also be disclosed to the defendant, although the district court retains discretion to forgo disclosure of or otherwise restrict the use of information that, while relevant to a selective enforcement claim, might not ordinarily be the sort of discovery material available to a criminal defendant under Fed. R. Crim. P. 16 or ***Brady*** and its progeny." (***Washington*** at p. 221.)

II. The Legislative History Behind "The California Racial Justice Act of 2020" (AB 2542)

A *version* of The California Racial Justice Act (hereinafter the "CRJA") was initially introduced on March 10, 2020. At that time, the version of the bill was ensconced in the shell of a different bill (Assembly Bill 2200 [2019-2020 Leg. Session]). AB 2200 itself had previously been a bill relating to employment and the Labor Code until it was completely gutted and amended to carry a version of the CRJA. Ultimately, AB 2200 became an inactive bill that died in committee. (**See** http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB2200.)

However, after AB 2200 became inactive, another vehicle for carrying the CRJA was located: Assembly Bill 2542. AB 2542 was originally a bill relating to transportation and the Public Utilities Code.
(**See** http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542 [Version 2/19/20].) The original version of AB 2542 was gutted and amended and a version of the CRJA replaced it. (**See** http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542 [version 7/1/20].) That version of the CJRA then underwent several amendments- all within a very short period of time. (***Id***. [Versions 8/01/20, 8/20/20, 8/25/20].)

Knowing where to look for the earlier versions of the CRJA and which aspects of the earlier versions were retained or rejected as the bill was rushed through the legislature **will be important in interpreting the final version of AB 2542**, which was enrolled on 9/4/2020. (**See *Carter* v. *California Dept. of Veterans Affairs*** (2006) 38 Cal.4th 914, 927 ["Successive drafts of a pending bill may be helpful to interpret a statute if its meaning is unclear."]; ***People* v. *Tingcungco*** (2015) 237 Cal.App.4th 249, 256 ["The evolution of a proposed statute after its original introduction is helpful when determining legislative intent."]; ***People* v. *Superior Court (Ferguson)*** (2005) 132 Cal.App.4th 1525, 1532 [prior versions of a bill as well as analyses of such earlier versions are appropriate for judicial notice as they "shed light on how the Legislature arrived at the ultimately enacted statute"].)

Also, knowing that the bill went through several iterations in statutory language in a hurried manner without corresponding changes made to the preamble, helps explain discrepancies between the uncodified preamble language and the codified statutory language.

III. The Language of the *Preamble* to "The California Racial Justice Act of 2020" (AB 2542)

In addition to enacting a new code section (Penal Code section 745) and amending existing Penal Code sections 1473 and 1473.7, AB 2542 contains a preamble. The preamble is set out in section 2 of AB 2542 and identifies the perceived problems necessitating the legislation. Subdivisions (i) and (j) of section 2 of the preamble lay out the intent of the legislation.

No part of section 2 of AB 2542, including the statements of intent, is codified. However, while "statements in an uncodified section [of a bill] do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (***Carter* v. *California Dept. of Veterans Affairs*** (2006) 38 Cal.4th 914, 925.) "In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration." (***Ibid***; ***People* v. *Canty*** (2004) 32 Cal.4th 1266, 1280.)

On the other hand, perhaps as a result of AB 2542 being rushed through the legislature, there exists some conflicts between the express statutory language and the language in the preamble. In that circumstance, the express statutory language controls. "A preamble is not binding in the interpretation of the statute. Moreover, the preamble may not overturn the statute's language." (***Jackpot Harvesting Co., Inc.* v. *Superior Court*** (2018) 26 Cal.App.5th 125, 153; ***Yeager* v. *Blue Cross of California*** (2009) 175 Cal.App.4th 1098, 1103; **accord *Chambers* v. *Miller*** (2006) 140 Cal.App.4th 821, 825–826 ["A statute's preamble . . . does not override its plain operative language."]; **see also *Briggs* v. *Eden Council for Hope & Opportunity*** (1999) 19 Cal.4th 1106, 1118-1119; ***McVeigh* v. *Recology San Francisco*** (2013) 213 Cal.App.4th 443, 470.)

SEC. 2 of AB 2542 states: "The Legislature finds and declares all of the following:

(a) Discrimination in our criminal justice system based on race, ethnicity, or national origin (hereafter "race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." (*Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (quoting *Ballard v. United States*, 329 U.S. 187,195 (1946))). The United States Supreme Court has also recognized "the

impact of … evidence [of racial bias] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." (*Buck v. Davis*, 137 S. Ct. 759, 777 (2017)). Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law.

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

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

(d) Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony, including expert testimony, and arguments in criminal trials. A court upheld a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery. (*United States v. Shah*, 768 Fed. Appx. 637, 640 (9th Cir. 2019)). Existing precedent has provided no recourse for a defendant whose own attorney harbors racial animus towards the defendant's racial group, or toward the defendant, even where the attorney routinely used racist language and "harbor[ed] deep and

utter contempt" for the defendant's racial group (*Mayfield v. Woodford*, 270 F.3d 915, 924-25 (9th Cir. 2001) (en banc); id. at 939-40 (Graber, J., dissenting)). Existing precedent holds that appellate courts must defer to the rulings of judges who make racially biased comments during jury selection. (*People v. Williams*, 56 Cal. 4th 630, 652 (2013); see also id. at 700 (Liu, J., concurring)).

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

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

(g) Current law, as interpreted by the courts, stands in sharp contrast to this Legislature's commitment to "ameliorate bias-based injustice in the courtroom" subdivision (b) of Section 1 of Chapter 418 of the Statutes of 2019 (Assembly Bill 242). The Legislature has acknowledged that all persons possess implicit biases (*Id*. at Section 1(a)(1)), that these biases impact the criminal justice system (*Id*. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (*Id*. at Section (1)(a)(3)-(4)). In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act

to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.

(h) There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decision making in the criminal justice system. Examples of the racism that pervades the criminal justice system are too numerous to list.

(i) It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, and violates the laws and Constitution of the State of California. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.

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

IV. New Penal Code section 745 and Selected Issues Arising in its Application.

1. Which version of section 745 is in effect?

AB 2542 is a little confusing at first glance because it provides two differing versions of Penal Code section 745 (i.e., sections 3 and 3.5) that are largely identical with one primary difference. Section 3 contains an additional paragraph identifying an additional way for section 745 to be violated. Specifically, in the version included in *section 3* of AB 2542, an additional paragraph describing how section 745 may be violated is included, i.e., if "[r]ace, ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of subdivision (a)." (Proposed Pen. Code, § 745(a)(3).) Whereas in the version included in *section 3.5* of AB 2542, this paragraph is absent.

The two alternative sections were proposed because *another* bill dealing with alleged discrimination in prosecution (AB 3070) was pending in the legislature at the same time as AB 2542. AB 3070 expressly and more expansively addressed the asserted issue of discrimination in jury selection in a manner that overlapped, but potentially conflicted with, AB 2542 if both bills were enacted. To avoid this potential conflict, the authors of AB 2542 included two alternate versions, one of which would become operative if AB 3070 passed (section 3.5) and one of which would become operative if AB 3070 did not pass (section 3). (See AB 2542, SEC. 7 ["Section 3.5 of this bill shall only become operative if Assembly Bill 3070 is enacted and *becomes effective on or before January 1,* ***2021***, in which case Section 3 of this bill shall not become operative."], emphasis added.)

It is confusing because while AB 3070 did pass, AB 3070 only added a single new statute: Code of Civil Procedure section 231.7. And subdivision (i) of that section specifically provided: "This section applies in all jury trials in which jury selection begins on or after January 1, ***2022***. (Code of Civ. Proc., § 231.7(i), emphasis added.) Thus, it appeared that AB 3070 did not become "effective" until *2022* and, accordingly, all the requirements for section 3.5 of *AB 2542* to become effective were not met. If this were the case, then many issues would arise in trying to reconcile the version of the CRJA embodied in section 3 of AB 2542 with AB 3070.

Fortunately, the confusion (or at least IPG's confusion) was cleared up by Santa Clara County Deputy District Attorney Kathy Storton who explained the difference between when a statute becomes operative and when it becomes effective:

> AB 3070 is indeed effective on January 1, 2021, even though its provisions do not apply (i.e., are not operative) until January 1, 2022. California Constitution Article 4, Section 8(c)(1) provides that a statute enacted at a regular session shall go into effect on January 1st next, following a 90-day period from the date of the enactment of the statute. The California Supreme Court recognizes that there is a difference between the effective date of a statute and the operative date of a statute. In ***People* v. *Alford*** (2007) 42 Cal.4th 749, 753, fn #2, the court cites other cases in finding that the effective date of a statute is the date upon which the statute came into being as an existing law and that the operative date is the date upon which the directives of a statute may be actually implemented. Although the effective and operative dates are often the same, the Legislature may postpone the operation of certain statutes until a later time.

In other words, AB 3070 *did* become "effective" on January 1, 2021. It simply did not, practically, become "operative" until January 1, 2022. This interpretation is consistent with how editors at both Thomson Reuters and LexisNexis are interpreting the statute. Nevertheless, do not be surprised if defense counsel are as confused as IPG was and they argue that section 3 of AB 2542 is the governing version of new Penal Code section 745, i.e., that a violation of section 745 can occur if "[r]ace, ethnicity, or national origin was a factor in the exercise of peremptory challenges" in 2021. Refer them to DDA Storton's analysis above. (**See also** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 7.)

2. The statutory language of Penal Code section 745

Penal Code section 745 states:

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

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

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

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

(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).

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

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

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

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

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this 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 court may permit the prosecution to redact information prior to disclosure.

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

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

(A) Declare a mistrial, if requested the by 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 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 modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

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

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

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

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

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

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

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

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

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

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

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

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

3. What type of group affiliation is section 745 intended to protect from discrimination?

Section 745 protects against a prosecution or sentencing based on only three types of group affiliation: race, ethnicity, or national origin. (Pen. Code, § 745(a).) Section 745 does not statutorily prohibit a criminal prosecution or sentencing based on other oft-protected group affiliations such as religion, gender, or sexual orientation. (***Compare*** Gov. Code, § 11135 [protecting persons from discrimination in state programs and activities on "the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability"]; Code of Civ. Proc., § 231.5 [protecting jurors from challenge based on assumptions regarding membership in groups identified in § 11135]; Civ. Code, § 51 [protecting against denial of, inter alia, service at business establishments because of "sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information."].)

However, the Equal Protection clauses of the state and federal constitutions would bar a prosecution or sentence based on religion, gender, or sexual orientation *in addition to* a prosecution based on race, ethnicity, or national origin. The equal protection component of the Due Process Clause of the Fifth Amendment precludes basing the decision to prosecute on "an unjustifiable standard such as race, religion, or other arbitrary classification[.]" (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 464.) And "[t]he Fourteenth Amendment of the federal Constitution, and article I, section 7, subdivision (a) of the California Constitution] prohibit all state action which denies to any person the 'equal protection of the laws.'" (***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 294; U.S. Const. amend. XIV [prohibiting states from denying "to any person within its jurisdiction the equal protection of the laws"]; Cal. Const., art. I, § 7 [prohibiting a person from being "denied equal protection of the laws"]; **see also *Zant* v. *Stephens*** (1983) 462 U.S. 862, 885 [noting due process prohibits sentencing based on race, religion, political affiliation, or other factors that are constitutionally impermissible or irrelevant to the sentencing process]; ***United States* v. *Christopher*** (9th Cir. 1983) 700 F.2d 1253, 1258 ["A defendant cannot stand convicted if there is unconstitutional discrimination in the administration of the penal statute."].)

To the extent the standards under section 745 differ from the standards governing a motion alleging a violation of equal protection, a motion based on a defendant's membership in a

group *other than* those identified in section 745 would not be subject to the standards laid out in section 745. Rather, a challenge to a criminal prosecution alleging the prosecution is improperly based on gender, religion, or sexual orientation would be subject solely to the procedures and standards demanded by the state and federal Equal Protection clauses. (**See** this IPG, section I-1 and 2 at pp. 14-30.)

4. How is race, ethnicity, or national origin defined for purposes of section 745?

Although none of terms "race, ethnicity, or national origin" are defined in the statute, it is likely that courts will utilize definitions from existing case law interpreting those terms in the context of constitutional challenges to consideration of race, ethnicity, or national origin in criminal prosecutions (including challenges in the context of jury selection) and from existing statutes that address discrimination in other contexts. (**See *Oyler* v. *Boles*** (1962) 368 U.S. 448, 456 [describing standards for showing violation of equal protection when selective enforcement is alleged "based upon an unjustifiable standard such as race, religion, or other arbitrary classification"]; ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 300[describing standards for showing violation of the Equal Protection clauses of the federal and state Constitutions "based upon an unjustifiable standard such as race, religion, or other arbitrary classification"]; Cal. Const., art. I, § 31 [prohibiting the state from discriminating against "any individual or group on the basis of race …, ethnicity, or national origin in the operation of public employment, public education, or public contracting']; Civ. Code, § 51 (b) [entitling all persons to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments "no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the of every kind whatsoever"]; 42 U.S.C.A. § 2000e-2 [prohibiting discrimination in employment based on an "individual's race, color, religion, sex, or national origin"].)

For purposes of statutes prohibiting discrimination, the terms "race, ethnicity, and national origin" often overlap. (**See *Saint Francis College v. Al-Khazraji*** (1987) 481 U.S. 604, 613 [finding Title VII of the Civil Rights Act of 1964 forbids discrimination against persons "solely because of their ancestry or ethnic characteristics" and such discrimination constitutes the type of "racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory."]; ***Sandhu* v. *Lockheed Missiles &***

Space Co. (1994) 26 Cal.App.4th 846, 853, 855, fn. 7 [recognizing it is difficult if not impossible to define the term "race" as distinguished from "national origin" and that there is "no bright line distinction between discrimination based on ancestry or ethnicity and that based on place or national origin"].)

However, it is fairly clear that, for purposes of laws preventing discrimination, the term "national origin" refers to the countries where a person *or* the person's ancestors originated and is *distinguished* from "citizenship." (**See *Espinoza* v. *Farah Mfg. Co., Inc***. (1973) 414 U.S. 86, 87 [for purposes of Tit. VII of the Civil Rights Act of 1964, "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came"; it does not refer to "citizenship"]; ***Mahdavi* v. *Fair Employment Practice Com.*** (1977) 67 Cal.App.3d 326, 337 [noting that the holding in ***Espinoza* v. *Farah Mfg. Co***., "to the effect that Congress, in using the term 'national origin,' did not intend to include alienage would compel a similar conclusion as regards the [California] Legislature's use of the same term" in state legislation barring discrimination in employment]; ***Ortiz* v. *Dameron Hospital Assn***. (2019) 37 Cal.App.5th 568, 580 ["the Equal Employment Opportunity Commission Guidelines currently 'define[ ] national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.' (29 C.F.R. § 1606.1 (2019)."]; **see also *Finch* v. *Commonwealth Health Ins. Connector Authority*** (2011) 459 Mass. 655, 694, fn. 6 ["in congressional debate leading up to Civil Rights Act, "national origin" was understood by legislators to mean "the nation of one's birth or the nations of birth of one's ancestors. This understanding of national origin merges one's national origin, or country of birth, with the national origin characteristics of one's ancestry"].)

In ***People* v. *Sassounian*** (1986) 182 Cal.App.3d 361, the court rejected a vagueness challenge to the special circumstance (Pen. Code, § 190.2(a)(16)) which applies when a defendant intentionally kills a victim "because of his or her . . . nationality, or country of origin", on the ground that that the term "national origin" has been used without difficulty for over 30 years as an integral part of the anti-discrimination language of the Unruh Civil Rights Act (Civ. Code, §§ 51 et seq.). The ***Sassounian*** court noted that the Civil Rights Act "has been held to be valid and properly applied to prohibit discrimination in a real estate transaction against persons of "Mexican *ancestry*." (***Id***. at p. 413 citing to ***Vargas* v. *Hampson*** (1962) 57 Cal.2d 479, 481, emphasis added.)

However, discrimination on the basis that someone is foreign born *in general* can *also* be characterized as discrimination based on "national origin." (**See** generally ***Zuckerstein* v. *Argonne Nat'l Lab.*,** (N.D. Ill. 1987) 663 F. Supp. 569, 576-577 [finding Title VII permitted a claim of discrimination based on national origin where allegation was that employer treated non-American-born employees (all from different countries) worse than American born employees].)

Use of the terms "race, ethnicity, or national origin" for purposes of section 745 will be subject to same problems that arise in trying to cabin individuals into arbitrary, artificial, and shifting categories of race, ethnicity, and national origin in other contexts. (**See *United States* v. *Guerrero*** (9th Cir. 2010) 595 F.3d 1059, 1063, fn. 3 ["in the modern world it can be difficult, if not impossible, to accurately identify the race/ethnicity of everyone we meet"]; **see also** https://www.pewsocialtrends.org/2017/05/18/intermarriage-in-the-u-s-50-years-after-loving-v-virginia/ [noting that in 2015, "17% of all U.S. newlyweds had a spouse of a different race or ethnicity, marking more than a fivefold increase since 1967."]; Desirée D. Mitchell, A Class of One: Multiracial Individuals Under Equal Protection (2021) 88 U. Chi. L. Rev. 237, 245 [about one in every seven babies born in the nation is multiracial].)

5. What must a defendant show to establish a violation of section 745 in general?

There are five, but only five, identifiable ways in which a defendant may establish a violation of Penal Code section 745(a). The statutory language identifying those five basic ways is recounted on pages 42-43 of this IPG. (**See** Pen. Code, § 745(a)(1)-(4).) But issues relating to each of the different ways will be explored under separate sub-headings in this IPG relating to each paragraph and subparagraph (subparagraphs (1), (2), (3), (4)(A), and (4)(B)) of section 745.

A. What is the burden of proof imposed on a defendant seeking to establish a violation of section 745?

A defendant must establish a violation of section 745 by a preponderance of the evidence." (**See** Pen. Code, § 745(a) ["A violation is established if the defendant proves, by a preponderance of the evidence, any of the following . . ."]; Pen. Code, § 745(c)(2) ["The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence."].)

B. Does a defendant seeking to establish a violation of section 745 have to establish "prejudice?'

In contrast to most other complaints of misconduct or error in the criminal justice system (**see e.g., *People* v. *Uribe*** (2011) 199 Cal.App.4th 836, 861), it is **not** necessary for a defendant to prove the violation of section 745 caused the defendant to suffer any actual prejudice, i.e., that the "misconduct" had a material adverse impact on defendant's ability to receive a fair trial. However, if a defendant did not suffer any prejudice, imposition of certain remedies may be barred by the California Constitution. (**See** Pen. Code, § 745(e); this IPG, section VII-6 at pp. 205-209].)

6. Selected issues arising in determining whether a violation of Penal Code section 745(a)*(1)* has occurred.

Penal Code section 745(a)(1) is violated if "[t]he 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."

A. What is "bias or animus for purposes of section 745(a)(1)?"

Section 745(a)(1) does not define "bias" or "animus." The term "bias" is often used in conjunction with, or interchangeably with, the term "prejudice." The first definition provided in Black's Law Dictionary of "bias" is "[a] mental inclination or tendency; prejudice; predilection." (Black's Law Dictionary (11th ed. 2019).) Black's Law Dictionary also provides a definition of "actual bias" as "[g]enuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject." (***Ibid***.)

The term "bias" is used in many different contexts. (**See e.g**., Pen. Code, § 1127(h) [instruction to jurors not to let "bias" influence their decision]; Code Civ. Proc., § 170.1(a)(6)(B) [allowing for disqualification of judges based on "bias" toward a lawyer in the proceeding]; Code Civ. Proc., § 225(b)(1)(C) [describing "Actual bias" as "the existence of a 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., § 229 [defining circumstances when jurors may be challenged for "implied bias" including when the juror has a state of mind "evincing enmity against, or bias towards, either party"]; Health & Saf. Code, § 123630.2(b) [defining "implicit bias" as "a bias in

judgment or behavior that results from subtle cognitive processes, including implicit prejudice and implicit stereotypes that often operate at a level below conscious awareness and without intentional control."].)

In most case (and likely in the case of section 745), "[t]he words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). (***Liteky* v. *U.S.*** (1994) 510 U.S. 540, 550.)

The word "animus" is used less frequently. "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or "animosity" or can be interpreted broadly to mean 'intention.'" (***Wallace* v. *County of Stanislaus*** (2016) 245 Cal.App.4th 109, 130 [citing to Black's Law Dictionary (9th ed. 2009) at p. 103].)

Because section 745(a)(1) requires that the "bias or animus" be exhibited towards the defendant, it is likely that the bias or animus must involve some form of conduct that reflects hostility toward the defendant and derives from the individual's bias against the defendant based on defendant's race, ethnicity, and national origin. (**Cf.**, ***Choochagi v. Barracuda Networks, Inc***. (2020) 274 Cal.Rptr.3d 753, 765 [if employer shows prima facie case of discrimination "is lacking or that the *adverse employment action* was based upon legitimate, nondiscriminatory [or retaliatory] factors, . . . the plaintiff must "'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer *acted* with discriminatory [or retaliatory] animus, such that a reasonable trier of fact could conclude that the employer *engaged in* intentional discrimination [or retaliation] or other *unlawful action*.'"], emphasis added; ***DeJung* v. *Superior Court*** (2008) 169 Cal.App.4th 533, 550 ["discriminatory animus does not end the analysis of a discrimination claim. There must also be evidence of a causal relationship between the animus and the adverse employment action"].)

B. Can a defendant establish a violation of section 745(a)(1) by showing an officer involved in the case engaged in a seizure or search of a defendant *because of* the defendant's race, ethnicity, or national origin?

Section 745(a)(1) is violated if "a law enforcement officer involved in the case . . . exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin." (Pen. Code, § 745(a)(1).) If a defendant can show that a search or seizure of a defendant was based in part or whole on a defendant's race, ethnicity, or national origin, would this constitute a violation of section 745(a)(1)?

An argument can certainly be made that section 745 does not cover this conduct because it only prohibits the state from seeking or obtaining a criminal conviction or sentence; and an officer who searches or seizes a defendant is not trying to "seek or obtain" a conviction based on defendant's race, ethnicity, or national origin. (See Pen. Code, § 745(a).) However, the defense may plausibly argue that the *actual language* of section 745(a)(1) allows relief simply by showing an officer involved in the case exhibited bias or animus toward the defendant (**see** Pen. Code, § 745(a)(1)), and thus it is irrelevant whether the officer acted with the specific intent to obtain or seek a conviction based on defendant's race, ethnicity, or national origin.

Moreover, if there is sufficient evidence an officer engaged in a seizure or stop of the defendant solely out of animus or bias toward the defendant due to defendant's race, ethnicity, or national origin, a section 745(a)(1) motion may be redundant. This is because a search or seizure of a defendant based solely on a defendant's race, ethnicity, or national origin (at least in the absence of otherwise objectively reasonable factors supporting the search or seizure) *violates equal protection*. (**See *United States* v. *Frazier*** (8th Cir. 2005) 408 F.3d 1102, 1108; ***United States* v. *Avery*** (6th Cir.1997) 137 F.3d 343, 358; **see also *Whren* v. *United States*** (1996) 517 U.S. 806, 813 ["the Constitution prohibits selective enforcement of the law based on considerations such as race."]; ***United States* v. *Montero-Camargo*** (9th Cir. 2000) 208 F.3d 1122, 1131 [seizure based solely on the race, ethnicity, or national origin of the defendant, in the absence of any evidence otherwise providing reasonable suspicion, would violate both the Fourth Amendment and the Equal Protection clause].) Indeed, even a search or seizure based *partly* on a discriminatory basis can potentially violate the Equal Protection clause unless it can be shown the search or seizure would have been made regardless of the improper motive. (***Farm Labor Organizing Committee* v. *Ohio State Highway Patrol*** (6th Cir. 2002) 308 F.3d 523, 538–539.)

Whether conducting a search or seizure based solely on race, ethnicity, or national origin *also* qualifies as "exhibit[ing] bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin" under section 745(a)(1), of course, has yet to be decided. However, it is certainly reasonable to believe that it will.

C. Can a defendant establish a violation of section 745(a)*(1)* by showing an officer involved in the case (or a judge, attorney, expert, or juror) used racially discriminatory language directed towards the defendant?

The mere use of racially discriminatory language during the course of a detention or arrest is not a constitutional violation. (**See *Chavez* v. *Illinois State Police*** (7th Cir. 2001) 251 F.3d 612, 646 ["While we certainly do not approve of racially insensitive remarks, such comments do not by themselves violate the Constitution."]; ***DeWalt* v. *Carter*** (7th Cir.2000) 224 F.3d 607, 612 ["The use of racially derogatory language, while unprofessional and deplorable, does not violate the Constitution."]; ***Williams* v. *Bramer*** (5th Cir. 1999) 180 F.3d 699, 706 ["We hold today that an officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation."].)

"This does not mean, however, that the use of racially derogatory language is without legal significance. Such language is strong ***evidence of racial animus***, an essential element of any equal protection claim." (***Chavez* v. *Illinois State Police*** (7th Cir. 2001) 251 F.3d 612, 646 [citing to ***DeWalt* v. *Carter*** (7th Cir.2000) 224 F.3d 607, 224 F.3d 607, 612 n. 3; ***Bell* v. *City of Milwaukee*** (7th Cir.1984) 746 F.2d 1205, 1259 (emphasis added); **see also *Valdez* v. *United States*** (W.D. Mich. 2014) 58 F.Supp.3d 795, 825 ["A court may consider threats and derogatory, racially-inflected comments in determining whether an officer acts with discriminatory purpose."]; ***Bennett* v. *City of Eastpointe*** (6th Cir.2005) 410 F.3d 810, 831 ["summary judgment was particularly inappropriate because of the alleged racial tones to the officer[s'] conduct."]; ***Carrasca* v. *Pomeroy*** (3d Cir. 2002) 313 F.3d 828, 834 [observing that a factfinder could determine that an officer's reference to plaintiffs as "Mexicans" was stated as a pejorative racial slur and demonstrated a racially discriminatory purpose].)

Unlike paragraph (2) of section 745(a), paragraph (1) of section 745(a) does not expressly specify that the use of racially discriminatory language qualifies as a violation of section 745. However, it is reasonable to believe that the use of racially discriminatory language by an officer involved in the case during the officer's interactions with the defendant may be viewed

as "strong evidence" of racial bias or animus towards the defendant and may, depending on the context in which the language is used, be sufficient to establish a violation of section 745(a)(1). (***Compare People* v. *Montes*** (2014) 58 Cal.4th 809, 831-832 [holding, in context, use of allegedly racially discriminatory language did not reflect racial animus].)

If a judge, attorney, expert, or juror uses racially discriminatory language when interacting with or referring to the defendant *outside of* court, that would similarly be *evidence of* bias or animus towards the defendant. (**Cf.,** this IPG, section IV-7 [discussing violations of section 745(a)(2) when racially discriminatory language is used during court proceedings at pp. 57-61.)

D. Can a defendant establish a violation of section 745(a)(1) based on "implicit" bias or animus?

Paragraph (1) appears to be geared to addressing only actual, rather than implicit, bias or animus. Notably, paragraph (1), unlike paragraph (2), is devoid of any language indicating the bias or animus "need not be purposeful." (**See** Pen. Code, § 745(a)(2).) This is significant because "[w]hen the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.'" (***Pasadena Police Officers Assn.* v. *City of Pasadena*** (1990) 51 Cal.3d 564, 576; **see also *People* v. *Herman*** (2002) 97 Cal.App.4th 1369, 1384 ["When the Legislature uses a term or phrase in one part of a statute but excludes it from another part, the courts should not imply the missing phrase into the sections from which it was excluded."].)

E. Can a defendant establish a violation of section 745(a)(1) by showing a prosecutor has engaged in discriminatory jury selection?

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]'" (***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 898, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 and ***Batson* v. *Kentucky*** (1986) 476 U.S. 79.)

The version of the California Racial Justice Act ultimately enacted omitted an express provision making it a violation of section 745 if "[r]ace, ethnicity, or national origin was a

factor in the exercise of peremptory challenges" regardless of whether "purposeful discrimination occurred in the exercise of peremptory challenges" that had been included in the *unenacted* version of the Act. (**See** Assemb. Bill No. 2542 (2019-2020 Reg. Sess.) unenacted § 3 [proposed section 745(a)(3)].) This suggests that this type of violation would ***not*** be covered by section 745(a)(1). (**See *People* v. *Delgado*** (2013) 214 Cal.App.4th 914, 918 ["When the Legislature chooses to omit a provision from the final version of a statute which was included in an earlier version, this is strong evidence that the act as adopted should not be construed to incorporate the original provision."]; ***People* v. *Connor*** (2004) 115 Cal.App.4th 669, 691 [We "presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language"].) Nevertheless, it is possible that if a challenge to remove a juror based on the juror's race, ethnicity, or national origin was held discriminatory *under the current* ***Batson-Wheeler*** standards, it might simultaneously violate equal protection *and* section 745(a)(2).

A court would have to find that the removal of a *juror* based on a discriminatory purpose was conduct that "exhibited bias or animus towards *the defendant* because of the *defendant's* race, ethnicity or national origin." (Pen. Code, § 745(a)(2), emphasis added.) This might prove difficult if the challenged juror did not belong to the same group as the defendant.

As a practical matter, since section 745 requires the imposition of a "remedy *specific to the violation*" (Pen. Code, § 745(e)), it is likely, but not certain, a court would impose the same remedy for both the statutory and the constitutional violation. (***Compare People* v. *Willis*** (2002) 27 Cal.4th 811, 820-824 [remedies for ***Batson-Wheeler*** violation include dismissal of panel, reseating jurors, monetary sanctions, and providing additional challenges to the aggrieved party] ***with*** Pen. Code, § 745(e) [aside from the existing remedies for a ***Batson-Wheeler*** violation, remedies under § 745 include declaring a mistrial, dismissal of enhancements, special circumstances, or special allegations, reduction of charges, and precluding capital punishment]; **see also** this IPG, section VII at pp. 186-209 [remedies].)

F. If a judge is accused of exhibiting bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, must the judge be recused from hearing the section 745(a)(1) motion?

Section 745 does not state whether a judge who is accused of exhibiting bias or animus towards a defendant because of the defendant's race, ethnicity, or national origin can hear the section 745(a)(1) or (a)(2) motion.

If the accused judge cannot hear the motion, defendants may be able to delay proceedings and/or potentially cause the removal of the judge who they do not like from the case simply by making the motion. Section 745 creates a vehicle susceptible to abuse. (**Cf., *People* v. *Peyton*** (2014) 229 Cal.App.4th 1063, 1067, 1073 [finding trial judge entitled to summarily deny motion *made in bad faith* alleging due process violation based on judicial bias against the defendant and discussing how a defendant may "sidetrack a cause . . . to divert the accusation from the pending issue (guilt or innocence) to some other issue, any issue, and then keep the prosecution (or the trial court) so occupied in litigating the side issue that the hearing of the accusation itself comes to a halt."].)

On the other hand, it stands to reason that a judge accused of misconduct or bias should not be ruling on their own bias, implied or otherwise. And since section 745 does not address whether judicial recusal is required when a section 745 motion is made, expect defense counsel to file a motion under Code of Civil Procedure section 170.1 in conjunction with their section 745(a)(1) or (a)(2) motion.

Whether or not the allegation of "bias or animus" as described in section 745(a)(1) or section 745(a)(2) provides grounds for recusal under section 170.1 has not yet been decided. At least when the accusation is of bias that is not "purposeful," it is questionable whether it does. That said, section 170.1 may be found applicable when there is a claim the judge exhibited bias or animus and/or used racially discriminatory language under one of the subdivisions of section 170.1(a)(6)(A)(i)-(iii) or 170.1(a)(1). (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 18.)

***Editor's note**: Code of Civil Procedure section 170.1(a)(6)(A) states a judge may be disqualified if "[f]or any reason: (i) The judge believes his or her recusal would further the interests of justice. ¶ (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial. ¶ (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."
Section 170.1(a)(1) states a judge may be disqualified if "[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding." Arguably, when a judge's own mental state is a disputed evidentiary fact (i.e., whether the judge was biased or used language in a racially discriminatory manner), the judge has "personal knowledge of a disputed evidentiary facts." However, this basis cannot be interpreted too broadly as it would prevent judges from deciding ***Batson-Wheeler*** motions when the judge is being asked to confirm observations about a juror's demeanor (**see *Thaler* v. *Haynes*** (2010) 559 U.S. 43, 48 ["the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire"] or to consider the judge's "own experiences as a lawyer and bench officer in the community" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613).

Even if the judge declines to be disqualified, another judge will usually have to rule on whether the challenged judge should be disqualified. (**See** Code Civ. Proc., § 170.3(a)(5).) The decision as to whether a judge should be disqualified pursuant to section 170.1 will often overlap with the question of whether the section 745(a)(1) or (a)(2) motion should be granted when it is based on a claim of the judge exhibited racial bias or animus. And the grant or denial of the section 170.1 motion may be a harbinger of how the section 745 motion itself will be decided. However, the overlap would not be complete. And there will still have to be a separate hearing on the second 745 motion. For example, if the basis for the disqualification was premised on section 170.1(a)(6)(A)(iii), the reviewing judge could find that "[a] person aware of the facts might reasonably entertain a doubt that the [original] judge would be able to be impartial" while still finding that the defendant failed to prove by a preponderance of the evidence that the original judge actually exhibited bias or animus as is required under section 745(a). The converse would be less likely to be, but could still theoretically be, true as well.

***Editor's note**: If a judge is disqualified under section 170.1, the judge would not only be excused from presiding over the section 745 motion; the judge would be disqualified for the remainder of the proceeding. (See Code Civ. Proc., § 170.3(a)(1).) If a judge is not disqualified under section 170.1, it still may be necessary for another judge to hear <u>just</u> the section 745 motion claiming judicial bias.

7. Selected issues arising in determining whether a violation of Penal Code section 745(a)*(2)* has occurred.

Penal Code section 745(a)(2) is violated if "[d]uring 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."

In many ways, paragraph (2) covers the same territory as paragraph (1). Both paragraphs prohibit exhibiting bias or animus based on a defendant's race, ethnicity, or national origin. However, paragraph (2) differs from paragraph (1) in three ways. First, paragraph (2) is limited to the exhibition of bias or animus towards the defendant that occurs during trial proceedings and in court. Second, paragraph (2) specifies the bias or animus need not be purposeful. It may be difficult to find a violation of paragraph (1) based on implied bias – but less so with paragraph (2). Third, paragraph (2) focuses on the use of racially discriminatory language as its *primary* target.

A. What is "racially discriminatory language" or "bias or animus" as used in section 745(a)(2)?

Penal Code section 745(h)(3) states: "'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."

The definition is perplexing because it defines "racially discriminatory language" as language that explicitly or implicitly appeals to "*racial* bias" even though the statute is designed to combat discrimination based on appeals to *ethnic or national* origin. Yet it then defines the term as including language that merely "references" the defendant's physical appearance, culture, *ethnicity*, or *national origin*." Moreover, it imports into the definition of the term "racially discriminatory language" references to concepts that are distinct from race, ethnicity, or national origin: "physical appearance" and "culture."

Some insight into what the legislature conceives as "racially discriminatory language" can be gained by looking at paragraph (e) of the preamble to AB 2542 and the articles cited therein. That paragraph states: "Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials. For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are "highly offensive and inappropriate" (Duncan v. Ornoski, 286 Fed. Appx. 361, 363 (9th Cir. 2008); see also People v. Powell, 6 Cal.5th 136, 182-83 (2018)).* Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system (Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, and Matthew Christian Jackson, Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology (2008) Vol. 94, No. 2, 292-293; Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham Law Review, Volume 86, Issue 6, Article 24 3091, 3105-06 (2018))." (Assemb. Bill No. 2542 (2019-2020 Reg. Sess.) § 2, para. (e).)

The two articles cited may also provide insight into the legislature's conception of what it means when it refers to "racially coded language, images, and racial stereotypes." The articles are, respectively, available at: https://web.stanford.edu/~eberhard/downloads/2008-NotYetHuman.pdf and https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5533&context=flr

Editor's note: *Existing* law prohibits prosecutors from comparing a defendant to a beast in argument "for the purpose of dehumanizing him before the jury or in an effort to evoke the jury's racial biases." (***People* v. *Powell*** (2018) 6 Cal.5th 136, 183 [albeit distinguishing such appeals from using animal-based parables to legitimately illustrate legal principles (e.g., by using the Bengal tiger story referenced in the preamble [**see** this IPG at p. 58] to "properly remind a penalty phase jury of the circumstances of the offense, including the brutality of the murder, and caution the jury against judging defendant solely based upon his calm demeanor in the courtroom.")].)

As to the definition of "bias or animus" for purposes of section 745(a)*(2)* **see** this IPG, section IV-6-A at pp. 50-51 [discussing definition for purposes of section 745(a)(1)].)

B. When can a defendant's race, ethnicity, national origin, culture, or physical appearance be mentioned in trial?

Paragraph 2 of subdivision (a) states the paragraph itself "does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect." (Pen. Code, § 745(a)(2).)

It *is* disconcerting that the statute did not simply state that use of language by an attorney, judge, law enforcement officer, witness or expert referencing a defendant's "physical appearance, culture, ethnicity, or national origin" is permissible "when the reference is relevant to factual or legal issues or arguments in the representation." (Comment [2] to Rules Prof. Conduct, rules 8.4.1.) However, the most reasonable way to interpret paragraph (a)(2) is to recognize that, while the definition provides examples of the kinds of language that could potentially be deemed to qualify as racially discriminatory language, whatever language is used must still be found to be "language that, to an objective observer, explicitly or implicitly appeals to racial bias." (Pen. Code, § 745(h)(3).) This conclusion is supported by inclusion of the following language: "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*." (***Ibid***, emphasis added.)

C. How will "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" be introduced?

Whether particular words or images are used exclusively or disproportionately *in cases* (i.e., in court) when the defendant is of a specific race, ethnicity, or national origin is likely a proper subject for expert testimony. (**See** Evid. Code, § 801(a) [requiring expert opinion to be "Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"]; **see also *People* v. *Williams*** (1992) 3 Cal.App.4th 1326, 1333 ["Matters beyond common experience are not proper subjects of lay opinion testimony."].) Thus, to introduce 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" or to rebut with evidence that particular words or images are *not* used exclusively or disproportionately in such cases, an expert will likely be needed.

D. Can a defendant establish a violation of section 745(a)(2) by showing a prosecutor has engaged in discriminatory jury selection?

Both section 745(a)(1) and (a)(2) provide that a violation of section 745 is made out if a prosecutor exhibits bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin. Section 745(a)(2) is more limited than (a)(1) in that the violation must occur during the defendant's trial, in court and during the proceedings; but more expansive than (a)(1) in that it specifically states the bias or animus need not be purposeful. However, with those qualifications in mind, the question of whether a defendant can establish a violation of section 745(a)(2) by showing a prosecutor has engaged in discriminatory jury selection is subject to the same analysis and raises the same issues as when the question is whether discriminatory jury selection (e.g., a ***Batson-Wheeler*** violation) can be the basis for a violation of section 745(a)*(1)*. (**See** this IPG, section IV-6-(E) at pp. 54-55.)

E. If a judge is accused of exhibiting bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, must the judge be recused from hearing the section 745(a)(2) motion?

Both section 745(a)(1) and (a)(2) provide that a violation of section 745 is made out if a judge exhibits bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin. Whether or not the allegation of "bias or animus" as described in section 745(a)(1) or section 745(a)(2) provides grounds for recusal under Code of Civil Procedure

section 170.1 has not yet been decided. At least when the accusation is of bias that is not "purposeful," it is questionable whether it does. That said, prosecutors should presume that a defendant making a challenge under either section 745(a)(1) or (a)(2) will also bring a motion pursuant to section, 170.1. And that section 170.1 may be found applicable when there is a claim the judge exhibited bias or animus and/or used racially discriminatory language under one of the subdivisions of section 170.1(a)(6)(A)(i)-(iii) or 170.1(a)(1). The analysis and issues raised will generally be the same regardless of whether the claim of judicial bias is based on section 745(a)(1) or (a)(2). (**See** this IPG, section IV-6-F at pp. 55-57.)

F. Can a violation of section 745(a)(2) be based on implicit bias?

Because section 745(a)(2) may be violated if a 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 . . . , *whether or not purposeful*," a violation of section 745(a)(2) could possibly be found even if the bias or animus was implicit, not express.

8. Selected issues arising in determining whether a violation of Penal Code section 745(a)*(3)* has occurred.

Penal Code section 745(a)(3) states a violation of section 745 occurs if "[t]he defendant was charged or convicted of a ***more serious offense*** than defendants of other races, ethnicities, or national origins ***who commit similar offenses*** and ***are similarly situated***, and the evidence establishes that the prosecution ***more frequently*** sought or obtained convictions for ***more serious offenses*** against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." (Emphasis added.) Thus, a defendant seeking to show a violation of section 745(a)(3) must establish:

1. He or she was charged or convicted of a more serious offense than other defendants not belonging to his or her racial, ethnic, or national origin group who commit similar offenses;

2. Those other defendants not only committed similar offenses to defendant's offense, but they are also similarly situated in *other* regards; and

3. The prosecution in the county where defendant is charged more frequently sought or obtained convictions for more serious offenses against members of the defendant's group than they did against defendants of other groups who committed similar offenses and are similarly situated.

A. Section 745(a)(3) permits claims to be made in a manner that parallels selective prosecution claims in some, but not all, respects.

"The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 464–465.) The claimant must demonstrate both that the prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." (***Ibid***.) And "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." (***Ibid***, emphasis added; **see also** this IPG, section I-1-A at p. 16).

Some of the elements of a claim brought under section 745(a)(3) closely track the elements of a selective prosecution claim. (**Cf., *Belmontes* v. *Brown*** (9th Cir.2005) 414 F.3d 1094, 1127 [rev'd on other grounds by ***Ayers* v. *Belmontes*** (2006) 549 U.S. 7] [finding defendant's claim that he was being discriminated against in being charged with special circumstances because defendants who kill a white person were five times more likely to be charged with special circumstances than a defendants who kill an African American and twenty times more likely to be charged than if the victims were Latino was "essentially a selective prosecution claim, and we analyze it under that rubric."].)

Like in a selective prosecution claim, a defendant claiming a section 745(a)(3) violation must show a type of discriminatory "effect," i.e., that "defendant was charged or convicted of a *more serious* offense than other defendants not belonging to his or her racial, ethnic, or national origin group who commit similar offenses." (Pen. Code, § 745(a)(3).)

Like in a selective prosecution claim, a defendant claiming a section 745(a)(3) violation must show he or she was treated differently than "similarly situated" individuals of a different race ethnicity, or national origin. (Pen. Code, § 745(a)(3).)

However, section 745(a)(3) and selective prosecution claims also differ in some respects.

Unlike in a selective prosecution claim, a defendant claiming a section 745(a)(3) violation does not *have* to show the government conduct was motivated by a discriminatory intent. (**See** Pen. Code, § 745(a)(3).)

Unlike in selective prosecution claim, a defendant claiming a section 745(a)(3) violation has to show 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." (Pen. Code, § 745(a)(3).) Albeit in a selective prosecution claim, the fact that other members of defendant's race, ethnicity, or national origin were treated differently in comparison to those not of defendant's race, ethnicity, or national origin *overall* is still highly relevant evidence. (**See e.g., *United States* v. *Armstrong*** (1996) 517 U.S. 456, 465-467, 469.)

Accordingly, cases interpreting the requirements of selective prosecution claims will often be helpful (and even potentially binding) when interpreting terms and general concepts common to both section 745(a)(3) and selective prosecution claims. (**See *People* v. *Lawrence*** (2000) 24 Cal.4th 219, 231 ["Generally, '[w]here the language of a statute uses terms that have been judicially construed,' 'the presumption is almost irresistible' 'that the terms have been used' 'in the precise and technical sense which had been placed upon them by the courts'."].) In particular, cases involving claims of selective prosecution (and its cousin, claims of selective enforcement) should provide guidance in interpreting what must be shown to obtain discovery, establish a prima facie case, and/or prevail on a section 745(a)(3) claim insofar as it relates to the "discriminatory effect" and "similarly situated" elements of a section 745(a)(3) claim.

The element of section 745(a)(3) that requires defendants to show that the prosecution has more frequently sought or obtained convictions for more serious offenses against members of the defendant's group than against defendants belonging to other groups "tastes" like a selective prosecution (or equal protection) related concept, but the language used is somewhat unique. Thus, selective prosecution cases should be considered, but may be less persuasive, in interpreting this element of section 745(a)(3).

B. A section 745(a)(3) claim also shares some elements in common with equal protection related civil claims based on a theory of "disparate impact" liability

A section 745(a)(3) claim may also be viewed as similar to civil claims based on anti-discrimination statutes that are premised a theory of disparate impact liability. What must be shown to prevail on a section 745(a)(3) claim significantly overlaps with what must be shown to prevail on a claim of discrimination based on a "disparate impact" theory of liability.

"Disparate-*impact* claims involve "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be

justified by business necessity." (***Raytheon Co.* v. *Hernandez*** (2003) 540 U.S. 44, 52, emphasis added.) Under a disparate-impact theory of discrimination, "a facially neutral . . . practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." (***Id.*** at pp. 52-53.) Disparate-impact claims "usually focus[ ] on statistical disparities...." (***Watson* v. *Fort Worth Bank and Trust (***1988) 487 U.S. 977, 987.) "In contrast to a disparate-*treatment* case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (***Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc***. (2015) 576 U.S. 519, 524, emphasis added.) In other words, a claimant does not have to *prove* the entity accused of discrimination took actions *because of* the claimant's group affiliation; but disparities *are* permitted when "the differentiation is based on reasonable factors other than" the claimant's group affiliation. (***Id***. at p. 538.)

> ***Editor's note**: The notion that once a sufficiently large disparity is shown that cannot be explained away by factors unrelated to group affiliation, an inference can be drawn that the disparity is due to discrimination (e.g., an implied bias) has been around for a long time. (**Cf., *Castaneda* v. *Partida*** (1977) 430 U.S. 482, 494, fn. 13 ["If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."]; **but see *Watson* v. *Fort Worth Bank and Trust*** (1988) 487 U.S. 977, 996 [cautioning against use of facially plausible statistical evidence based on "small or incomplete data sets and inadequate statistical techniques"].)

To avoid raising constitutional questions, disparate-impact liability cannot be imposed "based solely on a showing of a statistical disparity. Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' *not the displacement of valid governmental policies*." (***Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc***. (2015) 576 U.S. 519, 540, emphasis added.)

"[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." (***Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*** (2015) 576 U.S. 519, 533.)

This description of disparate impact liability *generally* characterizes the theory of liability underlying section 745(a)(3), which also does not require the defendant show discriminatory

intent but does require a showing of a disproportional adverse effect that is otherwise unjustified by a legitimate rationale (i.e., by requiring defendants be similarly situated). It refers to the consequences of actions, i.e., the defendant being charged or convicted with "more serious" offenses and the prosecution more frequently seeking or obtaining convictions for more serious offenses against the group to which the defendant belongs. And treating a section 745(a)(3) claim as a "disparate impact" claim is consistent with the statutory purpose of section 745(a)(3). (**See** Assemb. Bill No. 2542 (2019-2020 Reg. Sess.) § 2, para. (i) ["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."].)

The general elements of "disparate impact" statutes (i.e., significant disparity plus a lack of neutral reason for the disparity) is reflected in the requirement under section 745(a)(3) that (i) the defendant be "charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated" (Pen. Code, § 745(a)(3)) and (ii) that the "evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." (Pen. Code, § 745(h)(1).)

This is because the fact that other defendants are "similarly situated" can only be established by considering whether there are *valid relevant reasons* for why the defendant has been charged or convicted of a relatively more serious offense than others belonging to a different race, ethnicity, or national origin. (**See** this IPG, section IV-8-E at pp. 71-87.) It is also because the requirement that defendants show 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" cannot be shown unless the persons in the group being compared are similarly situated – which cannot be established if that disparity is explained by valid relevant reasons. (**See** this IPG, section IV-8-F at p. 87.)

This is not to say that *every* element of section 745(a)(3) neatly tracks the elements common to antidiscrimination statutes premised on a disparate impact theory of liability. Section 745 is somewhat of a griffin. But it makes sense to consider cases interpreting anti-discrimination civil statutes based on a disparate impact theory of liability when parallels can easily be drawn between those statutes and section 745(a)(3).

C. What is a "more serious offense?"

One element necessary to establish a violation of section 745(a)(3) is that the defendant be charged or convicted of a "more serious" offense than other similarly situated defendants belonging to a different group. The term "more serious offense" is not defined in section 745 nor does it have an existing legal definition in California. Whether an offense is more serious than another offense can potentially be determined by: (i) looking at which offense carries a longer *minimum* sentence; (ii) looking at which offense carries a longer *maximum* sentence; (iii) considering which offense carries *greater or more onerous consequences* regardless of the actual minimum or maximum sentence; and/or (iv) looking at whether one offense is considered a *lesser included* (or even lesser related) offense of the other offense.

In assessing whether an offense is a more serious offense than another offense, courts may first look to whether the offense at issue is a wobbler. It is easy to characterize a felony charge for a crime as being a "more serious offense" than a misdemeanor charge for the same crime. (**See e.g.**, ***People* v. *Bedrossian*** (2018) 20 Cal.App.5th 1070, 1076 ["Persons arrested for the commission of a felony are suspected of having committed ***a more serious offense*** and face more serious consequences than those arrested for a misdemeanor" (emphasis added.)].) So, for example, a felony charge for violating Vehicle Code section 10851(a) is easily characterized as a "more serious offense" than a misdemeanor charge of violating that same section.

Similarly, if a violation of a single statute is subject to an alternate penalty provision imposing a lengthier punishment based on the presence of additional factors, it is likely the version of the crime subject to the penalty provision will be considered the "more serious offense." For example, a violation of Penal Code section 314*(2)* is going to be viewed as a more serious offense than a violation of section 314*(1)* because it involves entry into an inhabited dwelling and is potentially a felony instead of a misdemeanor. However, if the alternate penalty provision version of the "same" offense is deemed "more serious" because of *additional conduct or circumstances*, it may not be available for comparison purposes because the conduct subjecting a defendant to the lengthier sentence may not be considered a "*similar* offense" for purposes of section 745(a). (**See** this IPG, section IV-8-D at p. 69.)

If one offense has been deemed a lesser included or lesser related* offense of another offense, it is very likely the latter will be deemed a more serious offense than the former.

Editor's note:** Although the concept of a lesser related offenses has gone out of fashion since a court is no longer authorized to instruct on lesser related offenses (**see *People* v. *Birks (1998) 19 Cal.4th 108; 2017-IPG#29 (LESSER INCLUDED OFFENSES) at pp. 66-67), pre-***Birks*** cases identifying what constitutes "lesser-related" offenses may still be useful in deciding whether one offense is a "more serious" offense for purposes of section 745.

It would not be surprising if a court took into consideration *all* the different measures of whether a sentence is more serious (i.e., length of maximum or minimum sentence, attendant consequences, and whether the crime is lesser included offense of the comparison crime), in deciding whether one offense is more serious than another. Doing so may cause confusion, however, when all the factors do not align in favor of finding one offense more serious than another. For example, a lesser-included offense is not necessarily less serious than a greater offense; it may simply have fewer statutory elements. (**See *People* v. *Wilkinson*** (2004) 33 Cal.4th 821, 839 [not irrational to *punish* lesser-included offense *more severely* than greater offense]; 2017-IPG#29 (LESSER INCLUDED OFFENSES) at p. 30; ***People* v. *Romo*** (1975) 14 Cal.3d 189, 196 [noting conviction for violating Pen. Code, § 245(a) could carry higher penalty than conviction for "*greater* offense of assault with intent to commit murder" in violation of former Penal Code section 217].)

Editor's note: For a list of which offenses are considered lesser included offenses of other offenses, **see** 2017-IPG#29 (LESSER INCLUDED OFFENSES) at pp. 85-116 -available upon request. The CJER Mandatory Criminal Jury Instruction Handbook (2015) published by CEB also provides a good list of crimes and their lesser included offenses.

However, whether an offense is a "more serious offense" should **not** be defined by reference to the sentence or punishment ***actually*** imposed on the defendant as disparities in the ***length of*** the actual sentence imposed are addressed in subdivision (a)(4).

i. Does the definition of an "offense" for purposes of determining whether an "offense" is a "more serious offense" include enhancements or penalty provisions?

Another issue that might crop up in deciding whether one offense is a "more serious offense than another" is whether section 745(a)(3) prohibits discrepancies based on race, ethnicity, or national origin in charging enhancements or penalty provisions. For example, if a defendant possesses 15 grams of heroin and all persons who possess 15 grams of heroin are likewise charged, but defendant is also charged with an enhancement for possessing more than 14.25

grams of a substance containing heroin and members of defendant's group are more frequently charged and convicted of that enhancement, has a violation of section 745(a)(3) occurred?

There is a distinction in the law between "substantive offenses" and enhancement or penalty provisions. (**See *People* v. *Wallace*** (2003) 109 Cal.App.4th 1699, 1702; ***People* v. *Garcia*** (1998) 63 Cal.App.4th 820, 827–828.) Section 745 only mentions "offenses" not enhancements or penalty provisions. Undoubtedly, allowing for violations to be found due to discrepancies in who is charged or convicted of enhancements or penalty provisions attributable to the state considering the race, ethnicity, or national origin of a defendant would be consistent with *the intent* behind AB 2542. And prosecutors might want to consider whether to even raise this issue if circumstances reveal true discrepancies in charging enhancements based on race, ethnicity, or national origin. But the plain language of the statute addresses only disparities in what "offenses" are charged, not what enhancements or penalty provisions are charged. (**See *People* v. *Statum*** (2002) 28 Cal.4th 682, 690 ["The plain language of the statute establishes what was intended by the Legislature."].)

In any event, regardless of how a "more serious offense" is defined, the burden would rest with the defendant to show that crime for which defendant was convicted is, in fact, a "more serious" offense" than the allegedly "less serious" crimes used for purposes of comparison.

D. What offenses (or crimes) are considered "similar offenses?"

Another element necessary to establishing a violation of section 745(a)(3) is that the defendant be charged or convicted of a "more serious" offense than other similarly situated defendants belonging to a different group "who commit ***similar offenses***." (Emphasis added.)

The term "offense" is generally used interchangeably with the term "crime" in the Penal Code and by courts. (**See** e.g., Pen. Code, § 15 ["A *crime or public offense* is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: . . ."]; § 16 ["Crimes and public offenses include: 1. Felonies; 2. Misdemeanors; and 3. Infractions."]; § 31 ["All persons concerned in the commission of *a crime*, whether it be felony or misdemeanor, and whether they directly commit the act constituting *the offense* . . ."]; ***People* v. *Bland*** (1995) 10 Cal.4th 991, 1002 ["With respect to felony drug possession, a defendant is armed "in the commission" of *that crime* so long as the defendant had the firearm available for use in furtherance of the *drug offense* at some point during the defendant's possession of the drugs"]; ***People* v. *Zermeno***

(1999) 21 Cal.4th 927, 932 ["Notably, both sections 971 and 31 refer to the commission of 'a' crime, and section 31 also uses the singular term 'the offense.'"], emphasis added throughout.)

It would have made more sense (and captured more of the discrimination the proponents of AB 2542 were hoping to root out) to have stated "(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~~ *engage in similar criminal conduct* and are similarly situated . . .".

Use of the term "commit similar offenses" reflects poor drafting because if one offense is truly a more serious charge than another offense, then it cannot logically be argued that those two offenses are "similar" in a meaningful way. Moreover, it would be highly unusual to give two different meanings to the same term used in the same sentence in attempt to avoid the conundrum. (**See *People* v. *Briceno*** (2004) 34 Cal.4th 451, 461 ["When a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout."]; ***People* v. *McCart*** (1982) 32 Cal.3d 338, 344 [same].) However, a court may or may not choose to ignore this logic.

If a court adheres to the plain language of the statute, in order to establish the defendant was charged with, or convicted of, a "more serious offense," the defense will likely have to show the defendant was arrested for the ***same*** offense as defendants belonging to other groups, but the defendant was then ***charged*** with a more serious offense or ***convicted*** of a more serious offense than defendants belonging to other groups who were arrested for the ***same*** offense as defendant. Or, conversely, that the defendants belonging to other groups were arrested for the same offense but were charged or convicted of a less serious offense.

For example, a violation of Penal Code section 243.1 should be viewed as a "similar" offense to a violation of Penal Code section 243(b). The two statutes carry different punishments (i.e., a violation of section 243.1 is a felony, a violation of section 243(b) is a misdemeanor) but when the offense is battery on a custodial officer in the performance of his or her duties, both statutes are violated. (**See *People* v. *Chenze*** (2002) 97 Cal.App.4th 521, 528.) Thus, assuming all the other prerequisites for a violation of section 745 are present, if a defendant was charged with a violation of section 243.1 for battery on a custodial officer, but defendants of different groups are just charged with violations of section 243(b), and members of defendant's group are more frequently charged with violating section 243.1 (instead of section 243(b)) than members of other groups, the defendant can show a violation of section 745.

If a court wants to give a *broader* reading and treat the term "offense" as meaning the **underlying conduct committed**, then "similar" offenses may be viewed as those offenses that involve conduct which would *almost always* be punishable under either of two different statutes. For example, a violation of Penal Code section 484e(c) is a different offense than a violation of Penal Code section 484e(d) and the two crimes carry different punishments (i.e., a violation of subdivision (c) is a misdemeanor while a violation of subdivision (d) is a wobbler). Fraudulent possession of someone else's credit card, however, ordinarily violates both subdivisions (c) and (d) (**see *People* v. *Molina*** (2004) 120 Cal.App.4th 507, 517) and thus it would be fair to treat these two subdivisions as similar offenses under this broader reading.

The concept of "similar offenses" might be given a *still broader* reading and be stretched to cover two offenses, one of which is a lesser included offense of the other. And might even be stretched to include two distinct offenses that involve different elements, but which *occasionally* punish the same conduct.

However, no matter how broad an interpretation is given to the term "offense," if that term is interpreted to mean the underlying conduct engaged in by the defendant, a violation of section 705(a)(3) ***can only logically be found when the underlying conduct engaged in by the defendant actually violates both of the statutes deemed similar.*** (**Cf.**, ***United States* v. *Armstrong*** (1996) 517 U.S. 456, 469 [to prove violation of equal protection based on selective prosecution, defendants must "produce some evidence that similarly situated defendants of other races *could* have been prosecuted but were not"], emphasis added.) The prosecution cannot be dinged for not charging an offense that they could not lawfully charge.

For example, if a defendant intentionally shot another person, either the offense of assault in violation of Penal Code section 240 (simple assault) or the offense of assault with a firearm in violation of Penal Code section 245(a)(2) (assault with a firearm) could be charged. In that situation, it is fair to treat the crime of simple assault as a "similar offense" to the crime of assault with a firearm for section 745(a)(3) purposes. But if the only conduct engaged in by the defendant was to swing a fist at another person, then it would not be fair to treat simple assault as similar to assault with a firearm. This is because, in that context, the crime of simple assault is NOT a similar offense to the crime of assault with a firearm because a prosecutor could not exercise any discretion in selecting which offense to charge: the prosecutor has to charge the simple assault and could not lawfully charge the assault with a firearm.

This also means, for example, that even under the broadest interpretation of what offenses are "similar," a defendant should not be able to prove a violation of section 745(a)(1) by showing that defendants of one group were more frequently charged and convicted of possession for sale versus defendants in another group unless the defendant can show the defendants used for comparison were charged with the *same* drug and *could* lawfully have been charged with possession of that drug for sale. (**Cf.**, ***United States* v. *Armstrong*** (1996) 517 U.S. 456, 460-461 [rejecting affidavit comparing black and non-black drug users and dealers as insufficient to meet showing for disclosure of discovery to support selective prosecution motion because, inter alia, the drug involved was not specified].)*

*__Editor's note__: A selective prosecution in violation of equal protection could conceivably occur, however, if there were a pool of defendants possessing different controlled substances, but all the substances caused comparable harm and were possessed in comparable amounts, and members of a particular race, ethnicity, national origin were much more frequently charged with possession for sale across the board. (**Cf.**, ***United States* v. *Watts*** (D. Mass. 2010) 736 F.Supp.2d 332, 333-334.)

The question of what constitutes a "similar crime" for purposes of section 745(a)(3) overlaps with the question of whether the defendants to whom defendant is being compared are "similarly situated" to the defendant. (**See** this IPG, section IV-8-E at pp. 71-87; ***People* v. *Applin*** (1995) 40 Cal.App.4th 404, 410 [persons who are convicted of different crimes are not similarly situated].)

E. What does it mean for other defendants to be "similarly situated" to the defendant for purposes of section 745(a)(3)?

Another element necessary to establishing a violation of section 745(a)(3) is that "the defendant be charged or convicted of a "more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses ***and are similarly situated*** . . ." (Emphasis added.) The requirement that the defendants be "similarly situated" was not included in the earlier versions of the CRJA. However, it was later expressly included *throughout* the proposed legislation by the Legislature. (*Compare* the 8/01/20 version of the California Racial Justice Act *with* the 8/20/20 version of the Act at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542.)

Perhaps the inclusion of the similarly situated requirement grew from concerns that failure to include it would be inconsistent with the "longstanding precept in Western thought that "likes" should be treated "alike." (**See** Giovanna Shay, Similarly Situated (2011) 18 Geo. Mason L.

Rev. 581, 586; **see also *Tigner* v. *Texas*** (1940) 310 U.S. 141, 147 ["The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same"]; ***City of Cleburne, Tex.* v. *Cleburne Living Center*** (1985) 473 U.S. 432, 439 ["The Equal Protection Clause . . . is essentially a direction that all persons *similarly situated* should be treated alike."]; ***Cooley* v. *Superior Court*** (2002) 29 Cal.4th 228, 253 ["The concept of the equal protection of the laws *compels* recognition of the proposition that persons *similarly situated* with respect to the legitimate purpose of the law receive like treatment."].) (Emphasis added throughout.) Or maybe it was included to clarify that section 745(a)(3) is, but for the requirement of intentional discrimination, a type of selective prosecution statute and derives from equal protection related concepts. (**See** this IPG, section IV-8-A & B at pp. 62-65.)

Perhaps it was included to reflect a recognition that a statute seeking to eliminate disparate impacts based on implied or express bias must not be so vague or broad that prosecutors are unable to make practical choices or exercise their ability to use discretion to further the various and legitimate goals of our criminal justice, including protection of the public, deterrence, rehabilitation, and punishment. (**Cf.**, ***Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*** (2015) 576 U.S. 519, 533 [noting "that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."]; ***Smith* v. *City of Jackson, Miss***. (2005) 544 U.S. 228, 242 [rejecting claim alleging that a police department violated the Age Discrimination in Employment Act by giving raises to lower, but not upper echelon officers, despite their being an adverse disparate impact on older officers, because trying to bring salaries in line with that of surrounding police forces was a decision based on a "'reasonable facto[r] other than age' that responded to the City's legitimate goal of retaining police officers."].)

Perhaps it was included to help save the legislation from being invalidated under the separation of powers doctrine. (**See *People* v. *Bunn*** (2002) 27 Cal.4th 1, 16 ["The separation of powers doctrine protects each branch's *core constitutional functions* from lateral attack by another branch" (emphasis added)]; ***United States* v. *Bass*** (2002) 536 U.S. 862, 864 [rejecting defendant's claim of entitlement to discovery in selective prosecution case based on raw statistics without having to show "relevant evidence that *similarly situated* persons were treated differently" because absent such a requirement, judicial intervention would threaten the "performance of a *core executive constitutional function*" (emphasis added)].)

Perhaps it was included to ensure that the discovery mechanism was not abused. (**Cf.**, ***Jones* v. *Sterling*** (2005) 210 Ariz. 308, 315–316 [noting a lenient standard for discovery to support a selective enforcement claim "would encourage the assertion of spurious claims of selective enforcement as a means of burdening criminal trials with massive discovery of material completely irrelevant to the defendant's case."].)

Or perhaps because, without its inclusion, no inference of disparate impact could legitimately arise. (**See *United States v. Aguilar*** (9th Cir. 1989) 883 F.2d 662, 706 ["The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination …. *If all other things are equal*, the prosecution of only those persons [to whom the factor applies] … gives rise to an inference of discrimination."], emphasis added.)

But regardless of the rationale behind its inclusion, the requirement that the defendants who are used for comparison purposes to the defendant be "similarly situated" to the defendant is an **essential element of section 745(a)(3).**

In the context of section 745(a)(3), the requirement that defendant identify similarly situated defendants serves the purpose of eliminating causes for disparate impact other than implied bias in prosecution. The more robust and nuanced the definition of "similarly situated," the more accurate section 745(a)(3) will be in ferreting out and eliminating implied bias. Conversely, the less robust and nuanced the definition of "similarly situated," the less accurate section 745 will be in ferreting out implied bias and the greater the chance that any remedy imposed will *create*, not eliminate, disparities based on race, ethnicity, or national origin. (**Cf.**, ***United States* v. *Ford*** (D. Or. 2016) 2016 WL 4443167, at p.*4 [allowing discovery based solely on statistical disparities absent a showing the groups being compared are similarly situated "could create a situation where a prosecutor does not pursue a meritorious charge against a minority defendant for the sole reason of avoiding a statistical anomaly."].)

Section 745 does not define the term "similarly situated" but it is a term commonly used in the case law. In particular, the term is often used in cases addressing claims that a defendant has been denied equal protection of the law due to the fact the defendant has been singled out for a prosecution based upon an unjustifiable standard such as race, religion, or other arbitrary classification. And this is the most closely analogous context to a claim that the state sought or obtained a conviction or sentence on the basis of race, ethnicity, or national origin in violation

of Penal Code section 745. (**See *United States* v. *Bass*** (2002) 536 U.S. 862, 863 [requiring a "credible showing" that "*similarly situated* individuals of a different race were not prosecuted."]; ***United States* v. *Armstrong*** (1996) 517 U.S. 456, 469 [requiring "defendant to produce some evidence that *similarly situated* defendants of other races could have been prosecuted, but were not"]; ***Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826, 832 ["Because the particular defendant, unlike *similarly situated* individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice."]; ***Murgia* v. *Municipal Court*** (1975) 15 Cal.3d 286, 298 [same]; **see also *United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27 ["Although we have not previously provided a distinct definition of the term 'similarly situated' in the selective prosecution context, *classic equal protection principles light our path and limn the attributes of one who is similarly situated."* (Emphasis added)].)

> ***Editor's note**: "After gaining currency in equal protection case law, the phrase 'similarly situated' migrated beyond Fourteenth Amendment litigation into other doctrinal contexts. . . . In addition to equal protection analysis, the phrase 'similarly situated' appears in cases involving tax law, the Clean Water Act, the commerce clause, shareholder actions, class action certification, social security, employment discrimination, standing, antitrust, and bills of attainder. It appears in numerous criminal law contexts, including sentencing, selective prosecution claims, capital punishment, Eighth Amendment proportionality review, retroactivity analysis, ex post facto claims, and peremptory challenges, among others." (Giovanna Shay, Similarly Situated (2011) 18 Geo. Mason L. Rev. 581, 585-586.)

Different courts define "similarly situated" in a slightly different manner in the context of selective prosecution claims, but they all share a focus on (1) whether the defendants being used for comparison purposes committed the same or similar crimes as the defendant and (2) whether distinctions may be drawn between the defendant and those persons being compared to the defendant ***based on legitimate and relevant circumstances*** prosecutors consider in exercising their charging function. (**See *United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1060 [discussing policy behind and cases defining "similarly situated" element].)

"A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced. [Citation omitted.] In configuring the pool of similarly situated offenders, 'no fact should be *omitted to make it out completely*.'" (***United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27 citing to ***United States* v. *Armstrong*** (1996) 517 U.S. 456, 469 [emphasis

added]; ***Sacramento Nonprofit Collective* v. *Holder*** (E.D. Cal. 2012) 855 F.Supp.2d 1100, 1110, aff'd (9th Cir. 2014) 552 Fed.Appx. 680 [same].)

"Defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." (***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 900–901; ***United States* v. *Deberry*** (10th Cir. 2005) 430 F.3d 1294, 1301; ***United States* v. *Taylor*** (D.N.M. 2009) 608 F.Supp.2d 1263, 1266.)

"[W]e define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant." (***United States* v. *Smith*** (11th Cir. 2000) 231 F.3d 800, 810; ***United States* v. *White*** (8th Cir. 2019) 928 F.3d 734, 743.)

Editor's note**: The focus on those persons being "similarly situated" on ***relevant and material points is not unique to the selective prosecution context. (**See *Gupta* v. *Trustees of California State University*** (2019) 40 Cal.App.5th 510, 519–520 ["'To be probative,' 'comparative data ... must be directed at showing disparate treatment between employees [who] are "similarly situated" to the plaintiff in all relevant respects.'"]; ***People* v. *Winbush*** (2017) 2 Cal.5th 402, 443 [when doing comparative analysis to ferret out discrimination in jury selection, "jurors need not be completely identical for a comparison to be probative" but "they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge."]; ***Squires* v. *City of Eureka*** (2014) 231 Cal.App.4th 577, 595 ["to be considered "'similarly situated,'" comparators must be "'prima facie identical in all relevant respects'" or "'directly comparable to [plaintiff] in all material respects'""].)

This does not mean that the pool of individuals who the defendant must show are "similarly situated" must be *identical* to the defendant. "Unrelated, irrelevant, or trivial factors cannot meet the materiality requirement and, therefore, cannot be built into the configuration of the pool." (***United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27; **cf.**, ***Cooley* v. *Superior Court*** (2002) 29 Cal.4th 228, 253 [when an equal protection claim is made, the "initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged'"].) But it does mean that when "determining whether a defendant and others are 'similarly situated' for purposes of a claim of selective prosecution, '[t]he focus of an inquiring court must be on factors that are at least arguably

material to the decision as to whether or not to prosecute,' and a factor will be deemed 'material' if it has 'some meaningful relationship either to the charges at issue or to the accused' and therefore 'might be considered by a reasonable prosecutor.'" (***United States* v. *Hendrickson*** (E.D. Mich. 2009) 664 F.Supp.2d 793, 799; **see also *United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27["court should assess every material fact in rendering its judgment as to which offenders should be deemed similarly situated"]; **cf.**, ***United States v. Docampo*** (11th Cir.2009) 573 F.3d 1091, 1101 ["'A well-founded claim of disparity ... assumes that apples are being compared to apples.'"]; ***Cordi-Allen* v. *Conlon*** (1st Cir. 2007) 494 F.3d 245, 251 ["To carry the burden of proving substantial similarity, "plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." (Citation omitted.) While the applicable standard does not require that there be an '[e]xact correlation,' . . . there must be sufficient proof on the relevant aspects of the comparison to warrant a reasonable inference of substantial similarity. Thus, the proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile."].)

The bottom line is that the addition of the element that the defendant be compared to those similarly situated (an element that was *intentionally included* by the legislature in AB 2542 after being omitted from earlier versions of the bill) must be taken into consideration whenever the defendant has a burden to meet, i.e., to obtain discovery, to obtain an evidentiary hearing, or to prevail on the motion. (See, respectively, this IPG, sections V-5 at pp. 133-158; VI-1 at pp. 168-169;IV-5-A at pp. 49-50.) Failure to do so, not only directly contradicts express language in the statute (**see** Pen. Code, § 745(a)(3) &(4)), it effectively eliminates the requirement that the evidence sought be relevant at the discovery stage (**see** Pen. Code, § 745(d)). Moreover, failure to consider whether the defendants being compared are similarly situated on relevant and material points or relying on superficial similarities will inevitably result in ***creating*** disparate treatment based on race, ethnicity, or national origin by distorting the equation.

i. What factors should a court look at in determining whether defendants are similarly situated?

"A multiplicity of factors *legitimately* may influence the government's decision to prosecute one individual but not another." (***United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27 citing to ***Wayte* v. *United States*** (1985) 470 U.S. 598, 607 and ***United States* v. *Magana***

(1st Cir. 1997) 127 F.3d 1, 9.) Many of the factors material to the decision to seek and obtain a conviction are also factors that courts are told to consider in deciding whether to grant or deny probation or to impose an aggravated or mitigated sentence. Legitimate and influential factors in determining whether a criminal defendant will be charged, offered, or convicted of a more or less serious crime (and thus are relevant factors in determining whether a defendant is "similarly situated" to other defendants) include:

● *The strength of the case, including the availability of witnesses.* (**See *United States* v. *Armstrong*** (1996) 517 U.S. 456, 465; ***Wayte* v. *United States*** (1985) 470 U.S. 598, 607; ***United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27; ***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; ***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177 [noting *insufficient* showing Caucasian defendant offered up for comparison with Hispanic defendant facing death penalty was similarly situated where, unlike Hispanic defendant, Caucasian defendant had been found incompetent to stand trial for killing his pregnant estranged wife and daughter, and a key prosecution witness had died before criminal proceedings resumed]; ***United States* v. *Deberry*** (10th Cir. 2005) 430 F.3d 1294, 1301 [questioning whether African-American defendants committing stabbing in jail were similarly situated to Native-Americans committing stabbing in jail, in part, because former stabbing was captured on videotape making evidence stronger than case against Native-Americans based only on impeachable eyewitnesses].) This factor would include consideration of whether the conviction occurred after an earlier mistrial – since an offer may be reduced in that circumstance.

● *Whether a defendant has a criminal history and how extensive it is.* (**See *Davis* v. *Municipal Court*** (1988) 46 Cal.3d 64, 82, fn. 9 [quoting Cal. Dist. Attys. Assn., Uniform Crime Charging Standards and ABA Standards for Criminal Justice]; ***People* v. *Wilkes*** (2020) 46 Cal.App.5th 1159, 1165 [specifically finding offenders with criminal histories are not "similarly situated" to non-recidivist offenders]; **see also *People* v. *Edwards*** (2019) 34 Cal.App.5th 183, 196 [state *laws* drawing distinction between treatment of recidivist offenders and others do not violate equal protection]; Cal. Rule of Court, Rule 4.414(b)(1) ["Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct" are factors in denial of grant of probation]; Rule 4.421(b)(2) [aggravating factor if "defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness"]; Rule 4.421(b)(3) [aggravating factor if "defendant has served a prior term in prison or county jail under

section 1170(h)"]; Rule 4.423(b)(1) [mitigating factor if "defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes"].)

● *Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole* (**See** Cal. Rule of Court, Rule 4.414(b)(2) [factor in denial or grant of probation]; Rule 4.421(b)(4) [present status is aggravating factor]; Rule 4.421(b)(5) [prior performance is aggravating factor]; Rule 4.424(b)(6) [past satisfactory performance is mitigating factor]; see also Rule 4.414(b)(3) ["Willingness to comply with the terms of probation"]; Rule 4.414(b)(4) ["Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors"].)

● *Age of the defendant* (**See *United States* v. *Davis*** (6th Cir. 2008) 537 F.3d 611, 617 [consideration of defendant's advanced age in imposing sentence appropriate]; ***United States* v. *Smith*** (1st Cir.2006) 445 F.3d 1, 5 [same].)

● *Unusual circumstances, including those providing "near legal" defense.* (**See *People* v. *Suarez*** (2020) 10 Cal.5th 116, 177 [noting insufficient showing Caucasian defendant offered up for comparison with Hispanic defendant facing death penalty was similarly situated where, inter alia, and unlike Hispanic defendant, Caucasian defendant had been found *incompetent* to stand trial for killing his pregnant estranged wife and daughter]; Cal. Rule of Court, Rule 4.414(a)(7) ["Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur" is a factor in denial or grant of probation]; Cal. Rule of Court, Rule 4.423(a)(3) [same circumstance is a mitigating factor]; Rule 4.423(a)(4) [mitigating factor if "defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense"]; Rule 4.423(a)(7) [mitigating factor if "defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal"]; Rule 4.423(a)(8) [mitigating factor if "defendant was motivated by a desire to provide necessities for his or her family or self"]; Rule 4.423(a)(9) [mitigating factor if "defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse

does not amount to a defense"]; Rule 4.423 (b)(2) [mitigating factor if "defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime"].)

● *Role of the victim*. (**See** Cal. Rule of Court, Rule 4.423(a)(2) [mitigating circumstance if "victim was an initiator of, willing participant in, or aggressor or provoker of the incident"].)

● *The defendant's candor and willingness to plead guilty*. (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; **see also *United States* v. *Bass*** (2002) 536 U.S. 862, 863-864 [where defendant who refused plea bargain is claiming discriminatory treatment, statistics on defendants who accept plea bargains are not relevant]; Cal. Rule of Court, Rule 4.423(b)(3) [mitigating factor if "defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process"].)

● *Whether the defendant will present a danger if released*. (Cal. Rules of Court, Rule 4.414(b)(8) ["The likelihood that if not imprisoned the defendant will be a danger to others" is a factor in grant or denial of probation] and Rule 4.421(a)(5) [aggravating circumstance if the "defendant has engaged in violent conduct that indicates a serious danger to society"].)

● *Whether the defendant induced a minor to commit or assist in the commission of the crime*. (Cal. Rule of Court, Rule 4.421(a)(5) [aggravating circumstance].)

● *Whether the defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process*. (Cal. Rule of Court, Rule 4.421(a)(6) [aggravating circumstance]; Rule of Court 4.423(a)(6) [mitigating factor if "no harm was done or threatened against the victim"].)

● *Whether a defendant chooses to cooperate and expose more criminal activity*. (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; ***United States* v. *Docampo*** (11th Cir. 2009) 573 F.3d 1091, 1101.)

● *The defendant's role in the crime, e.g., was the defendant an aider or abettor or a direct perpetrator*. (**See *People* v. *Keenan*** (1988) 46 Cal.3d 478, 507, fn. 11; ***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; Cal. Rule of Court, Rule 4.414(a)(6) ["Whether the defendant was an active or a passive participant"]; Cal. Rule of Court, Rule 4.421(a)(4) [aggravating circumstance if "defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission"];Rule 4.423(a)(1) [mitigating circumstance if "defendant was a passive

participant or played a minor role in the crime"]; 4.423(a)(5) [mitigating circumstance if "defendant, with no apparent predisposition to do so, was induced by others to participate in the crime"].)

● *The comparability, including relative severity, of the crimes.* (**See *Davis* v. *Municipal Court*** (1988) 46 Cal.3d 64, 82, fn. 9; ***United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 27; ***People* v. *Suarez*** (2020) 10 Cal.5th 116, 177-178 [noting insufficient showing Caucasian defendants offered up for comparison with Hispanic defendant facing death penalty was similarly situated where cases against Caucasian defendant involved fewer murders and no rape allegations]; Cal. Rule of Court, Rule 4.414(a)(1) [factor in grant or denial of probation].)

● *Whether the defendant was armed or used a weapon.* (**See *People* v. *Stokes*** (Ill. App. Ct. 1981) 430 N.E.2d 370, 376 ["treating armed felons more severely than unarmed felons, does not violate equal protection since the two groups are not 'similarly situated"]; Cal. Rule of Court, Rule 4.414(a)(2) [factor in grant or denial of probation]; Cal. Rule of Court, Rule 4.421(a)(2) [aggravating circumstance].)

● *The amount of loss or damage.* (See Cal. Rule of Court, Rule 4.414(a)(5) [factor in grant or denial of probation]; Rule 4.421(a)(9) [aggravating circumstance if "crime involved an attempted or actual taking or damage of great monetary value"]; Rule 4.423(a)(6) [mitigating factor if "defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small"].)

● *Whether the defendant made restitution to the victim.* (Cal. Rule of Court, Rule 4.423(b)(5) [mitigating factor].)

● *Whether the defendant inflicted physical or emotional injury.* (Cal. Rule of Court, Rule 4.414(a)(5); see also Cal. Rule of Court, Rule 4.421(a)(1) [aggravating circumstance if the "crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"]

● *Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant.* (See Cal. Rules of Court, Rule 4.414(a)(8) [factor in grant or denial of probation] and Rule 4.421(a)(8) [aggravating circumstance].)

● *Whether the defendant took advantage of a position of trust or confidence to commit the crime.* (See Cal. Rules of Court, Rule 4.414(a)(9) [factor in grant or denial of probation] and Rule 4.421(a)(11) [aggravating circumstance].)

● *Whether the crime involved a large quantity of contraband*. (Cal. Rule of Court, Rule 4.421(a)(10) [aggravating circumstance].)

● *Whether the victim was particularly vulnerable.* (See Cal. Rules of Court, Rule 4.421(a)(3) [aggravating circumstance] and Rule 4.414(a)(3) [factor in grant or denial of probation].)

● *Whether the defendant is remorseful.* (Cal. Rule of Court, Rule 4.414(b)(7).)

● *Whether the defendant is being prosecuted by other authorities*. (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901.)

● *The number of charges facing the defendant*. (**See *United States* v. *Lewis*** (1st Cir. 2008) 517 F.3d 20, 28; ***United States* v. *Smith*** (11th Cir. 2000) 231 F.3d 800, 812; **see also** Cal. Rule of Court, Rule 4.421(a)(7) [aggravating circumstance if "defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed"].)

● *Whether the defendant is subject to additional consequences such as deportation stemming from the criminal conviction* (**See** this IPG, section IX-1 at pp. 210-212; ***Padilla* v. *Kentucky*** (2010) 559 U.S. 356, 373; Pen. Code, § 1016.5(d); Cal. Rules of Court, 4.414(b)(6) ["The adverse collateral consequences on the defendant's life resulting from the felony conviction" is a favor in denial or grant of probation].)

● *Whether the crime constitutes a hate crime under section 422.55 and no hate crime enhancements under section 422.75 are imposed nor is the crime subject to sentencing under section 1170.8.* (Cal. Rule of Court, Rule 4.421(a)(12) [aggravating circumstance].)

● *The amount of resources required to convict a defendant*. (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901.)

● *The extent of prosecutorial resources.* (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901.)

● *The potential impact of a prosecution on related investigations and prosecutions.* (**See *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901.)

● *The government's enforcement priorities.* (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 465; ***Wayte* v. *United States*** (1985) 470 U.S. 598, 607; ***United States* v. *Magana*** (1st Cir. 1997) 127 F.3d 1, 9; ***United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901.)

● *The "cases's relationship to the Government's overall enforcement plan."* (***United States* v. *Armstrong*** (1996) 517 U.S. 456, 465; ***Wayte* v. *United States*** (1985) 470 U.S. 598, 607.)

● *The likelihood of defendant re-offending*. (**See *Davis* v. *Municipal Court*** (1988) 46 Cal.3d 64, 82, fn. 9.)

Note that even defendants who commit *the same offense together* may not be similarly situated. (**See e.g., *United States* v. *Venable*** (4th Cir. 2012) 666 F.3d 893, 901; ***United States* v. *Docampo*** (11th Cir. 2009) 573 F.3d 1091, 1101; ***United States* v. *Mateo–Espejo*** (1st Cir.2005) 426 F.3d 508, 514.)

ii. What is the time frame within which the defendants used for comparison must fall to be deemed "similarly situated?"

Section 745(a)(3) itself does not say when the "defendants of other races, ethnicities, or national origins who commit similar offenses" had to have committed their offenses in order for them to be compared to the defendant other than that these defendants must be "similarly situated." However, it is difficult to believe that persons who are not charged or convicted within a contemporaneous time period as the defendant can be deemed similarly situated to the defendant.

As an initial limitation, because section 745 only applies prospectively, the relevant comparison group should only be defendants who commit similar offense whose judgment has not yet been entered before January 1, 2021. (**See** Pen. Code, § 745(j) ["This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021."].)

Moreover, the time frame in which the comparison defendants were charged, convicted, or sentenced must be a relatively contemporaneous period in order for the defendants to be "similarly situated." ***Annual*** changes in the law by the legislature impact what can be charged, what offers are made, and what sentences are imposed. (**See e.g.,** Assem. Bill No.

1950 (2019-2020 Reg. Sess.) [limiting maximum period of probation for most misdemeanor crimes to one year and to two years for most felony cases while eliminating court's power to impose a probation period that is as long as the defendant's maximum jail term]; Assem. Bill No. 3234 (2019-2020 Reg. Sess.) [authorizing judicial diversion to most misdemeanor defendants even over objection by the prosecution].) Similarly, numerous initiatives have dramatically altered the landscape of charging, plea negotiations, and sentencing. (**See e.g.**, Proposition 57 [significantly reducing the amount of time before persons convicted of a nonviolent felony offense are eligible for parole consideration and changing law as to whether minors may be prosecuted as adults as of November 2016]; Proposition 64 [legalizing recreational use of marijuana and reducing criminal penalties for various marijuana-related offenses as of November 2016]; Proposition 47 [rendering numerous drug- and theft-related offenses misdemeanors instead of felonies and prohibiting shoplifting from being charged as burglary as of November 2014].)

Changes in elected district attorneys and/or changes in office-charging policies also can heavily impact what cases are charged, what offers are made, and what sentences are imposed in a very short period of time. (See e.g., https://www.mercurynews.com/2020/07/22/santa-clara-county-district-attorney-unveils-wide-ranging-reform-plan-to-address-racial-equity-disparities-in-prosecutions/ [discussing institution of wide-ranging reforms to address racial inequity in prosecutions, including dropping death penalty charges, revamping charging criteria, increasing police oversight, and backing off minor violations by Santa Clara County District Attorney]; https://www.sfgate.com/news/bayarea/article/District-Attorney-Boudin-Announces-New-Policy-15094513.php [discussing new policy prohibiting prosecutors from charging people with the possession of contraband resulting from stop-and-frisk style pretextual searches, or making use of status-based sentencing enhancements such as prior strikes or alleged gang affiliation status, except in extraordinary circumstances by San Francisco District Attorney]; https://townhall.com/tipsheet/juliorosas/2020/12/08/los-angeles-new-da-releases-stunning-list-of-radical-changes-n2581209 [discussing new policy of, inter alia, refusing to charge trespassing, disturbing the peace, criminal threats, drug possession, drug use, resisting arrests except in certain cases, and refusing to charge all sentencing enhancements by Los Angeles District Attorney].)

Larger events impacting society in general, like the 2020 pandemic, can have a massive influence on charging, plea negotiations, and sentencing. Due to pressures stemming from the

need to reduce jail populations and more limited courtroom availability, there will be significant differences in what plea bargains are offered and what sentences are imposed in 2020 and 2021 versus the year preceding the pandemic. Budget cuts can also limit resources to investigate certain crimes and reshuffle priorities in charging. (**Cf.,** ***Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County*** (11th Cir. 1997) 122 F.3d 895, 912 [statistical analysis of construction contracts did not include fiscal year 1992 because of the extraordinary expenditures associated with Hurricane Andrew].)

Thus, comparing a defendant who was charged and convicted in 2020 or 2021 with defendants who were charged and convicted three years ago, tells us very little about whether the defendant is *currently* being charged or convicted unfairly in relation to other defendants. Equally important, unless the defendants being compared are similar situated from a *chronological* standpoint, there is an unacceptable risk that discrimination will be found where it does *not* exist, and that discrimination will *not* be found where it *does* exist.

For example, assume that each year there are 100 people who could be potentially charged with either possession for sale or simple possession based on possessing 2 ounces of cocaine. Of those 100 people, 25 belong to group A. In each year between 2010-2019, of the 25 people in group A, 20 are charged with possession for sale. In all other groups, only 15 are charged with possession for sale. However, as a result of new policies, a new administration, changes in the law, etc., in 2020, only 10 people are charged in group A, but the percentage of defendants charged in all the other groups remains at the same rate. If the ten-year comparison group is used, then it will appear that the defendants in the same group as the defendant are more frequently being charged and convicted vis-à-vis defendants not in defendant's group. Correcting the sentence of defendants convicted in group A by reducing a case charged as possession for sale to possession based on the 10-year statistics will then result in discrimination against defendants in the other groups who engaged in identical conduct in the *past year*. The comparison defendants contemporaneously charged will not have their sentences reduced – even though the prosecution charged them with the same offense as the defendant in group A.

If a defendant of one race, ethnicity, or national origin can obtain a reduction in charges, whereas a defendants of other races, ethnicities, or national origin cannot, because the statistics used to show a disparity are based on a ten-year period of comparison – *even though no disparity would be shown using a contemporaneous one year period of comparison* - then

the defendant who has been deprived of the ability for the reduction based on membership in the relevant group will have a valid claim that section 745 itself violates equal protection *as applied*. (**See *McLaughlin* v. *State of Fla.*** (1964) 379 U.S. 184, 188 [noting "equality of protection under the laws implies that any person, 'whatever his race shall not be subjected, for the same offense, to any greater or different punishment.'"].) The very purpose of section 745 would be undermined if the comparison is distorted by failure to require inclusion of less contemporaneous statistics or if defendants are not similarly situated contemporaneously.

***Editor's note:** Expect defense counsel to argue that by limiting the comparison group to defendants in cases where judgment has not been entered as of January 1, 2021, motions alleging violations of section 745(a)(3) or (a)(4) are effectively postponed for 6 months or a year until relevant data can be accumulated. The response to this claim is primarily that unless data relevant to a claim that a defendant is suffering adverse consequences due to race, ethnicity, or national origins in comparison to other defendants is current, the data is irrelevant. Moreover, it should also be noted that prosecutor's offices need to be given some amount of time to develop a means of collecting the relevant data in light of the passage of section 745. Otherwise, it will be impossible to avoid the problem of burdensome requests and the problem of insufficient data to accurately detect implicit bias in the system.

iii. When determining whether a defendant was charged or convicted of a more serious offense than similarly situated defendants of other races, ethnicities, or national origins who commit similar offenses, how many defendants of other races, ethnicities, or national origin must be offered up for comparison purposes?

Section 745(a)(3) allows for a violation to be shown if, inter alia, "[t]he defendant was charged or convicted of a more serious offense than ***defendants*** of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, . . .". (Emphasis added.) Assuming the other elements of section 745 are met, is there a violation if ***any*** similarly situated defendant of a different race, ethnicity, or national origin than defendant was charged or convicted of a less serious offense for committing a similar offense to that committed by the defendant? The statute does not identify *how many* defendants of other races, ethnicities, or national origin must be presented for comparison purposes in order for a defendant to obtain discovery, to make a prima facie showing for an evidentiary hearing, or to prevail after the hearing.

In the *selective prosecution or enforcement* context, the numbers of defendants (both defendants belonging to defendant's group and defendants belonging to the other groups)

offered to show disparate impact by way of comparison can vary but generally do not involve insubstantial numbers. (**See e.g.**, ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1181-1185 [referencing 21-26 purportedly similarly situated defendants who were not prosecuted in establishing requisite showing for discovery]; ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 715, 722-723 [allowing limited discovery in selective prosecution case where defendants established government "prosecuted 20 stash-house stings, and that of the defendants in these cases 75 were black and 19 white" (and 13 of the 19 white defendants were also Hispanic)]; ***United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1060 [finding defendants established some evidence of discriminatory effect in government targeting of drug dealers around schools and playgrounds because "all 37 of those targeted and arrested" were African American].) On the other hand, depending on the specific nature of the claim, in the employment discrimination context, assuming all the other elements are shown, a "prima facie" case of discrimination for failure to promote, can potentially be met even though the plaintiff is only compared to a single similarly situated employee outside of a protected class. (***Compare Jordan* v. *City of Gary, Ind.*** (7th Cir. 2005) 396 F.3d 825, 834 [comparison of only two persons] ***with Paige* v. *California*** (9th Cir. 2002) 291 F.3d 1141, 1144 [comparison of approximately 5,675 persons].)

Regardless, because section 745(a)(3) refers to "defendant***s*** of other races, ethnicities, or national origins who commit similar offense***s***", the statute contemplates comparison to at least more than one defendant. Had comparison to a single other similarly situated defendant been sufficient, the statute would have stated "The defendant was charged or convicted of a more serious offense than a defendant of another race, ethnicity or national origin."

The level of proof required to obtain discovery ('good cause") or an evidentiary hearing (a "prima facie" showing) will be discussed in this IPG, respectively, in section IV-5 at pp. 133-152 and VI-1 at pp. 168-170. But to *prevail on* a section 745(a)(3) motion, it appears unlikely that showing the defendant was charged with or convicted of a more serious offense in comparison to just a few similarly situated defendants not belonging to defendant's group will suffice *unless* there are adequate numbers to definitively meet the second prong of section 745(a)(3) requiring defendant to show that "the prosecution more frequently sought or obtained convictions for more serious offenses against" similarly situated persons charged with similar crimes who belong to the defendant's group. And unless the statistics relating to the second prong *comprehensively* cover all similarly situated defendants charged with similar offenses within a contemporaneous time period, the less the chance the defendant will be able to meet

the second prong. (**Cf.**, ***Carter* v. *CB Richard Ellis, Inc.*** (2004) 122 Cal.App.4th 1313, 1325 [finding "plaintiff failed to establish a prima facie case of disparate impact discrimination because her data set was incomplete," since she "offered no evidence regarding the gender or age composition of *all* of defendant's employees", emphasis in original].)

iv. Must the defendants against whom defendant is being compared be defendants charged or convicted in the same county as the defendant?

Section 745(a)(3) states that the evidence must establish "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***. (Pen. Code, § 745(a)(3), emphasis added.) Technically, it does not state that *the defendant* must be charged or convicted of a more serious offense than defendants in the same county. However, because the group of defendants charged or convicted in the same county is defined as the relevant comparison group for purposes of the second sentence of section 745(a)(3), it is likely that the courts will also find the defendants used for comparison in the first sentence must also be charged or convicted in the county. And, if the defendants being compared in the first sentence of section 745(a)(3) were in another county, they would not be similarly situated anyway.

F. What does it mean for the prosecution to have "more frequently sought or obtained convictions" as described in section 745(a)(3)?

The second element defendants must show to establish a violation of section 745(a)(3) is to prove "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." (Emphasis added.)

The term "more frequently sought or obtained" is defined in subdivision (h)(1) of section 745 to mean "that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions . . . comparing individuals who have committed ***similar offenses and are similarly situated,*** and the prosecution cannot establish race-neutral reasons for the disparity." (Pen. Code, § 745(h)(1), emphasis added.)

The terms "similar offenses" and "similarly situated" will undoubtedly be interpreted to mean the same thing throughout all of section 745(a)(3). (**See** this IPG, respectively, section IV-8-D at pp. 67-71 and IV-8-E at pp. 71-87.) This is because "[w]hen a word or phrase is repeated in a

statute, it is normally presumed to have the same meaning throughout." (***People* v. *Briceno*** (2004) 34 Cal.4th 451, 461; ***People* v. *McCart*** (1982) 32 Cal.3d 338, 344, 185.)

i. What is "aggregate data" as that term is used in section 745(h)(1)?

As noted above, to show the prosecution more frequently sought or obtained convictions against a particular race, ethnicity, or nationality, the "statistical evidence or ***aggregate data***" must demonstrate a significant difference in seeking or obtaining convictions . . ." (Pen. Code, § 745(h)(1), emphasis added.)

The term "aggregate data" is not defined in section 745, but the term is often used in California statutes when referring to information about individuals that is collected and compiled into statistics or summaries for public distribution in a form that does not disclose the identity of the individuals to whom the information pertains. (**See** Gov. Code, § 8310.7(c)(2) ["The state department identified in paragraph (3) of subdivision (a) shall not report demographic data that would permit identification of individuals. The department may, to prevent identification of individuals, *aggregate data* categories at a state, county, city, census tract, or ZIP Code level *to facilitate comparisons and identify disparities*."]; Food & Agr. Code, § 65076(b) ["*Data that is aggregated* from proprietary information, including the total amount refunded by the council annually, is not confidential, and may be disclosed to the public, if the data does not disclose proprietary information of an individual producer and the data does not identify an individual producer."]; Mil. & Vet. Code, § 58(a)(3) ["Reporting on restricted cases shall be limited to *aggregated statistical data* so that the privacy of victims is protected. Reporting on unrestricted cases shall be limited to aggregated statistical data, but shall include, at a minimum, the following subcategories. . ."]; Pub. Util. Code, § 913.3(d) ["The commission shall *aggregate data* to the extent required to ensure protection of the confidentiality of individual contract costs even if this aggregation requires grouping contracts of different energy resource type."]; Welf. & Inst. Code, § 16543 ["Consistent with state and federal law, the council shall have access to *aggregate data* and information concerning the child welfare and foster care systems held by any state or local department, agency, or court that serves children, youth, and families receiving child welfare and foster care services subject to state and federal confidentiality laws and regulations."].)

However, the term is also sometimes in cases involving claims of alleged discrimination simply to refer to consolidating databases that might ordinarily be divided. (**See e.g.**, ***Eldredge* v. *Carpenters 46 Northern California Counties Joint Apprenticeship and Training***

Committee (9th Cir. 1987) 833 F.2d 1334, 1339 [aggregate data was just a consolidation of annual data over a nine-year period]; ***Paige* v. *California*** (9th Cir. 2002) 291 F.3d 1141, 1148 [aggregate data was result of combining non-white officers into single group rather than dividing them according to individual minority groups]; ***Engineering Contractors Ass'n of South Florida Inc.* v. *Metropolitan Dade County*** (11th Cir. 1997) 122 F.3d 895, 919 [aggregate data was a result of combining three different contracting programs directed at different groups].)

In the context of a section 745(a)(3) claim, either or both definitions of the term "aggregate data" could be meant and applied. However, if the reference in section 745(h)(1) to aggregate data was referring to the second definition, it *may* be redundant – at least in part. (**See** this IPG, section IV-H at pp. 95-97.)

ii. What does it mean for there to be a "significant difference" in seeking or obtaining convictions against a particular group as that term is described in section 745(h)(1)?"

As noted above, to show the prosecution more frequently sought or obtained convictions against a particular race, ethnicity, or nationality, the "statistical evidence or aggregate data" the defendant "must demonstrate ***a significant difference*** in seeking or obtaining convictions . . . comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." (Pen. Code, § 745(h)(1), emphasis added.)

The statute does not define "significant difference." This means courts can *potentially* interpret "significant" to be anywhere from a one percent differential to a 100% percent differential in the rate of seeking or obtaining longer or more severe convictions amongst different groups. Ultimately, the question should be "at what point is a disparity sufficiently large, and the probability that the disparity was caused by chance sufficiently low, that an inference of discrimination can be drawn solely from the fact of the disparity." (***Stender* v. *Lucky Stores, Inc.*** (N.D. Cal. 1992) 803 F.Supp. 259, 322–323; **see also *Ottaviani* v. *State University of New York at New Paltz*** (2d Cir. 1989) 875 F.2d 365, 372 ["statistical significance indicates that it is fairly unlikely that an observed disparity is due to chance, and it can provide indirect support for the proposition that disparate results are intentional rather than random."].)

While courts are not required to do so, they are *likely* to look to case law interpreting what constitutes a "significant" difference when determining whether a group has been subject to disparate treatment or disparate impact for equal protection purposes or for purposes of applying other anti-discrimination laws. (**See *Ricci* v. *DeStefano*** (2009) 557 U.S. 557, 587 [describing "a prima facie case of disparate-impact liability" as "essentially, a threshold showing of a *significant statistical* disparity"]; ***City of Richmond* v. *J.A. Croson Co.*** (1989) 488 U.S. 469, 509 ["Where there is a *significant statistical* disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."]; ***Jones* v. *City of Boston*** (1st Cir. 2014) 752 F.3d 38, 43 ["Statisticians . . . ask whether the outcomes of an employment practice are correlated with a specified characteristic, such as race, and, if so, whether the correlation can reasonably be attributed to random chance. The customary yardstick for making this latter determination is called "*statistical significance*."], emphasis added to all.) Looking to this caselaw is useful because courts in those contexts are looking for "significant differences" in how laws are applied to similarly situated persons and groups *for the same reasons* that courts are required to check for significant inter-group differences under section 745(a)(3): to ferret out discrimination (e.g., implied bias) in how laws are being applied.

"Statisticians employ a number of different methods to assess statistical significance in a variety of different contexts." (***Jones* v. *City of Boston*** (1st Cir. 2014) 752 F.3d 38, 43 [citing to the Federal Judicial Center, Reference Manual on Scientific Evidence 251 (3d ed. 2011)].) But whatever the method of analysis, a claimant relying on disparities to establish discrimination exists, must "demonstrate the existence of a statistical disparity significant enough to give rise to an inference of discrimination." (***Ficken* v. *Clinton*** (D.D.C. 2012) 841 F.Supp.2d 85, 89; **see also *Watson* v. *Fort Worth Bank and Trust*** (1988) 487 U.S. 977, 994–995 [noting that in employment discrimination cases, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation."].)

Moreover, *all* approaches recognize that for any difference to be statistically significant, it must be based on two *similarly situated* groups or persons. Otherwise, any differences are

meaningless. (**See *Smith* v. *City of Madison*** (W.D. Wis. 2019) 413 F.Supp.3d 823, 836 ["Statistics are relevant to discriminatory effect only if they address whether plaintiff was treated differently from a similarly situated member of the unprotected class."]; **accord *Alston* v. *City of Madison*** (7th Cir. 2017) 853 F.3d 901, 907; ***Chavez* v. *Illinois State Police*** (7th Cir. 2001) 251 F.3d 612, 638.)

"There are at least two widely recognized statistical measures of disparate impact: (1) the 80% or Four-fifths Rule, and (2) statistical significance or standard deviation analysis." (***United States* v. *City of New York*** (E.D.N.Y. 2009) 637 F.Supp.2d 77, 86.)

The "four-fifths" test approach is embodied in the EEOC Uniform Guidelines on Employment Selection Procedures and codified in 29 C.F.R. § 1607.4D. Specifically, section 1607.4D, in relevant part, states: "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will *generally* be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will *generally not* be regarded by Federal enforcement agencies as evidence of adverse impact." (***Ibid***, emphasis added.)

> ***Editor's note**: This general rule is not, however, the end and be all. The regulation itself notes: "*Smaller* differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. *Greater* differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. (**See** 29 C.F.R. § 1607.4 D. ["Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is *based upon numbers which are too small to be reliable*, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact."]; **see also *Watson* v. *Fort Worth Bank and Trust*** (1988) 487 U.S. 977, 996–997 [stating that statistical evidence may not be probative if it is based on a "small or incomplete data set"];); ***Stout* v. *Potter*** (9th Cir. 2002) 276 F.3d 1118, 1123 [citing to ***Morita* v. *Southern Cal. Permanente Med. Group*** (9th Cir.1976) 541 F.2d 217, 220 for that "statistical evidence derived from an extremely small universe ... has little predictive value and must be disregarded."].)

How the "selection rate" calculation is *described* in the context of a section 745(a)(3) claim is different than how the selection rate calculation is described in the employment context because, *unlike* in the employment context, selection of a defendant for prosecution and conviction of a "more serious offense" is a negative not a positive. Thus, in the context of a

section 745(a)(3) claim, if similarly situated defendants ***not*** belonging to defendant's group at issue are charged with a more serious offense than defendants belonging to defendant's group at a rate that is less than four-fifths of the rate, there is a statistically *significant difference*.

***Editor's note**: The five federal agencies having primary responsibility for the enforcement of Federal equal employment opportunity laws have issued guidelines for calculating adverse impact. Under those guideless, "[a]dverse impact is determined by a four step process.
(1) calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).
(2) observe which group has the highest selection rate.
(3) calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).
(4) observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances." (Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 FR 11998, Question 12.)

Applying that calculus in the context of a section 745(a)(3) challenge is illustrated below:

Assume 100 people were arrested for possessing an ounce of cocaine, 50 were Hispanic and 50 were not Hispanic. Of the 50 Hispanic defendants, 30 got the benefit of only being charged with simple possession. Of the non-Hispanic defendants, 40 got the benefit of only being charged with simple possession. There would be a *significant* difference because the rate at which Hispanic defendants received the benefit was less than 80% (4/5ths) of the rate at which non-Hispanic defendants received the benefit (i.e., 30 is *75%* of 40). However, if 35 Hispanic defendants got the benefit of only being charged with simple possession, then there would *not* be a significant difference because the rate at which Hispanic defendants received that benefit was more than 80% (4/5ths) of the rate at which non-Hispanic defendants received the benefit, i.e., 35 is *87.5%* of 40.

The four-fifths rule "has been criticized on technical grounds, and it has not provided more than a rule of thumb for the courts." (***Watson* v. *Fort Worth Bank and Trust*** (1988) 487 U.S. 977, 995.) However, it continues to be widely used. (**See e.g.**, ***Stout* v. *Potter*** (9th Cir. 2002) 276 F.3d 1118, 1124; ***Isabel* v. *City of Memphis*** (6th Cir. 2005) 404 F.3d 404, 409; ***Smith* v. *City of Boston*** (D. Mass. 2015) 144 F.Supp.3d 177, 199–200 [citing cases].)

The standard deviation analysis (or statistical significance analysis) approach in determining whether there has been a disparate impact "measures the probability that a result is a random deviation from the predicted result—the more standard deviations the lower the probability the result is a random one." (***United States* v. *City of New York*** (E.D.N.Y. 2009) 637 F.Supp.2d 77, 87 citing to ***Waisome* v. *Port Authority of New York and New Jersey***

(2d Cir. 1991) 948 F.2d 1370, 1376.) Under that approach, "statistical significance" is simply viewed as "a measure of the probability that a disparity is simply due to chance, rather than any other identifiable factor." (***Ottaviani* v. *State University of New York at New Paltz*** (2d Cir. 1989) 875 F.2d 365, 371.) "Because random deviations from the norm can always occur (citations omitted], statisticians do not consider slight disparities between predicted and actual results to be statistically significant. (Citations omitted.) "As the disparity between predicted and actual results becomes greater, however, it becomes less likely that the deviation is a random fluctuation. When the probability that a disparity is due to chance sinks to a certain threshold level, statisticians can then infer from the statistical evidence, albeit indirectly, that the deviation is attributable to some other cause unrelated to mere chance." (***Ibid***.)

"One unit of measurement used to express the probability that an observed result is merely a random deviation from a predicted result is the "standard deviation." (***Ibid***.) The standard deviation "is a measure of spread, dispersion or variability of a group of numbers." (***Ibid***.)

Editor's note**: In ***Castaneda* v. *Partida (1977) 430 U.S. 482, 494, the High Court discussed how to calculate a "standard deviation" in assessing whether a prima facie case of discrimination in grand jury selection has been established, i.e., whether there was a "substantial" underrepresentation of Mexican-Americans in the jury pool. (***Id***. at pp. 494-496.) Given the total population pool from which grand jurors and drawn and the percentage of Mexican-Americans in the jury pool, there would be an expected number of Mexican-Americans among the persons summoned to serve as grand jurors. In any given drawing some fluctuation from the expected number is predicted, but the results of a random drawing are likely to fall in the vicinity of the expected value. (***Id***. at p. 496, fn. 17.) "The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample. . . times the probability of selecting a Mexican-American . . . times the probability of selecting a non-Mexican-American . . ." (***Ibid***.)

Editor's note within a note: "Binomial distribution, in mathematics and statistics, is the probability of a particular outcome in a series when the outcome has two distinct possibilities, success or failure." (https://whatis.techtarget.com/definition/binomial-distribution.) "Binomial distributions are discrete and can be used to model the total number of successes in repeated trials as long as each trial is independent and the probability of getting either outcome remains constant. Determining the probability of a single, particular outcome is only valid if the experiment is repeated." (***Ibid***.) Repeated calls for grand jurors amongst a *fixed* population is the repeated experiment. Each time grand jurors are called to serve, it is likely the same number of Mexican-Americans (within a range) will (success) or will not (failure) be called. That is why (IPG thinks) a binomial distribution analysis can be done.

"Generally, the fewer the number of standard deviations that separate an observed from a predicted result, the more likely it is that any observed disparity between predicted and actual

results is not really a 'disparity' at all but rather a random fluctuation. Conversely, '[t]he greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results.' (Citations omitted.) A finding of two standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm, and most social scientists accept two standard deviations as a threshold level of 'statistical significance.' When the results of a statistical analysis yield levels of statistical significance at or below the 0.05 level, chance explanations for a disparity become suspect, and most statisticians will begin to question the assumptions underlying their predictions." (***Ottaviani* v. *State University of New York at New Paltz*** (2d Cir. 1989) 875 F.2d 365, 371; **see also *Stender* v. *Lucky Stores, Inc.*** (N.D. Cal. 1992) 803 F.Supp. 259, 323 [in Title VII cases with sufficiently large samples, "[m]any courts have followed the social science convention which holds that for disparities below a 5% probability level ("P-value"), chance explanations become suspect."].)

This presence of two or more standard deviations does not necessarily translate, however, into a different of *legal* significance. (**See *Watson* v. *Fort Worth Bank and Trust*** (1988) 487 U.S. 977, 995 ["we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination."]; ***Ottaviani* v. *State University of New York at New Paltz*** (2d Cir. 1989) 875 F.2d 365, 372 ["By no means, however, is a five percent probability of chance (or approximately two standard deviations) considered an "exact legal threshold."].)

Other alternative statistical analyses, "such as the T– and Z–Tests, 'chi-square,' binomial, and Fisher's exact test," may also be relied upon to prove or disprove an adverse impact. (***Howe* v. *City of Akron*** (N.D. Ohio 2010) 789 F.Supp.2d 786, 797 citing to ***Isabel -. City of Memphis*** (6th Cir.2005) 404 F.3d 404, 412.)

Whichever statistical approach is used, however, the disparity will be of little significance unless (i) the defendants used for comparison to the defendant bringing a claim under section 745(a)(3) are "similarly situated"; (ii) any data demonstrating a "significant difference in seeking or obtaining convictions" must compare "individuals who have committed similar offenses and are similarly situated" within one group against the whole; and (iii) there is an absence of "race-neutral reasons for the disparity" (Pen. Code, § 745(h)(1)).

G. In deciding whether the prosecution more frequently sought or obtained convictions for more serious offenses against people who share a defendant's race, ethnicity, or national origin, how far back in time should courts look?

When deciding whether the prosecution has "more frequently sought or obtained" convictions "for more serious offenses against people who share the defendant's race, ethnicity, or national origin" (Pen. Code, § 745(a)(3), courts must only consider "individuals who have committed similar offenses and are *similarly situated*" (Pen. Code, § 745(h)(1)). (Emphasis added.)

Accordingly, for the same reasons that a court should not compare defendants who are not similarly situated from a chronological standpoint to the defendant bringing the section 745(a)(3) motion, a court should not compare *groups* of "people who share the defendant's race, ethnicity, or national origin" to people who do *not* share the defendant's race, ethnicity, or national origin unless both groups are similarly situated from a chronological standpoint.

This means the relevant comparison group should be limited to persons in or outside of defendant's group who have committed similar offenses shortly before or after January 1, 2021 and thereafter in a roughly contemporaneous time period to when the defendant committed his offense. (**See** this IPG, section IV-8-E-ii at pp. 82-85.)

H. When deciding whether the defendant was charged with a "more serious offense than defendants" of other races, ethnicities or national origins or whether the prosecution "more frequently sought or obtained convictions . . . for more serious offenses against people who share the defendant's race, ethnicity, or national origin" is the relevant comparison group *all* similarly situated defendants not belonging to defendant's group or can the relevant comparison group be similarly situated defendants who belong to just one *sub-group* of all similarly situated defendants?

If an Asian-American defendant can show that he was charged or convicted of possessing cocaine for sale based on possession of a single ounce of cocaine and defendant points to several Hispanic-American defendants who were charged with simple possession based on possessing a single ounce of cocaine, and the evidence shows that Asian-American defendants were more frequently charged or convicted with possession for sale based on an ounce of cocaine than Hispanic-American defendants, is there a violation of section 745(a)(3) if the

evidence *also* shows that Asian-Americans were *not* charged with possession for sale based on an ounce of cocaine more frequently when compared to *all non*-Asian-Americans?

If a Mexican-American defendant can show that he was charged or convicted of possessing cocaine for sale based on possession of a single ounce of cocaine and defendant points to several Cuban-American defendants who were charged with simple possession based on possessing a single ounce of cocaine and the evidence shows that Mexican-American defendants were more frequently charged or convicted with possession for sale based on an ounce of cocaine than Cuban-American defendants, is there a violation of section 745(a)(3) if the evidence also shows that Mexican-Americans were *not* charged with possession for sale based on an ounce of cocaine more frequently when compared to *all* Hispanic-American defendants or when compared to *all* other defendants?

In other words, what is the *relevant* comparison group for section 745(a)(3) purposes?

In the selective prosecution or selective enforcement context, the analysis appears binary: the comparison is simply between persons belonging to the defendant's group and all similarly situated persons not belonging to defendant's group. (**See e.g., *Yick* v. *Hopkins*** (1886) 118 U.S. 356, 374 [finding discrimination where all those prosecuted for violation of ordinance were "Chinese subjects" and "80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions"]; **cf.**, ***People* v. *Montes*** (2014) 58 Cal.4th 809, 830 [rejecting claim defendant entitled to discovery to support selective prosecution motion based on the race of the victim where defendant failed to identify percentage of eligible *non-White-victims versus white victims*].)

Similarly, when there is a claim that a juror was struck for discriminatory purposes, the courts *appear* to engage in a binary analysis in considering whether "comparable" jurors were struck or not struck. (**See e.g., *Davis* v. *Ayala*** (2015) 576 U.S. 257, 294 ["There is also great probative force to a "comparative juror analysis"—an analysis of whether the prosecution's reasons for using its peremptory strikes against *nonwhite* jurors apply equally to *white* jurors whom it would have allowed to serve."]; ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a *black* panelist applies just as well to an otherwise-similar *nonblack* who is permitted to serve, that is evidence tending to prove purposeful discrimination."].) (Emphasis added to both.)

However, in the area of employment discrimination claims, when trying to assess whether a group as suffered an "adverse impact," the federal government considers "whether the selection rate for any group is substantially less (i.e., less than 4/5ths or 80%) than the selection rate *for the highest group*." (EEOC Uniform Employment Selection Guidelines Interpretation and Clarification, Answer to Question # 12, 44 FR 11998, emphasis added; **see also *id***., Answer to Question #17, 44 FR 11999 ["the selection rates for the race and ethnic groups are compared with the selection rate of the race or ethnic group with the highest selection rate"].) In other words, the comparison group might belong to a single race, ethnicity, or nationality (i.e., a sub-group) rather than *all* persons who are not members of the defendant's group. (**But see *Garcia* v. *Hatch Valley Public Schools*** (N.M. 2018) 458 P.3d 378, 383-385 [allowing plaintiff claiming employment discrimination based on national origin under the New Mexico Human Rights Act to pursue claim *without identifying* her national origin other than as "non-Hispanic," i.e., she could potentially have prevailed under a binary analysis].)

Unfortunately, the language of section 745(a)(3) does not provide a clear answer to whether the relevant comparison group is *all others* or just another identifiable racial, ethnic, or national origin group. There are advantages and disadvantages to either approach.

On the one hand, it seems more equitable to do a binary analysis comparing all members of the group against all nonmembers because that is more likely to accurately identify whether the defendant's group is actually being singled out. On the other hand, comparing one group against everyone not in the group can potentially mask discrimination. If the whole population surveyed is made up of four groups and members of two groups (A and B) are both routinely charged with and convicted of more serious offense than the two other groups (C and D), an analysis lumping group B with groups C and D for comparison purposes may create a false picture of how much discrimination is actually occurring by "diluting" the difference between members of group A and members of groups C and D.

I. Issues arising when a defendant belongs to more than one racial, ethnic, or national origin group: Penal Code section 745(j)

As our nation has struggled to meet the goal of equitable treatment regardless of race, ethnicity, or national origin, the government has often relied on methods that are premised on increasingly archaic assumptions about divisions among the different groups in our society.

(**See** Mitchell, A Class of One: Multiracial Individuals Under Equal Protection (2021) 88 U. Chi. L. Rev. 237, 253 ["courts have generally lumped individuals identified as multiracial together with other members of conventional categories, reformulating the narrative of discrimination of those identified as multiracial to avoid disruption of the prevailing racial classification scheme."].) Often to the detriment of persons whose identity crosses boundaries. (***Id***. at p. 261 ["By incorrectly categorizing the racial identity of--and thereby refusing to acknowledge the unique experiences of and harms faced by--multiracial people, mixed-race people do not receive equal protection under the law."].)

> ***Editor's note**: One potential means of providing equal protection to multiracial or multiethnic individuals is to allow "class of one" civil suits which allows an individual to be recognized as a class of their own for equal protection purposes. True, "[s]ome might argue that allowing class-of-one claims could completely undermine current understandings of race and discrimination. [But] "[w]hile this could certainly be a possibility, one must consider the possibility that we live in a society whose racial categorization schemes ought to be questioned. Rather than perceiving race [or ethnicity] as clear-cut (and often binary), it might be more useful and accurate to perceive racial categories as fluid." (Mitchell, A Class of One: Multiracial Individuals Under Equal Protection (2021) 88 U. Chi. L. Rev. 237, 272 [bracketed information added].) How this approach might be translated in the context of a section 745 motion is beyond the scope of this IPG.

Ironically, methods based on archaic assumptions about race and ethnicity have become increasingly difficult to use as a result of, arguably, the most effective *non-governmental* means of integration: intermarriage. Intermarriage, of course, naturally diminishes inequitable treatment regardless of race, ethnicity, or national origin. (**See** https://www.migrationpolicy.org/article/intermarriage-second-generation-choosing-between-newcomers-and-natives/ ["Social scientists have long considered high levels of racial and ethnic intermarriage — along with language acquisition, socioeconomic attainment, and residential patterns — a bellwether of social integration into the larger American society. Intermarriage requires individuals in different groups to form intimate attachments, which suggests that group boundaries are fading in importance and that preferences for marriage within the group are weak. ¶ Moreover, the children of interracially married couples have complex racial backgrounds and often identify with two or more races, which further blurs the boundaries between groups and leads to more intermarriage in the next generation."].)

Section 745 recognizes that "[a] defendant may share a race, ethnicity, or national origin with more than one group." (Pen. Code, § 745(j).) But other than cryptically allowing defendants "to "aggregate data among groups to demonstrate a violation of subdivision (a)," section 745 largely endorses and perpetuates the existing paradigm.

It is not clear whether a defendant claiming to be a member of more than one racial, ethnic, or national origin group would have to identify persons with a similar make-up to the defendant for purposes of comparison or whether the defendant could pick and choose which and/or how many groups he or she wants to use for comparison purposes. Presumably, a defendant belonging to more than one group will choose a single group identification versus an amalgamation of sub-groups depending on which would be most advantageous to prevailing on the motion. This issue is not unique to the context of a section 745 motion. (**See *State* v. *Raynor*** (2019) 334 Conn. 264, 275 [raising the question, but not providing an answer, as to which group a juror should be placed if a prospective juror identifies as belonging to multiple racial groups for purposes of making ***Batson*** motions and rulings].)

Section 745 does not provide an answer to how a court should characterize a defendant. Nor does it state whether classification based on self-identification is permissible.

Section 745 does not explain what it means to "aggregate data among groups to demonstrate a violation of subdivision (a)" of section 745. (**Cf.**, ***Paige* v. *California*** (9th Cir. 2002) 291 F.3d 1141, 1148 [allowing plaintiffs to aggregate members of all "minority groups" but indicating it would only be allowed where employment practices have the identical discriminatory effect upon members of all minority groups aggregated]; ***Rich* v. *Martin Marietta Corp.,*** (10th Cir.1975) 522 F.2d 333, 346 [holding that aggregating "Orientals and American Indians" (sic) was not appropriate because they were not similarly situated in terms of numbers in upper echelon of the labor force].)

However, regardless of whatever it means to "aggregate data among groups" (**see** this IPG, section IV-8-F-i at pp. 88-89), based on the juxtaposition of the only two sentences in subdivision (j), it appears that it may only be done when the defendant is multiracial, multiethnic, or has ancestors from more than one nationality.

9. Issues arising in determining whether a violation of Penal Code section 745(a)*(4)(A)* has occurred.

Penal Code section 745(a)(4)(A) states a violation of section 745 can be established by showing "[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." (Emphasis added.)

Because much of the same language used in section 745(a)(4)(A) is identical to language used in section 745(a)(3), the issues raised in interpreting the language will be the same in both contexts as will the analysis of how those issues may or should be resolved.*

*__Editor's note__: Unlike section 745(a)(3), section 745(a)(4) does not require that the defendant be compared to defendants belonging to a different race, ethnicity, or national origin in assessing whether the sentence imposed was longer or more severe. Rather, in pertinent part, it requires "[a] longer or more severe sentence was imposed on the defendant than was imposed on other *similarly situated individuals convicted of the same offense*." (Emphasis added.) Arguably, because the plain language does not require comparison to persons *not* belonging to defendant's same group and because subdivision (a)(3) does, traditional rules of statutory interpretation would suggest, there is no such requirement. (**See *In re Ethan C.*** (2012) 54 Cal.4th 610, 638 ["When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful."].) On the other hand, as pointed out by retired Judge Couzens: "Since the purpose of the legislation is to address disparity in sentencing, to include people of defendant's own demographics would produce an absurd result. The first element must be read in connection with the second element which does require a comparison between people of different demographics." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 14, fn. 7; **see also *People ex rel. San Francisco & S.J. Ry. Co.* v. *Craycroft*** (1896)111 Cal. 544, 547 ["generally, no law will be so applied as to work a palpable absurdity"].)

A. Section 745(a)(4)(A) is properly viewed as a statute designed to uncover *disparate impact* discrimination based on race, ethnicity, or national origin, and cases discussing disparate impact discrimination in other contexts can provide guidance to interpreting section 745(a)(4)(A)

Like section 745(a)(3), section 745(a)(4)(A) is premised on a theory of disparate impact* and has much in common with claims of selective prosecution/enforcement or discrimination in employment and housing. (**See** this IPG, section IV-8-A and B at pp. 62-65 [discussing disparate impact liability under antidiscrimination statutes].)

Editor's note (Part I of II: "[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (***Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc***. (2015) 576 U.S. 519, 524.) "[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." (***Id***. at p. 533.) [Cont'd next page.]

***Editor's note (Part II of II)**:
This description of disparate impact liability *generally* characterizes the theory of liability underlying section 745(a)(4)(A), which also does not require the defendant show discriminatory intent but does require a showing of a disproportional adverse effect that is otherwise unjustified by a legitimate rationale. Like other disparate impact claims, section 745(a)(4)(A) refers to the consequences of actions (i.e., being sentenced to a longer or more severe sentence than similarly situated individuals convicted of the same offense). And treating a section 745(a)(4)(A) claim as a "disparate impact" claim is consistent with the statutory purpose of section 745. (**See** Assemb. Bill No. 2542 (2019-2020 Reg. Sess.) § 2, para. (i) ["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."].)

The aspect of section 745(a)(4)(A) requiring defendants be similarly situated and the aspect of section 745(h)(1) requiring the showing of disparity in sentences imposed on members of defendant's group in comparison to similarly situated individuals who have committed similar offenses and for whom "the prosecution cannot establish race-neutral reasons for the disparity" serve as a way of ensuring that the disparate impact alleged is not justified by a legitimate rationale, i.e., what is ordinarily required to show discrimination under a disparate impact theory of liability

Like in a selective prosecution claim or claim of discrimination based on disparate impact in the employment or housing context, a defendant claiming a section 745(a)(4)(A) violation must show a type of discriminatory "effect," i.e., that "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense . . .". (Pen. Code, § 745(a)(4).)

Like in a selective prosecution claim or claim of discrimination based on disparate impact in the employment or housing context, a defendant claiming a section 745(a)(4)(A) violation must show he or she was treated differently than "similarly situated" individuals of a different race ethnicity, or national origin. (Pen. Code, § 745(a)(4)(A).)

However, as with section 745(a)(3), section 745(a)(4)(A) differs in some respects from these other types of equal-protection related claims. (**See** this IPG, section IV-8-A and B at pp. 62-65 [discussing similarities and differences section 745(a)(3) has with equal protection claims].)

Unlike in a selective prosecution claim or in a claim of discrimination based on disparate impact in the employment or housing context, a defendant claiming a section 745(a)(4)(A) violation does not *have* to show the government conduct was motivated by a discriminatory intent. (**See** Pen. Code, § 745(a)(4)(A).)

Unlike in selective prosecution claim, a defendant claiming a section 745(a)(4)(A) violation has to show "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 . . .". (Pen. Code, § 745(a)(4)(A).) Albeit in a selective prosecution claim or in a claim of discrimination based on disparate impact in the employment or housing context, the fact that other members of defendant's race, ethnicity, or national origin were treated differently in comparison to those not of defendant's race, ethnicity, or national origin *overall* is still highly relevant evidence. (**See e.g., *United States* v. *Armstrong*** (1996) 517 U.S. 456, 465-467, 469; ***International Broth. of Teamsters* v. *United States*** (1977) 431 U.S. 324, 335.)

Accordingly, cases interpreting the requirements of selective prosecution claims or claims of discrimination in employment or housing based on disparate impact liability will often be helpful when interpreting terms and general concepts common to both section 745(a)(4)(A) and selective prosecution claims. In particular, cases involving claims of selective prosecution (and its cousin, claims of selective enforcement) should provide guidance in interpreting what must be shown to obtain discovery, establish a prima facie case, and/or prevail on a section 745(a)(4)(A) claim insofar as it relates to the "discriminatory effect" and "similarly situated" elements of a section 745(a)(4)(A) claim. (**See** this IPG, section I at pp. 14-19.)

Moreover, because the element of adverse disproportionate impact is common to disparate *treatment* and disparate *impact* theories, even cases involving disparate treatment (such as selective prosecution and selective enforcement cases) can provide guidance applicable in interpreting questions regarding what a defendant must do to establish the element of disproportionate adverse impact required by section 745(a)(4)(A): that "[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 . . .". (***Ibid***.)

Editor's note**: In ***McCleskey* v. *Kemp (1987) 481 U.S. 279, the High Court observed "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 *or Title VII case*." (***Id***. at pp. 294–295, emphasis added.) This seems inconsistent with the notion that certain principles regarding the use of statistics from cases interpreting anti-discrimination laws in the employment and housing context can be applied in the context of a section 745(a)(4)(A) motion. (**See** this IPG, section IV-9-A at p. 100-103.) But the court was not discussing sentencing *in general*. It was referring to the fact that "the nature of the *capital* sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases." (***Id***. at p. 294.) This is because "a capital sentencing jury may consider any factor relevant to the defendant's background, character, and the offense" and "[t]here is no common standard by which to evaluate all defendants who have or have not received the death penalty." (***Id***. at p. 295, fn. 14.) "[E]ach 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." (***Id***. at p. 294.) Whereas "[i]n venire-selection cases, the factors that may be considered are limited, usually by state statute" and "[t]hese considerations are uniform for all potential jurors, and although some factors may be said to be subjective, they are limited and, to a great degree, objectively verifiable." (***Ibid***.) Similarly, [w]hile employment decisions may involve a number of relevant variables, these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee's qualifications to perform the particular job at issue. Identifiable qualifications for a single job provide a common standard by which to assess each employee." (***Ibid***.)

B. What is a "longer or more severe" sentence for purposes of section 745(a)(4)(A)?

The term "longer or more severe" sentence is not defined in section 745. In some circumstances, there should be little dispute over whether one sentence is longer or more severe than another sentence (i.e., if two defendants are both sentenced on a single count to prison and one receives the mid-term and the other receives the upper-term). However, there will be some cases where deciding which sentence is the longer or more severe sentence will not be so easy to determine.

Assuming the "same offense" can encompass both the misdemeanor and felony version of an offense, if one defendant is convicted of a misdemeanor violation of Penal Code section 245(a)(1) and is sentenced to a year in county jail and the other defendant is convicted of a felony violation of that same section but is placed on one year probation without any time in custody, which defendant has received the "longer or more severe" sentence?

Simply looking at statistics that broadly reflect whether a defendant charged with a violation of Penal Code section 245(a)(1) received a misdemeanor or a felony sentence without those statistics also reflecting how long the person served in custody may create a distorted picture reflecting discrimination where none exists or reflecting an absence of discrimination where some exists.

i. Does the definition of an "offense" for purposes of determining whether a "longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense" include enhancements or penalty provisions?

As discussed in this IPG, section IV-8-C-i at pp. 67-68, there is a distinction between offenses and enhancements or alternative penalty provisions. Because enhancements and penalty provisions relate directly to the length or severity of a sentence, it is likely a court will permit a violation to be found if defendants subject to the same offense and same enhancement are treated significantly differently based on race, ethnicity, or national origin. And it is also likely that courts will not view defendants as being convicted of the *same* crime or as similarly situated - even though they have been convicted of the same substantive offense - if they all have not also been charged with the same enhancement or penalty provision. (**See** this IPG, section IV-8-D at pp. 68-71; IV-8- E at pp. 71-82.)

C. What does it mean for defendants to be "similarly situated for purposes of section 745(a)(4)(A)?

The factors that must be looked at to determine whether two or more defendants are "similarly situated" for purposes of section 745(a)*(4)(A)* will often be the same factors that a court must consider in determining whether two or more defendants are "similarly situated" for purposes of section 745*(a)(3)*. (**See** this IPG, section IV-8-E at pp. 77-87.) However, the overlap is not complete. There are some factors courts may take into consideration in *sentencing* that do not relate to whether defendants are similarly situated for purposes of determining whether a violation of section 745(a)(3) based on differential impact in *charging or obtaining convictions* has occurred and vice versa.

All the criteria under California Rules of Court relating to sentencing should be considered in determining whether "[a] longer or more severe sentence was imposed on the defendant than was imposed on other ***similarly situated*** individuals convicted of the same offense . . .". (**See** Rule 4.414 [criteria affecting the decision to grant or deny probation]; Rule 4.421 [describing factors in aggravation]; Rule 4.423 [describing factors in mitigation].)

In particular, defendants sentenced after a plea bargain are not similarly situated, and thus should not be compared to, defendants sentenced after pleading as charged to the court nor to defendants who have been convicted after trial. (**Cf.**, ***Com.* v. *Moury*** (Pa. Super. Ct. 2010) 992 A.2d 162, 171 ["A codefendant who has successfully negotiated a plea deal and a defendant sentenced after a jury trial, however, are not similarly situated for sentencing purposes."].)

i. What is the time frame within which the defendants used for comparison must fall to be deemed "similarly situated?"

For the same reasons that the defendants used for comparison purposes under section 745(a)(3) should be similarly situated from a chronological standpoint, so should the defendants who are used for comparison purposes under section 745(a)(4)(A). (**See** this IPG, section IV-8-E-ii at pp. 82-85.)

ii. When determining whether a "longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense," how many defendants of other races, ethnicities, or national origin must be offered up for comparison purposes?

Section 745(a)(4)(A) does not identify *how many* defendants of other races, ethnicities, or national origin must be presented for comparison purposes in order for a defendant to obtain discovery, to make a prima facie showing for an evidentiary hearing, or to prevail after the hearing.

In the selective prosecution or enforcement context, the numbers of defendants (both defendants belonging to defendant's group and defendants belonging to the other groups) offered to show disparate impact by way of comparison can vary but generally do not involve insubstantial or incomplete numbers. (**See** this IPG, section IV-8-E-iii at p. 85-87.)

Depending on the specific nature of the claim, in the employment discrimination context, assuming all the other elements are shown, a "prima facie" case of discrimination for failure to promote, can potentially be met even though the plaintiff is only compared to a single similarly situated employee outside of a protected class. (**See** this IPG, section IV-8-E-iii at p. 86.)

Regardless, because section 745(a)(4)(A) refers to longer or more severe sentence being imposed "on other similarly situated individual***s***", the statute contemplates comparison to at least more than one defendant. Had comparison to a single other similarly situated defendant

been sufficient, the statute would have stated: "A longer or more severe sentence was imposed on the defendant than was imposed *on one or more similarly situated individual* convicted of the same offense."

The level of proof required to obtain discovery ('good cause") or an evidentiary hearing (a "prima facie" showing) will be discussed in this IPG, respectively, in this IPG, sections V-5-A at pp. 133-151 and VI-1 at pp. 168-170.) But to *prevail on* a section 745(a)(4)(A)motion, it appears unlikely that showing "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense" will suffice *unless* there are adequate numbers to definitively meet the second prong of section 745(a)(4)(A) requiring defendant to show "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."

And unless the statistics relating to the second prong *comprehensively* cover all similarly situated defendants charged with similar offenses within a contemporaneous time period, it is unlikely the defendant will be able to meet the second prong. (**Cf.**, ***Carter* v. *CB Richard Ellis, Inc.*** (2004) 122 Cal.App.4th 1313, 1325 [finding "plaintiff failed to establish a prima facie case of disparate impact discrimination because her data set was incomplete," since she "offered no evidence regarding the gender or age composition of *all* of defendant's employees", emphasis in original].)

D. What does it mean for sentences to have been "more frequently imposed" as described in section 745(a)(4)(A)?

The second element defendants must show to establish a violation of section 745(a)(4)(A) is to prove 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." (Emphasis added.)

The term "more frequently imposed" is defined in subdivision (h)(1) of section 745 to mean "that statistical evidence or aggregate data demonstrate a significant difference . . . in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity."

The terms "similar offenses" and "similarly situated" will undoubtedly be interpreted to mean the same thing throughout all of section 745(a)(3) and (a)(4)(A). (**See** this IPG, respectively, section IV-8-D at pp. 68-71 [defining "similar offenses" for purposes of section 745(a)(3)]; IV-8-E at pp. 71-87 [defining "similarly situated for purposes of section 745(a)(3)].)

For a discussion of what the term "aggregate data" means as that term is used in section 745(h)(1), **see** this IPG, section IV-8-F-i at pp. 88-89.

For a discussion of what it means for there to be a "significant difference" in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, **see** this IPG, section IV-8-F-ii at pp. 89-94. The discussion of what it means for there to be a significant difference in seeking or obtaining convictions against a particular group for purposes of section 745(a)*(3)* will be generally applicable to what constitutes a significant difference in imposing sentences for purposes of section 745*(a)(4)*.

E. In deciding whether "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 origin," how far back in time should courts look?

When deciding whether "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 origin" (Pen. Code, § 745(a)(4)(A), courts should only consider "individuals who have committed similar offenses and are *similarly situated*" (Pen. Code, § 745(h)(1). (Emphasis added.)

Accordingly, for the same reasons that a court should not compare defendants who are not similarly situated from a chronological standpoint to the defendant bringing a section 745(a)(3) or section 745(a)(4) motion (**see** this IPG, respectively at sections IV-8-E-ii at pp. 82-85 and IV-9-C-i at p. 105), a court should not compare *groups* of "people who share the defendant's race, ethnicity, or national origin" to people who do *not* share the defendant's race, ethnicity, or national origin unless both groups are similarly situated from a *chronological* standpoint. This means the relevant comparison group should be limited to persons in or outside of defendant's group who have committed similar offenses shortly before or after January 1, 2021 and thereafter in a roughly contemporaneous time period to when the defendant committed his offense. (**See** this IPG, section IV-8-E-ii at pp. 82-85.)

F. When deciding "whether 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 origin," is the relevant comparison group all similarly situated defendants not belonging to defendant's group or can the relevant comparison group be similarly situated defendants who belong to just one sub-group of all similarly situated defendants?

The issues raised in deciding whether the comparison group must be all defendants not in defendant's group (a binary approach) or whether the comparison group can be a sub-group of defendants (a nonbinary approach) for purposes of section 745(a)(4)(A) are the same issues raised when deciding the same question for purposes of section 745(a)(3). (**See** this IPG, section IV-8-H at pp. 95-97.)

10. Issues arising in determining whether a violation of Penal Code section 745(a)*(4)(B)* has occurred.

Penal Code section 745(a)(4)(B) states section 745 is violated when: "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." (Emphasis added.)

This sub-paragraph is written in a manner almost identical to sub-paragraph (A) of section 745(a)(4) except that the focus is on whether discrimination in sentencing is occurring based on the race, ethnicity, or national origin of the *victim*. Accordingly:

For what a "longer or more severe sentence" means, **see** this IPG, section IV-9-B at p. 103.

For whether an "offense" includes enhancements or penalty provisions, **see** this IPG, section IV-9-B-i at p. 104 and section IV-8-C-i at pp. 67-68.

For what it means for other defendants to be "similarly situated," whether "similarly situated" includes being "similarly situated" from a chronological viewpoint, and how many "similarly situated defendants must be offered up for comparison purposes, **see** this IPG, section IV-9-C- at pp. 104-106, section IV-8-E at pp. 71-87.

For what is means for sentences to have been "more frequently imposed," **see** this IPG, section IV-9-D at pp. 106-107.

For how far back in time courts should look in comparing *groups* of defendants, **see** this IPG, section IV-9-E at p. 107 and section IV-8-G at p. 95.)

For a discussion of the issues raised in deciding whether the comparison group must be *all* defendants not in defendant's group (a binary approach) or whether the comparison group can be a sub-group of defendants (a nonbinary approach), **see** this this IPG, section IV-9-F at p. 108 and section IV-8-H at pp. 95-97.)

A. Section 745(a)(4)(B) is properly viewed as a statute designed to uncover *disparate impact* discrimination based on race, ethnicity, or national origin and cases discussing disparate impact discrimination in other contexts can provide guidance to interpreting section 745(a)(4)(B)

Like sections 745(a)(3) and 745(a)(4)(A), section 745(a)(4)(B) is premised on a theory of disparate impact* and has much in common with claims of selective prosecution/enforcement or discrimination in employment and housing. (**See** this IPG, section IV-8-A and B at pp. 62-65 [discussing disparate impact liability under antidiscrimination statutes]; IV-9-A at pp. 100-103 [discussing why section 745(a)(4)(A) is premised on a theory of disparate impact liability].)

However, like section 745(a)(3) and section 745(a)(4)(A) (and for the same reasons), section 745(a)(4)(B) differs in some respects from these other types of equal-protection related claims. (**See** this IPG, section IV-8-A and B at pp. 62-65 [discussing similarities and differences section 745(a)(3) has with such claims]; section IV-9-A at pp. 100-103 [same, except regarding section 745(a)(4)(A)].

Accordingly, cases interpreting the requirements of selective prosecution claims or claims of discrimination in employment or housing based on disparate impact liability can be helpful when interpreting terms and general concepts common to both section 745(a)(4)(B) and selective prosecution claims. In particular, cases involving claims of selective prosecution (and its cousin, claims of selective enforcement) should provide guidance in interpreting what must be shown to obtain discovery, establish a prima facie case, and/or prevail on a section 745(a)(4)(B) claim insofar as it relates to the "discriminatory effect" and "similarly situated" elements of a section 745(a)(4)(A) claim.

For example, in ***Belmontes* v. *Brown*** (9th Cir.2005) 414 F.3d 1094 [rev'd sub nom. ***Ayers* v. *Belmontes*** (2006) 549 U.S. 7 on other grounds], a selective prosecution case involving a claim that defendant was subject to discrimination based on the race of the victim because "defendants who kill a white person were five times more likely to be charged with special circumstances than a defendants who kill an African American and twenty times more likely to be charged than if the victims were Latino," the court stated "[t]o establish a discriminatory ***effect*** in a race discrimination case, a defendant must prove that similarly situated individuals of a different race, or whose victims were of a different race, were not prosecuted." (***Id***. at p. 1126, 1127.) This closely tracks what needs to be shown to prevail on a section 745(a)(4)(B) motion: that "[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." (***Ibid***.)

B. Do the *victims* of the defendants being compared have to be "similarly situated" for purposes of section 745(a)(4)(B)?

Unlike when it comes to the *defendants* and the *groups of defendants* being compared, when a claim under section 745(a)(4)(B) is made, the statute does not state that the *victims* of the defendants used for comparison purposes must be "similarly situated" to the *victim* of the defendant. However, indirectly the victims must be "similarly situated" insofar as characteristics of the victim are relevant to the sentence a defendant might receive. For example, whether the victim is cooperative with the prosecution, is hostile to the prosecution going forward, or is indifferent are important and legitimate factors that can play a significant role in the length and severity of the sentence *offered* by the prosecution and imposed by the court that has nothing to do with the race, ethnicity, or national origin. Similarly, the quality of the potential testimony of the victim is important and legitimate factor that can impact the offer (and thus the sentence) of a defendant. Unless the victims of the defendants against whom the victim of the defendant is being compared are similarly positioned in these regards, then the *defendants* should necessarily not be viewed as similarly situated.

When a judge imposes a sentence on a defendant, the judge must consider whether the "victim was an initiator of, willing participant in, or aggressor or provoker of the incident." (Cal. Rule of Court, Rule 4.423(a)(2).) A judge must also consider whether the victim was particularly

vulnerable. (**See** Cal. Rule of Court, Rule 4.421(a)(3) and Rule 4.414(a)(3).) The number of victims should also be considered.

Thus, when comparing sentences imposed amongst defendants and groups of defendants for section 745(a)(4)(B) purposes, a defendant who committed a crime with *multiple* victims, whose victim was *not* an aggressor or provoker of the incident, or whose victim *was* particularly vulnerable cannot be treated as similarly situated to defendants whose crime only involved a *single* victim, whose victim *was* an aggressor or provoker of the incident, or whose victims were *not* particularly vulnerable.

Difficulties devising an appropriate calculation formula to determine whether defendants were more frequently subject to longer or more severe sentences will likely arise when there is more than one victim of defendant's crime and the victims are not of the same race, ethnicity, or national origin.

11. When and where can a motion claiming a violation of Penal Code section 745(a) be brought?

Obviously, a motion claiming a violation of section 745(a)(3) based on alleged discrimination in obtaining a conviction or a violation of section 745(a)(4) based on discrimination in sentencing cannot be filed pre-trial. Similarly, a claim based on use of "racially discriminatory language" *during* the trial in violation of section 745(a)(2) cannot be filed pre-trial. But otherwise, there are no limitations on when a defendant may claim a violation of Penal Code section 745. It appears that it can be made before, during, or after trial.

However, if the motion is made after judgement, it must be made by way of a habeas petition under PC section 1473 if a defendant is in custody, or a motion under Section 1473.7 if a defendant is out of custody.

Judgment should be interpreted to mean when a defendant has been convicted and sentenced. (**See *People* v. *Karaman*** (1992) 4 Cal.4th 335, 344, fn. 9 ["In a criminal case, judgment is rendered when the trial court orally pronounces sentence"]; ***People* v. *Perez*** (1979) 23 Cal.3d 548, 549, fn. 2 ["judgment is synonymous with the imposition of sentence"]; ***People* v. *Flores*** (1974) 12 Cal.3d 85, 94, fn. 6 [noting that section 1191 interchangeably uses the term "pronouncing judgment" with the term "pronouncing sentence"].)

The forum for hearing the motion is designated as the trial court *unless judgment has already been imposed*. In that case, the motion "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)." (Pen. Code, § 745(b).)

> **Editor's note: See** this IPG, section X at pp. 217-235 [discussing Pen. Code, § 1473(f)] and section XI at pp. 236-245 [discussing Pen. Code, § 1473.7(a)(3)].

A. Can a defendant who discovers a violation of section 745 delay in bringing the section 745 motion for tactical or other purposes?

Section 745 does not require that a motion alleging a violation of the section be brought as soon as the violation is discovered. Thus, it is possible that a defendant can delay bringing the motion until the verdict has been reached. And, in some circumstances, even after judgment has been imposed. (**See** Pen. Code, § 1473(f) and § 1473.7(a)(3).)

Judge Couzens suggests that "failure to raise a known violation in a timely manner would trigger a laches defense by the prosecution" and that it "would seem improper for the defendant not to raise a known violation at a time when it could be addressed, but hold it pending the outcome of the trial." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at pp. 16-17.) The *rationale* underlying the laches defense, which is "an equitable defense to the enforcement of a stale claim and requires a showing of unreasonable delay plus either the plaintiff's acquiescence in the act complained of or prejudice to the defendant resulting from the delay" (***People* v. *Koontz*** (2002) 27 Cal.4th 1041, 1087-1088) seems to apply to delay in the context of a section 745 motion, but "[t]he doctrine of laches may be asserted only in a suit in equity" (***id***. at p. 1088). Purposefully delaying filing a claim does not fit neatly into the doctrine of estoppel or waiver either. (**See** 2015-IPG#4(ESTOPPEL TO CONTEST JURISDICTION - FORD.) A court might, however, be able to take into account the fact of intentional delay in weighing the merits of the motion.

B. Can a defendant bring more than one section 745 motion – even if the second motion is identical to the first?

Presumably, if the reason for bringing a second section 745 motion did not arise until after an initial section 745 motion, there should be no bar to bringing a second motion based on that reason. Section 745 does not place a limit on the number of times a section 745 motion may be brought even if the motion is identical. But, as with renewed motions based on other statutes

that do not expressly limit the bringing of a motion to a single time, courts are likely to find a court has discretion to (and should) deny a second bite at the apple absent changed circumstances. (**See e.g.**, ***People* v. *Sherwin*** (2000) 82 Cal.App.4th 1404, 1411 ["a motion under section 995 should not be renewed unless changed circumstances are shown which have a significant bearing on the question whether a defendant was indicted or committed without probable cause]; ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1084 [upholding trial court refusal to hear renewed motion to sever under section 1098 where there was insufficient evidence of changed circumstances].)

12. Issues relating to discovery motions made by the defense requesting evidence to support a section 745 motion

For a discussion of issues relating to discovery motions made by the defense requesting evidence to support a section 745 motion, **see** this IPG, section V at pp. 119-167.)

13. Issues relating to the evidentiary hearing on a section 745 motion

For a discussion of issues relating to the evidentiary hearing on a section 745 motion, **see** this IPG, section VI at pp. 168-186.)

14. What is the burden of proof imposed upon a defendant in order to prevail on a section 745 motion?

Penal Code section 745(c)(2) states: "The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence." (**See also** Pen. Code, § 745(e) ["Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, *by a preponderance of evidence*, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list . . ."] , emphasis added.)

This standard of proof is the same standard required to prevail in a Title VII of the Civil Rights Act of 1964 suit claiming discrimination in employment. (***Bazemore* v. *Friday*** (1986) 478 U.S. 385; ***Paige* v. *California*** (9th Cir. 2002) 291 F.3d 1141, 1145, fn. 3.) This is also the standard to prove a ***Batson-Wheeler*** violation in jury selection. (***People* v. *Hutchins*** (2007) 147 Cal.App.4th 992, 997; ***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.) However, to prevail on a claim of selective prosecution in violation of Equal Protection, the standard is likely higher. (**See *United States* v. *Armstrong*** (1996) 517 U.S. 456, 465 ["In order to dispel the presumption that a prosecutor has not violated equal protection, a

criminal defendant must present *clear* evidence to the contrary" by demonstrating that a prosecutorial policy "had a discriminatory effect and ... was motivated by a discriminatory purpose."]; ***Reno* v. *American-Arab Anti-Discrimination Committee*** (1999) 525 U.S. 471, 489 [standard for proving a selective prosecution claim "is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully."] ***United States* v. *Smith*** (11th Cir. 2000) 231 F.3d 800, 808 ["we interpret ***Armstrong*** as requiring the defendant to produce 'clear' evidence or 'clear and convincing' evidence which is the same thing."].) Pre-***Armstrong*** cases in California had set the standard at a preponderance of the evidence. (**See e.g., *People* v. *Smith*** (1984) 155 Cal.App.3d 1103, 1129 [disapproved of on other grounds by ***Baluyut* v. *Superior Court*** (1996) 12 Cal.4th 826]; ***People* v. *Gray*** (1967) 254 Cal.App.2d 256, 266.)

15. What remedies may be imposed for a violation of section 745?

For a discussion of issues relating to the remedies that can be imposed for a violation of section 745 motion, **see** this IPG, section VII at pp. 186-209.)

16. Does prosecuting a defendant for a hate crime or hate crime enhancement violate section 745?

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

This provision was likely included because section 745(a) states: "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*." And the legislature may have been concerned that a prosecution for a hate crime could be interpreted as running afoul of section 745 in some way - although none of Penal Code sections mentioned in subdivision (g) permit a *defendant* to be prosecuted on the basis of their race, ethnicity, or national origin. Rather hate crimes are "criminal act[s] committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the *victim*: . . . (3) Nationality. (4) Race or ethnicity." (Pen. Code, § 422.55, emphasis added.)

To prove a violation of section 745(a)(4)(B), a court *does* consider whether defendants were subject to increased sentences where, inter alia, "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. . ." (Emphasis added.) Hate crimes are disproportionately committed against African-American victims (**see** "Hate Crimes in California" at p. 5 [Table 1 "Events, Offenses, Victims, and Suspects by Bias Motivation" https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/hc16.pdf); and the legislature may have been worried that this disproportion might paradoxically be used to help perpetrators of hate crimes take advantage of section 745.

Or, regardless of any concerns about who the victims of hate crimes might be, the legislature may simply have been generally averse to allowing defendants who engage in discriminatory acts to take advantage of a law designed to eliminate discrimination. Although if that were what was intended, it would have made more sense to say section 745 "does not *apply* to the prosecution of hate crimes pursuant to Sections 422.6 to 422.865."

It remains to be seen whether subdivision (g) could be applied to *allow* a prosecution to continue if, for example, a defendant charged with a hate crime was able to prove racial or ethnic animus or bias on the part of a "judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror" in violation of subdivision (a)(1) or (a)(2) of section 745.

Depending on the circumstances, an argument can be made that finding a violation of section 745 does not necessarily "*prevent* the prosecution of hate crimes" (**see** § 745(g)) if the remedy imposed merely *impedes* the prosecution, i.e., if the remedy imposed is not dismissal but simply the declaration of a mistrial (see § 745(e)(1)(A)) or discharge of the jury panel (**see** § 745(e)(1)(A)).

17. May a section 745 motion be brought in conjunction with a juvenile proceeding?

Penal Code section 745(f) states: "This section also applies to adjudications and dispositions in the juvenile delinquency system."

As to whether a defendant would be able to obtain juvenile records to support a section 745(a)(3) or 745(a)(4) motion, **see** this IPG, section V-4-B at pp. 132-133.

18. May a section 745 motion be brought in conjunction with a proceeding to revoke probation or mandatory supervision?

Section 745(a)(4) permits defendants to bring a motion claiming "[a] longer or more severe ***sentence was imposed*** on the defendant than was imposed on other similarly situated individuals convicted of the same offense . . .". (Emphasis added.) That motion may be brought in the trial court if "judgment" has not yet been entered. (Pen. Code, § 745(b).)

A "judgment" is entered when it is recorded in the minutes of a court. (**See** Pen. Code, § 1207 ["When judgment upon a conviction is rendered, the clerk must enter the judgment in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any."]; ***People* v. *Karaman*** (1992) 4 Cal.4th 335, 348.) An "entered judgment" exists even though execution of the judgment is stayed. (**See *People* v. *Banks*** (1959) 53 Cal.2d 370, 386.)

The term "judgment" in section 745 should be given the same meaning as it has previously been given by the courts. This is because "[t]he Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light of those decisions. Therefore [it may be] assume[d] that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed." (***People* v. *Tingcungco*** (2015) 237 Cal.App.4th 249, 257.) Under existing law, "the terms 'judgment' and "'sentence'" are generally considered 'synonymous' [Citation omitted], and there is no 'judgment of conviction' without a sentence." (***People* v. *McKenzie*** (2020) 9 Cal.5th 40, 46.)

Thus, a persuasive argument can be made that, at least when a defendant is placed on probation with imposition of sentence suspended, "judgment" has not yet occurred. As discussed by the California Supreme Court in ***People* v. *Scott*** (2014) 58 Cal.4th 1415:

> "[w]hen the trial court suspends imposition of sentence, ***no judgment is then pending*** against the probationer, who is subject only to the terms and conditions of the probation. [Citations.] The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.' [Citation.] On the defendant's rearrest and revocation of her probation, '... the court may, ***if the sentence has been suspended, pronounce judgment*** for any time within the longest period for which the person might have been sentenced.'" (***Id***. at pp. 1423–1424 quoting ***People* v. *Howard*** (1997) 16 Cal.4th 1081, 1087, emphasis added.)

If judgment has *not* been pronounced, the defendant should be able to file the section 745 motion in the trial court. And it should not make a difference that defendant was tried and convicted before January 1, 2021 since the judgment was not imposed until after January 1, 2021. (**See** Pen. Code, § 745(j) ["This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021."].)

Of course, until a sentence is actually imposed, it would be premature to bring a motion under section 745(a)(4) so a defendant seeking to challenge a sentence in the trial court (instead of having to proceed by way of section 1473 or 1473.7) might need to ask the judge to delay ordering execution of the sentence and the formal entry of judgment.

On the other hand, if a sentence has been imposed but *execution* of sentence has been suspended, then a "judgment" (i.e., a conviction and sentence) *has* been entered. (**See** Pen. Code, § 1207; ***People* v. *Banks*** (1959) 53 Cal.2d 370, 386.) "[A] defendant is 'sentenced' when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended." (***People* v. *Scott*** (2014) 58 Cal.4th 1415, 1423; **see also *People* v. *Chavez*** (2018) 4 Cal.5th 771, 781 [where the court suspends execution of sentence, the sentence constitutes "a judgment" but it is a "judgment provisional or conditional in nature."].) Thus, a defendant who received a sentence that was imposed but not executed would likely have to file a post-judgment motion pursuant to Penal Code section 1473 or 1473.7. (**See** Pen. Code, § 745(b) ["A defendant . . . 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)."].)

Moreover, the defendant would be precluded from bringing a motion in *any* forum if the entered judgment were imposed but execution of sentence had been suspended before January 1, 2021. (**See** Pen. Code, § 745(j).)

Expect defense counsel to argue, based on cases discussing when a "judgment" is "final" for purposes of whether to apply ameliorating changes in the law retroactively (**see** this IPG, section IV-18 at p. 118-119 [discussing whether a defendant's judgment is final if defendant is on mandatory supervision]), that a "judgment" is not a "judgment" for purposes of section 745 if it is provisional in nature and that a judgment that is not executed is provisional in nature.

However, whether a "judgment" is "final" for purposes of a retroactivity analysis is a *different* question than whether a "judgment" has been "entered" for section 745 purposes. Section 745

is expressly made prospective in application and not even an ameliorative change in the law is retroactive if the statute is expressly made prospective in application. (***People* v. *Floyd*** (2003) 31 Cal.4th 179, 185.) A provisional judgment *is* still a judgment. And section 745 itself implicitly recognizes the distinction between defendants whose sentence has been imposed and those whose sentence has not been imposed by treating the former as if they received judgment. That is why the statute requires defendants alleging a violation of section 745 to "file a petition for writ of habeas corpus or a motion under Section 1473.7" if judgment has been imposed. (Pen. Code, § 745(b).)*

Editor's note:** The question of whether a judgment in a criminal case is considered "final" for "purposes of applying a later ameliorative change in the law when probation is granted and execution of sentence is suspended, or only upon revocation of probation when the suspended sentence is ordered into effect" is currently pending before the California Supreme Court. (**See *People* v. *Esquivel (S262551) and ***People* v. *Shelton*** (S262972).

A defendant who was given a split sentence that included mandatory supervision *after* January 1, 2021 and wishes to bring a section 745 challenge will likely have to file a petition under section 1473. This is because a defendant who has been placed on mandatory supervision is in the same posture as a defendant whose sentence has been imposed but not executed.

Penal Code section 1170(h)(5)(A) provides: "Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, ***when imposing a sentence*** pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion. (***Ibid***, emphasis added.)

And Penal Code section 1170(h)(5)(B), in pertinent part, provides: "The portion of a defendant's ***sentenced*** term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later." (***Ibid***, emphasis added.)

Albeit, in some ways, a sentence that includes mandatory supervision is *even closer* in nature to a sentence that has been *executed* since "the Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is *akin* to a state prison commitment; *it is not a grant of probation or a* conditional *sentence*." (***People* v. *Malago*** (2017) 8 Cal.App.5th 1301, 1305; ***People* v. *Rahbari*** (2014) 232 Cal.App.4th 185, 192; ***People* v. *Martinez*** (2014) 226 Cal.App.4th 759, 763; ***People* v.**

Fandinola (2013) 221 Cal.App.4th 1415, 1422, emphasis added; **but see *People* v. *Diaz Martinez*** (2020) 268 Cal.Rptr.3d 411, 415 [review granted November 10, 2020, S264848] ["Mandatory supervision is 'akin to probation.'"].)*

Editor's note:** ***Diaz Martinez and other cases addressing the question of whether a judgment in a criminal case is considered "final" for purposes of applying a later ameliorative change in the law when a defendant is on mandatory supervision have been "taken up for review and deferred pending consideration and disposition of a related issue in ***People* v. *Esquivel***, S262551 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court." (**See *People* v. *Diaz Martinez*** (2020) 268 Cal.Rptr.3d 411, 415 [review granted November 10, 2020, S264848]; ***People* v. *Conatser*** (2020) 53 Cal.App.5th 1223 [review granted November 10, 2020, S264721]; ***People* v. *Lopez*** (2020) 57 Cal.App.5th 409 [review granted December 15, 2020, S266016].) The related issue in ***Esquivel*** is described in this IPG, section IV-18 at p. 118 [editor's note].

19. Is section 745 retroactive?

Section 745 is not retroactive in that it does not apply to cases in which judgment has been entered before January 1, 2021. (**See** Pen. Code, 745 (j) ["This section applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021."].)

Whether a defendant who has been placed on probation before January 1, 2021 may bring a section 745 motion may turn on whether the defendant was placed on probation with imposition of sentence suspended or execution of sentence suspended. (**See** this IPG, section IV-18 at pp. 116-119 [and also discussing whether a defendant placed on mandatory supervision before January 1, 2021 is entitled to file a section 745 motion].)

***Editor's note:** There is a bill currently pending in the legislature (AB 256) which would make Penal Code sections 745 and 1473 retroactive to *all cases regardless of when judgment was entered*.

V. Discovery Requests for Evidence Relevant to a Potential Violation of Section 745(a)

1. *Informal* defense requests for discovery

Although section 745 provides a formal mechanism for defendants to seek discovery (**see** this IPG, section V-2 at p. 121), there is nothing that prevents a defendant from initially making an informal discovery request for information. Prosecutors should consider *voluntarily* responding to good faith requests - at least if doing so is feasible and would not entail an

unreasonable amount of effort to comply with the request. This is *consistent with* the intent behind section 745. Moreover, provision of some types of discovery (most likely evidence relevant to claims brought under section 745(a)(1) or (a)(2)) may even be separately required under the obligation to provide exculpatory evidence pursuant to Penal Code section 1054.1(e).

The more onerous informal requests will be those for statistical information or case files potentially relevant to section 745(a)(3) or (a)(4) motions. No doubt, if such requests become routine, then the collective effort to respond will quickly become infeasible and unreasonable. But if defense counsel can make an *informal* good faith showing of good cause to believe their client is being treated (intentionally or not) differently based on the client's race, ethnicity, or national origin, prosecutors should be open to assuaging that concern. One way to do so is to provide reasonably accessible relevant statistics.

Of course, what is reasonably accessible will differ from office to office and depend on whether:
(i) the office has been compiling statistics electronically showing how many individuals were charged with a specific crime;
(ii) those statistics provide a breakdown of the race, ethnicity, or national origin of the defendants (or victims) – and in *specific enough* form to be relevant; and
(iii) those statistics also capture other characteristics of the crime or the offender that establish whether or not the defendants are similarly situated to the defendant making the request.

Keep in mind, prosecutors have an interest in ensuring a defendant is not treated unfairly based on their race, ethnicity, or national origin. If the evidence uncovered in responding to an informal request actually shows that a defendant has been (intentionally or unintentionally) improperly charged, convicted, or sentenced in violation of section 745(a)(3) or (a)(4), there is no reason to litigate. Prosecutors can adjust the charges or seek to adjust the sentence without the necessity of a formal motion. The following advice assumes the prosecutor is unaware of any reason to suspect unfairness in the prosecution.

If a prosecutor chooses to voluntarily provide statistics, it is respectfully recommended the prosecutor should do so subject to three clarifying caveats.

First, defense counsel should be informed the data is being provided voluntarily and its provision should not be taken as a concession that defendant has shown, or the prosecution believes, "good cause" exists for its provision. (**See** this IPG, section V-5 at pp. 133-138.) This

is especially important if the statistics provided do not reflect whether defendants are similarly situated. Broad statistics (which do not reflect whether defendants are similarly situated) may potentially result in very misleading data regarding disparities that *foment* the filing of section 745 motions. (**See** this IPG, section IV-8-E at p. 76.) Indeed, if the data *does* suggest disparate treatment and it is not overly burdensome, before providing the data, prosecutors should consider doing a dive into the specific case files to see if the defendants described in the statistical data are actually similarly situated to the defendant. The results of this dive can then also be provided to the defense.

Second, defense counsel should be informed that providing the data is not a concession that the data would be admissible over a foundational, hearsay, or other evidentiary objection. (**See** this IPG, sections VI-2 at pp. 170-171; VI-5 at p. 176; VI-6 at p. 176.)

Third, prosecutors should consider keeping track of the amount of time (i.e., cost) of complying with the informal request. This is necessary to assess how to respond to future informal requests, for internal office budgetary purposes, and for establishing whether AB 2542 is an unfunded mandate if making such a claim is contemplated. (**See** this IPG, section XII at pp. 246-252.)

2. *Formal* defense requests for discovery under section 745(d)

Subdivision (d) of section 745 states: "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 court may permit the prosecution to redact information prior to disclosure." (Emphasis added.)

Paragraph (j) of section 3 of the preamble portion of AB 2542, in pertinent part, states: "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." (Emphasis added.)

There are many ambiguities, undefined terms, and unanswered questions built into section 745. Most courts are going to try to resolve issues stemming from these ambiguities, undefined

terms, and unanswered questions **before** determining what discovery, if any, is going to be potentially relevant. Accordingly, and logically, courts should use the following procedure:

First, require the defendant to identify which paragraph of subdivision (a) of section 745 is the defendant alleging has been potentially violated.

Second, settle on a definition of the terms used in whatever subdivision has been identified.

Third, determine whether the sought-after discovery is potentially relevant to proving a violation (or lack of violation) of the subdivision at issue.

Fourth, determine whether the sought-after discovery is in the possession or control of the prosecution.

Fifth, determine whether the defendant has made a sufficient showing of "good cause" for disclosure.

3. What type of discovery is "relevant" evidence to proving a violation of section 745(a)?

The first question that needs to be resolved in assessing what evidence is "relevant to a potential violation of subdivision (a)" is whether the defendant is entitled to evidence that simply *supports* a showing section 745(a) has been violated or whether it *also* encompasses evidence that *undermines* a claim section 745(a) has been violated. Under the definition of "relevant evidence" in the Evidence Code, it appears that relevant evidence would include evidence that *undermines* the allegation that section 745(a) has been violated. (**See** Evid. Code, § 210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason *to prove or disprove* any disputed fact that is of consequence to the determination of the action." emphasis added.)

With that assumption in mind, the type of evidence that is discoverable will depend on which paragraph of subdivision (a) is alleged to have been violated.

> ***Editor's note:** Issues regarding discovery when defendants are pursuing post-conviction relief pursuant to either Penal Code 1473 or 1473.7 will be discussed in this IPG, sections X-6 at p. 221-224 and XI-5 at p. 239-240.)

A. What type of discovery is "relevant" evidence to proving a violation of section 745(a)(1) or (2)?

If the alleged violation falls under paragraphs (1) or (2) of subdivision (a) of section 745, the evidence is likely to speak for itself and not much discovery would be warranted. However, if there is some ambiguity surrounding how statements or conduct should be interpreted, then evidence that the judge, attorney, officer, or expert witness had previously engaged in behavior exhibiting bias or animus towards the defendant or racial bias or animus towards members of the group to which defendant belongs could potentially be relevant. For example, if an officer has a sustained finding for engaging in conduct involving prejudice or discrimination against a person on the basis of race, ethnicity, or national origin, that might be relevant to deciding whether to interpret hostile conduct as "animus or bias" arising "because of the defendant's race, ethnicity, or national origin." (Pen. Code, § 745(a)(1).)

B. What type of discovery is "relevant" evidence to proving a violation of section 745(a)(3)?

If the allegation falls under paragraph (3) of subdivision (a) of section 745, then the scope of discovery is likely to be much broader and may be much more difficult to provide. Figuring out what is going to be relevant evidence in establishing a violation of paragraph (3) **will require a court to define certain terms that were left undefined in the statute**. These terms (italicized below) cannot be left undefined or it will be impossible to obtain any consistency in whether or how much discovery should be provided.

A violation of paragraph (3) of subdivision (a) requires the defendant to show he or she "was charged or convicted of a *more serious offense* than defendants of other *races, ethnicities, or national origins* who commit *similar offenses* and are *similarly situated*, and the evidence establishes that the prosecution *more frequently sought or obtained* convictions for *more serious offenses* against people who *share the defendant's race, ethnicity, or national origin* in the county where the convictions were sought or obtained." (Pen. Code, § 745(a)(3), emphasis added.)

Thus, to assess what type of evidence would be relevant to proving or disproving a violation of section 745(a)(3), a court must figure out the following:

1. What does “more serious” mean and which offenses would be considered “more serious” than other offenses? (**See** this IPG, section IV-8-C at pp. 65-68.)

2. How are “offense” and “similar offense” to be defined? (**See** this IPG, section IV-8-C-i at p. 67-68 and IV-8-D at pp. 68-71.)

3. How “similarly situated” is defined? (**See** this IPG, section IV-8-E at pp. 71-87.)

4. How “race, ethnicity, or national origin” are defined? (**See** this IPG, section IV-4 at pp. 47-49.)

5. What does “more frequently sought or obtained” mean? (**See** this IPG, section IV-8-F at pp. 87-89.)

6. What does “significant difference” as used in the definition of “more frequently sought or obtained” mean? (**See** this IPG, section IV-8-F-ii at pp. 89-94.)

7. How far back in time will statistics on charging and conviction still be relevant to a section 745(a)(3) motion? (**See** this IPG, section IV-8-E-ii at pp. 82-85; section IV-G at p. 95.)

8. What is the appropriate comparison group? (**See** this IPG, section IV-8-H at pp. 95-96.)

Relevant evidence could consist of statistical data regarding defendants charged with the same or a similar offense to the defendant from a relatively contemporaneous time period to when defendant was charged or convicted if that data reflected the race, ethnicity, or national origin of the defendants and was accompanied by sufficient information establishing which defendants were similarly situated to the defendant.

Relevant evidence could also be case files, including police reports and charging notes, from a time period relatively contemporaneous with the time period when defendant was charged or convicted if those reports reflected the race, ethnicity, or national origin of the defendants and encompassed information establishing which defendants were similarly situated to the defendant.

Relevant evidence, especially concerning factors that would relate to whether the defendants used for comparison were similarly situated to the defendant, could also be found in probation

reports. Some of those reports might be contained in the case files of the prosecution but those reports might not be deemed to be in the possession of the state. (**See** this IPG, section V-4-A at pp. 130-132.)

C. What type of discovery is "relevant" evidence to proving a violation of section 745(a)(4)(A)?

To determine what evidence is relevant when the defendant is seeking discovery to support an allegation that paragraph (4)(A) of subdivision (a) of section 745 has been violated, courts **will have to define certain terms that were left undefined in the statute**. These terms (italicized below) cannot be left undefined or it will be impossible to obtain any consistency in whether or how much discovery should be provided.

A violation of subparagraph (4)(A) of subdivision (a) requires the defendant to show "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." (Pen. Code, § 745(a)(4)(A), emphasis added.)

Thus, to assess what type of evidence would be relevant to proving or disproving a violation of section 745(a)(4)(A), a court must figure out the following:

1. What is a "longer or more severe sentence?" (**See** this IPG, section IV-9-B at pp. 103-104.)

2. How is "offense" defined? (**See** this IPG, section and IV-9-B-i at p. 104; IV-8-C-i at p. 67-68)

3. How is "similarly situated" is defined? (**See** this IPG, section IV-9-C at pp. 104-105; section IV-8-E at pp. 71-87.)

4. How "race, ethnicity, or national origin" are defined? (**See** this IPG, section IV-4 at pp. 47-49.)

5. What does "more frequently sought or obtained" mean? (**See** this IPG, section IV-9-D at pp. 106-107; section IV-8-F at pp. 87-89.)

6. What does "significant difference" mean as it is used in the definition of "more frequently sought or obtained?" (**See** this IPG, section IV-9-D at p. 107; section IV-8-F-ii at pp. 89-94.)

7. How far back in time will statistics on charging and conviction still be relevant to a section 745(a)(3) motion? (**See** this IPG, section IV-9-E at p. 107; section IV-8-E-ii at pp. 82-85; section IV-G at p. 95.)

8. What is the appropriate comparison group? (**See** this IPG, section IV-9-F at pp. 108; section IV-8-H at pp. 95-96.)

Relevant evidence would generally consist of statistical data from a time period relatively contemporaneous with the time period when defendant was sentenced describing the defendants charged with the same offense as the defendant who were similarly situated to the defendant *if* that data reflected the race, ethnicity, or national origin of the defendants and was accompanied by sufficient information establishing which defendants were similarly situated to the defendant.

Relevant evidence could be found in the prosecution's case files, including police reports and charging and sentencing notes, from a time period relatively contemporaneous with the time period when defendant was sentenced *if* the documents reflected the race, ethnicity, or national origin of the defendants and was accompanied by sufficient information establishing which defendants were similarly situated to the defendant.

Relevant evidence could also be information regarding the sentences imposed on defendants found in court files, probation reports, or court databases. However, whether such information could be sought pursuant to section 745(d) is an open question. (**See** this IPG, section V-4-A at pp. 130-132 [discussing what information is in the "possession and control" of the "state"].)

D. What type of discovery is "relevant" evidence to proving a violation of section 745(a)(4)(B)?

Because subparagraph (4)(B) largely parallels subparagraph (4)(A) of section 745(a) much of the same evidence that may be relevant to a violation of subparagraph (A) may also be relevant to a violation of subparagraph (B). (**See** this IPG, section V-3-C at pp. 125-126.) However, because subparagraph (4)(B) is focused on disparities due to the race, ethnicity, or national

origin of the *victims* of crimes, additional records may be relevant that are not under a subparagraph (4)(A) discovery request.

A violation of subparagraph (4)(B) of subdivision (a) requires the defendant to show "[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 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." (Pen. Code, § 745(a)(4)(B), emphasis added.)

Thus, to assess what type of evidence would be relevant to proving or disproving a violation of section 745(a)(4)(B), a court must figure out the following:

1. What is a "longer or more severe sentence?" (**See** this IPG, section IV-9-B at pp. 103-104.)

2. How is "offense" defined? (**See** this IPG, section IV-9-B-i at p. 104; IV-8-C-i at p. 67-68.)

3. How is "similarly situated" is defined? (**See** this IPG, section IV-9-C at pp. 104-105; section IV-8-E at pp. 71-87.

4. How "race, ethnicity, or national origin" are defined? (**See** this IPG, section IV-4 at pp. 47-49.)

5. What does "more frequently sought or obtained" mean? (**See** this IPG, section IV-9-D at p. 107; section IV-8-F-ii at pp. 89-94.)

6. What does "significant difference" as used in the definition of "more frequently sought or obtained" mean? (**See** this IPG, section IV-9-D at p. 107; section IV-8-F-ii at pp. 89-94.)

7. How far back in time will statistics on charging and conviction still be relevant to a section 745(a)(3) motion? (**See** this IPG, section IV-9-E at p. 107; section IV-8-E-ii at pp. 82-85; section IV-G at p. 95.)

8. What is the appropriate comparison group? (**See** this IPG, , section IV-9-F at pp. 108; section IV-8-H at pp. 95-96.)

In addition to all the evidence that would be relevant to support or undermine an alleged violation of section 745(a)(4)(A) (**see** this IPG, section V-C at pp. 125-126), information regarding the race, ethnicity, or national origin of the victim as well as whether the victim provoked the crime, was cooperative, was vulnerable, or was credible would be relevant. This information might or might not be contained in prosecutor's cases files.

4. When will the prosecution be deemed to be in "possession or control" of discovery bearing on a section 745 motion?

Subdivision (d) of section 745, in pertinent part, states: "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***." (Emphasis added.)

Subdivision (h), paragraph (4) provides: "'State'" includes the Attorney General, a district attorney, or a city prosecutor."

The discovery obligation regarding evidence that is *solely* relevant to a section *745* motion does not exist until the defense files a motion for discovery. (**Contrast, *United States* v. *Agurs*** (1976) 427 U.S. 97, 107 [duty to disclose favorable material evidence was not dependent on a request by the defense]; Pen. Code, § 1054.1 ["The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies"].) Though such discovery may be provided voluntarily. (**See** this IPG, section V-1 at pp. 119-120.)

How "possession or control" will be defined for purposes of section 745(d) is not known. "Possession" may be defined in the same way that term has been defined for purposes of a prosecutor's due process obligation under ***Brady* v. *Maryland*** (1963) 373 U.S. 83 (i.e., so that it includes evidence knowingly possessed and reasonably accessible to any member of the prosecution team). (**Cf.**, ***United States* v. *Jones*** (D. Me. 2020) 2020 WL 3128905 [collecting cases finding "***Brady*** does not compel the disclosure of information in connection with a defendant's claim of selective enforcement" or "selective prosecution"].) It could be defined in the same way the term is defined for purposes of a prosecutor's statutory obligations under Penal Code section 1054.1 (i.e., so that it includes evidence in the actual possession of the prosecuting attorney but only evidence in the possession of the investigating agencies if it is known to the prosecuting attorney). (**See** this IPG, section V-12 at p. 164.) Or it could (and

likely should) be defined as the term is ordinarily defined for discovery purposes (i.e., as it was defined before the passage of Proposition 115 enacted Penal Code section 1054.1).

That said, "[b]ased on the plain meaning of the statute, it does not include information in the possession of law enforcement or an expert witness." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 22.) Thus, for example, information contained solely in an officer's personnel file that might be relevant to a section 745(a)(2) claim that an officer exhibited bias or animus towards the defendant could not be ordered pursuant to section 745(d). The defense would have to file a *Pitchess* motion.

This IPG will not go over all the different types of relevant evidence that might potentially be deemed to be within the possession of the "state" that might support or undermine a section 745 motion. Suffice to say that the most common type of request will likely be for (i) statistical data from a time period relatively contemporaneous with the time period when defendant was charged or convicted or sentenced relating to other similarly situated defendants charged, convicted, or sentenced on the same or similar offenses to the defendant and/or (ii) case files, including police reports and charging notes, from that same time period relating to other similarly situated defendants charged, convicted, or sentenced on the same or similar offenses to the defendant. (**See** this IPG, sections V-3-B at pp. 123-134, V-3-C at pp. 125-126, and V-3-D at pp. 126-128.)

Subject to one caveat, exising statistical data compiled by the district attorney's office or information contained in the case files of a district attorney's office is likely to be viewed as within the "possession or control" of the state under *any* reasonable definition of "possession."

The one caveat to this conclusion is that under most definitions of "possession" for purposes of discovery in criminal cases, a necessary component of "possession" is whether the information is "***reasonably accessible***" to the entity from whom discovery is sought. (**See e.g., *People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1095 ["a criminal defendant's right to discovery is based on the fundamental proposition that the accused is entitled to a fair trial and the opportunity to present an intelligent defense in light of all relevant and *reasonably accessible information*."]; ***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514 ["The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has *reasonable access*."]; ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 904 [noting that when assessing whether evidence is in "possession" of the prosecution team, one

of three factors federal case law has considered is "whether the entity charged with constructive possession *has 'ready access' to the evidence.'"*]; ***In re Littlefield*** (1993) 5 Cal.4th 122, 135 [noting that "California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution" and then noting it had previously "construed the scope of possession and control as encompassing information '*reasonably accessible'* to the prosecution."]; **cf.,** ***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 346 [in determining whether good cause exists to order discovery, courts must ask "Is the material '*reasonably available* to the … entity from which it is sought (and not readily available to the defendant from other sources)'?"].)* (Emphasis added throughout.)

Editor's note:** Whether the information sought is reasonably accessible is a consideration in deciding ***both whether the evidence is "possessed" by the prosecution ***and*** whether there exists good cause for disclosure of the evidence. (**See** this IPG, section V-5-A-iii at p. 141-144.)

Statistical data that does *not exist* and cannot easily be created is not reasonably accessible. (**See** also this IPG, section V-11 at pp. 163-164; **cf.**, Fed. Rules Civ. Proc., rule 26(b)(2)(B), 28 U.S.C.A ["A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost" – albeit allowing order of disclosure in limited circumstances].) And thus, an argument can be made that it should not be treated as within the possession and control of the state.

Similarly, if the data contained in case files is not "reasonably accessible" because the information sought is so extensive and extracting it is so time-consuming, the data may properly be viewed as not being reasonably accessible. And, thus, not within the possession of the state. (**Cf.**, ***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 345 [one factor in assessing whether there is good cause for discovery is whether "production of the records containing the requested information … place an unreasonable burden on the" the party from whom the records are sought].)

A. Are probation reports or other "court" records within the "possession and control" of the "state" for section 745 purposes?

Whether a discovery motion for court records, including probation reports, could be made pursuant to section 745(d) is an open question. Subdivision (d) permits discovery requests for "evidence relevant to a potential violation of subdivision (a) in the possession or control of the ***state***." (Pen. Code, § 745(d), emphasis added.)

The "state" is defined in section 745(h)(4) as including "the Attorney General, a district attorney, or a city prosecutor." It makes no mention of the courts. Significantly, in earlier versions of the CRJA, the language in (h)(4) stated: "'State' includes the Attorney General, a district attorney, a city prosecutor, *or a superior court judge*." The reference to "a superior court judge" was deleted from the final version. (Compare http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542 [8/20/20 version] with [9/30/20 version].)

This amendment to the earlier language may have been in response to claims that defining the "state" to include judges was awkward since section 745 prohibits the "state" from seeking or obtaining criminal convictions for improper reasons, but judges do not seek or obtain criminal convictions. And thus grouping the executive branch in with the judicial branch could run afoul of the separation of powers doctrine. (**See *Gananian* v. *Wagstaffe*** (2011) 199 Cal.App.4th 1532, 1542-1543 [discussing why prosecution's authority to charge "is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch."].) Or it could have been included in response to concerns that discovery obligations would be imposed on the courts. Whatever the reason, the deletion of the reference to judges may have eliminated the ability to demand court records *pursuant to section 745(d)*.

Moreover, under existing discovery principles, records possessed by the judicial branch are not deemed to be in the possession of the prosecution. (**See *Satele* v. *Superior Court*** (2019) 7 Cal.5th 852, 859.) And so, the prosecutor is under no obligation to provide discovery of such records. (**See *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 728; ***County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; ***United States* v. *Zavala*** (9th Cir. 1988) 839 F.2d 523, 528; **see also *United States* v. *Lacerda*** (3d Cir. 2020) 958 F.3d 196, 219 [declining to impute failure to disclose information held by federal probation officer to prosecution].)

Probation reports may contain information relevant to why a defendant received a particular sentence or offer. Some probation reports may be located in the case files of district attorney's offices. Others may only be within the possession or control of the court.

Unless the probation officer conducted the investigation into the crime with which the defendant is charged, records of the probation department are records of the court. Records

relating to the supervision of a defendant on probation are not deemed to be in the possession of the prosecution team. (**See *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 729; ***County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; **see also *United States* v. *Zavala*** (9th Cir. 1988) 839 F.2d 523, 528 [disclosure of witness statements in probation reports "is not compelled by ***Brady*** . . . if the reports are in the hands of court or probation office"]; ***McGuire* v. *Superior Court*** (1993) 12 Cal App 4th 1685, 1687["the probation file is a court record"]; Pen. Code, § 1203.10 ["[t]he record of the probation officer is a part of the records of the court"]; **but see *Amado* v. *Gonzalez*** (9th Cir. 2013) 734 F.3d 936, 949, 951 [suggesting prosecution not only had a duty to disclose conviction from the rap sheet of a prosecution witness but a duty to disclose the gang affiliation of the witness which was revealed *in the probation report* associated with the witness' conviction because, inter alia, the witness was convicted by the same prosecutor's office]; ***In re Pratt*** (1999) 69 Cal.App.4th 1294, 1318 [presuming prosecution had a copy of a probation report relating to prosecution witness "because it was the prosecuting agency in case" against the witness].)

Note that probation reports are generally confidential sixty days after judgment is pronounced, or probation granted. The inspection of such reports is controlled by Penal Code section 1203.05. The limitations in that statute regarding how and when such reports can be accessed are not subordinate to section 745, which does not include any language suggesting it applies notwithstanding any other provision of law. (**See** Couzens, "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 24.)

This does not mean that if the court has compiled relevant statistics or has probation reports, the defense would be unable to obtain them. (The defense could subpoena those statistics, sift through court files for themselves to collect the data upon which the court-generated statistics are based, and/or file requests for probation reports in compliance with Penal Code section 1203.05.) It just means that the defense *may* not be able to obtain the data through the mechanism of a discovery request pursuant to section 745(d).

B. Are juvenile records within the "possession and control" of the "state" for section 745 purposes?

Penal Code section 745(f) states: "This section also applies to adjudications and dispositions in the juvenile delinquency system." Thus, a defendant may seek juvenile records to support a section 745(a)(3) or 745(a)(4) motion.

Although prosecutors may be in possession of case files relating to juveniles, the files themselves are deemed to be within the control of the juvenile *court*. (**See** 2020-IPG-47 (BRADY, STATUTORY, & ETHICAL DISCOVERY OUTLINE) at pp. 161-162 [for a more expansive discussion and case citations].)* Accordingly, when the defense files a section 745(d) request for access to juvenile records (other than juvenile crime statistics made available to the public pursuant to Penal Code section 13010.5(b)), the defense will likely have to simultaneously file a petition for disclosure under subdivision (a)(1)(P) of section 827, the general exception allowing for disclosure to "any other person who may be designated by court order of the judge of the juvenile court[.]" (Welf. & Inst. Code, § 827(a)(1)(P); Rule of Court 5.552(b)(3); ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337; **see also *People* v. *Stewart*** (2020) 55 Cal.App.5th 755, 776; 2020-IPG-47 (BRADY, STATUTORY, & ETHICAL DISCOVERY OUTLINE) at pp. 167-168.)*

Additional problems may arise when the pertinent records include juvenile files that have been sealed pursuant to Welfare and Institutions Code sections 781, 781.5, 786, and 793 and Penal Code sections 851.7 and 1203.45. There are exceptions in several of these statutes which allow prosecutors (but not defense counsel) to access records in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant. (**See** Pen. Code, § 851.7(g); Welf and Inst. Code, §§ 781(a)(1)(D)(iii), 786(g)(1)(K), 793(d); 2020-IPG-47 (BRADY, STATUTORY, & ETHICAL DISCOVERY OUTLINE) at pp. 177-181.)* There is no provision allowing defense counsel to access the records so even if they contain relevant evidence to the section 745 motion, access to the records could not be obtained by the defense by filing a section 827 petition. Moreover, it is not clear whether even prosecutors could utilize the exception to access sealed records to meet a request for "relevant" evidence pursuant to section 745(d).

***Editor's note:** The 2020-IPG-47 (BRADY, STATUTORY, & ETHICAL DISCOVERY OUTLINE) is available upon request.

5. What will be a sufficient showing of "good cause" in general for disclosure of discovery bearing on a section 745 motion?

Penal Code section 745(d), in pertinent part, allows a defendant to make a discovery request for evidence relevant to a potential violation of section 745 and provides: "Upon a showing of ***good cause***, the court shall order the records to be released." (Emphasis added.)

In the original version of the bill, there was no requirement of any showing before discovery could be disclosed. However, amendments to the original version were expressly requested by the author to "[r]equire the defense to file a motion for discovery and to describe the records requested *and show good cause*." (Sen. Approp. Com., Analysis of Assem. Bill No. 2542 (2019-2020 Reg. Sess.) as amended August 20, 2020.)

Although the term "good cause" is not defined in section 745, it is a commonly used term to describe the showing necessary before discovery will be ordered in other contexts. And while the specifics of what constitutes a "good cause" showing is necessarily tied to what discovery is being sought, there is no reason to believe the general principles governing what "good cause" means in all these other discovery contexts will be different from what it means as used in section 745(d). Accordingly, it makes sense to consider the recent case of ***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, a case in which the California Supreme Court provided a comprehensive overview of what constitutes "good cause" for discovery purposes.

The discussion in ***Facebook*** of what constituted "good cause" arose in the context of whether a defense subpoena for third party records should be granted. However, the court's definition of good cause and discussion of what factors must be considered by a judge in deciding whether "good cause" for release of the records relied heavily and repeatedly on numerous decisions addressing what constituted good cause for discovery directly from the district attorney. (**See *Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 345–347 [citing to, inter alia, ***Hill* v. *Superior Court*** (1974) 10 Cal.3d 812, 817–818; ***Joe Z.* v. *Superior Court*** (1970) 3 Cal.3d 797, 804; ***Ballard* v. *Superior Court*** (1966) 64 Cal.2d 159, 167; ***Lemelle* v. *Superior Court*** (1978) 77 Cal.App.3d 148, 162–164.) Indeed, the seven factors the California Supreme Court stated "[t]he trial court … must consider and balance" when "deciding whether the defendant shall be permitted to obtain discovery of the requested material" were derived from and first articulated in ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, a case involving a pretrial discovery request to the prosecution for police reports relating to other homicides ostensibly similar to defendant's charged homicide. (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 344 and fn. 5.)

Many of the cases (both those involving discovery for third party records as well as discovery directly from the prosecution) relied upon in ***Facebook*** used the term "good cause" and

"plausible justification" alternatively. But the California Supreme Court clarified that "plausible justification" is ***not*** synonymous with "good cause." "The plausible justification consideration is but one (albeit the most significant) of multiple factors that, together, reflect a global inquiry into whether there is good cause for a criminal subpoena. ***It is included within the overall good-cause inquiry and is not an alternative to that inquiry***." (***Id***. at p. 345, fn. 6 [and *rejecting* language in earlier decisions suggesting the test is either good cause *or* plausible justification], emphasis added.)

The seven factors that must be considered and balanced when deciding whether "good cause" exists for permitting a defendant to obtain discovery laid out in ***Facebook*** are as follows:

First, "[h]as the defendant carried his burden of showing a "'plausible justification'" for acquiring documents from a third party [citations omitted] by presenting specific facts demonstrating that the subpoenaed documents are admissible or might lead to admissible evidence that will reasonably "'assist [the defendant] in preparing his defense'"? [Citations omitted.] Or does the subpoena amount to an impermissible "'fishing expedition'"?" (***Id***. at p. 345 [citing to ***Pitchess* v. *Superior Court*** (1974) 11 Cal.3d 531, 537]; **see also *People* v. *Luttenberger*** (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent "some preliminary showing 'other than a mere desire for all information in the possession of the prosecution'" plus "[t]he request must be 'with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition"'"]; ***People* v. *Prince*** (2007) 40 Cal.4th 1179, 1232 ["motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure"]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 953 [same].)

To illustrate what would constitute a "plausible justification" in general, it may be helpful to consider some of the analysis in ***Facebook*** itself. There, a defendant charged with attempted murder and claiming self-defense sought the social media posts of his victim. In support of the plausible justification, the defendant noted the victim had posted updates of his physical recovery from the hospital, updates of court hearings, and even "discussed his personal use of guns and drugs, and described his desire to rob and kill people." (**See *Facebook, Inc.* v. *Superior Court*** (2017) 15 Cal.App.5th 729, 733 [facts drawn, in part, from the lower court opinion reviewed in ***Facebook* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329].) The defendant claimed the standard of plausible justification had been met because (1) [the victim's social media] may contain additional information that is inconsistent

with the information previously provided by … [the victim] to law enforcement and the prosecution as it related to this case, (2) it may contain additional information that demonstrates a motivation or character for dishonesty in this matter, (3) it may contain additional information that demonstrates a character for violence that is relevant to the self-defense that will be asserted by defense counsel at trial, and [(4)] it may contain additional information that provides exonerating, exculpatory evidence for [defendant]." (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 343.) After noting that certain representations made by defense counsel regarding how the crime occurred were contradicted by the record of the preliminary examination, the ***Facebook*** court suggested (without deciding) that there was no plausible justification since it was "questionable whether there is any similar substantial connection between the victim's social media posts and the alleged attempted murder." (***Id***. at p. 354.)

It is also useful to consider the case of ***Hill* v. *Superior Court*** (1974) 10 Cal.3d 812, one of the decisions relied upon in ***Facebook***. ***Hill*** illustrates that while "proof of the existence of the item sought is not required," (***id***. at p. 817) to establish a plausible justification for release of records, ***speculative or far-fetched theories of relevance should be viewed skeptically***. In ***Hill*,** the court upheld the disclosure of any "public records of felony convictions that might exist regarding the prosecution's prospective key witness against him — in order to impeach that witness." (***Id***. at p. 819.) But the ***Hill*** court *also* upheld the *nondisclosure* of any general arrest and detention records of the prosecution's prospective key witness (which were sought under the speculative theory that the witness who reported the crime was the actual burglar) in "view of the minimal showing of the worth of the information sought and the fact that requiring discovery on the basis of such a showing could deter eyewitnesses from reporting crimes." (***Id***. at p. 22.) The ***Hill*** court observed that even if the arrest and detention records might conceivably lead "to the discovery of evidence of prior offenses by [the prospective witness] having a distinctive modus operandi common to both the prior offenses and the offense with which [the defendant] is charged" and even assuming "such evidence would be admissible as tending to show that [the prospective witness] committed the instant offense" by showing he had a motive to lie, the request for these records was still properly denied. (***Hill*** at pp. 822-823; **see also *Facebook, Inc.* v. *Superior Court of San Diego, supra,*** 10 Cal.5th at pp. 351-352 [describing ***Hill***].)

In contrast to the showing made in ***Hill*** and in the case before it, the California Supreme Court in ***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329 suggested there *was* plausible justification for disclosure of social media posts of a homicide victim and a witness in the case of ***Facebook, Inc. (Hunter)* v. *Superior Court*** (2018) 4 Cal.5th 1245 since "there was significant evidence that the underlying shooting and resulting homicide [in that case] may have related to, and stemmed from, social media posts — and hence the nexus, and justification for intruding into a victim's or witness's social media posts (public and restricted, and/or private messages), was substantial." (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 354; **see also *City of Santa Cruz* v. *Municipal Court*** (1989) 49 Cal.3d 74, 78-79, 86 ["good cause" showing to obtain in camera hearing for prior complaints alleging arresting officers used excessive force found where the defense articulated a valid theory of how prior excessive force complaints against the officers "might be admissible" which was supported by counsel's declaration specifically describing how "the defendant had been handcuffed, grabbed by the hair, thrown to the ground, and one officer had stepped on his head while another "'twisted his arm behind his back'"" and where police reports stated that "one officer punched defendant and then helped another officer wrestle the defendant to the ground"].)

Second, "[i]s the sought material adequately described and not overly broad?" (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 346.)

Third, "[i]s the material 'reasonably available to the … entity from which it is sought (and not readily available to the defendant from other sources)'?" (***Ibid***.)

Fourth, "[w]ould production of the requested materials violate a third party's 'confidentiality or privacy rights' or intrude upon 'any protected governmental interest'?" (***Ibid***.) It is important to recognize that whether the materials are privileged or are otherwise confidential is both a factor in assessing good cause ***and*** a primary consideration in whether records should be released ***even if*** good cause for their release is shown. (***Id***. at p. 347; Hoffstadt, California Criminal Discovery (6th Ed.) at p. 375; this IPG, section V-8 at pp. 155-159.)

Fifth, "[i]s defendant's request timely? [Citations omitted.] Or, alternatively, is the request premature?" (***Facebook, Inc.* v. *Superior Court of San Diego, supra*,** 10 Cal.5th at p. 347.)

Sixth, "[w]ould the "time required to produce the requested information … necessitate an unreasonable delay of defendant's trial"? (***Ibid***.)

Seventh, "[w]ould 'production of the records containing the requested information … place an unreasonable burden on the [third party]'?" (***Ibid***; **see also *People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957 [proper to deny a request to search for discovery of third-party culpability where "the burdens placed on government and on third parties substantially outweigh the demonstrated need for discovery].)

A. Application of the factors used in assessing good cause *in the context of a section 745(d) request* for discovery of relevant information to support a section 745(a)(3) or 745(a)(4) motion

"[E]ach legal claim that a defendant advances to justify acquiring and inspecting sought information must be scrutinized and assessed regarding its validity and strength." (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 352.)

i. Plausible justification for disclosure of charging, conviction, and sentencing information

In assessing whether a defendant has shown a plausible justification for data relating to other similarly situated defendants charged with, convicted of, or sentenced on similar offenses, "the defendant's stated justification for acquiring the sought information" must be measured "against the legal claims [in this case, asserted violations of either section 745(a)(3) or (a)(4)] pursuant to which the defendant urged the information would be relevant." (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 349.)

In resolving that plausible justification inquiry, the court must examine the facts known to the court (either through the briefs of counsel or otherwise available to the court) "in order to assess whether a claim [section 745 has been violated] is sufficiently viable to warrant the intrusion that would occur if the sought [data] were required to be disclosed." (***Ibid***; **cf.,** ***Perakis* v. *Superior Court*** (1979) 99 Cal.App.3d 730, 733 [equating "plausible justification" for discovery supporting selective prosecution motion to a "prima facie" showing]; ***United States* v. *Parham*** (8th Cir. 1994) 16 F.3d 844, 846 [defendants "must establish a prima facie case of selective prosecution before discovery of materials requested in connection with the claim can be compelled"].)

Specifically, the court must ask whether there are specific facts demonstrating that the data or case files relating to similarly situated defendants not belonging to defendant's group will be (or lead to) "admissible evidence that will reasonably "'assist [the defendant] in preparing '"" (***ibid***) his claim that (i) defendant has been charged or convicted of a more serious offense (or sentenced more severely) than similarly situated defendants of different races, ethnicities, or nationalities, who are charged with, convicted of, or sentenced on similar offenses; (ii) that persons belonging to the same group as defendant have been subject to being charged and convicted of more serious offenses (or longer/more severe sentences) for similar (or the same) offenses more frequently than have similarly situated defendants of other groups who have been charged or convicted of similar crimes or sentenced for the same crime; and (iii) any significant disparities cannot be explained by race-neutral reasons. (**See** Pen. Code, § 745(a)(3)&(4), (h)(1).

a. When will statistical data suffice to establish "good cause?'

It is quite possible that statistical data available to and proffered by the defense may be sufficient to establish the good cause necessary to obtain additional statistical data or other evidence bearing on a section 745(a)(3) or (a)(4) motion.

To make a showing of good cause, it is not necessary that the statistics provide a plausible justification for believing the prosecution *purposefully* engaged in discrimination since section 745 was enacted to provide defendants a mechanism for eliminating illegitimate but *unintentional* disparities. (**See**, Sec. 2, subd. (j) of AB 2542; III-3 at p. 40; IV-8-A at p. 62.) However, if the defense cannot point to *any persons* belonging to other groups who have been treated in a disparate way or to *any* statistics that *other groups* of *similarly situated* defendants charged with similar crimes have been treated in a disparate way, it is difficult to see how a request for data or case files can be viewed as something other than a "simple fishing expedition." (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 345.)

This point was illustrated in the case of ***People* v. *McPeters*** (1992) 2 Cal.4th 1148. In that case, a defendant made a discovery request for capital charging policies, practices, and decisions, as well as "a vast amount of statistical data on cases filed and charging decisions made by the district attorney over a seven-year period" in support of a request for discovery bearing on a selective prosecution motion. (***Id***. at pp. 1169-1170.) The defense request was

premised on a study that "did not describe or analyze the facts or circumstances of any case, other than the sentence and the race of victim." (***Id***. at p. 1170.) The California Supreme Court held the defense was not entitled to the requested discovery because the defense had not established a "plausible justification" for discovery. And the defense study did not provide a "plausible justification" because it was devoid "of any factual comparison among the homicide cases presented by defendant, despite the availability of information in the public record that could have been used to make such a comparison." (***Id***. at pp. 1170-1171.)

Expect defense counsel to note that in ***McPeters***, the California Supreme Court discussed and relied upon ***McCleskey* v. *Kemp*** (1987) 481 U.S. 279, 312. Defense counsel may argue that the reliance on ***McClesky*** cases taints all the principles espoused in ***McPeters*** relating to what must be shown to establish discrimination. And they may point out that ***McClesky*** was expressly criticized in the preamble portion of AB 2542 because the High Court declined to find a constitutional violation notwithstanding racial disparities, "concluding that we must simply accept these disparities as "an inevitable part of our criminal justice system." (Stats. 2020, ch. 317, § 2(f).) However, this argument lacks nuance.

The reason ***McClesky*** was criticized was because the ***McClesky*** court held there must be proof of ***intentional*** discrimination, which "established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was *conscious, deliberate and targeted*." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assemb. Bill No. 2542 (2019–2020 Reg. Sess.) as amended August 25, 2020, p. 8, emphasis added.) But the reason the ***McPeters*** held the statistics provided did not establish plausible justification for the discovery of the district attorney's capital charging policies, practices, and decisions was not because (or only because) there was no suggestion of *intentional* discrimination. Rather, it was because the defendant "showed no more than the barest form of 'apparent disparity'" devoid of any description or analysis of "the facts or circumstances of any case, other than the sentence and the race of victim" notwithstanding "readily available, case-specific data that could, if favorable, have supplied a plausible justification for further inquiry." (***Id***. at pp. 1170, 1171; **see also *People* v. *Montes*** (2014) 58 Cal.4th 809, 831 [recognizing whether there exists plausible justification for discovery bearing on a discriminatory *intent* is a different question than whether there exists plausible justification for discovery bearing on discriminatory *effect*].) In other words, *the failure to show the statistics offered in support of the discovery*

request involved similarly situated defendants rendered the statistics irrelevant in showing discriminatory effect.

Statistics that do not create any inference of discriminatory *intent* may still be relevant to a section 745(a)(3) or (a)(4) if they establish discriminatory *effect*. But statistics that do not create an inference of discriminatory *effect* because they fail to compare *similarly situated* defendants are of little to no value. And thus, are largely *irrelevant*. (**See *United States* v. *Taylor*** (D.N.M. 2009) 608 F.Supp.2d 1263, 1266; ***United States* v. *Johnson*** (M.D.N.C. 2015) 122 F.Supp.3d 272, 363 [and cases cited therein].) The basic principle that "raw statistics" demonstrating discrepancies in charging defendants belonging to different races, ethnicities, or national origins "say nothing about charges brought against *similarly situated* defendants" (***United States* v. *Bass*** (2002) 536 U.S. 863–864, emphasis added) should remain valid and is as applicable in the context of a section 745(a)(3) or (a)(4) discovery request as it is in the context of *any* claim alleging discrimination.

ii. Is the request for information overly broad and adequately described?

A request seeking information to support a claim that section 745(a)(3) or (a)(4) has been violated that is not limited to seeking information relating to charges, convictions or sentences of defendants *similarly situated* to the defendant who commit the *same or similar offenses* within a *relatively contemporaneous time period* is an overly broad request. (**See** this IPG, sections IV-8-D at pp. 68-71 [similar offenses for § 745(a)(3) purposes]; IV-8-E at pp. 71-87 [similarly situated for § 745(a)(3) purposes]; IV-8-E-ii at pp. 82-85 [time frame for § 745(a)(3) purposes]; IV-9-B at pp. 103-104 [similar offenses for § 745(a)(4)(A) purposes]; IV-C at p. 104 [similarly situated for § 745(a)(4)(A) purposes]; IV-9-C-i at p. 105 [time frame for § 745(a)(4)(A) purposes]; IV-9-E at pp. 107 [same]; IV-10 at pp. 108-109 ["similar offenses" "similarly situated" and time frame for § 745(a)(4)(B) purposes]; IV-10-B at p. 110 [discussing relevant statistics regarding victims for § 745(a)(4)(B) purposes].)

iii. Is the information sought reasonably available to the prosecution and not available to the defense?

Whether the information sought to support to a section 745(a)(3) or (a)(4) motion is reasonably available will depend on how much and what data is collected and electronically stored in a particular county. Broad statistics capturing the number of defendants charged with a particular crime may be available. And the "race" of the defendant will often be

included in the data. However, the ethnicity or national origin of the defendant is more often going to be missing. And the same may hold true for data even about the "race, ethnicity, or national origin" of the victim.

Penal Code section 13125 describes the form of the standard data that must be stored in state or local criminal offender record information systems when available. Although it requires collection of data about the race of the offender and the offender's place of birth, it does not require collection of data about the ethnicity or national origin of the offender (which is not dictated solely by the offender's place of birth). Nor does it require collection of any data about the victim's race, ethnicity, or national origin. (Pen. Code, § 13125.)

Moreover, while some relevant information to a section 745 claim may be found in state or local databases (e.g., the charge or conviction being used for comparison purposes, what other offenses or enhancements a defendant may have been charged with or convicted of, and whether a conviction stemmed from a plea or trial), information regarding the characteristics of defendants and circumstances of the crime necessary to establish whether the defendants used for comparison are "similarly situated" (**see** this IPG, sections IV-8-E at pp. 71-87; IV-9-C at pp. 104-105) to the defendant will also <u>not</u> be found in state or local databases. (**See** Pen. Code, § 13125.)

Penal Code sections 13010 through 13014 require the Department of Justice to collect and compile certain statistical data regarding crime and criminals and make it available to the public. But the information collected pursuant to these statutes is also unlikely to capture data on the ethnicity or national origin of the offenders, data on the victim's race, ethnicity, or national origin, or data relevant to determining whether the group of defendants used for comparison purposes to the defendant are similarly situated to the defendant. (**But see** Pen. Code, §§ 13012(a)(2) [information "published on the OpenJustice Web portal pursuant to Section 13010 shall contain statistics showing . . . (1) The amount and the types of offenses known to the public authorities. ¶ (2) The personal and social characteristics of criminals and delinquents"]; Pen. Code, § 13014 [requiring the collection of demographic information about *the victim* and persons charged with the *crime of homicide*, including age, gender, race, and ethnic background"].)

Additional information bearing on the ethnicity or national origin of defendants might be found in case files (electronic or otherwise) of individual defendants. (Although even in the

case files, much information about the ethnicity or national origin of a defendant or a victim will not be included.) Case files (and charging notes) might potentially support or undermine a section 745(a)(3) or (a)(4) claim by showing the defendant to whom the file relates is or is not similarly situated to the defendant making the claim. However, depending on the number of files which must be reviewed, the process of combing through files for this information (and then redacting information protected by a privilege or state privacy right – **see** this IPG, section V-9 at pp. 160-161) can be extremely time consuming and potentially impossible to comply with given the time and resources available to a public prosecutor's office.

> ***Editor's note:** Whether the information sought is reasonably accessible is a consideration in deciding ***both*** whether there exists good cause for disclosure of the evidence and, arguably, whether the evidence should even be deemed to be "possessed" by the prosecution. (**See** this IPG, section V-4 at pp. 129-130.)

Broad statistical data that does not identify defendants and is possessed by the state Department of Justice [hereafter "DOJ"] should be equally available to the defense upon a request made to the DOJ. (**See** Pen. Code, § 11105(b)(9).) The same would hold true for information on the sentences imposed on defendants (broken down into racial categories). (***Ibid***; **see also** Pen. Code, §§ 13010-13014, 13125.)

Moreover, *some* information regarding charging or sentencing (**see e.g.**, publicly filed charging documents and orders reflecting the sentence imposed) would also be equally available to the prosecution and the defense by accessing court records. In general, the First Amendment provides 'broad access rights to judicial hearings and records ... both in criminal and civil cases.'" (***NBC Subsidiary (KNBC-TV), Inc.* v. *Superior Court*** (1999) 20 Cal.4th 1178, 1209, fn. 25.) "Both the federal (First Amendment to the United States Constitution) and the state (Article I, section 2(a), California Constitution) constitutions provide broad access rights to judicial hearings and records." (***Copley Press, Inc.* v. *Superior Court*** (1992) 6 Cal.App.4th 106, 111.) And while court records are exempt from requests under the California Public Records Act (Gov. Code, § 6250 et seq.), case law has confirmed that "court records are public records open to inspection" notwithstanding that exemption. (***Id.*** at pp. 111-112 [and noting that precluding public inspection of court records "should be permitted only upon a showing that revelation would 'tend to undermine individual security, personal liberty, or private property, or ... injure the public or the public good.'"].)

iv. Would production of the requested materials violate a third party's confidentiality or privacy rights or intrude upon any protected governmental interest?

There is a general confidentiality provided to state and local criminal history records (**see** Pen. Code, § 11105(b) and Cal. Code Regs. tit. 11, § 703(b) [State "[c]riminal offender record information may be released, on a need-to-know basis, only to persons or agencies authorized by court order, statute, or decisional law to receive criminal offender record information"]; ***Westbrook* v. *County of Los Angeles*** (1994) 27 Cal.App.4th 157, 162 [noting that "Penal Code section 13300 sets forth significant restrictions on access to "'[l]ocal summary criminal history information'"" and that "access to the information is restricted unless otherwise allowed by law" citing to Pen. Code, § 13201].)

> ***Editor's note:** It is an open question whether *state* summary criminal history information of persons *other than* the person being represented is confidential vis-à-vis criminal defense attorneys when requested in the course of representation. (**See** Pen. Code, § 11105(b)(9); "The Basic Brady, Statutory, and Ethical Discovery Obligations Outline (November 17, 2020 Edition), section X-4 at pp. 352-355 [available upon request].)

However, broad statistical data that simply points to the number of arrests, convictions, or sentences and breaks down that data along racial, ethnic, or national origin lines is ***not*** likely to implicate any confidentiality or privacy rights or intrude upon a protected governmental interest so long as no defendant is identified (or, arguably, can be identified). Indeed, "statistical records and reports in which individuals are not identified and from which their identities are not ascertainable" is not considered "criminal offender record information." (Pen. Code, § 13201; **see also** Pen. Code, § 11105(g) [relating to state summary criminal history information and stating "[i]t is not a violation of this section to disseminate *statistical* or research information obtained from a record, provided that the identity of the subject of the record is not disclosed."]; Pen. Code, § 13300(h) [relating to local summary criminal history information and stating "[i]t is not a violation of this article to disseminate *statistical* or research information obtained from a record, provided that the identity of the subject of the record is not disclosed."]; Pen. Code, § 13305(a) [same].) (Emphasis added.)

On the other hand, disclosing case files containing police reports, criminal history records, or case notes would unquestionably involve some violation of a third party's confidentiality or privacy rights and/or intrude upon a protected government interest. Depending on what information is sought, the interest in confidentiality could potentially be protected through

sufficient redaction, but not always. If persons (whether defendants, victims, or witnesses) can still potentially be identified, if pending investigations still might be impacted, or if privileges would be breached, then redaction will not suffice. (**See** this IPG, section V-8-A&B at pp. 156-159 [discussing privileges potentially implicated by requests for information to support section 745(a)(3) or (a)(4) motions].)

a. <u>Privacy Rights of Victims, Witnesses and Defendants</u>

Third party confidentiality interests include the interest of the victims, the witnesses, and the defendants in maintaining their state constitutional right to privacy.

<u>Victims' Privacy Rights</u>

Police reports contain information relating to victims of crimes. "[V]ictims have a constitutional right of privacy." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287, citing to Cal. Const., art. I, § 1.) This fact weighs "heavily against a criminal defendant's right [even] to potentially exculpatory material." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287.) Moreover, pursuant to constitutional provisions enacted by Marsy's law, a victim has a right "to prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law" (Cal. Const., art. I, § 28, subd. (b)(4)) and to refuse a discovery request by a defendant (***id.***, at subd. (b)(5)). (**See *Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 355-356.)

Marsy's Law also requires that victims have a right to "reasonable notice of all public proceedings, . . . upon request, at which the defendant and the prosecutor are entitled to be present . . . and to be present at all such proceedings" (Cal. Const., art. I, § 28 (b)(7)) as well as the right to "be heard, upon request, at . . . any proceeding, in which a right of the victim is at issue." (Cal. Const., art. I, § 28 (b)(8).) However, it is an open question whether Marsy's law requires notification to the victims of crimes before release of police reports identifying the victim when the reports are being released in cases where the victim identified in the report was not a victim in the case for which discovery is sought, e.g., in cases where the police reports are being released as evidence to support a section 745(a)(3) or (a)(4) motion.

Keep in mind, the strength of the victim's privacy interest in reports may vary depending on the nature of the crime alleged in the requested reports. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 289-290 [noting the victim of a "home invasion slash sexual assault" had "a strong interest in maintaining her anonymity"].)

Witnesses' Privacy Rights

Witnesses also have a state constitutional right of privacy that must be considered in deciding whether to disclose police reports. (**See *People* v. *Littleton*** (1992) 7 Cal.App.4th 906, 911.)

Suspects/Defendants' Privacy Rights

Suspects named in the police reports also have an interest in privacy that must be considered when deciding whether to disclose police reports. (***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957.) This is because arrest records are protected by the state constitutional right to privacy. (**See *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 340; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957; ***Reyes* v. *Municipal Court*** (1981) 117 Cal.App.3d 771, 775; ***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72.) "The courts have repeatedly recognized that release of arrest records or dissemination of information about arrests implicated the right to privacy of the arrestees." (***Denari* v. *Superior Court*** (1989) 215 Cal.App.3d 1488, 1498 [citing to numerous cases].)

b. Governmental Interest in Protecting Official Information

A "protected governmental interest" (***Facebook, Inc.* v. *Superior Court of San Diego County*** (2020) 10 Cal.5th 329, 346) weighing against disclosure includes the governmental interests in maintaining the confidentiality of criminal investigations – all of which are protected by the official information privilege of Evidence Code section 1040. (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290.) "Ongoing investigations fall under the privilege for official information." (***People* v. *Suff*** (2014) 58 Cal.4th 1013, 1059; ***People* v. *Bradley*** (2017) 7 Cal.App.5th 607, 626; ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287 citing to Evid. Code, § 1040.)

"It is true that as time passes and an investigation lapses or is abandoned, the need for confidentiality in police files wanes." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280,290, citing to ***County of Orange* v. *Superior Court*** (2000) 79 Cal.App.4th 759, 768–769.)

"However, the general confidentiality of police investigations accrues significant public benefit. Informants and witnesses are more likely to cooperate with law enforcement if they trust that their participation will not be made public." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280,290, citing to ***County of Orange* v. *Superior Court*** (2000) 79 Cal.App.4th 759, 764–765.) Thus, any decline in the need for confidentiality "never renders law enforcement investigative files automatically discoverable and is but one factor to consider when weighing a defendant's right to otherwise privileged information under Evidence Code section 1040." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290.)

Even when the reports relate to a case that *has gone to court*, this does not mean that all third party or governmental interests in confidentiality have been extinguished. It is undisputed that "the government's interest in maintaining confidentiality in a case of ongoing investigation is far greater than in a case where a suspect has been charged and the matter has entered the public view through the court system." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 288.) But a charged crime may have resulted in a plea at arraignment without any disclosure of information regarding the names of witness in open court. The fact that some information has been disclosed in court does not vitiate the interest in information that has not been disclosed. For example, in ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, the defense argued that it was entitled to disclosure of a report relating to a burglary committed by an unidentified third party that revealed a similar modus operandi to those burglaries defendant was alleged to have committed. The ***Jackson*** court found that the victim had a strong interest in maintaining her privacy *even though* the defense had already been made aware of certain fact surrounding the uncharged burglary and the defendant had been asked about this other burglary when he was interrogated about the charged burglaries. "Neither the official information privilege, or the victim's privacy interests were waived by the publication of the address and date of the crime. The prosecution's voluntary disclosure that the victim failed to identify [the defendant] in a lineup and the police interrogation of [the defendant] likewise failed to disclose sufficient facts to render the entire file discoverable." (***Id***. at pp. 289-290.)

The need to weigh the government's claim of privilege against the defendant's constitutional right to present a defense has <u>not</u> been altered by the passage of Proposition 115 as this balancing test is "inherent in the criminal discovery statutes." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 291 [citing to Pen. Code, § 1054.7 which permits the denial of even exculpatory evidence altogether for 'good cause' which includes "possible compromise of other investigations by law enforcement"].)

If defendant's request seeks case notes, the protected governmental interests would include the governmental interest in maintaining the work product privilege of Code of Civil Procedure section 2018.030(a) and in maintaining the confidentiality of information protected by the official information privilege. (**See** also this IPG, section V-8 at pp. 155-159 and V-10 at pp. 161-162 [discussing whether § 745 discovery requests can override privileges or privacy rights].)

c. <u>Governmental Interest in Avoiding Unduly Burdensome Requests</u>

There is a strong governmental interest in conserving and prioritizing resources which should weigh heavily against requiring the agency to collect all the relevant case files and engage in sufficient redaction to protect the various interests in confidentiality and/or avoid piercing privileges. (**See** this IPG, sections V-9 and 10 at pp. 160-163.)

> ***Editor's note:** The fact that responding to a request would be unduly burdensome is its own separate consideration in assessing whether to grant a discovery motion under Facebook. (**See** this IPG, section V-5-A-vii at pp. 149-152.) However, when the entity to whom the request is made is the government, avoiding an undue burden also serves as a separate government interest.

It is important to recognize that when information is privileged, protected by the state right of privacy, or is otherwise confidential, this is not only a factor in deciding whether good cause exists but requires a court ***to separately conduct a balancing test even when good cause has been found***. As discussed by Justice Hoffstadt in California Criminal Discovery (6th Ed.), section 13.03: "If the third party, opposing party or court asserts that the subpoenaed documents may be privileged, then the court must take an additional step: Not only must the court find "good cause" for the disclosure, the court must also assess (1) whether the documents are privileged; and (2) if so, whether the subpoenaing party has any interest that overrides any applicable privileges. (***Id***. at p. 375, citing to ***People* v. *Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 751 [and cases cited therein], emphasis added; **cf**., ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 722 [recommending that when official and confidential information possessed by federal agencies exists regarding how stash-house stings are conducted and could shed light on whether an initial suspicion of race discrimination is justified, an in camera review by the court "would respect the legitimate interest of law enforcement in preventing suspects (and potential suspects) from learning how to avoid being investigated or prosecuted."]; **see also** this IPG, section V-8 at pp. 155-159 and section V-10 at p. 161-163 [respectively discussing when privileged material can be released and when in camera hearings should be held].)

v. Is the request timely or premature?

Whether a request is timely will generally not be much an issue when it comes to a discovery request for information bearing on a section 745(a)(3) or (a)(4) motion since the motion itself can be brought at any time in the trial court up until judgment and even thereafter by filing a petition for writ of habeas corpus or a motion under Section 1473.7. (**See** Pen. Code, § 745(b).) However, *to the extent* a section 745 claim may be denied for undue delay, it is likely a request for discovery to support that claim can similarly be denied. (**See** this IPG, section X-13-B at pp. 230- [discussing delay in filing habeas petition]; Pen. Code, § 1473.7(c) ["A motion pursuant to paragraph (2) or (3) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section or Section 745."].)

vi. Would the time required to produce the requested information necessitate an unreasonable delay of defendant's trial?

Consideration of whether the time required to produce the requested information would result in an unreasonable delay of defendant's trial overlaps with the question of whether responding to the request would place an unreasonable burden upon the prosecution. The greater the burden, the longer the delay. In weighing this consideration, it is important to remember that "not just the criminal defendant but also the People, represented in a criminal case by the prosecutor, are constitutionally entitled to due process and to a speedy trial." (***Galindo* v. *Superior Court*** (2010) 50 Cal.4th 1, 12 [citing to Cal. Const., art. I, § 29]; **see also** Pen. Code, § 1050 ["It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice."].)

vii. Would production of the records containing the requested information place an unreasonable burden on the party required to produce the records?

Whether a request for information to support a claim of discrimination under section 745(a)(3) or (a)(4) is unreasonably burdensome will depend how much information is requested and how difficult it will be to produce it. (**Cf.**, ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 722 [limiting district court order requiring the United States to produce "all documents"

that contain any "information" about how the FBI and ATF manage reverse stash house stings "plus all details concerning how these agencies curtail discrimination" because this would require "the disclosure of thousands (if not millions) of documents generated by hundreds (if not thousands) of law-enforcement personnel" and "would bog down this case (and perhaps the agencies) for years"].)

How burdensome the request is will also turn on whether the information sought has been collected in the first place, and, if so, whether it is available by conducting an electronic search. If a request is for information that is not contained in an electronic database which can be easily searched, then whether the request places an unreasonable burden on the prosecution will turn how many case files must be located and reviewed. To determine the relevance and discoverability of each file, the file will have to be reviewed to (i) determine if the defendant referenced in the file is, in fact, charged with a similar crime and is otherwise similarly situated to the defendant making the claim (**see** this IPG, sections IV-8-C-i at p. 67-68; IV-8-D at pp. 68-71; IV-8-E at pp. 71-87) and (ii) determine whether information contained in the file is confidential, subject to a right of privacy, or is privileged (**see** this IPG, sections V-5-A-iv at pp. 144-149; V-8 at pp. 155-159). Moreover, the files will have to be redacted to protect the identity of the defendants, victims, and witnesses in the file. (**See** this IPG, section V-9 at pp. 160-161.) And finally, if the information is privileged, a decision will have to be made whether to assert the privilege. (**See** this IPG, section V-8-10 at pp. 155-163.)

How much of a burden will be considered significant enough to tilt the scales against a finding of good cause will vary depending on the other factors. But courts may be guided as to what weight to give to defense requests for reports relating to the files of other defendants in other contexts.

For example, in ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, the defendant sought a year's-worth of police reports prepared by a murdered officer on the theory that a person investigated or arrested by the officer may have borne a grudge against the officer and thus been responsible for the murder of the officer. The defense pointed out that some eyewitnesses to the shooting of the officer had described the assailant as White or Hispanic, whereas defendant was African–American. The defense contended that evidence of a White or Hispanic suspect in one of the officer's cases who bore a grudge against the officer — if such a person existed — would add weight to his defense. The prosecution successfully resisted having to provide the discovery on the grounds that defendant had made an inadequate showing and that the request

would impose an inordinate burden on the police department to sift through its records to determine what arrests or investigations the officer had been involved in during the year preceding his death (although the prosecution agreed to go through their files and dig up any information relating to reports of serious threats of great bodily injury or death to the officer). (***Id***. at p. 956.) In upholding the denial of discovery, the ***Jenkins*** court took into account the practical burden placed on the government in collecting the reports. (***Id.*** at p. 957.)

In ***People* v. *Kaurish*** (1990) 52 Cal.3d 648, the defendant attempted to subpoena "police reports pertaining to child molestation killings in the Hollywood area" for the six months preceding and following the murder. The trial court granted a motion to quash the subpoena. The California Supreme Court upheld the trial court's ruling because there was a limited showing of relevance, and because "defendant's request was broad and somewhat burdensome, both with regard to expenditure of police resources to review files and to the privacy interests of third parties." (***Id***. at pp. 686-687; **see also *United States* v. *Brooks*** (D.C. Cir. 1992) 966 F.2d 1500, 1504 [noting as "the burden of the proposed examination rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort"].)

In contrast to ***Jenkins*** and ***Kaurish***, the appellate court in ***Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, held that a trial court did ***not*** abuse its discretion in finding a defendant in a multiple murder case was entitled to receive *12* specific homicide investigation and police reports from the district attorney's office where the specific reports sought were described with sufficient specificity. (***Id***. at p. 1135.) However, in ***Alhambra*** the court found that locating or producing the reports would place *no significant burden* on any governmental entity and *there was no showing that release of the requested information would violate any protected governmental interests or any third-party confidentiality or privacy rights*. (***Id***. at p. 1135-1136 [and noting that, "[u]nder such circumstances, it was not necessary that the showing of plausible justification be as strong as might be required under other circumstances"].) Moreover, as pointed out in ***People* v. *Littleton*** (1992) 7 Cal.App.4th 906, the appellate court in ***Alhambra*** did not find the reports *had* to be produced. Rather, the ***Alhambra*** court "simply found no abuse of discretion in granting discovery. Such a conclusion does not mean a court would abuse its discretion in denying discovery under similar facts." (***Littleton*** at p. 911, fn. 7.)

In ***Weaver* v. *Superior Court*** (2014) 224 Cal.App.4th 746 a death row prisoner made a *California Public Records Act* [hereafter "CPRA"] request for copies of *publicly filed charging*

documents in homicide cases covering a 16-year period, and court filings in two cases to assist in investigating whether the District Attorney impermissibly sought the death penalty based on the race of the defendant, the victim, or both. (***Id***. at p. 748.) The District Attorney objected to complying with the request on several grounds, one of which was that the request was overly burdensome because "programming and extraction of the data necessary to identify the records would require approximately 35–40 hours of time at a cost of $85 per hour for a total of approximately $3,400." (***Id***. at p. 749.) This cost was the basis for the argument that "the public interest served by not disclosing the record clearly outweigh[ed] the public interest served by disclosure of the record" – which would permit the court to excuse compliance with the CRPRA. (***Id***. at p. 752.) The ***Weaver*** court held that "the public's interest in the fair administration of the *death penalty*" would outweigh any countervailing interest. And held that the $3,400 expense of generating the list of cases at issue should be given little weight because it "pale[d] in comparison to the interests of Weaver and the public in disclosure." (***Id***. at p. 752 [and noting that in ***County of Santa Clara* v. *Superior Court*** (2009) 170 Cal.App.4th 1301, 1327 the court found a $43,000 cost of compiling an accurate list of names for disclosure was not a sufficient burden to outweigh the public interest in disclosure].)

6. Can the good cause showing under section 745(d) be based on hearsay?

Penal Code section 745 does not state whether hearsay is admissible to meet the showing required to obtain discovery in support of a section 745 motion. However, in the closely analogous context of a claim of selective prosecution, while courts have accepted declarations in support of (or in opposition to) a discovery request, it has been limited to declarations *within the personal knowledge of the declarant*. The declaration itself must not recount statements from other persons. (**See *United States* v. *Armstrong*** (1996) 517 U.S. 456, 470 [finding defense *failed* to provide the requisite "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim because, inter alia, affidavits submitted by the defense "recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence."]; ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1193 [disregarding hearsay portions of affidavits filed by defense when reviewing sufficiency of showing to obtain evidence in selective prosecution claim]; ***People* v. *Moya*** (1986) 184 Cal.App.3d 1307, 1313 [upholding denial of discovery request to support ***Murgia*** motion because, inter alia, prosecution presented

declarations of trial prosecutor and deputies who reviewed and evaluated cases all denying that race entered into decisions to prosecute]; **see also *United States* v. *Hendrickson*** (E.D. Mich. 2009) 664 F.Supp.2d 793, 799 [rejecting defendant's claim he was entitled to discovery to support a selective prosecution motion where defendant's showing was based on statements of counsel and hearsay].)

Statistical data used to support the good cause showing may not be exempt from a hearsay objection. Statistical evidence that a certain number of individuals were charged or convicted of particular offense or an enhancement, whether those individuals suffered a prior conviction, and whether the conviction derived from a plea might be admissible over a hearsay objection *if* a foundation could be established that the information in this regard was derived from official court records. (**See** Evid. Code, §§ 1280, 452.5.) However, even court records showing a conviction occurred may not reflect the race, ethnicity, or national origin of the defendant or victim. Nor do they reflect much of the information necessary to establish the defendants were similarly situated (i.e., the strength of the evidence, whether the defendant was the actual perpetrator or an aider/abettor, whether the witnesses were cooperative, etc.,).

7. Can or should prosecutors submit any evidence, including statistics, at the discovery stage to challenge the defense showing of "good cause" for disclosure?

Penal Code section 745(d) is silent on whether a court may consider information provided by the prosecution in deciding whether the defendant has made a sufficient showing of good cause for release of records or information sought to support a section 745 motion. But it is almost certain a court may do so.

In the closely analogous situation of a motion claiming selective prosecution, courts have considered evidence presented by the People in finding the defense did not make a sufficient showing to justify granting of a discovery request bearing on the motion. (**See *People* v. *Suarez*** (2020) 10 Cal.5th 116, 177-178 [considering information provided by the prosecution in ***Suarez***, including information challenging the defense statistical data and information bearing on whether the defendant was similarly situated to the comparison group of defendants, in finding discovery properly denied]; ***People* v. *Montes*** (2014) 58 Cal.4th 809, 831-832 [considering statements made by the prosecution regarding whether the alleged racially discriminatory language used in conversation with defendant showed discriminatory intent in finding discovery properly denied]; ***People* v. *Moya*** (1986) 184 Cal.App.3d 1307,

1313 [upholding denial of discovery request to support ***Murgia*** motion because, inter alia, prosecution presented declarations of deputies who review and evaluate cases - all denying that race entered into decisions to prosecute]; **see also *United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1054 [finding defense made sufficient showing to obtain discovery to support selective enforcement claim but repeatedly expressing dismay that the government failed to secure declarations or rebut defense evidence]; ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 723 [recommending district court receive affidavits or testimony of the case agents before deciding what discovery to disclose in a selective enforcement case]; ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 221 [suggesting district court could consider "the testimony, in person or otherwise, of case agents or supervisors" and conducting an "in camera analysis of policy statements, manuals, or other agency documents" before deciding what discovery to disclose in a selective enforcement case]; ***United States* v. *Ford*** (D. Or. 2016) 2016 WL 4443167, at p. *3 [relying on, inter alia, declarations of agents in upholding denial of discovery in selective prosecution and enforcement case]; **but see *People* v. *Ochoa*** (1985) 165 Cal.App.3d 885, 889 ["mere introduction of evidence that contradicts the defendants' allegations does not automatically destroy justification for the discovery order"].)

Moreover, in the context of deciding whether a defendant requesting discovery has made a sufficient showing of good cause for release to the defense of relevant and potentially privileged third-party social media records, the California Supreme Court endorsed the trial court's consideration of evidence beyond that simply presented by the defense. Specifically, in ***Facebook, Inc.* v. *Superior Court of San Diego*** (2020) 10 Cal.5th 329, the court stated, "in assessing the present defendant's primary basis for plausible justification to acquire and inspect the sought restricted posts and private messages (to support a claim of self-defense), an appropriate inquiry would focus on the facts as alleged *in the briefs* and *also as reflected in the preliminary hearing transcript* in order to assess whether a claim of self-defense is sufficiently viable to warrant that significant intrusion." (***Id***. at p. 352-353, emphasis added.)

Information that might potentially undermine a defense showing of good cause for disclosure may include declarations from prosecutors who did the charging or negotiated the plea as to the non-discriminatory reasons why a particular charge or sentence was sought. The factors that went into the decision can set the benchmark as to what would constitute a similarly situated defendant and, accordingly, help determine whether a plausible justification exists for disclosure. (**See** this IPG, section V-5-A-i at p. 138.) Similarly, some statistics undermining the showing of good cause may be readily available and could potentially be introduced.

8. Can or should records that are privileged or confidential be disclosed pursuant to a section 745(d) request?

Penal Code section 745(d) appears to completely exempt privileged materials from disclosure but the way it is currently phrased creates an ambiguity. In relevant part, it states: "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 court may permit the prosecution to redact information prior to disclosure." (Emphasis added.) The way it currently reads, privileged records are not exempt and only non-privileged records may be redacted. This does not appear to be what is intended and the language should be interpreted to exempt privileged records from discovery entirely and allow non-privileged records to be redacted upon a showing of good cause for redaction.

A pending bill in the Assembly (AB 256) would re-arrange the language to read: "Upon a showing of good cause, *and if the records are not privileged,* the court shall order the records to be released. Upon a showing of good cause, the court may permit the prosecution to redact information prior to disclosure."

Note that in some *other* contexts, certain privileges can be overcome by a sufficiently strong showing of an interest in disclosure. However, section 745(d) does not authorize a court to order records released if the records are privileged – period. That said, section 745(d) is not the only mechanism under which discovery can occur and privileged third party records relevant to a section 745 motion (or selective prosecution motion) may be still be accessible via subpoena or a ***Pitchess*** motion.

All *privileged* records or information are *confidential*, but not all *confidential* records or information are *privileged*. Division 8 of the Evidence Code (§§ 900-1063) generally covers the privileges recognized under state law. But other statutes may expressly or impliedly create privileges. (**See *Welfare Rights Organization* v. *Crisan*** (1983) 33 Cal.3d 766, 769 ["unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal"]; **see also** Evid. Code, § 911(b) ["*Except as otherwise provided by statute*: . . . (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing."].) For example, numerous courts have treated the statutory privacy protections granted by Penal Code section 832.7 to

peace officer personnel records as having rendered those records "privileged." (**See *Chambers* v. *Appellate Div. of Superior Court*** (2007) 42 Cal.4th 673, 679; ***City of Santa Cruz* v. *Municipal Court***, (1989) 49 Cal.3d 74, 81; ***City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1427 ["Section 832.7 ... creates a general privilege and then carves out a limited exception"]; ***Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 403 [describing section 832.7 as a "new privilege"]; ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98-99 [referring to officer personnel files as "privileged"].) And just as a statute may impliedly generate a privilege, so may a provision of the California Constitution. (**See *Garstang* v. *Superior Court*** (1995) 39 Cal.App.4th 526, 532 [disapproved on other grounds by ***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531] [creating a qualified privilege for private institutions "not to disclose communications made before an ombudsman in an attempt to mediate an employee dispute"].) However, it should not be assumed that records or information are "privileged" merely because the records or information have been given some protection from disclosure under the California state right of privacy or a statute (unless case law has deemed the statute to provide a privilege).

A. What type of records or information likely to be sought in discovery pursuant to section 745(d) will be privileged?

i. Peace officer personnel records: the *Pitchess* privilege

To support a claimed violation of section 745(a)(1) or (2) on the basis an officer exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin (**see** this IPG, section V-3-A at p. 123), the defense may ask the government to disclose information maintained in an officer's personnel file. Such files are subject to the privilege created by the ***Pitchess*** statutes. (**See** this IPG, section V-8 at p. 155-156.) And in any event, such files should not be viewed as being in the possession of the state because they are not reasonably accessible. (**See** this IPG, section V-4 at pp. 129-130.)

ii. Charging and other file notes: the official information and work product privileges

To support a section 745(a)(3) or (a)(4) motion, the defense may request the charging notes or other notes in the defendant's case file and/or the charging notes or other notes in other defendants' files. Such notes could also potentially *undermine* the defense claim by helping to show neutral reasons for charging the defendant and/or the defendants being compared to the

defendants. These notes could also reveal reasons for why the defendants being compared to the defendant are not similarly situated to the defendant (as is required to establish a violation of section 745(a)(3) or (a)(4). (**See** this IPG, section IV-8-E at pp. 71-87.)

Work-Product Privilege: Code of Civil Procedure Section 2018.030.

Code of Civil Procedure section 2018.030 lays out the work-product privilege. It provides:

"(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."

The privilege described in subdivision (a) is deemed "absolute" even though it may be waived. (**See *Ardon* v. *City of Los Angeles*** (2016) 62 Cal.4th 1176, 1186; ***Wells Fargo Bank* v. *Superior Court*** (2000) 22 Cal.4th 201, 214.) The privilege "survives the termination of the litigation or matter in which the work product is prepared and may be claimed in subsequent litigation—whether related or unrelated to the prior matter—to preclude disclosure of the attorney's work product." (***Fellows* v. *Superior Court*** (1980) 108 Cal.App.3d 55, 62.)

Note that in cases governing discovery *subject to the parameters of the California discovery statute* (Pen. Code, § 1054 et seq.), the work product privilege may only be asserted if the writing falls under subdivision (a). The work product privilege described in subdivision (b) is not applicable. (**See** Pen. Code § 1054.6; ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 382 fn. 19; ***People* v. *Zamudio*** (2008) 43 Cal.4th 327, 356.) However, the *full* work product privilege should be applicable when a defendant seeks discovery *under section 745(d)* because there are no limitations on assertion of the privilege in general. (**See** Code Civ. Proc., § 2018.030.) And because, *when read properly,* section 745(d) does provide authority to a court to override privileges. (**See** this IPG, section V-8 at p. 155.)

*__Editor's note__: A constitutional imperative *might* be able to override the absolute work product privilege. The California Supreme Court will have a chance to weigh in on the issue in the case of ***People* v. *Superior Court (Jones)*** [S255826], a case addressing whether the attorney work product privilege may be overcome to effectuate an equal protection claim in the ***Batson-Wheeler*** context. However, unlike a selective prosecution claim, a section 745 motion is not based on a constitutional imperative and thus the interest in disclosure would not be able to override the privilege regardless of the holding in ***Jones***. If the information contained in the notes fell into the category of favorable material (i.e., ***Brady***) evidence, the privilege *might* potentially be overridden. (**See e.g.**, ***People* v. *Collie*** (1981) 30 Cal.3d 43, 59, fn. 12 [indicating in dicta that at least qualified work-product could be overridden].) But a prosecutor's *analysis* of such information does not constitute ***Brady*** material and would be protected by the privilege. (**See *United* v. *Taylor*** (D.N.M. 2009) 608 F.Supp.2d 1263, 1269, fn. 7; ***United States* v. *Furrow*** (C.D. Cal. 2000) 100 F.Supp.2d 1170, 1178.)

Prosecutors may not want to assert the privilege, especially since (hopefully) the information will establish proper reasons for the charging decision. But charging decisions and notes in a case file reflecting the factors underlying that charging decision are almost certainly protected by the absolute work-product privilege. (**See e.g.**, ***People* v. *Gilmore*** (Mich. Ct. App. 1997) 564 N.W.2d 158, 163–165 [records of prosecutor's assessment of whether to authorize issuance of arrest warrant taking into account the credibility of witnesses, the presence or lack of corroborating or conflicting evidence presence, and "the factual, evidentiary and legal issues that are likely to arise if the case should proceed to preliminary examination or trial" is protected by work product privilege (i.e., "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation")]; ***United States* v. *Fernandez*** (9th Cir.2000) 231 F.3d 1240, 1246–1247 [47 231 F.3d at 1246–1247 [work product privilege applied to the death penalty evaluation form and prosecution memorandum]; ***United States* v. *Johnson*** (N.D. Iowa 2012) 900 F.Supp.2d 949, 969 [same]; ***United States* v. *Taylor*** (D.N.M. 2009) 608 F.Supp.2d 1263, 1265, 1269 [citing cases finding similar documents subject to work product privilege and finding information "relating to the authorization process for cases subject to the federal death penalty based on the race of the victim, including any correspondence from the Government regarding race neutral capital case policies" to be protected by the work product privilege].)

The Official Information Privilege of Evidence Code Section 1040

The official information privilege of Evidence Code section 1040, in pertinent part, provides:

"(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered." Charging or other file notes may contain information protected by the official information privilege simply because the information was "acquired in confidence by a public employee in the course of his or her duty." (Evid. Code, § 1040(a).)

Even assuming that section 745 only prohibits disclosure orders mandating discovery of unqualified privileged material and not disclosure orders inconsistent with the exercise of a unqualified privilege like section 1040, the court should not order disclosure of official information absent in camera review. (**See** this IPG, section V-10 at pp. 161-163; **cf.**, ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 722 [recommending that when official and confidential information possessed by federal agencies exists regarding how stash-house stings are conducted and could shed light on whether an initial suspicion of race discrimination is justified, an in camera review by the court "would respect the legitimate interest of law enforcement in preventing suspects (and potential suspects) from learning how to avoid being investigated or prosecuted."].)

B. What type of records or information likely to be sought in discovery pursuant to section 745(d) will be confidential (e.g., protected by the California state right of privacy or other statute)?

Although section 745(d) (when read properly) only identifies "privileged" materials as exempt from court-mandated disclosure, it is possible that the term "privileged" encompasses records

that are protected by the rights of privacy embodied in Article I, sections 1 and 28 of the California Constitution. (**See** this IPG, section V-8 at pp. 155-156.)

But even assuming that records deemed confidential under the state right of privacy are not considered "privileged," for purposes of section 745(d), a statutory mandate cannot trump a constitutional protection. And thus, at a minimum, section 745 could not mandate or authorize the disclosure of records or information protected by the state privacy right absent a court determination that the invasion of privacy is outweighed by legitimate and competing interests. (**See *Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 37.)

The types of records that would potentially be subject to protection from disclosure (or at least disclosure without a judicial review) pursuant to the state right of privacy would include police reports containing information relating to victims of crimes, witnesses, and defendants as well as criminal history records. (**See** this IPG, section V-5-A-iv at pp. 144-146.) However, in some circumstances, the invasion of privacy may be mitigated or eliminated by redaction of the records as is permitted under section 745(d). (**See** this IPG, section V-9 at pp. 160-161.)

9. Can or must records be redacted before disclosure?

Penal Code section 745(d) provides: "Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact information prior to disclosure." Read properly, section 745(d) permits even records that are not privileged to be redacted upon a showing of good cause. (**See** this IPG, section V-8 at p. 155.) If the records are rendered confidential by statute or are subject to the state constitutional right of privacy, *good cause* to redact the records in a manner that does not disclose the identity of persons who are victims, witnesses, or defendants should exist. (**See** this IPG, sections V-5-A-iv at pp. 144-148; V-8-B at pp. 159-160.)

There may be debate as to *how much* redaction should occur. If a defendant is seeking statistical information, redaction of the identity of the individual defendants (so all that is known is the nature of the charge and the race, ethnicity, or nationality of the defendant) should be sufficient to avoid an unwarranted invasion of privacy. Albeit, if the pool of defendants used for comparison in a section 745(a)(3) or (a)(4) motion is sufficiently small, even disclosure of the charges and group affiliation of the comparison defendants could conceivably violate a statutory or constitutional right of privacy.

However, to make a showing that defendants are (or are not) similarly situated may require the disclosure of additional information relating to criminal histories, more specific facts about the nature of the crime, more specific facts about victims, witnesses, or defendants, and/or more specific facts about information acquired in confidence. The more specific the disclosure, the more likely it is that the identity of victims, witnesses, or defendants may be revealed even if their names are not disclosed. In these circumstances, the court will likely have to balance the interest of the defendant in disclosure against whatever privacy interest is furthered by the redaction. (**See** this IPG, sections V-5-A-iv at pp. 144-148; V-8-B at pp. 159-160; V-10 at pp. 161-163.)

It is important to keep in mind that when this balancing test is done, the issue is *not* whether the information should or should not be disclosed. It is whether the *redaction* sufficiently reduces the interest in confidentiality so that it no longer outweighs the interests in disclosure.

10. Is the prosecution or defense entitled to an in camera hearing when the prosecution asserts a privilege or a right of privacy in the records?

If the information requested pursuant to section 745(d) is subject to a privilege, the defense would presumably have the right to claim the privilege does not apply or the privilege is qualified. Similarly, if the prosecution refuses to provide records on grounds doing so would violate a statutory or constitutional right of privacy, the defense will presumably have the right to claim the right of privacy does not exist or should be overridden by the interest in disclosure.

In general, when determining whether privileged or private information should be disclosed in order to vindicate a competing need such as defendant's state or federal constitutional right to discovery, a court should (and likely must) hold an in camera review of the materials. (**See** ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 61 [requiring in camera review to determine whether defendant's interest in disclosure outweighed state's need to protect the confidentiality of those involved in child-abuse investigations]; ***People* v. *Rhoades*** (2019) 8 Cal.5th 393, 407 [appropriate for court to review documents subject to evidentiary privileges and privacy interests to assess their value to defendant's exercise of his constitutional rights and determine what relevance, if any, they bear to the posited defenses or impeachment]; ***People* v. *Abel*** (2012) 53 Cal.4th 891, 930-935 [approving denial of defense request for psychiatric records of prosecution witness and noting the "[d]efendant does not dispute that

the trial court properly reviewed the psychiatric records in camera]; ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 842 [describing process in ***Ritchie***]; ***People* v. *Hobbs*** (1994) 7 Cal.4th 948, 959, 963 ["an in camera review procedure is specifically authorized when the defendant is seeking disclosure of the identity of a confidential informant 'on the ground the informant is a material witness on the issue of guilt.' ([Evid. Code,] § 1042, subd. (d).)"]; ***People* v. *Webb*** (1993) 6 Cal.4th 494, 518 [When a state seeks to protect material, exculpatory but privileged evidence (i.e., psychiatric records) from disclosure, "the court *must* examine them in camera to determine whether they are 'material' to guilt or innocence."], emphasis added; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1336 ["Subsequent to ***Ritchie***'s selection of the ***in camera*** review procedure, courts have recognized that in camera inspection is appropriate when there is a 'special interest in secrecy' afforded to the files."]; ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, 1349-1351 [requiring in camera review of videotape of sexual relations between a married couple to determine whether criminal defendant's right to due process outweighs couple's constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications]; **see also *Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 169 [if discoverable material in possession of defense is potentially protected by the work product privilege, the attorney "can seek a protective order to that effect . . . or an in camera review in which the privileged material can be excised"]; ***Dickson* v. *Quarterman*** (5th Cir. 2006) 462 F.3d 470, 480 [criticizing a prosecutor for failure to disclose recordings containing evidence impeaching prosecution witnesses, even assuming the prosecutor believed the evidence contained some protected attorney opinion, because "he should have known that the duty lay with the trial judge, not the prosecutor, to weigh the need for confidentiality against the defendant's need to use the material to obtain a fair trial"]; ***United States* v. *Dupuy*** (9th Cir. 1985) 760 F.2d 1492, 1501 ["Consultation with the judge is particularly appropriate when the Government has legitimate reasons for protecting the confidentiality of the material requested, for the trial judge can then weigh the Government's need for confidentiality against the defendant's need to use the material in order to obtain a fair trial"]; ***United States* v. *Bocra*** (3d Cir.1980) 623 F.2d 281, 285 ["The submission of discovery materials to the court for an in camera inspection and decision as to which materials are discoverable is commonly used when the Government's need for preserving confidentiality over the materials must be balanced with the defendant's constitutional right to evidence material to his defense"]; ***Ealoms* v. *State*** (1998) 983 S.W.2d 853, 859 [court has obligation to conduct in camera review of potentially ***Brady*** but privileged information]; Evid. Code, § 915(b) [procedure for in camera review when work product or

official information privilege is asserted]; Hoffstadt, California Criminal Discovery (6th Ed.), section 13.03 at p. 375 ["If the third party, opposing party or court asserts that the subpoenaed documents may be privileged, then the court must take an ***additional step***: ***Not only must the court find "good cause" for the disclosure, the court must also assess*** (1) whether the documents are privileged; and (2) if so, whether the subpoenaing party has any interest that overrides any applicable privileges," citing to ***People* v. *Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 751 [and cases cited therein], emphasis added].)

There is no reason to believe this general rule should not apply in the context of a request for relevant evidence pursuant to section 745(d) that is privileged or confidential. (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at pp. 23-24; **cf.,** ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, 221 [recommending courts conduct in camera review of confidential information requested by the defense to support a claim of discriminatory enforcement before disclosing information]; ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, 723 [same].)

11. Can a court order the prosecution to create statistical reports that do not currently exist, and which may be difficult or impossible to produce?

Nothing in section 745 requires the state to compile any statistics or create new data. "In the absence of statutory mandate, the Act does not obligate the state to collect and synthesize data. Likely the only obligation is to disclose the raw data or make the source of the data available to the defense to review." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 22.)

If a court is inclined to ignore this absence of a statutory mandate, San Francisco DDA Alison MacBeth has suggested that caselaw concerning when statistics must be compiled in response to requests under the California Public Records Act (hereafter "CPRA") and federal Freedom of Information [FOIA] *may* be instructive. "It is well established under California law and guiding federal precedent under the Freedom of Information Act (FOIA) [citation omitted] that, while the CPRA requires public agencies to provide access to their existing records, it does not require them to create new records to satisfy a request." (***Sander* v. *Superior Court*** (2018) 26 Cal.App.5th 651, 665.) "The basic rule is that an agency must comply with a request if responsive records can be located with reasonable effort. [Citation.] If the agency would be

required to create a new set of public records in order to provide responses to a CPRA request, such agency action may be found to exceed its statutory duties." (***Id***. at p. 666.)

"Federal law construing the FOIA is in accord. 'The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained. ... [O]nly the Federal Records Act, and not the FOIA, requires an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it.'" (***Ibid*** citing to ***Kissinger* v. *Reporters Committee for Freedom of the Press*** (1980) 445 U.S. 136, 152.)

That said, the statutory language included in the CPRA and FOIA is different than that in the CRJA and whether the request under section 745(d) is tantamount to a request mandating "the searching, extracting, compiling or redacting electronically stored data, which our state and federal public access laws require" (see ***Sander* v. *Superior Court*** (2018) 26 Cal.App.5th 651, 667) or is tantamount to "creating new records" (***ibid***) will turn on the specifics of the requested discovery.

12. Does the discovery authorized by section 745 conflict with the discovery statute (Pen. Code, § 1054 et seq.)?

Penal Code section 1054, subdivision (e) prohibits any discovery in a criminal case which is not expressly mandated by statute or required by the U.S. Constitution. (Pen. Code, § 1054, subd. (e); **see also** Pen. Code, § 1054.5, subd. (a).) However, Penal Code section 745(d) expressly relates to and mandates discovery. Thus, there is likely no conflict between the discovery provisions of section 745 and the general California discovery statute. (**See also** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 23 [noting distinction between discovery procedures outlined in section 745(d) and the general discovery obligation in criminal cases contained in sections 1054, et seq.].)

13. Should a court consider graduated disclosure orders?

Although section 745(d) states 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" (emphasis added), a court likely has the ability to find, under the totality of the circumstances, that "good cause" for ordering disclosure only exists for disclosure of some records. In other words, utilizing the balancing test for assessing good cause, a court could initially determine that while there is good cause to release the most easily obtainable and

nonconfidential records, there is not good cause for disclosure of those records that are more difficult to locate and/or are generally confidential. Then, once this more limited group of records is released and reviewed, the court could either open up or shut down further discovery - depending on whether those records support or undermine the showing of good cause. This approach would be consistent with how *some* courts have approached the question of what information a defendant is entitled to discovery in selective enforcement cases when the "demanding" standard for discovery to support a claim of discrimination adopted in ***United States* v. *Armstrong*** (1996) 517 U.S. 456, 463 is inapplicable, i.e., when the standard for disclosure is more closely akin to the standard for disclosure under section 745 because no initial showing of discriminatory intent is required - only a showing of discriminatory effect. (**See** this IPG, section IV-8-A&B at pp. 62-65.)

For example, in ***United States* v. *Davis*** (7th Cir. 2015) 793 F.3d 712, the Seventh Circuit held a discovery request for information relating to reverse sting stash-house prosecutions by federal agencies was overbroad. However, the court was nonetheless troubled by the racial disproportion in stash-house prosecutions, and thus recommended further inquiry to determine whether race played a role in the investigation of the defendants before deciding whether to grant the type of broad discovery order issued by the district court. (***Id***. at p. 721.)

The ***Davis*** court stated: "Instead of starting with a blunderbuss order, a district court should proceed in measured steps" by receiving additional evidence from both the defense and prosecution "to determine whether forbidden selectivity occurred or plausibly could have occurred." (***Id***. at pp. 722-723.) The ***Davis*** court observed that if not, the discovery process could be halted; and, if so, the discovery process could be expanded:

> "If the initial inquiry gives the judge reason to think that suspects of another race, and otherwise similarly situated, would not have been offered the opportunity for a stash-house robbery, it might be appropriate to require the FBI and ATF to disclose, in confidence, their criteria for stash-house stings. Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination in this case is justified. Keeping that part of the investigation in camera would respect the legitimate interest of law enforcement in preventing suspects (and potential suspects) from learning how to avoid being investigated or prosecuted. If after that inquiry the judge continues to think that racial discrimination may have led to this prosecution, more information could be gathered.

> We do not want to tie the judge's hands, but we do think it essential, lest this and other prosecutions be sidetracked (both defendants and the public have a right to speedy resolution of criminal cases), to start with limited inquiries that can be conducted in a few weeks, and to enlarge the probe only if evidence discovered in the initial phase justifies a wider discovery program." (***Id***. at p. 723.)

Similarly, in ***United States* v. *Washington*** (3d Cir. 2017) 869 F.3d 193, after noting a defense claim of selective enforcement in seeking out and conducting reverse stings is not subject to the same strict standards as those laid out in ***United States* v. *Armstrong*** (1996) 517 U.S. 456 and ***United States* v. *Bass*** (2002) 536 U.S. 862, 863 (**see** this IPG, section I-2 at pp. 23-26; I-3 at pp. 31-35), the ***Washington*** court stated, "a district court retains the discretion to conduct a limited pretrial inquiry into the challenged law-enforcement practice on a proffer that shows 'some evidence' of discriminatory *effect*" and "contains reliable statistical evidence, or its equivalent" such that it is "strong enough to support a reasonable inference of discriminatory intent and non-enforcement." (***Id***. at p. 221, emphasis added.) The ***Washington*** court then went on to recommend how the district court should proceed:

> "[T]he inquiries should be of the sort recommended in [***United States* v.**] ***Davis*** [(7th Cir. 2015) 793 F.3d 712], and cabined to the same considerations of judicial economy and the need to avoid protracted pretrial litigation of matters collateral to the upcoming trial—as well as the need to avoid impinging on other areas of executive privilege. Areas of consideration could include the testimony, in person or otherwise, of case agents or supervisors, and the in camera analysis of policy statements, manuals, or other agency documents. Relevant information, having passed the filter, can also be disclosed to the defendant, although the district court retains discretion to forgo disclosure of or otherwise restrict the use of information that, while relevant to a selective enforcement claim, might not ordinarily be the sort of discovery material available to a criminal defendant under Fed. R. Crim. P. 16 or *Brady* and its progeny. Throughout, the district court must be mindful that the end "goal" of such a discovery motion is a valid claim of selective enforcement under the heightened substantive standards, which we are not asked to diminish or distinguish. If the district court's initial or secondary inquiry sees that destination recede or stand still, not advance, the court operates within its discretion to deny additional discovery and to proceed to trial." (***Id***. at p. 221.)

Other courts "have confirmed the importance of granting discovery only in 'measured steps.'" (***United States* v. *Lopez*** (S.D.N.Y. 2019) 415 F.Supp.3d 422, 427 [and noting, in addressing discovery requests for evidence of selective enforcement in conducting reverse stings, "an incremental approach is a prudent means of preventing fishing expeditions into what is, after

all, a sensitive area involving law enforcement operations that places the very lives of agents and informants in danger"]; ***United States* v. *Mumphrey*** (N.D. Cal. 2016) 193 F.Supp.3d 1040, 1069 [directing "parties to meet and confer and agree upon a more measured, perhaps phased, approach" to providing discovery to support a selective enforcement claim].)

14. What sanctions are available when the state does not comply with a section 745(d) discovery order?

"Section 745 does not specify a sanction for failure of the state to comply with a discovery order. There is no indication in the statute that failure to comply with the order will trigger any of the remedies listed in section 745, subdivision (e), nor any of the discovery sanctions authorized by section 1054.5, subdivision (b)." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 25.) Because section 1054.5 is inapplicable, a court would retain whatever the authority it ordinarily has to enforce a lawful court order, including an order requiring a party to provide discovery.

15. Can the denial or granting of a section 745 discovery request be appealed?

"Penal Code section 1511 expressly authorizes the People to seek review by a petition for writ of mandate or prohibition of an order granting a criminal defendant's motion for discovery." (***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1186 [citing former section 1511, now section 1512].)

The standard for review when a request for discovery to support a selective prosecution motion is granted or denied is the abuse of discretion standard. (***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1185, 1187.) Under this standard of review, all inferences must be drawn in favor of the trial court's ruling. (***Id***. at p. 1196.)

However, if the basis for the challenge is premised on a claim that the court granted or denied discovery as a result of an erroneous interpretation of section 745 (*or any statute*), then the standard on review will be de novo. (**See *Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 390–391; ***White* v. *Superior Court*** (2002) 102 Cal.App.4th Supp. 1, 4.)

VI. Evidentiary Hearings on Section 745 Motions

Subdivision (b) of section 745 allows a defendant to file a motion in the trial court alleging a violation of subdivision (a) of section 745. (Pen. Code, § 745(b).) Subdivision (c) of section 745 states: "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***. (Emphasis added.)

1. What must a defendant show before the defendant is entitled to an evidentiary hearing on a section 745 motion (i.e., what is a "prima facie" showing)?

Paragraph (2) of subdivision (h) of section 745 loosely defines what constitutes a "prima facie" showing entitling a defendant to an evidentiary hearing on whether to grant or deny a section 745 motion. It states: "'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."

The term "substantial likelihood" is used in other contexts. (**See e.g.,** Pen. Code, § 209(a) [imposing LWOP punishment for kidnapping when the person kidnapped is "intentionally confined in a manner which exposes that person to a substantial likelihood of death"]; ***Neil* v. *Biggers*** (1972) 409 U.S. 188, 201 [allowing witness subject to improper identification procedures to testify when there is "no substantial likelihood of misidentification"]; ***People* v. *Harris*** (2008) 43 Cal.4th 1269, 1303 [the "standard for determining whether an individual verdict must be overturned for jury misconduct or irregularity ""is resolved by reference to the substantial likelihood test, an objective standard"" and this standard is met if circumstances establish "there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant"]; ***Walbrook Ins. Co.* v. *Liberty Mutual Ins. Co.*** (1992) 5 Cal.App.4th 1445, 1461 [noting the term "substantial" is synonymous with "strong" and the term "likely" is synonymous with "probable" thus a "strong probability" is a permitted restatement of "substantial likelihood"].) But whether cases interpreting the term in other contexts will provide useful guidance is an open question.

Nevertheless, logic dictates that a substantial likelihood (i.e., "a prima facie" showing) cannot exist if the showing made by the defense does not create *at least a reasonable inference* that

each element of a section 745 violation is present. (**Cf.**, ***Johnson* v. *California*** (2005) 545 U.S. 162, 170 [*rejecting* California Supreme Court's equating of "prima facie" showing to showing that discrimination in jury selection was "more likely than not the product of purposeful discrimination" but mandating defendants "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred" before requiring the prosecution to justify challenges]; ***Perakis* v. *Superior Court*** (1979) 99 Cal.App.3d 730, 733-734 [equating a showing of plausible justification for discovery in selective prosecution case to a "prima facie showing that the prosecution was inspired by a discriminatory and hence unjustifiable motive" and finding that showing was not met because showing made "did not give rise to a rational inference of selective enforcement based upon . . . invidious criteria"]; ***Jones* v. *White*** (11th Cir. 1993) 992 F.2d 1548, 1572 [noting that an "evidentiary hearing on the issue of selective prosecution is not automatic; such a hearing is conducted 'only where a defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive.'"]

> ***Editor's note:** "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (***Johnson* v. *California*** (2005) 545 U.S. 162, 168, fn. 4.)

Thus, when the defendant is making a section 745(a)(3) motion, a prima facie case should not be found unless the defendant can at least create a reasonable inference that (i) he or she was charged or convicted of a more serious offense than other similarly situated defendants belonging to different group who committed a similar offense and (ii) prosecutors more frequently sought or obtained convictions for more serious offense against defendants belonging to defendants' group than they did against defendants of other groups who committed similar offenses and are similarly situated.

Statistics that merely show persons belonging to a particular group are charged more frequently than persons belonging to other groups cannot create a prima facie case of a claimed violation of section 745(a)(3). This is because while such statistics create a "possibility" of disparate impact, absent any showing the groups being compared are similarly situated, no reasonable inference of discrimination (implied or otherwise) can arise. As noted in the case of ***United States* v. *Taylor*** (D.N.M. 2009) 608 F.Supp.2d 1263, when discussing the discriminatory effect prong of a selective prosecution claim (i.e., the analogous element to the discriminatory effect element of a section 745(a)(3) or (a)(4) claim (**see** this IPG, section IV-8-A at pp. 62-63; section IV-9-A at pp. 100-102), "a defendant cannot satisfy the discriminatory *effect* prong by providing statistical evidence which simply shows that the challenged

government action tends to affect one particular group. Rather, the proffered statistics must address the critical issue of whether that particular group was treated differently than a *similarly-situated* group." (Citation omitted.) To satisfy the prong, the study needs to identify similarly situated persons who could have been prosecuted for the same offenses, but were not." (***Id***. at p. 1266, emphasis added.)

This principle is basic - as recognized by Judge Couzens in his analysis of AB 2542: "The defendant will not establish a prima facie basis for relief, for example, if the motion simply alleges a majority of the people prosecuted for defendant's crime are of defendant's race. The defendant must also compare his or her case with the cases of defendants of different races who commit similar offenses. The defendant must show that defendants of his or her race are being prosecuted more than defendants of other races even though the offenses are similar, and all defendants are "similarly situated" except for race, ethnicity or national origin." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020 [Rev. 1/12/21] at p. 11.)

Editor's note:** Cases involving claims of Title VII discriminatory treatment require the plaintiff to establish a "prima facie" case of unlawful discrimination before the burden of "producing evidence" shifts to the employer to show that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." (St. Mary's Honor Center* **v.** ***Hicks*** (1993) 509 U.S. 502, 506–507.) However, a "prima facie" case of discriminatory treatment in that context must be shown by "a preponderance of the evidence." (***Id***. at p. 506.) This is likely a more demanding standard than the "prima facie" standard a defendant must meet to obtain an evidentiary hearing under section 745(b) since the standard under section 745(b) does not require a showing of discrimination is "more likely than not." (Pen. Code, § 745(h)(2).) California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (***Guz* v. *Bechtel Nat. Inc.*** (2000) 24 Cal.4th 317, 354.) Thus, California cases involving claims of discrimination also require a plaintiff to establish a "prima facie" case showing that "*it is more likely than not that such actions were*" based on a [prohibited] discriminatory criterion ..." (***Id***. at p. 355, emphasis added.) And thus California cases involving discrimination claims in civil cases would also be inapplicable in this regard.

2. Can the prima facie showing be based on hearsay?

Although it is fairly certain that hearsay would not be admissible *at the evidentiary hearing* contemplated by section 745(c) itself (**see** ***Jauregi* v. *Superior Court*** (1999) 72 Cal.App.4th 931, 939 ["Evidence Code section 300 makes it clear that, except as otherwise provided by statute, the Evidence Code applies to every evidentiary hearing in the state courts...."]), section 745 is <u>silent</u> as to whether hearsay is admissible to support the prima facie showing necessary *to obtain* an evidentiary hearing.

Even assuming that whatever hearsay could be used to establish the "good cause" showing necessary to obtain discovery pursuant to section 745(d) could also be used to establish the prima facie showing necessary to obtain an evidentiary hearing pursuant to section 745(c), the hearsay would likely be limited to declarations based upon personal knowledge of the declarant - as is the case when discovery requests to support selective prosecutions are made. (**See** this IPG, section V-6 at pp. 152-153.)

A. Is statistical evidence hearsay?

Statistics that are offered to create a reasonable inference of discrimination in effect are being offered for their truth when they are being offered to show: (i) other persons were charged, convicted, or sentenced to a particular offense, (ii) other persons engaged in particular conduct; (iii) the other person(s) used for comparison belong to a different racial, ethnic, or national origin group than defendant; and (iv) the other persons have characteristics or engaged in certain conduct that makes them similarly situated to the defendant.

Such statistical data may not be exempt from a hearsay objection. (**See *Luque* v. *McLean*** (1972) 8 Cal.3d 136, 147 [trial court properly excluded "statistical surveys dealing with the allegedly great number of injuries occurring from the use of rotary power lawn mowers" as hearsay]; ***Foroudi* v. *Aerospace Corporation*** (2020) 57 Cal.App.5th 992, 1006–1007 [trial court in age discrimination case properly found numerous tables containing statistics that included the ages, genders, and bin rankings of employees as well bar charts purporting to visualize the statistics to be hearsay]; ***Brake* v. *Beech Aircraft Corp***. (1986) 184 Cal.App.3d 930, 937 [computer-generated statistical analysis prepared by expert comparing accident rates for one kind aircraft with the rates for other aircraft, on a per-flight-hour basis properly excluded as inadmissible hearsay].)

It is possible that some statistical evidence *might* be admissible over a hearsay objection if it could be established that the statistics were based solely on data documenting official acts of a court, i.e., records showing a particular individual was charged or convicted with a particular offense or enhancement, whether the conviction stemmed from a plea or jury trial, and what sentence was imposed. (**See** Evid. Code, §§ 1280, 452.5.) However, court records showing a conviction occurred may not reflect the race, ethnicity, or national origin of the defendant or victim. Moreover, even if the records do mention the defendant's race, ethnicity, or national origin, such information is not a *basis* for the conviction and could not be considered an official

record of the court itself akin to the fact that a conviction occurred in court (**see** Evid. Code, § 1280) or that a crime occurred (Evid. Code, § 452.5). Nor do court records reflect much of the information necessary to establish the defendants were similarly situated (e.g., the details of the crime, the strength of the evidence, whether the defendant was the actual perpetrator or an aider/abettor, whether the witnesses were cooperative, etc., - **see** this IPG, sections IV-8-E at pp. 71-87; IV-9-C at pp. 104-105) - which would have to be derived from case file notes, preliminary hearing transcripts, police reports, or probation reports. This type of information, when offered to establish a prima facie case of a section 745 violation is not being offered to prove up a conviction, but *even if* the information *were* being used for that purpose, much of it would still not be admissible. (**See *People* v. *Woodell*** (1998) 17 Cal.4th 448, 458 ["The normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction."].)

When statistical information is being used to support (or undermine) *an element* of a section 745(a)(3) or (a)(4) claim by establishing that certain individuals belong to a particular race, ethnicity, or national origin or that certain individuals are similarly situated, the statistical information is likely "case-specific" hearsay as defined in ***People* v. *Sanchez*** (2016) 63 Cal.4th 665.

As explained in ***Sanchez***, "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (***Id***. at p. 676.) In a section 745(a)(3) or (a)(4) motion, the contested issue is whether there are other similarly situated defendants who have received more favorable charges or sentences based on their race, ethnicity, or nationality in comparison to the defendant and members of defendant's group. This means statistics relating relevant information about whether the other defendants are of the same or different groups, whether the other defendants are similarly situated, and whether the other defendants have committed the similar crimes ***are*** "the facts on which their theory of the case depends" and hence they are "case-specific" facts. (***Ibid***.) When statistics are "case-specific" facts being offered for the truth of what is asserted, they should only be admissible if the statistics constitute "general background information" of the type reasonably relied upon by an expert or if the statistics fall under a hearsay exception.

The *actual statistics being relied upon* to establish discriminatory impact do not qualify as general background information that might be admissible as "generalized information" of the sort that can be conveyed via the testimony of an expert. (**Cf.**, ***People* v. *Yates*** (2018) 25

Cal.App.5th 474, 478 485–487 [finding the contents of state hospital records, the opinions and conclusions of nontestifying experts including hospital staff, hearsay statements regarding other allegations of criminal conduct by the defendant, and hearsay information relating to a parole violation were "case specific hearsay" in an SVP case and should have not been related by the experts to the jury.].)*

*__Editor's note:__ The distinction between "case specific" hearsay and general background information that may properly be conveyed by an expert was explained by the California Supreme Court in ***People* v. *Sanchez*** (2016) 63 Cal.4th 665. "An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (***Id***. at p. 675.) Unlike lay persons, "experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. This latitude is a matter of practicality. (***Ibid*** [albeit also noting that "[w]hen giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others"].) "Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (***Id***. at p. 676.) "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (***Id***. at p. 684.)

Accordingly, unless the case specific statistics regarding race and ethnicity recounted by an expert are independently introduced or fall within a hearsay exception, they are subject to a hearsay objection if relied upon by the expert as true. (**See *People* v. *Sanchez*** (2016) 63 Cal.4th 665, 686 ["When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay."].)

It follows that even assuming a declaration of an expert can support a prima facie case requiring an evidentiary hearing, if the expert's *declaration* relies on case-specific statistics (whether provided by the prosecution or obtained independently by the defense) to establish or undermine the section 745 claim, and those statistics do not themselves fall within a hearsay exception, the expert declaration arguably remains subject to a hearsay objection. (**Cf.**, ***California State Auto. Assn. Inter–Ins. Bureau*** (1983) 139 Cal.App.3d 509, 514

[statements in declarations that are not based upon the personal knowledge of the declarant may not be considered in connection with a motion for summary judgment].)

The "Published Compilation" Hearsay Exception: Evidence Code section 1340

Statements of fact contained in statistics uniquely generated by a law enforcement agency or prosecutor's office in response to discovery request will not likely qualify under the "published compilation" hearsay exception of Evidence Code section 1340, which requires "(1) the proffered statement must be contained in a '*compilation*'; (2) the compilation must be '*published*'; (3) the compilation must be '*generally* used … in the course of a business'; (4) it must be '*generally* … relied upon as accurate' in the course of such business; and (5) the statement must be one of fact rather than opinion." (***People* v. *Mooring*** (2017) 15 Cal.App.5th 928, 937; ***People* v. *Franzen*** (2012) 210 Cal.App.4th 1193, 1206, emphasis added.)

Editor's note:** For a better understanding of what sort of statistics will or will not qualify under section 1340 (i.e., what "compilation," "published" and "generally" mean as described in section 1340), **see *People* v. *Mooring (2017) 15 Cal.App.5th 928, 937-939.

However, statistics annually generated by the Department of Justice pursuant to Penal Code sections 13010-13014 and 13125 (**see** this IPG, section V-5-A-(iii) at pp. 141-143) will likely qualify under published compilation hearsay exception of Evidence Code section 1340.

Statistical Data Provided by the Prosecution Does Not Fall Under the Hearsay Exception for Admissions: Evidence Code section 1220

If the statistics relied upon by the defendant to establish the prima facie case were initially provided by the prosecution, the defense might attempt to argue that they are admissible as "admissions" under Evidence Code section 1220. Some federal courts treat statements of federal prosecutors as statements of a party opponent under federal rule of Evidence 801(d)(2) in certain limited circumstances. However, no California case has ever held the statements of a prosecuting attorney constitutes an admission under section 1220, let alone held that simply because documents were provided to the defense *by the prosecution*, those documents are admissible pursuant to section 1220. (**Cf.**, ***Foroudi* v. *Aerospace Corporation*** (2020) 57 Cal.App.5th 992, 1006 [indicating that data provided by a defendant company in a *civil* age discrimination suit *might* be admissible under section 1220 but finding that even if that were true, it would not extend to exhibits reflecting statistical analyses of that data created by unidentified persons].)

3. Can prosecutors provide information *before* the evidentiary hearing to prevent the defense from making the prima facie showing necessary to obtain the evidentiary hearing?

There should be no barrier to prosecutors presenting evidence *before* an evidentiary hearing is held to *defeat* a prima facie showing. Just as the prosecution should be able to introduce evidence to defeat the showing of good cause before discovery is required under section 745(d) (**see** this IPG, section V-7 at pp. 153-154), so should the prosecution be able to introduce evidence to defeat the prima facie showing before an evidentiary hearing is required under section 745(b).

In somewhat analogous contexts, when the government is accused of selective prosecution, an evidentiary hearing may be avoided after the party accused of discrimination provides information that undermines the showing required before the person claiming discrimination is entitled to a hearing. (**See e.g.**, ***United States* v. *Graham***, (1st Cir.1998) 146 F.3d 6, 9 ["if the defendant alleges facts that tend to show that she has been selectively prosecuted and that raise a reasonable doubt about the propriety of the government's purpose, then she is entitled to an evidentiary hearing *unless the government puts forth adequate countervailing reasons to refute the charge* and ... the court is persuaded that the hearing will not be fruitful" (citation and internal quotation marks omitted), emphasis added]; ***United States* v. *Rivera Class*** (D.P.R. 2002) 216 F.Supp.2d 1, 3 [defendant who identifies facts which tend to show the Government did not prosecute other individuals similarly situated to the defendant and the Government's decision was motivated by illegitimate discrimination "will be entitled to discovery and a hearing, *unless the Government can present countervailing reasons for its decision which refute the claim of discrimination and which persuade the court that judicial review of this matter is unnecessary*", emphasis added]; ***United States* v. *Williams*** (E.D. La. 2020) 2020 WL 5960689, at p. *13 [acknowledging information regarding other tax cases provided by the government to undermine claim of selective prosecution but finding defense nonetheless met burden entitling defendant to evidentiary hearing]; ***United States* v. *Haoyang Yu*** (D. Mass. 2020) 2020 WL 5995212, at p. *2 [taking defense request for dismissal or, alternatively, to hold evidentiary hearing on motion to dismiss for selective prosecution under advisement pending review of additional evidence from both defense and the government]; **see also *Guz* v. *Bechtel Nat. Inc.*** (2000) 24 Cal.4th 317, 353–354 [upholding grant of summary judgement in employment age discrimination case where employer offered extensive evidence of its reasons, unrelated to age, for its conduct].)

4. What is the burden of proof at the evidentiary hearing in a section 745 motion?

Penal Code section 745(a) requires the defendant prove a violation of section 745 "by a preponderance of the evidence." Penal Code section 745(c)(2) also expressly states: "The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence."

5. What type of evidence may be considered at the evidentiary hearing?

Penal Code section 745(c)(1) identifies the kind of evidence that may be "presented by either party, [as] including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses." As to what type of evidence would be *relevant* at a section 745 hearing, **see** this IPG, section V-3 at pp. 122-128.

6. Is hearsay admissible at the evidentiary hearing in a section 745 motion?

Because section 745(c) contemplates an evidentiary hearing, hearsay would ordinarily not be admissible at the hearing. (**See *Jauregi* v. *Superior Court*** (1999) 72 Cal.App.4th 931, 939 ["Evidence Code section 300 makes it clear that, except as otherwise provided by statute, the Evidence Code applies to every evidentiary hearing in the state courts...."].) Moreover, section 745 does not *expressly* specify that the rules of evidence in whole or part are inapplicable even though the legislature knows how to specify that the rules of evidence, including the rule against admission of hearsay is inapplicable at a particular type of hearing. (**See** Lab. Code, § 5708 ["All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, . . ."]; Pub. Util. Code, § 25812 ["The hearing need not be conducted according to technical rules relating to evidence and witnesses. . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action."]; **see also** Cal. Const., art. I, § 30(b) ["In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process."].)

On the other hand, California Supreme Court has recognized that the legislature can also implicitly authorize the admission of hearsay at hearings. (**See *People* v. *Otto*** (2001) 26 Cal.4th 200, 207 [Welfare and Institutions Code section 6600(a)(3) expressly permits the use of probation and sentencing reports to show '[t]he details underlying the commission of an offense.' This provision implicitly authorizes the admission of hearsay statements in those reports."].)

Section 745(c) identifies evidence that could potentially (but does not necessarily) contain hearsay such as "statistical evidence" and "aggregate data." Thus, it is ambiguous because it can be read as simply identifying the "type" of evidence that may be presented - in which case the ordinary rules of evidence should apply. Or it may be read as permitting the admission of "statistical evidence" or "aggregate data" regardless of the rules of evidence - in which case such evidence might be admissible over a hearsay objection. If the latter is true, then, by parallel reasoning, the "statistical evidence" or "aggregate data" would also be admissible over *any* other evidentiary objection, including foundational objections (Evid. Code, §§ 400–405) – which seems unlikely.

7. Can or should prosecutors submit any evidence, including statistics, at the section 745(c) evidentiary hearing?

Penal Code section 745(c) expressly permits the prosecution to produce evidence at the evidentiary hearing. (Pen. Code, § 745(c)(1) ["(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. . ."].)

If the defendant is relying on statistical data or expert testimony regarding statistics, prosecutors may need to consult with (and potentially retain) experts who are capable of interpreting statistical data and identifying possible flaws in the studies relied upon and conclusions drawn by the defense experts.

8. May a court appoint an independent expert to assist the court in assessing whether a violation of section 745 has occurred?

Section 745(c) expressly states that the court may "appoint an independent expert" for the evidentiary hearing. (Pen. Code, § 745(c)(1).) No guidance is provided as to what factors should be taken into consideration in deciding whether to appoint an independent expert

under that subdivision. Presumably, the same factors (contextualized to the issues at stake in a section 745 motion) that a court considers in general when deciding whether to appoint an independent expert under Evidence Code section 730 will be considered in deciding whether to appoint an independent expert pursuant to section 745(c)(1).

Evidence Code section 730, in pertinent part, provides:

"When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court."

The prosecution may ask the trial court to appoint an expert pursuant to Evidence Code section 730 and a court may exercise its discretion to do if it decides that expert evidence "is or may be required." (***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1117.)

The decision to appoint an independent expert under section 730 is within the discretion of the court. (***People* v. *Gaglione*** (1994) 26 Cal.App.4th 1291, 1304, disapproved on other grounds in ***People v. Martinez*** (1995) 11 Cal.4th 434, 452 & ***People* v. *Levesque*** (1995) 35 Cal.App.4th 530, 539; ***In re Jennifer J.*** (1992) 8 Cal.App.4th 1080, 1084.) "[T]he trial court is never obliged to appoint an expert to assist it in making a factual, much less a legal, determination under Evidence Code section 730 unless, as that section provides, 'it appears to the court ... that expert evidence is ... required.'" (***In re Eric A***. (1999) 73 Cal.App.4th 1390, 1394, fn. 4.)

A criminal defendant may have a *constitutional* right to appointment of an expert in some circumstances, but "the test for constitutional entitlement to appointment of defense experts focuses on whether a defendant requires assistance on an issue relating to guilt." (***People* v. *Garcia*** (2016) 5 Cal.App.5th 640, 655.) And a section 745 motion does not bear on a defendant's guilt or innocence.

9. Is expert testimony premised on a theory of "implicit bias" subject to a *Kelly/Frye* objection or exclusion under *Sargon*?

In ***People* v. *Kelly*** (1976) 17 Cal.3d 24, the California Supreme Court adopted a test for determining the admissibility of expert testimony that relies on a new scientific technique. Under that test, in order for evidence relying on a new scientific technique to be admitted, the party proposing its admission must do three things. (***Id***. at p. 30.)

First, the proponent must establish the reliability of the technique, usually by expert testimony. A new scientific technique will be deemed reliable if it is "sufficiently established to have gained general acceptance in the particular field to which it belongs." (***Id***. at p. 30.) However, "[r]eliability need not be relitigated in every case. '[O]nce a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community.'" (***People* v. *Turner*** (2020) 10 Cal.5th 786, 801 citing to ***Kelly*** at p. 32.)

Second, the proponent must show that the witness furnishing testimony about the scientific technique is "properly qualified as an expert to give an opinion on the subject" as dictated by Evidence Code sections 720 and 801.* (***People* v. *Leahy*** (1994) 8 Cal.4th 587, 594 citing to ***Kelly*** at p. 30.)

***Editor's note:** "Sections 720 and 801 are the California provisions regarding admissibility of expert testimony. Section 720, subdivision (a), provides that 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates....' Subdivision (b) of that section provides that "[a] witness' special knowledge ... may be shown by any otherwise admissible evidence, including his own testimony.'

Section 801 permits an expert to state an opinion that is "(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge ...) perceived by or personally known to the witness ..., whether or not admissible, *that is of a type that reasonably may be relied upon* by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.'" (***People* v. *Leahy*** (1994) 8 Cal.4th 587, 597–598, emphasis added.)

Third, the proponent must "demonstrate that correct scientific procedures were used in the particular case." (***People* v. *Leahy*** (1994) 8 Cal.4th 587, 594 citing to ***Kelly*** at p. 30.)

The test adopted in ***Kelly*** is often referred to as the ***Kelly-Frye*** test because the ***Kelly*** test was based on the "test for determining the underlying reliability of a new scientific technique [as] described in the germinal case of ***Frye* v. *United States*** (D.C.Cir. 1923) 293 F. 1013, 1014." (***Kelly*** at p. 30.) In federal courts, the ***Frye*** test is no longer used because the High Court in ***Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*** (1993) 509 U.S. 579, held the test for admissibility of expert testimony based on a new scientific technique used in ***Frye*** was abrogated by rule 702 of the Federal Rules of Evidence (28 U.S.C.).* (***People* v. *Leahy*** (1994) 8 Cal.4th 587, 591.)

Editor's note:** Rule 702, governing expert testimony in federal court, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*** (1993) 509 U.S. 579, 588.) The ***Daubert*** court held this rule does not require "general acceptance" of the scientific technique "as an absolute prerequisite to admissibility." (***Ibid***.) And found the ***Frye*** test was "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" (***Ibid***.)

The ***Daubert*** court went on to say, however, that Rule 702 still places some limits on the admissibility of purportedly scientific evidence and the rule requires that a trial judge act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*." (***Id***. at p. 589, emphasis added.) "The subject of an expert's testimony must be "scientific ... knowledge." (***Id***. at pp. 589-590.) "In order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability." (***Id***. at p. 590 [and noting that while "scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?)," . . . [i]n a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*"].) Among the factors, courts may consider in exercising their gatekeeping role: (i) whether a "theory or technique ... can be (and has been) tested"; (ii) whether it "has been subjected to peer review and publication"; (iii) whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (iv) whether the theory or technique enjoys "'general acceptance'" within a "'relevant scientific community.'" (***Id***. at pp. 592-594; **see also *Kumho Tire Co., Ltd.* v. *Carmichael*** (1999) 526 U.S. 137, 147, 149-150 [finding the basic gatekeeping obligation applies not only to "scientific" testimony but to all expert testimony].)

But the California Supreme Court has held, notwithstanding the abrogation of the ***Frye*** test by ***Daubert***, "that the ***Kelly/Frye*** formulation (or now more accurately, the ***Kelly*** formulation)

should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in [California]." (***People* v. *Leahy*** (1994) 8 Cal.4th 587, 591; **see also *People* v. *Lucas*** (2014) 60 Cal.4th 153, 245, fn. 36 [noting that its opinion in ***Sargon Enterprises, Inc.* v. *University of Southern California*** (2012) 55 Cal.4th 747 "did not, by using the term 'gatekeeper,' indicate any move away from the ***Kelly*** test toward the federal ***Daubert*** standard"].)

The ***Kelly/Frye*** rule "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law." (***People* v. *Stoll*** (1989) 49 Cal.3d 1136, 1156.) Cases in which the ***Kelly/Frye*** rule has been applied usually involve an unproven technique or procedure that "appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data." (***People* v. *Stoll*** (1989) 49 Cal.3d 1136, 1156.) But "***Kelly/Frye*** also has been applied to less tangible new procedures which carry an equally undeserved aura of certainty." (***Ibid***.) And "nothing precludes its application to "a new scientific process operating on purely psychological evidence." (***Ibid***, citing to ***People* v. *Shirley*** (1982) 31 Cal.3d 18, 53.) "However, absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to ***Kelly/Frye***." (***People* v. *Stoll*** (1989) 49 Cal.3d 1136, 1156–1157; **see also *Wilson* v. *Phillips*** (1999) 73 Cal.App.4th 250, 254 ["***Kelly–Frye*** applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness."]; ***People* v. *Ward*** (1999) 71 Cal.App.4th 368, 373 [same]; **cf., *People* v. *Fortin*** (2017) 12 Cal.App.5th 524, 532 [finding trial court properly prevented expert giving opinion on whether defendant lacked sexual interest in prepubescent children from reporting defendant's results on a test that measured how much time a test-taker spent on photographs of preschoolers clad in bathing suits while clicking on photographs of persons from all genders and ages].)

Because a section 745 evidentiary motion does not involve a jury, there is <u>less need</u> to be concerned that expert testimony offered at that motion should be excluded based on a ***Kelly-Frye*** objection. "Because the inventions and discoveries which could be considered 'scientific' have become virtually limitless in the near-70 years since ***Frye*** was decided, application of its principle has often been determined by reference to its narrow 'common sense' purpose, i.e., to protect the jury from techniques which, though 'new,' novel, or "'experimental,"' convey a

"'misleading aura of certainty.'"" (***People* v. *Stoll*** (1989) 49 Cal.3d 1136, 1155-1156; ***People* v. *Hardy*** (2021) 275 Cal.Rptr.3d 566, 575 [rehearing gtd, opinion not citeable].) A ***Kelly/Frye*** objection "'is intended to prevent *lay jurors* from being unduly influenced by procedures which seem scientific and infallible, but which actually are not.'" (***People* v. *Daveggio and Michaud*** (2018) 4 Cal.5th 790, 831, emphasis added.)

That said, the ***Kelly-Frye*** test has been applied to render evidence inadmissible even where a judge is the trier of fact, with no attendant danger of jury confusion. (**See *Seering* v. *Department of Social Services*** (1987) 194 Cal.App.3d 298, 310 [administrative hearing]; ***Harris Transportation Co.* v. *Air Resources Board*** (1995) 32 Cal.App.4th 1472, 1478 [same]; ***In re Sara M.*** (1987) 194 Cal.App.3d 585, 594 [dependency proceeding]; ***In re Amber B***. (1987) 191 Cal.App.3d 682, 686 [same]; ***In re Christie D.*** (1988) 206 Cal.App.3d 469, 478 [same].)

As noted earlier, it is possible that a defendant could make out a violation of section 745(a)(2) based on a judge, attorney, law enforcement officer, expert witness or juror exhibiting *implicit or unconscious* "bias or animus" towards a defendant based on race, nationality, or ethnicity. (**See** this IPG, section IV-7-F at p. 61.) If so, whether expert testimony on implicit bias should be admitted over a ***Kelly-Frye*** objection is a question that may arise. And the answer may not be easily arrived at. (**See *People* v. *Stoll*** (1989) 49 Cal.3d 1136, 1155 ["While the standards imposed by the ***Kelly/Frye*** rule are clear, the definition of a "new scientific technique" is not."]; ***People* v. *Bowker*** (1988) 203 Cal.App.3d 385, 391 ["Which particular evidence is deemed 'scientific' and therefore subject to the general acceptance test is frequently disputed."].)

Aside from the question of whether expert testimony may be excluded based on a ***Kelly-Frye*** objection, "[t]rial judges have a critical gatekeeping function when it comes to expert testimony beyond merely determining whether the expert may testify at all. Expert evidence that does not require a ***Kelly*** analysis must still be admissible under Evidence Code section 801, which mandates it be "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject." (***People* v. *Azcona*** (2020) 58 Cal.App.5th 504, 513 citing to Evid. Code, § 801, subd.(b) and ***In re O.D.*** (2013) 221 Cal. App.4th 1001, 1009.)

"Further, under Evidence Code sections 801, subdivision (b), and 802, the court must act as a gatekeeper to ensure the opinions offered by an expert are not 'based on reasons unsupported

by the material on which the expert relies.'" (***People* v. *Azcona*** (2020) 58 Cal.App.5th 504, 513 citing to ***Sargon Enterprises, Inc.* v. *University of Southern California*** (2012) 55 Cal.4th 747, 771.) "[T]he expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors.... [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?'" (***Sargon Enterprises, Inc.* v. *University of Southern California*** (2012) 55 Cal.4th 747, 770.)

***Editor's note:** A bill pending in the California legislature (Senate Bill 243) would add a new Evidence Code section: 806. That section would state: "In any criminal proceeding, a court considering whether expert testimony is based on matter that is of a type that reasonably may be relied upon by an expert in forming an opinion pursuant to this article, shall determine whether the expert's opinion, and supporting literature, studies, research or other bases on which the expert relies in forming that opinion, are based on a reliable foundation, properly tested methodology, and sound logic. Whatever the underlying basis for the expert's opinion, a court shall inquire into, not only the type of material on which the expert relies, but also whether the material provides a reasonable basis for the expert's opinion or whether there is too great an analytical gap between the data and the opinion proffered for the testimony to be reliable and admissible. If the opinion or supporting literature, studies, research, or other bases lack a reliable foundation, properly tested methodology, and sound logic, they are not matter that may be reasonably relied upon. If a portion of the expert's testimony extends beyond the underlying support, the court may allow the portions of the testimony that do not extend beyond the underlying support if they are otherwise admissible."

The bill's author claims the new section would be "consistent with" the holding in ***Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,*** (1993) 509 U.S. 579 and the "strengthens the standards for expert testimony in a criminal case." (Sen. Pub. Safety Com., Analysis of Sen. Bill No. 243 (2020-2021 Reg. Sess.) as amended March 9, 2021, at p. 4.) However, it does not appear this new section actually permits a court to exclude evidence that could not already be excluded under the existing law. (**See** this IPG, section VI-9 at pp. 179-183; ***People* v. *Leahy*** (1994) 8 Cal.4th 587, 598 ["Sections 720 and 801, in combination, seem the functional equivalent of Federal Rules of Evidence, rule 702, as discussed in ***Daubert***."].) Moreover, to the extent the bill would supplant the test for admissibility of scientific evidence under ***Kelly-Frye*** with the test for admissibility under ***Daubert***, it would result in a ***more lenient*** test for admissibility - not a stricter standard. (**See *People* v. *Leahy*** (1994) 8 Cal.4th 587, 596-604 [treating the ***Kelly-Frye*** test as a more "conservative" approach to admissibility of new scientific techniques than the standard adopted in ***Daubert***]; ***Daubert* v. *Merrell Dow Pharmaceuticals, Inc***. (1993) 509 U.S. 579, 589 [describing the ***Frye*** standard as "austere" and "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony'"].) However, if proponents of the bill are to be taken at their word, it would lessen the chance of expert testimony on implicit bias from being admitted.

When the court is also the sole factfinder, it should be able to listen to the evidence before ruling on its admissibility over a ***Sargon***-type objection that the expert testimony is inadmissible because it is not reliable or relevant. (**See also *Kansas City S. Ry. Co.* v. *Sny Island Levee Drainage Dist.,*** (7th Cir. 2016) 831 F.3d 892, 900 [in a bench trial, "the judge need not conduct a ***Daubert*** (or Rule 702) analysis before presentation of the evidence," but she "must determine admissibility at some point."].)

Whether the testimony of an expert offered in support of a section 745 claim based on implicit bias is admissible over either a ***Kelly-Frye*** objection or an objection grounded in Evidence Code sections 720 and 801 *may* turn on whether the expert is asked to discuss the *general* psychological principles underlying implicit bias or whether the expert is asked to opine on whether specific conduct or language alleged to be discriminatory is properly attributed to implicit or unconscious bias. (**Cf.,** ***Tuli* v. *Brigham & Women's Hosp., Inc.,*** (D. Mass. 2009) 592 F.Supp.2d 208, 211; ***Maciel* v. *Thomas J. Hastings Properties, Inc***. (D. Mass., 2012,) 2012 WL 13047595, at *6.)

In ***People* v. *Leahy*** (1994) 8 Cal.4th 587, the California Supreme Court described the combination of California Evidence Code sections 720 and 801 as "the functional equivalent of Federal Rules of Evidence, rule 702, as discussed in ***Daubert***." (***Id***. at p. 598.)

Under the ***Daubert*** (or similar) standard, courts have gone both ways in permitting experts to testify regarding implicit bias – albeit many courts excluding the testimony have done so, in part, because, *unlike with section 745 motions*, intentional discrimination had to be shown. (***Compare Karlo* v. *Pittsburgh Glass Works, LLC*** (3d Cir. 2017) 849 F.3d 61, 84–85 [finding district court properly *excluded* one expert's testimony regarding his "experience with Implicit Association Tests (IAT)" since the expert's statistics had only speculative application to employer and its decision-makers]; ***Jones* v. *Nat'l Council of Young Men's Christian Associations of the United States of Am.*** (N.D. Ill. 2014) 34 F. Supp. 3d 896, 899-901 [finding expert who proffered a report describing general implicit bias and concluded that, "more likely than not," implicit bias caused the adverse impact in the case was properly *prevented* from testifying because "even opinions about general principles have to be logically related to the factual context of a case to be admissible"; and since the case involved employers who were familiar with the employees being evaluated, principles derived from testing the implicit bias of subjects against "virtual strangers in laboratory settings whom they will never meet or see again, with nothing at stake," allowing the testimony threatened to "blur, if not

erase altogether, the line between hypothetical possibility and concrete fact."]; ***Johnson* v. *Seattle Public Utilities*** (2018) [unpublished] 3 Wash.App.2d 1055, *8 [proper to *exclude* testimony of expert on implicit bias as "confusing and misleading for the jury" where testimony consisted only of "generalized opinions that are not tied to the specific facts of this case."]; ***Jackson* v. *Scripps Media, Inc.*** (W.D. Mo., Dec. 5, 2019) 2019 WL 6619859, at pp. *5-*6 [finding plaintiff's expert's generalized views concerning implicit bias are not relevant in cases alleging intentional discrimination and proper to exclude defendant's expert's opinions on implicit bias for lack of sufficient expertise]; ***White* v. *BNSF Railway Company*** (9th Cir. 2018) 726 Fed.Appx. 603, 604 [upholding exclusion of expert on implicit bias because expert opinion was not based on a "significant review of the facts of his case" because a lack of explanation as "how testimony regarding implicit bias would be helpful to the jury in a disparate treatment case requiring evidence of intentional discrimination"] ***with Maciel* v. *Thomas J. Hastings Properties, Inc.*** (D. Mass., 2012) 2012 WL 13047595, at pp. *4-*6 [*permitting* expert on implicit bias to give opinions regarding bias in general but *excluding* his opinion that the evidence was "indicative of bias" since the expert did not "provide any connection between, or scientific support for, his general statements about bias and his opinion that Defendants were biased in this case. He does not describe how the listed events indicate bias, the method by which he determined that these events indicate bias, or how his experience informed this conclusion. Although he states that the Implicit Association Test is the standard bearer for measuring implicit bias, he does not describe its application to, or use in, this case" and also finding the opinion was excludable because it had the potential to confuse the issues and mislead the jury]; ***Martin* v. *F.E. Moran, Inc***. (N.D. Ill., 2017) 2017 WL 1105388, at pp. *2-*3 [*permitting* expert to testify on, inter alia, implicit bias in order to describe the context in which an employer made employment decisions and to rebut the employer's proffered legitimate business reasons as pretextual where expert did not purport to rest her opinion on a scientific basis and testable methodology but on general psychological principles and her experience in the field]; ***Samaha* v. *Washington State Department of Transportation*** (E.D. Wash. Jan. 3, 2012) 2012 WL 11091843, *4 ["Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee"]; ***Pippen* v. *State*** (Iowa 2014) 854 N.W.2d 1, 6–7 [not addressing issue of whether experts on implicit bias could properly testify but noting that two experts on implicit bias *did* testify]; **cf**., ***Tuli* v. *Brigham & Women's Hosp., Inc***. (D. Mass. 2009) 592 F.Supp.2d 208, 210 [*permitting* expert testimony about sex stereotyping and discrimination where expert expressly refused to come to a conclusion about

whether there has been discrimination in this case because, inter alia, "that it is not possible to make any decision to a reasonable degree of scientific certainty about a real world case."].)

For an overview of the articles and studies relied upon by experts on implicit bias authored by a justice *favoring* its admissibility, **see *State* v. *Plain*** (Iowa 2017) 898 N.W.2d 801, 831-833 (conc. opinion of Justice Appel) [listing *many* studies and articles]. For *criticisms* of the reliability and methodology of implicit bias theory, **see** Gregory Mitchell & Philip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading (2006) 67 Ohio St. L.J. 1023, 1025 and Jesse Singal, Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job, N.Y. Mag. (Jan. 11, 2017) https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html.

VII. What Remedies are Available if a Court Finds a Violation of Section 745?

Penal Code section 745(e) identifies the remedies available when a violation of section 745(a) is shown.

1. *Must* a remedy be imposed if a violation of section 745 is found?

It is likely, but not *entirely* clear, that a remedy *must* be imposed if a violation of section 745 is found unless the remedy is barred by a law enacted by an initiative.* Section 745(e) states: "Notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court ***shall*** impose a remedy specific to the violation found from the following list: . . ." (Pen. Code, § 745(e), emphasis added.) However, paragraph (1) in the list states: "Before a judgment has been entered, the court ***may*** impose any of the following remedies: [listing three remedies]. ." (Pen. Code, § 745(e)(1), emphasis added.) This creates somewhat of an ambiguity.

***Editor's note:** As to when a remedy may be barred by an initiative, see this IPG, section VII-4-E at pp. 194-197.

"It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory, particularly when both terms are used in the same statute." (***Common Cause* v. *Board of Supervisors*** (1989) 49 Cal.3d 432, 443; **but see *People* v. *Lara*** (2010) 48 Cal.4th 216, 227 ["it should not be assumed that every statute that uses [the term "shall"] is mandatory" and "[n]either the word 'may,' nor the word 'shall,' is dispositive"].)

Subdivision (e) could be interpreted to mean that, at least before a judgment has been entered, a court retains discretion not to impose a remedy. Or it could be interpreted to mean it is within the discretion of the court to decide *which of* the remedies listed in paragraph (1) to impose. Based on the statutory history of AB 2542, it is more likely the latter.

2. *Must* the remedy that is imposed be a remedy *listed* in section 745(e)?

In pertinent part, subdivision (e) of section 745 provides: Notwithstanding any other law, . . . if the court finds . . . a violation of subdivision (a), the court shall impose a remedy specific to the violation found ***from the following list***: [listing paragraphs (1)-(4)]."

Thus, not only must a remedy be imposed, but it must be a remedy from the remedies listed in subdivision (e). (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 24.)

However, paragraph (4) of subdivision (e) does not specify a remedy. Rather, it simply states that the remedies that are "available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law." (Pen. Code, § 745(e)(4).) This incongruity also can likely be chalked up to inadequate drafting.

Structurally, paragraph (4) should not be a paragraph under subdivision (e) because it does not specify a remedy. It should be its own subdivision – and if it were – it would make perfect sense. However, because paragraph (4) was listed under paragraph (e), it at least raises the question of whether the remedies available under the federal or state constitution or any other law are *included* in the list of remedies that can be imposed *in lieu of* the remedies listed in paragraphs (1) through (3).

3. What does it mean for a remedy to be "specific to the violation?"

Section 745(e), in pertinent part, states: "Notwithstanding any other law, . . . 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: . . ." (Pen. Code, § 745(e), emphasis added.)

This is an odd turn of phrase considering that the statute, with one exception (**see** Pen. Code, § 745(e)(2)(A) [specifying remedy when the violation that occurred is based on paragraph (3) of

subdivision (a)]), does not attach a particular remedy to a particular violation. Section 745(e) does draw a distinction between remedies that may be imposed pre-judgment and remedies that may be imposed post-judgment. (Compare subds. (e)(1) to (e)(2).) But not always. (**See** Pen. Code, § 745(e)(3).) Although somewhat superfluous, the mandate that the remedy be specific to the violation could simply be a way of emphasizing that post-judgment remedies should not be imposed pre-judgment and vice versa. Or it could be a way of recognizing that certain types of remedies are more well-suited to certain types of violation than others. And judges must figure out the remedy that is the best fit. (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 25 ["Likely the remedy should have some relationship to the nature of the violation and in proportion to its seriousness."].)

In some circumstances, it may be easy to figure out the proper remedy. For example, if a defendant is "overcharged" in relation to other defendants belonging to a different group and the defendant's group is more frequently overcharged in violation of section 745(a)(3), reducing the charge to eliminate the disparity seems like the most tailored and justifiable remedy. In other circumstances, it will be nearly impossible to figure out the proper remedy. For example, if it is discovered that an officer exhibited racial bias or animus towards a defendant charged with an assault (Pen. Code, § 240) before trial begins in violation of section 745(a)(1), what remedy should be imposed? The jury has not been selected yet, so discharging the jury (subd. (e)(1)(A)) is not available. Nor is declaring a mistrial (subd. (e)(1)(B)). There are no enhancements, special circumstances, or special allegations, and there are no lesser included (or related)* offenses to which the charge can be reduced (subd. (e)(1)(C)).

***Editor's note:** As to whether a court can reduce an offense to a lesser related offense as a remedy for a section 745 violation, **see** this IPG, section VII-4-D-ii at pp. 193-194.)

4. Which remedies are available to be imposed *before* judgment?

Penal Code section 745(e)(1) states: "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."

A. Is there any requirement that there be a showing of prejudice (in the sense of actual harm) to the defendant from the section 745 violation before a remedy may be imposed?

A remedy for a violation of section 745(a) may be imposed regardless of whether the violation resulted in any harm to the individual defendant or deprived defendant of a fair trial in any way, i.e., no prejudice to the defendant need be shown. (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 24; this IPG, section IV-5-B at p. 50; **but see** this IPG, section VII-6 at pp. 205-209.) However, whether defendant has suffered any prejudice *might* play a role in *which* remedy to impose (and/or how severe the remedy) for the violation.

B. When should the remedy of discharging the jury *panel* be utilized?

One remedy for a violation of section 745(a) is to "[d]ischarge the jury panel and empanel a new jury." (Pen. Code, § 745(e)(1)(B).) This remedy is most suitably tailored (i.e., specific to) addressing a violation based on discriminatory jury selection. Indeed, discharge of a jury panel is the most common remedy imposed for discriminatory use of peremptory challenges in violation of the ***Batson-Wheeler*** line of cases. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 813; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.) Albeit proving discriminatory use of peremptory challenges under the ***Batson-Wheeler*** line of cases does not require a showing of bias or animus *towards the defendant* as does section 745. Moreover, it is quite possible that this remedy was largely intended to address a violation of a paragraph included in the *alternative* version of section 745 which would have gone into effect if AB 3070 had not passed but which was *not* included in the version of AB 2542 that was ultimately enacted. That paragraph would have made it a violation of section 745 if "[r]ace, ethnicity, or national origin was a factor in the exercise of peremptory challenges." (**See** this IPG, section IV-1 at pp. 40-41.)

The remedy also seems suited to addressing bias or animus on the part of a juror, attorney, or judge that "taints" the jury panel.

On the other hand, the remedy appears inapplicable to addressing a violation of section 745(a)(1) or (a)(2) that occurs *before* jury selection or *outside* the jury's presence. And it also is not tailored to address violations of section 745 that occur *after* the jury has been selected and sworn. This is because, as pointed out by Judge Couzens, "[t]he jury ***panel*** is ***not*** the jury

after it has been empaneled and sworn." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 26, emphasis added.)

"'A "panel" is the group of jurors from the venire who are assigned to a courtroom and from which a jury may be selected for a particular case.' (***People* v. *Massie*** (1998) 19 Cal.4th 550, 580, fn. 7.) 'A "venire" is the group of prospective jurors summoned from [the master] list and made available, after excuses and deferrals have been granted, for assignment to a "panel."' (***Ibid***.) Thus, [the remedy of discharging the *jury panel*] can only be imposed at a point in time between the jury panel walking into the court room for jury selection and the time the jury has been empaneled, which means up to the point when the jurors and alternates have been sworn. (**See *People* v. *Scott*** (2015) 61 Cal.4th 363, 383 [jury is said to be empaneled after jurors and alternates are sworn]; ***People* v. *McDermott*** (2002) 28 Cal.4th 946, 969 [same].)" (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020" [Rev. 1/12/21] at p. 26.)

Section 745(e)(1)(B) does not condition the discharge of the jury panel as a remedy on the request or consent of the defendant. However, Judge Couzens has cautioned that, regardless of the fact that double jeopardy does not bar retrial of a case dismissed *before* a jury is sworn (i.e., the retrial can occur without a finding of defendant's consent or of manifest necessity), the better practice would still be to obtain defendant's consent to the discharge of the jury panel before the remedy of section 745(e)(1)(B) is imposed. (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020" [Rev. 1/12/21] at pp. 26-27.)

As to the remedy tailored to a violation of section 745 that occurs *after* the jury is selected and sworn and involves discrimination in the use of jury selection or the exhibition of bias or animus that taints the jury, **see** this IPG, section VII-5-C at p. 200.)

C. When should the remedy of a mistrial be utilized?

By requiring that the remedy of granting a mistrial only be done with the consent of the defendant, the authors of AB 2542 seem to have been aware that "[i]n a trial by jury, the defendant is deemed to have been placed in jeopardy when the jurors have been impaneled and sworn" and that "[o]nce this occurs, if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant *consented to the discharge*, or manifest necessity required it." (***People* v. *Fields*** (1996) 13 Cal.4th 289, 299, emphasis added.)

However, because a violation of section 745 does not require a showing the defendant suffered any prejudice or was deprived of a fair trial, by providing the remedy of a "mistrial" for a violation of section 745, the authors have ignored long-standing law. It is well established that a "trial court should grant a motion for mistrial 'only when '"a party's chances of receiving a fair trial have been irreparably damaged"' (***People* v. *Ayala*** (2000) 23 Cal.4th 225, 282 [alternate citations omitted], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' (***People* v. *Haskett*** (1982) 30 Cal.3d 841, 854 [alternate citations omitted]." (***People* v. *Avila*** (2006) 38 Cal.4th 491, 573.)

Since the legislature is deemed "to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them" (***Williams* v. *County of San Joaquin*** (1990) 225 Cal.App.3d 1326, 1332 [citing to ***Viking Pools, Inc.* v. *Maloney*** (1989) 48 Cal.3d 602, 609; ***People* v. *Weidert*** (1985) 39 Cal.3d 836, 844; and ***People* v. *Silverbrand*** (1990) 220 Cal.App.3d 1621, 1628]), an issue will arise whether the remedy of a mistrial can be imposed when the violation of section 745 does not actually prejudice or deprive the defendant of a fair trial.

Putting aside that issue, the remedy of granting a mistrial (with defendant's consent) as described in section 745(e)(1)(A) is *most well* suited to remedying a violation of section 745 that involves discrimination in the use of jury selection or an exhibition of bias or animus that taints the jury and which is found to have occurred *after* the jury is selected and sworn.

However, if the term "specific to" the violation is interpreted broadly, a mistrial is a potential remedy for *any* violation of section 745(a)(1) or (a)(2) that occurs after the jury is sworn. And if a court is reluctant to impose the remedy identified in section 745(e)(1)(C), which seems more suited to a violation of section 745(a)(3) or (a)(4), then a mistrial is the only pre-judgment remedy left in a non-death penalty case.

D. When should the remedy of dismissing "enhancements, special circumstances, or special allegations, or reduc[ing] one or more charges" be applied?

The remedy of dismissing "enhancements, special circumstances, or special allegations, or reduc[ing] one or more charges" as described in section 745(e)(1)(C) may potentially be inapplicable in certain circumstances because it runs afoul of the separation of powers doctrine or of an initiative approved by the voters. (**See**, respectively, this IPG, sections VII-4-D-ii at

pp. 193-194 and VII-4-E at pp. 194-198.) However, assuming it does not, this remedy seems most "specific to" correcting a violation of section 745(a)(3). That is, it can most aptly apply when the defendant is "charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." (Pen. Code, § 745(a)(3).) This is because the remedy of reduction of the charges can eliminate the disparity in charging based on race, ethnicity, or national origin – which is the primary rationale behind AB 2542 in general and section 745(a)(3) in particular.

Assuming that an "enhancement, special allegation, or special circumstance" qualifies as an "offense" for purposes of section 745(a)(3) (**see** this IPG, section IV-8-c-i at pp. 67-68), the remedy of dismissal or reduction of such an enhancement or allegation can be interpreted as "specific to" a violation of section 745 when a defendant has been charged with an enhancement, special circumstance, or special allegation based on race, ethnicity, or national origin in circumstances when defendants of other groups would not also be charged with the same enhancement or allegation.

i. When will reduction of a charge or dismissal of an enhancement, special circumstance or special allegation be in "the interest of justice?"

Section 745(e)(1)(C) permits a court to "dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges" if "the court determines that it would be in the interest of justice."

Although the statute does not define the term "interests of justice" it is a term commonly used in statutes. (**See e.g.**, Pen. Code, § 463(a) [standard for determining whether to reduce or eliminate mandatory jail sentence for looting]; Pen. Code, § 1203(e) [standard for determining whether to grant probation in unusual cases if certain circumstances exist]; Welf. & Inst. Code, § 782 [standard for dismissal of petition in juvenile court].) Judicial discretion under this standard is likely to be broad. (**See *People* v. *Nuno*** (2018) 26 Cal.App.5th 43, 49; ***People* v. *Superior Court (Du)*** (1992) 5 Cal.App.4th 822, 831.) However, "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (***People* v. *Russel*** (1968) 69 Cal.2d 187, 195.)

To overturn a judicial decision in this regard is thus likely going to require a showing that the determination was "arbitrary, capricious, or exceed[ed] the bounds of reason." (***People* v. *Nuno*** (2018) 26 Cal.App.5th 43, 49; ***People* v. *Superior Court (Du)*** (1992) 5 Cal.App.4th 822, 831.)

Judge Couzens likens the standard to that used by a court in deciding whether an action should be dismissed "in furtherance of justice" pursuant to Penal Code section 1385 and suggests the same considerations and limitations would apply. (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020" [Rev. 1/12/21] at p. 27.) That is probably a good analogy.

ii. Will reduction of a charge ever violate the separation of powers doctrine?

Giving judges the power to dismiss charges or strike enhancements does not generally violate the separation of powers doctrine. (**See *People v. Superior Court (Romero)*** (1996) 13 Cal.4th 497, 513- 519.) "When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." (***Id***. at p. 517.) There is one circumstance, however, where reduction of a charge might violate the doctrine: when the crime is reduced to a lesser related, instead of lesser included, offense.

Although section 745(e)(1)(C) provides *statutory* authorization to reduce a charge to a lesser related offense *before judgment*, allowing a court to do so *over prosecution* objection would almost certainly violate the *constitutionally* based separation of powers doctrine. As explained in ***People* v. *Birks*** (1998) 19 Cal.4th 108, a case holding a court could not give an instruction on a lesser related offense over prosecution objection, "it is ordinarily the prosecution's function to select and propose the charges. Hence, separation of powers difficulties may arise, as they did in ***Romero***, from a constitutional interpretation that requires a judicial officer, acting at the defendant's unilateral insistence, to add lesser nonincluded offenses which the prosecution has chosen to withhold in the exercise of its charging discretion, and to which it objects." (***Id***. at p. 136 [albeit, at p 135, declining to finally decide the question]; **see also *People* v. *Smith*** (1975) 53 Cal.App.3d 655, 657-658 [finding it a violation of Article III, section 3 of the California Constitution for a judge to permit a defendant charged with an assault by means of force likely to produce great bodily injury to enter a plea of guilty to a lesser related offense of battery].)

The violation of the constitutional doctrine of separation of powers would exist if, by the reduction, the court was forcing the prosecution to proceed on a lesser-related offense, i.e.,

because that would implicate the power to decide what charges to file. Moreover, if there were proof issues with a lesser related charge rendering it unethical for the prosecutor to proceed on the lesser related offense, the sanction would amount to a dismissal – which was expressly exempted from section 745 as a sanction. (**See** this IPG, section VII-4-D at p. 194.)

iii. Can a court dismiss charges before judgment as a sanction for violating section 745?

Section 745(e) does not authorize *dismissal* of *charges* before judgment as a sanction for a violation of section 745. Indeed, the remedy of dismissal before judgment, which had been included in an earlier version of AB 2542, was specifically omitted from the final version of section 745. (**See** Proposed Pen. Code, § 745(f)(1) ["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* or reduce one or more charges. Monetary sanctions and training alone are not sufficient as a remedy."] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB2542 [version 7/1/20].) (Emphasis added.)

Under the enacted version of section 745, only enhancements, special circumstances, or special allegations may be dismissed. (Pen. Code, § 745(e).)

There is *also* an argument that dismissal of *any* charges (or *even* enhancements, special circumstances, or special allegations) is prohibited because section 745 expressly states the remedies are not permitted if they would conflict with "an initiative approved by the voters." (Pen. Code, § 745(e); **see also** this IPG, section VII-4-E at pp. 194-195.)

> ***Editor's note:** Even if section 745(e) did not expressly state that "[n]otwithstanding any other law, except for an initiative approved by the voters," the remedy of dismissal would still be unavailable if section 745 is deemed to have improperly amended an initiative or to have authorized the "exclusion" of relevant evidence in contravention of Proposition 8. (**See** this IPG, section VII-4-E at pp. 195-198.)

E. Can a voter initiative potentially preclude, or limit, application of the remedies identified in section 745(e)?

Section 745(e), in pertinent part, provides that a court shall impose a remedy for a violation of subdivision (a) of section 745 "[n]otwithstanding any other law, ***except for an initiative approved by the voters*** . . ." (Ibid, emphasis added.)

Although somewhat awkwardly phrased, it seems relatively clear that the drafters intended to allow a court to impose a remedy regardless of any other law except a law enacted by a voter-approved initiative. This language saves section 745(e) from being challenged on grounds the imposition of the remedy is inconsistent with a law passed by a voter initiative.

With the exception of discussing Proposition 8 ["The Victims' Bill of Rights"], which arguably precludes dismissal of ***any*** enhancement, special circumstance, or special allegation for violating section 745 (**see** this IPG, section VII-4-E-i at pp. 196-198), this IPG will not attempt to cover all the initiatives that potentially override the ability of a court to impose a pre-judgment remedy for a section 745 violation.

Judge Couzens identifies at least one provision of an initiative that would prevent dismissal of a particular enhancement even though dismissal would otherwise be authorized by section 745(e). "[T]he provisions authorizing the striking of enhancements or allegations under section 745, subdivision (e)(1)(C), likely do not override section 667.61, subd. (g), which prohibits the court from striking allegations making a person punishable under the One Strike law. The restrictions in the One Strike law were established, at least in part, by Proposition 83, enacted by the voters on November 7, 2006." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at pp. 27-28.) There are other examples as well.*

Editor's note:** Proposition 83 ["The Sexual Predator Punishment and Control Act"] also added subdivision (d) to Penal Code section 667.71. Section 667.71 requires imprisonment in the state prison for 25 years to life for defendants who have a prior conviction for a sexual offense designated in subdivision (c) of that section and who commit a new sexual offense designated in subdivision (c). Subdivision (d) states: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any prior conviction specified in subdivision (c) for any person who is subject to punishment under this section." (Ibid***.) Thus, a court would not have the ability to dismiss a section 667.71 enhancement as a remedy for a violation of section 745(a).

Note also that many initiatives put restrictions on amendments to the initiative such as requiring that any amendments be consistent with and further the intent of the initiative (**see e.g.,** Proposition 57 ["Public Safety and Rehabilitation Act of 2016"]) or that any amendments be passed by a certain percentage of the legislature (**see e.g**., Proposition 115 [The "Crime Victims Justice Reform Act"].) Thus, even if section 745 did not include language expressly stating subdivision (e) did not override a voter initiative, if a provision of section 745 effectively "amended" another statute enacted by a voter initiative in violation of the restrictions placed

on the amendment by the initiative, the provision in section 745 that improperly amended the initiative would be void.

For example, section 33 of Proposition 83 ["The Sexual Predator Punishment and Control Act: Jessica's Law"] states: "The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase the punishments or penalties provided herein by a statute passed by majority vote of each house thereof." (***Ibid***.) Since AB 2542 did not pass by two-thirds membership and the provisions of section 745 enacted by AB 2542 allowing for dismissal of enhancements as a remedy did not "expand the scope" of Proposition 83's application or increase punishment, these provisions would be void insofar as they would amend Proposition 83 by allowing dismissal of Penal Code sections 667.61 or 667.71 enhancements in contravention of Proposition 83. (**See** this IPG section VII-4-E at p. 195.)

i. Does the "Truth-in-Evidence" provision of Proposition 8 prevent dismissal of charges or enhancements before judgment as a sanction for violating section 745(a)?

Proposition 8 ["The Victims' Bill of Rights"] was a voter initiative enacted on the June 1982 California primary election ballot. It "added section 28, subdivision (d) (hereafter section 28(d)), to article I of the California Constitution." (***In re Lance W.*** (1985) 37 Cal.3d 873, 879.) Section 28(d) is now section 28(f)(2) and it states: "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile court for a criminal offense, whether heard in juvenile or adult court." (Cal. Const., art. I, § 28(f)(2).)

> ***Editor's note:** AB 2542 did not pass by a two-thirds vote of the membership in each house of the Legislature. (See https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200AB2542

In ***In re Lance W.*** (1985) 37 Cal.3d 873, the California Supreme Court interpreted the language "relevant evidence shall not be excluded in any criminal proceeding" to conclude "that the electorate intended to mandate admission of relevant evidence, even if unlawfully

seized, to the extent admission of the evidence is permitted by the United States Constitution." (***Id***. at pp. 887-888.) Since then, the California Supreme Court has made it clear that the "Right to Truth-in-Evidence" provision did not only abrogate those exclusionary rules that were judicially created. It abrogated those exclusionary rules that have a statutory basis. (***People* v. *Guzman*** (2019) 8 Cal.5th 673, 681.)

Statutes that authorize the remedy of exclusion of evidence also violate Proposition 8 unless those statutes are passed by a two-thirds vote in each legislative house. "Merely because an exclusionary remedy is codified does not mean that it is beyond the reach of the Right to Truth-in-Evidence provision. Nothing in our case law or the language of the constitutional amendment supports a contention to the contrary." (**See *People* v. *Guzman*** (2019) 8 Cal.5th 673, 681-682 [noting that "more than once, we have found that the constitutional amendment superseded statutory provisions" and citing previous decisions]; **accord *People* v. *Alvarez*** (2002) 27 Cal.4th 1161, 1176-1177 ["Of course, our decisions have already rejected defendant's suggestion that the effect of section 28(d) should be confined to court-made rules excluding evidence as a remedy for police misconduct."].)

Because a remedy requiring the *dismissal* of a case is the functional equivalent of exclusion, amounting to an exclusion of *all* relevant evidence in the case, several courts have held that imposing the remedy of dismissal also violates Proposition 8 unless the federal Constitution simultaneously requires dismissal (or dismissal is mandated by a *post*-Proposition 8 statute enacted by a two-thirds vote in each house). (**See *People* v. *Epps*** (1986) 182 Cal.App.3d 1102, 1115 ["We find that, … where the evidence allegedly lost or destroyed is potentially exculpatory, and the usual remedy is exclusion of evidence potentially inculpatory, the functional remedial equivalent of exclusion of evidence is dismissal or dismissal of specific intent crimes."]; ***People* v. *Valencia*** (1990) 218 Cal.App.3d 808, 818 [agreeing with ***Epps*** that "the reach of Proposition 8 includes not only suppression of evidence cases, but instances where the judicially created remedy is dismissal of charges"]; ***People* v. *Lopez*** (1988) 198 Cal.App.3d 135, 145 ["The asserted distinction between dismissal and exclusion is artificial because dismissal is nothing more than the exclusion of all evidence against a defendant."]; **see also *People* v. *Jay*** (unpublished) 2002 WL 31661318, at *6; **but see *People* v. *Lazarus*** (2015) 238 Cal.App.4th 734, 756 ["we are doubtful that the truth-in-evidence provision applies where the requested remedy is not suppression of evidence, but dismissal of all charges based on the state's violation of a defendant's due process rights"].)

If Proposition 8 precludes dismissal as a remedy, and dismissal would effectively result in the exclusion of evidence, it should not make a difference whether a dismissal is of a substantive charge or an attached enhancement, special circumstance, or special allegation. (**Cf.**, ***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 49-50 [holding Penal Code section 1054.5, subdivision (c)'s limitation on dismissing a "charge" as a remedy for a discovery violation "unless required to do so by the Constitution of the United States" also bars dismissal solely of an allegation that goes beyond the underlying substantive offense, such as the special circumstance in the case before it]; ***People* v. *Carreon*** (1997) 59 Cal.App.4th 804, 806-809 [holding Penal Code section 1387(a) two-dismissal rule barring further prosecution for the same offense after order terminating an "action" pursuant to certain designated sections if "the action has been previously terminated" pursuant to certain designated sections prohibits prosecution of a special allegation when the substantive offense is not dismissed twice but the special circumstance allegation is].) Thus, Proposition 8 may preclude imposing the remedy dismissal of enhancement, special circumstance, or special allegation (**see** Pen. Code, § 745(e)(1)(C)) for a violation of section 745, regardless of whether a court determines the violation occurred pre-judgment or post-judgment.

F. Can or must a court preclude eligibility for the death penalty if the court finds a violation of section 745(a) before judgment?

Penal Code section 745(e), in pertinent part, states: "Notwithstanding any other law, *except for an initiative approved by the voters*, if the court finds, by a preponderance of evidence, a violation of subdivision (a), the court shall impose a remedy specific to the violation found from the following list: . . . (3) *When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty*." (Emphasis added.)

This remedy is mandatory in any case in which a defendant is charged with a special circumstance rendering them eligible for the death penalty. It appears this remedy may be imposed when a violation of section 745 is found *before* or *after* judgment.

This provision potentially runs afoul of Proposition 8, if elimination of eligibility for the death penalty is deemed the functional equivalent of exclusion (i.e., exclusion of evidence bearing on whether to impose the death penalty). (**See** this IPG, section VII-4-E-i at pp. 196-198.)

If, *after judgment*, the violation of section 745 was found to have occurred, the remedy of precluding eligibility for the death penalty may run afoul of Proposition 115. Proposition 115

enacted Penal Code section 1385.1, which bars dismissal of a special circumstance. However, section 1385.1 only bars the striking or dismissal of a "special circumstance *which is admitted by a plea of guilty or nolo contendere or is found by a jury or court* as provided in Sections 190.1 to 190.5, inclusive." (Pen. Code, § 1385.1, emphasis added.) Thus, the remedy of barring eligibility for the death penalty *before* judgment could be imposed without contravening section 1385.1 but not if the remedy is imposed after judgment.

Imposing the remedy identified in section 745(e)(3) may also potentially run afoul of Proposition 7 (approved by voters, Gen. Elec. (Nov. 7, 1978)) commonly known as the "Briggs Initiative." (***People* v. *Superior Court (Gooden)*** (2019) 42 Cal.App.5th 270, 274.) The issue of whether this provision is void as an improper amendment *in general* is discussed extensively in Judge Couzens in his memo on AB 2542. (**See** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at pp. 30-32.) Because it appears that Proposition 7 and Proposition 115 are more likely to be a bar to imposing the remedy of eliminating eligibility for the death penalty when a court finds the violation *after* judgment, this topic is discussed in the section of this IPG covering remedies that may be imposed after judgment. (**See** this IPG, section VII-5-C at pp. 203-205.)

5. Which remedies are available to be imposed *after* judgment?

Penal Code section 745(e)(2) lays out the remedies available to the court when a judgment has been entered.

Subject to two exceptions (**see** this IPG, section VII-5-A and 5-B at pp. 200-203), "[w]hen 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).*" (Pen. Code, § 745(e)(2)(A), emphasis added.)

While recognizing that it not entirely clear what it means to order "new proceedings consistent with subdivision (a)," Judge Couzens postulates that it "means nothing more than the court must order the criminal proceedings be started over from the point where the violation of subdivision (a) occurred." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 28.) But it could also mean that the individual who exhibited the animus or bias must be barred from participating in the new proceedings.

In most post-judgment cases involving a violation of section 745***(a)(1)*** or ***(a)(2)***, the remedy identified in the first sentence of section 745(e)(2)(A) [vacating the conviction and ordering new proceedings consistent with subdivision (a)] will be the remedy ordinarily imposed - although imposition of the remedy may be barred by unless it is reasonably probable the defendant would have obtained a more favorable result had the violation not occurred. (**See** this IPG, section VII-6 at pp. 205-209.)

If exclusion of the individual who "exhibited bias or animus towards the defendant" (subd. (a)(1)) or "used racially discriminatory language" (subd. (a)(2)) is required, excluding that person (i.e., a judge, attorney, juror, or even an expert witness) from "new proceedings" will allow the case to be retried in a manner "consistent with subdivision (a)." However, in at least one circumstance, it may be logically impossible to comply with the requirement that "new proceedings consistent with subdivision (a)" be ordered.

That circumstance is when a law enforcement officer "involved in the case" exhibited bias or animus towards the defendant. This would *remain true* no matter how many times the case is retried. For example, if an officer during the arrest of a defendant exhibited bias or animus towards the defendant but never testified in the original trial, this "error" cannot be corrected during a new trial by excluding the officer from testifying in the second trial. Thus, the new proceedings could not be conducted in a manner consistent with subdivision (a). Courts may choose to ignore this conundrum and interpret the statute to only require a single reversal in this circumstance.

A. When can a court remedy a violation of section 745(a)(3) post-judgment without vacating all aspects of the conviction or sentence (Pen. Code, § 745(e)(2)(A)?

In pertinent part, the second sentence of sub-paragraph (A) of paragraph (2) of subdivision (e) provides: "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 *modify the judgment to impose an appropriate remedy for the violation that occurred.* On resentencing, the court shall not impose a new sentence greater than that previously imposed." (Emphasis added.)

Violations of paragraph 3 of subdivision (a) are essentially premised on defendants showing that they (and members of their race, ethnicity, or national origin) were overcharged (e.g., with a more serious offense or, arguably, subject to an enhancement) in comparison to similarly situated defendants belonging to a different race, ethnicity, or national origin. (**See** this IPG, section IV-8 at pp. 61-98.) Thus, it stands to reason that giving a court the ability to "modify the judgment to impose an appropriate remedy for the violation that occurred" allows the court to resentence the defendant in a manner that eliminates the disparity based on race, ethnicity, or national origin. For example, if a defendant were charged and convicted of possession for sale of cocaine when similarly situated defendants of other groups would only have been convicted of simple possession, a court could modify the judgment by reducing the defendants' conviction to simple possession. Or if a defendant were charged with an enhancement that similarly situated defendants belonging to different groups would not ordinarily be charged with, a court could modify the judgment by eliminating the enhancement.

> ***Editor's note:** Judge Couzens cogently highlights a mistake by the drafters regarding subdivision (e)(2)(A). "The procedural steps mandated to be taken by the court under section 745, subdivision (e)(2)(A), are legally inconsistent. Section 745, subdivision (e)(2)(A), specifies the court 'shall vacate the conviction and sentence, find the conviction is legally invalid.' Such an order means the defendant no longer stands convicted of any criminal offense. Yet the legislation then directs the court to 'modify the judgment to impose an appropriate remedy for the violation that occurred.' *But there is no crime to sentence – the conviction was vacated*. Section 745, subdivision (e)(2)(A), only authorizes the modification of the sentence, not the granting of a new trial to establish a new conviction. Until this procedural quagmire is cleaned up by the Legislature or appellate opinion, it is suggested the court focus on the statute's end product: that the judgment be modified 'to impose an appropriate remedy for the violation that occurred.' Although this portion of section 745, subdivision (e)(2)(A), directs the court to vacate the conviction, the emphasis – the goal – of the legislation appears to be the correcting of the judgment to correspond to a race-free charging decision. In other words, notwithstanding the legislative directive to vacate the conviction, the court should leave the defendant convicted of the crimes originally sentenced, but consider all available sentencing discretion to modify the judgment to account for the violation of subdivision (a): resentencing the defendant to a lower term, imposing a concurrent sentence; exercising discretion under section 1385 to dismiss enhancements or special allegations; imposing a local disposition (if authorized), and/or reducing charges. The only limitation is that the court may not impose a greater sentence than originally imposed. (§ 745, subd. (e)(2)(A).)" (Emphasis added.)

If the state violates section 745(a)(3) by seeking the death penalty when similarly situated defendants of a different race, ethnicity, or national origin would be not subject to capital punishment (and assuming the other elements of section 745(a)(3) are met), the remedy

specific to the violation would seem to be imposition of the remedy identified in section 745(e)(3): vacating the death sentence and imposing an LWOP sentence.

Assuming a court may "modify" the sentence, *possible* issues arise if a court seeks to remedy a violation of section 745(a)(3) by modifying the sentence to a "lesser" related offense *that was not proved at* the trial or by the plea. (**See** this IPG, section VII-D-ii at pp. 193-194.) Doing so may run afoul of both the defendant's and the People's right of due process. (**See**, respectively, Cal. Const. art. I, § 7 and § 29; ***People* v. *Toro*** (1989) 47 Cal.3d 966, 975 ["the due process notice requirement precludes conviction for a lesser related offense when the defendant has not consented to its consideration by the trier of fact"]; ***People* v. *Birks*** (1998) 19 Cal.4th 108, 136 [abrogating rule allowing defendant to request lesser related offense but not the rule allowing a defendant to complain on appeal if convicted of an uncharged and nonincluded offense without his or her consent as discussed in ***People* v. *Toro*** (1989) 47 Cal.3d 966].) On the other hand, defendant's motion pursuant to section 745 requesting relief may be viewed as consent to the reduction. (**See *People* v. *Birks*** (1998) 19 Cal.4th 108, 136 ["our decision does not foreclose the parties from agreeing that the defendant may be convicted of a lesser offense not necessarily included in the original charge. When the parties consent to such a procedure, with or without formal amendment of the pleadings, *neither can claim unfairness*, and the prosecution's role in determining the charges is not improperly compromised."].)

Courts have held that they do not have *statutory* authority to reduce a crime after conviction to a lesser related offense. (**See e.g.**, ***People* v. *Lagunas*** (1994) 8 Cal.4th 1030, 1034, 1040; ***People* v. *Hamilton*** (2018) 30 Cal.App.5th 673, 685.) However, these cases were interpreting whether Penal Code section 1181, subdivision (6) provided the authority to reduce a charge to a lesser related offense. Section 1181, subdivision (6) authorizes a court to modify a verdict convicting a defendant of a particular crime, but only to "a lesser degree" of that crime or to "a lesser crime *included* therein." (Italics added; ***People* v. *Lagunas*** (1994) 8 Cal.4th 1030, 1034.) Section 745(e) does not contain similar language. It simply states an appellate court may "modify the judgment to impose an appropriate remedy" when "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[.]" (Pen. Code, § 745(e)(2)(A).) Thus, assuming reduction to an unproved lesser related offense does not violate due process (**see** this IPG, section VII-5-A at pp. 201-202), AB 2542 *may* have provided a court *statutory* authority to reduce a conviction to a lesser related offense – albeit the term "lesser related offense" is not mentioned in section 745.

B. When can a court remedy a violation of section 745(a)(4) post-judgment without vacating all aspects of the conviction or sentence (Pen. Code, § 745(e)(2)(B)?

Sub-paragraph (B) of paragraph (2) of subdivision (e) provides: "When a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed."

This sub-paragraph is clearly targeted to violations of section 745(a)(4) (**see** this IPG, section IV-9 at p. 99 and IV-10 at p. 108), although it does not expressly state it only applies in that circumstance. Presumably, if, based on defendant's membership in a particular race, ethnicity, or national origin, a defendant received a longer or more severe sentence than similarly situated defendants not belonging to defendant's race, ethnicity, or national origin, a court could and should resentence the defendant in a manner that eliminates that disparity.

C. What should a court do if a violation of section 745 is found post-judgment in a case where the defendant has been convicted of a special circumstance?

Penal Code section 745(e)(3) states: "When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty."

Although the verdict of a jury is sometimes referred to as a "judgment," if the jury has already returned a verdict of death but the judge has not yet ruled on a defendant's application for modification of the verdict (**see** Pen. Code, § 190.4(e)), the case might still be deemed pre-judgment. Regardless, the applicability of section 745(e)(3) does not seem to turn on whether the violation of section 745 is found before or after judgment. Presumably, if the violation is found after the jury's verdict, that statute requires that the verdict be reduced to LWOP.

Penal Code section 1385.1 provides: "Notwithstanding Section 1385 or any other provision of law, a judge *shall not strike or dismiss any special circumstance which* ... is found by a jury or court *as provided in Sections 190.1 to 190.5*, inclusive." (Emphasis added.)

If overturning a death verdict pursuant to section 745(e)(3) is viewed as akin to striking or dismissing a special circumstance, then this post-verdict remedy may be barred by Penal Code

section 1385.1 since section 1385.1 was enacted by a voter initiative. (**See** this IPG, section VII-4-F at pp. 198-199.)

However, of overturning a death verdict pursuant to section 745(e)(3) is viewed as akin to a modification of a verdict by a judge pursuant to Penal Code section 190.4, then the remedy might not be barred by Penal Code section 1385.1 (which seems to acknowledge that the verdict must be found "as provided in Sections 190.1 to 190.5, inclusive." (Pen. Code, § 1385.1, emphasis added.) That is, the authority of a judge to modify a verdict as described in section 190.4 does not appear to be encompassed within section 1385.1's prohibition on striking or dismissing a special circumstance. However, this all presumes that the time for a modification under section 190.4 has not yet passed at the time the violation of section 745 is found.

The remedy proposed in section 745(e)(3) may also run afoul of Proposition 7. Proposition 7 enacted the current version of Penal Code section 190, which, inter alia, states: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. *The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.*" (Pen. Code, § 190(a), emphasis added.) Proposition 7 "increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (Prop. 7, §§ 1–2.) It increased the punishment for second degree murder from a term of five, six, or seven years to a term of 15 years to life. (***Ibid***.) Further, it amended section 190.2 to expand the special circumstances under which a person convicted of first degree murder may be punished by death or life imprisonment without the possibility of parole (LWOP). (***Id***., §§ 5–6.) Proposition 7 did not authorize the Legislature to amend or repeal its provisions without voter approval." (***People* v. *Superior Court (Gooden)*** (2019) 42 Cal.App.5th 270, 278.)

Arguably, the remedy proposed in section 745(e)(3), which would prevent the penalty from being determined as provided in Sections 190.2 through 190.5, could not apply because subdivision (e) itself does not purport to override an inconsistent initiative and Proposition 7 was a voter initiative. (**See** this IPG, section VII-4-E at p. 194.) The remedy may also be voided because AB 2542 might constitute an *improper amendment* of Proposition 7.

***Editor's note:** Notwithstanding the language requiring that "penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5," Proposition 7 does not prevent a court from overturning a death verdict on constitutional grounds. But section 745 would overturn a death verdict in the absence of constitutional error.

Lastly, unless the violation of section 745 rises to the level of a federal constitutional error or created a fundamental structural defect in the trial, eliminating imposition of the death penalty might run afoul of article VI, section 13 of the California Constitution if the violation did not prejudice the defendant. (**See** this IPG, section VII-6 at pp. 205-209.)

D. If the court modifies a judgment as a remedy for a violation of paragraphs 3 or 4 of subdivision (a) of section 745, may the court impose a new sentence greater than that originally imposed?

Both subparagraphs (A) and (B) of paragraph (2) of subdivision (e) of section 745 state, in pertinent part, that "[o]n resentencing, the court shall not impose a new sentence greater than that previously imposed." (Pen. Code, § 745(e)(2)(A)&(B).)

6. Can the remedy of vacating a conviction post-judgment be imposed without a showing of prejudice to the defendant, and if so, does section 745 violate article VI, section 13 of the California Constitution?

If a violation of section 745 is found, section 745(e)(1)(c) *authorizes* the dismissal of enhancements, special circumstances, or special allegations pre-judgment (i.e., post-conviction but pre-sentencing) and section 745(e)(2)(A) *requires* the court to vacate the conviction and sentence post-judgment (i.e., after sentencing). In either scenario, there is no requirement the defendant show he or she has been denied a fair trial, i.e., suffered any prejudice. (**See** this IPG, sections IV-5-B at p. 50; VII-4-A at p. 189; X-13-A at pp. 229-230.) However, in many cases involving violations of section 745, unless the defendant can show it is reasonably probable that he or she would have obtained a more favorable result had the violation not occurred, or the error rises to the level of fundamental structural or federal constitutional error, vacating of the conviction should be prohibited by article VI, section 13 of the California Constitution.

Section 13 provides, in pertinent part: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, *unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice*." (Emphasis added.)

The language of section 13 has been interpreted to mean "that a 'miscarriage of justice' should be declared ***only*** when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (***People* v. *Watson*** (1956) 46 Cal.2d 818, 836, emphasis added.) This standard requires a showing of "prejudice" to the defendant. It "applies to state law errors generally" and legislation requiring the granting of new trials automatically, without any consideration of prejudice, must yield to the state constitutional provision. (***People* v. *Braxton*** (2004) 34 Cal.4th 798, 816–817.)

Section 13 generally applies to enhancements as well as substantive offenses. (**See e.g.**, ***People* v. *Breverman*** (1998) 19 Cal.4th 142, 174-175.)

This does not mean that dismissal is precluded in *all* circumstances of error unless it can be shown that it is reasonably probable that a more favorable result to the appealing party would have been reached in the absence of the error. A defendant may be able to obtain dismissal *without* making this showing if the error resulted in a violation of the federal constitution. In that circumstance, the defendant need not show it is reasonably probable a more favorable verdict would have been reached. Rather, the burden shifts so that dismissal *is required unless* the court can "declare a belief that [the error] was harmless beyond a reasonable doubt." (***Chapman* v. *California*** (1967) 386 U.S. 18, 24.) "Under ***Chapman***, a federal constitutional error is harmless when the reviewing court determines 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (***People* v. *Aranda*** (2012) 55 Cal.4th 342, 367.) Most errors implicating a federal constitutional right are amenable to harmless error analysis and only a "very limited class of cases" are subject to per se reversal. (***People* v. *Aranda*** (2012) 55 Cal.4th 342, 363.)

Moreover, there are certain errors that require *automatic* reversal (i.e., errors requiring reversal *regardless* of whether the error was harmless). These errors are those involving a fundamental "structural defect in the judicial proceedings" such that the error denied a criminal defendant a "fair trial." (***People* v. *Cahill*** (1993) 5 Cal.4th 478, 501–502.) "The high court has identified as structural error constitutional violations such as the denial of counsel or of self-representation, racial discrimination in jury selection, and trial before a biased judge. [Citations omitted].) Structural errors usually involve constitutional violations that "deprive defendants of 'basic protections'" and "'***necessarily*** render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" (***People* v.**

Aranda (2012) 55 Cal.4th 342, 363 citing to ***Neder* v. *United States*** (1999) 527 U.S. 1, 9, emphasis added.) But structural error is also sometimes found without consideration of the actual effect of the error, i.e., in circumstances when it is too difficult to assess the effect of the error or whether the question of whether the error is harmless proves to be irrelevant. (**See *People* v. *Aranda*** (2012) 55 Cal.4th 342, 364.) Indeed, structural error in the latter circumstance may be found even where the error does not necessarily violate the state or federal constitution. (**See *People* v. *Blackburn*** (2015) 61 Cal.4th 1113, 1134.)

Thus, whether a case can be reversed for a violation of section 745 without running afoul of article VI, section 13 the California Constitution will turn on whether the violation of section 745 simultaneously violates the federal Constitution or otherwise involves fundamental structural error.

Violations of section 745(a)(1) or (a)(2)

Racial bias by a judge can be a violation of the federal constitution. (**See *Berger* v. *United States*** (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]; ***Zant* v. *Stephens*** (1983) 462 U.S. 862, 885 [noting due process prohibits sentencing based on race, religion, political affiliation, or other factors that are constitutionally impermissible or irrelevant to the sentencing process]; ***Norris* v. *United States*** (11th Cir. 2016) 820 F.3d 1261, 1264-1266.)* Racial bias by a defense attorney can violate the Sixth Amendment. (**See e.g.**, ***Frazer v. United States*** (9th Cir. 1994) 18 F.3d 778, 784 [Sixth Amendment right to appointed counsel violated when attorney "explicitly assaults his client with racial slurs and makes threatening and improper statements to the client capable of overriding the client's own judgment as to how he should exercise his various rights"]; ***Ellis* v. *Harrison*** (9th Cir. 2020) 947 F.3d 555, 556 [granting habeas relief based, inter alia, on claim same defense counsel in ***Mayfield*** was biased against client and concession from the Attorney General].) The use of peremptory challenges to strike prospective jurors on the basis of group bias is prohibited because it violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 898, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 and ***Batson* v. *Kentucky*** (1986) 476 U.S. 79; ***People* v. *Douglas*** (2018) 22

Cal.App.5th 1162, 1165 [prohibiting removal of jurors even if prosecutor has mixed motives if one motive for challenge is discriminatory in purpose].) Racial appeals by prosecutors may also violate the constitution. (**See *McCleskey* v. *Kemp*** (1987) 481 U.S. 279, 309 fn. 30 [noting "[t]he Constitution prohibits racially biased prosecutorial arguments"]; ***United States* v. *Ramirez-Fuentes*** (7th Cir. 2013) 703 F.3d 1038, 1044 ["the Constitution 'prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the Constitution generally demands that the jury ignore."].) Racial bias on the part of a juror violates the right to an impartial jury guaranteed by both the Sixth Amendment and by principles of due process. (**See *Turner* v. *Murray*** (1986) 476 U.S. 28, 36 and fn. 9; **see also *People* v. *Allen and Johnson*** (2011) 53 Cal.4th 60, 78 ["Although jurors are entrusted to evaluate the credibility of witnesses, they may not do so based on prejudice or stereotype. Nor may they apply differing standards to the consideration of different witnesses."].) Expert testimony premised on ethnic stereotyping can violate due process and equal protection. (**See e.g., *United States* v. *Cabrera*** (9th Cir.2000) 222 F.3d 590, 595 [expert witness testifying about the inner workings of the drug trade explicitly stated that the form of the drugs and localities involved indicated that the drug dealers were likely members of a particular ethnic group]; ***United States* v. *Doe*** (D.C.Cir.1990) 903 F.2d 16, 19–21 [same]; ***United States* v. *Vue*** (8th Cir. 1994) 13 F.3d 1206, 1213 [holding the injection of ethnicity into the trial by an expert on opium smuggling, which clearly invited the jury to put the "defendant's racial and cultural background into the balance in determining their guilt" violated due process and equal protection guaranteed by the fifth amendment.].)

Editor's note:** While trial before a biased judge has been described as "structural error" (**see *People* v. *Aranda (2012) 55 Cal.4th 342, 363), exhibitions of judicial bias may be subject to harmless error analysis (**see *People* v. *Houston*** (2012) 54 Cal.4th 1186, 1221-1222; ***People* v. *Abel*** (2012) 53 Cal.4th 891, 916).

But it is unclear whether, and under what circumstances, an "exhibition of bias or animus" or use of "racially discriminatory" language on the part of a "judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror" ***as defined in section 745(a)(1) or (a)(2***) (especially if it reflects mere unconscious bias) will rise to the level of a denial of a constitutional right or involves a fundamental structural error. For example, a violation of section 745(a)(1) may be found if an officer involved in the case exhibited bias or animus towards the defendant based on race, ethnicity, or national origin even if the officer is never called as a witness at trial. Obviously, in that circumstance there could be no fundamental structural error at trial, no showing of any prejudice to the defendant, and no

showing the defendant was deprived of a fair trial - and thus vacating of the conviction on this basis would contravene article VI, section 13 the California Constitution.

Violations of section 745(a)(3) or (a)(4)

It is less likely, however, that vacating a conviction or sentence for the reasons listed in section 735(a)(3) or (a)(4) will run afoul of article VI, section 13. This is because if it can be shown that the defendant was overcharged or received a disparate sentence based on race, ethnicity or national origin, the "error" is a conviction of a more serious charge or imposition of a more serious sentence and the defense should be able to easily show that, but for the error, it is reasonably probable the defendant would have received a different result. In other words, the defendant may *necessarily* be prejudiced *whenever* a violation of section 745(a)(3) or (a)(4) is shown. Moreover, if a court then simply reduces the conviction to a lesser conviction or lesser sentence consistent with what other similarly situated defendants would have received (or eliminates an enhancement that similarly situated defendants would not have been charged with), it becomes even more difficult to argue that the remedy imposed violates article VI, section 13.

It might be a different story if the remedy results in the vacating of the conviction *entirely* (without substituting the lesser included offense) since the error in overcharging would not be reasonably probable to have resulted in *no* conviction.

7. Are the remedies identified in subdivision (e) of section 745, the exclusive remedies available for a violation of section 745?

Penal Code section 745(e)(4) states: "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."

Presumably, in order for a remedy available under the United States Constitution, the California Constitution, or any other law to be imposed, the violation of section 745 would have to independently be a violation of the federal or state constitution or some other statute.

VIII. May the Denial or Grant of a Section 745 Motion be Appealed?

The People should be able to appeal any remedy dismissing a case or enhancement, or reduction of charges, under one or more the subdivisions of Penal Code section 1238. (**See** Pen. Code, § 1238 [permitting an appeal of "(1) An order setting aside all or any portion of the indictment, information, or complaint . . . (3) An order granting a new trial . . . (5) An order made after judgment, affecting the substantial rights of the people. (6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense. . . (8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy."].)

IX. Other Miscellaneous Issues Related to Penal Code Section 745

1. Will considering a defendant's citizenship status in negotiating or obtaining a conviction, or when imposing a sentence, run afoul of section 745?

It is not uncommon for prosecutors to consider the immigration consequences of a conviction upon a defendant who is not a citizen of the United States. Negotiated dispositions may be reached, for example, in which a defendant who is a non-citizen is allowed to plead to a lesser included or lesser-related charge in exchange for serving a longer sentence. In this sense, a non-citizen can potentially be viewed as being treated differently than a citizen charged with the same offense. However, while ignoring such negotiated dispositions in determining whether defendants are similarly situated will potentially distort comparisons between ethnic or national origin groups if an ethnic or national origin group is disproportionately more likely to contain non-citizens (**see** this IPG at pp. 211-212), it is unlikely the differential treatment will run afoul of section 745 - notwithstanding the fact that section 745 prohibits various forms of discriminatory conduct based on "national origin."

This is because drawing distinctions or differential treatment based on "citizenship" is not discrimination based on "national origin." As explained by the United States Supreme Court in ***Espinoza* v. *Farah Mfg. Co., Inc.*** (1973) 414 U.S. 86, a case discussing the Civil Rights Act of 1964, which, inter alia, forbids discrimination based on national origin, "Tit. VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States." (***Id***. at p. 95.) "Aliens are protected from illegal discrimination under the Act, but *nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage*." (***Ibid***, emphasis added; **see also *Mahdavi* v. *Fair Employment Practice Com.*** (1977) 67 Cal.App.3d 326, 337 [noting that the holding in ***Espinoza* v. *Farah Mfg. Co***., "to the effect that Congress, in using the term 'national origin,' did not intend to include alienage would compel a similar conclusion as regards the [California] Legislature's use of the same term" in state legislation barring discrimination in employment]; this IPG, section IV-4 at pp. 47-49.)

The fact a defendant is not a citizen is a factor that prosecutors and courts may properly consider in negotiating a sentence. (**See *Padilla* v. *Kentucky*** (2010) 559 U.S. 356, 373 ["informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process" and "[b]y bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."]; Pen. Code, 1016.5(d) [stating legislative intent that courts "grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction."]; Cal. Rules of Court, 4.414(b)(6) ["The adverse collateral consequences on the defendant's life resulting from the felony conviction" is a factor to be considered in determining whether to grant probation].)

Thus, defendant who is a citizen is **not** "similarly situated" to non-citizen defendants for purposes of section 745 even if the non-citizen defendants being compared are charged with the same or similar offense as the defendant. (**See** Pen. Code, § 745(a)(3)&(4).) And failing to consider the fact that a disproportionate number of a particular racial, ethnic, or national origin group are non-citizens can also distort whether members of a defendant's group are "more frequently" convicted or sentenced "for more serious offenses." (Pen. Code, § 745(a)(3)&(4).) (**See** this IPG, section IV-E-i at p. 76.)

To illustrate: *Purely hypothetically*, let us say 50 out of every 100 Caucasian defendants who snatch purses are charged with robbery instead of grand theft from the person whereas only 40 out of every 100 non-Caucasian defendants who snatch purses are charged with robbery instead of grand theft. And further that only 20% of Caucasian defendants are citizens while 40% of non-Caucasian defendants are non-citizens. If a district attorney's office is frequently offering non-citizen defendants the option of pleading to a felony grand theft in exchange for longer sentences in order to allow a non-citizen defendant to avoid deportation (e.g., because robbery is a "crime of violence" and an aggravate felony under 8 U.S.C.A. § 1101(a)(43)(F) and 8 U.S.C.A. § 1227(a)(2)(A)(iii)), then a defendant could likely show that purse-snatching Caucasian defendants were more often convicted of a "more serious" charge than non-Caucasian defendants and that Caucasian defendants as a group were more frequently convicted for more serious offenses than are non-Caucasian defendants. Unless non-citizens are not considered similarly situated to citizens, a Caucasian defendant charged with robbery based on a purse snatch will likely (and unfairly) be able to establish a violation of section 745 – even though Caucasian defendants are *actually* being charged with less serious offenses.

2. Should prosecutors ask defendants to waive the right to bring a post-conviction challenge pursuant to section 745 as part of a negotiated plea?

It is possible that a violation of section 745 could be found prior to a negotiated plea. Assuming the defendant is aware of the violation (or could reasonably become aware of a violation of section 745 through the exercise of due diligence), the defendant should be able to waive the right to bring a section 745 motion. "Generally, permitting waiver '"is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights." [Citation.]' [Citation.] A defendant may waive a right that exists for his or her own benefit, where such waiver is not against public policy." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 146.) A defendant may waive a right accorded by statute so long as the statute does not expressly preclude waiver. (***People* v. *Jackson*** (1996) 13 Cal.4th 1164, 1209 1211; **see also** Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 34.) Section 745 does not expressly preclude waiver.

However, if the violation comes to light *post*-plea and could not reasonably have come to light through the exercise of due diligence (e.g., by filing a discovery request under section 745(d))), there may be a question of whether the waiver was knowing and intelligent and a defendant

might be able to bring a challenge pursuant to sections 1473 or 1473.7. (**See** this IPG, sections X-13-B at pp. 230-231 and XI-3 at pp. 237-238.)

3. If a violation of section 745 is found, will the prosecutor handling the case have a duty to report the finding to the state bar and/or be subject to disciplinary action?

Whether a prosecutor has to report that a case was reversed and/or face disciplinary charges based on the finding of a section 745 violation will likely turn on (i) whether *the prosecutor* engaged in the discriminatory action underlying the section 745 violation and (ii) whether the prosecutor intentionally engaged in the action found to have violated section 745.

Discriminatory conduct on the part of a prosecutor is a violation of the rules of professional conduct. (Rules Prof. Conduct, rules 8.4.1(a) ["In representing a client, . . . a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic"] 8.4.1(b) ["In relation to a law firm's operations, a lawyer shall not: (1) on the basis of any protected characteristic, (i) unlawfully discriminate or knowingly* permit unlawful discrimination"].)

Comment [2] to Rule 8.4.1 states: "The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) ["A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others."].) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

A finding that someone *other than* the prosecutor exhibited bias or animus towards the defendant based on defendant's race, ethnicity, or national origin in violation of section 745(a)(1) or (a)(2) is unlikely to require reporting to the state bar.

A finding that the *prosecutor* exhibited bias or animus based on defendant's race, ethnicity, or national origin, including using racially discriminatory language, is much more likely to be found to be a violation of Rule 8.4.1(a). However, a prosecutor could be found to be in violation of section 745(a)(2) based on the use of racially discriminatory language about the defendant's race, ethnicity, or national origin or based on the exhibition of bias or animus towards the defendant, "whether or not purposeful." (Pen. Code, § 745(a)(2); this IPG, section IV-7 at pp. 57-60.) It is reasonable to believe that the state bar will not impose discipline if the use of racially discriminatory language is found not to be purposeful. However, a court finding a violation of section 745(a)(2) may not state whether the violation was purposeful. This could cut both ways. It may permit the state bar to avoid imposing discipline because the violation does not require any intentional mental state. Or it could allow the imposition of discipline even if the court did not find any purposeful discrimination. Thus, prosecutors who have been found to violate section 745(a)(2) for what appears to unintentional or unconscious bias should consider asking the court to make a specific finding in this regard.

A similar issue may arise when it comes to violations of section 745(a)(3). Although a violation of paragraph (3) could theoretically be intentional (i.e., if a prosecutor purposefully sought to convict a defendant of a more serious offense based on defendant's race, ethnicity, or national origin), it is much more likely to be unintentional. Section 745(a)(3) can be violated regardless of the individual prosecutor's mental state. All that must be shown is that "[t]he defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." (Pen. Code, § 745(a)(3).) Absent any requirement of express intent in the statute (and absent any evidence of an intent to discriminate), it is logical to think that the state bar will not be inclined to impose discipline unless the trial court specifically finds intentional discrimination.

It is probable that the duty to report (and corresponding possibility of discipline) will parallel what happens when there is ***Batson-Wheeler*** violation, i.e., a finding of *intentional* racial discriminatory use of jury challenges. This is stated with the caveat that a section 745 violation may be treated as less egregious than a ***Batson-Wheeler*** violation *if* no finding of intent is made in connection with the section 745 violation. But, also, with the additional caveat that

IPG has not spoken directly with the State Bar since the passage of section 745. We include how ***Batson-Wheeler*** violations are treated by the State Bar below for possible guidance as to how section 745 violations might be treated:

Batson-Wheeler Violation in Trial Court

Business and Professions Code § 6086.7 states a court shall notify the State Bar of any of the following: . . . (c) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

Business and Professions Code § 6068(o) states that is the duty of an attorney to report to the "agency charged with attorney discipline [i.e., the State Bar], in writing, within 30 days of the time the attorney has knowledge of any of the following: . . . (3) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

Since the California Supreme Court in ***Wheeler*** appears to have considered dismissing the venire a "sanction" (***id***., at p. 282, fn. 29; **see also *People* v. *Willis*** (2002) 27 Cal.4th 811, 815 [appearing to accept without comment the trial court's reference to the remedies imposed for improper use of peremptory challenges as "sanctions"]), an argument can be made that if an attorney is found to have violated the ***Batson-Wheeler***, and the court has imposed the "sanction" of dismissing the venire or re-seating the juror or imposing a fine of over a thousand dollars, the attorney would have a duty to report. (**See** Coleman, "Meeting the *Wheeler* Challenge" Prosecutor's Notebook Volume XIX, p. 35; Michaels (ed), "Professionalism" Prosecutor's Notebook Volume XX, p. III-33-34.)

Moreover, attorneys have the responsibility to uphold the law. Business and Professions Code section 6068(a) specifically mandates that lawyers "support the Constitution and the laws of the United States and of this state." A lawyer's use of peremptory challenges for an invidious reason fails to support the law and is arguably a violation of these rules as well.

Nevertheless, based on past discussions with State Bar administrators, unless the trial court finds the prosecutor in contempt or imposes a fine of over $1,000 or unless the trial court specifically states the court is "sanctioning" the offending attorney, it is not necessary to report that a trial court has found a ***Batson-Wheeler*** violation. This seems consistent with

paragraph [2] of the Comment to Rule 8.4.1 that "a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

Post-Judgment Reversal Based on a ***Batson-Wheeler*** Violation

Business and Professions Code § 6086.7 states a court shall notify the State Bar of any of the following: . . . ¶ "(b) Whenever a modification or ***reversal of a judgment*** in a judicial proceeding is based in whole or in part on the ***misconduct***, incompetent representation, or willful misrepresentation of an attorney." (Emphasis added.)

Business and Professions Code § 6068(o) states that is the duty of an attorney to report to the "agency charged with attorney discipline" [i.e., the State Bar], in writing, within 30 days of the time the attorney has knowledge of any of the following: ¶¶ "(7) ***Reversal of judgement in a proceeding based in whole or in part upon misconduct***, grossly incompetent representation, or willful misrepresentation by an attorney." (Emphasis added.)

"An advocate who chooses jurors based on racial bias commits ***grievous misconduct***, for "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' [citation], and undermines public confidence in adjudication." (***People*** **v.** ***Armstrong*** (2019) 6 Cal.5th 735, 782, emphasis added; **see also** Comment to Rules Prof. Conduct, rules 8.4.1, para. [1] ["Conduct that violates this rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal."].)

In all likelihood, this means that if a case is reversed on appeal because of a determination that the prosecutor used peremptory challenges in a discriminatory manner (i.e., violated equal protection as described in the ***Batson-Wheeler*** line of cases), both the reversing court and the attorney who is sanctioned must report the reversal to the State Bar.

"[A] reversal based on ***Wheeler*** error would seem to be attorney conduct rendering the trial fundamentally unfair. At the very least, if the reversal is predicated upon an appellate court finding the attorney's reasons to be sham or pretextual, that means counsel was deceptive in stating justification, and therefore has committed misconduct. Since either way the reversal was caused by attorney misconduct, it must be reported to the Bar by both court and counsel." (Coleman, "Meeting the Wheeler Challenge" Prosecutor's Notebook Volume XIX, p. 35; Michaels (ed), "Professionalism" Prosecutor's Notebook Volume XX, p. III-33-34.)

Per discussions with the State Bar, it would be a different story if the reversal were based on ***Batson-Wheeler***-related grounds that did not specifically implicate the prosecutor's state of mind. Moreover, per discussions with the State Bar, just because a reversal based on ***Batson-Wheeler*** error is reported, this does not mean that an investigation or any disciplinary proceedings will necessarily follow.

> ***Editor's note:** Failure to report the reversal is potentially a basis for discipline itself. Business and Professions Code § 6068(o)(10) states: "This subdivision is only intended to provide that the ***failure to report*** as required herein may serve as a basis of discipline." (Emphasis added.) However, per discussions with the State Bar, while failure to report may be the subject of disciplinary proceedings, failure to report is rarely, by itself, grounds for the imposition of discipline.

X. New Subdivision (f) of Penal Code section 1473 (Post-Judgment Habeas Petitions Alleging Violations of Section 745) and Selected Issues Arising in its Application.

AB 2542 enacted a new subdivision of Penal Code section 1473: subdivision (f). Section 1473 generally governs state habeas petitions. Under section 1473, "[a] person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint." (Pen. Code, § 1473(a).)

1. The statutory language of Penal Code section 1473(f)

The subdivision added to section 1473 by AB 2542 is subdivision (f) and it states:

(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. 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 appear at the hearing by video unless counsel indicates that their 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."

2. Where can a habeas petition claiming a violation of section 745 be filed?

Penal Code section 745(b) states: "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)." (Emphasis added.)

"The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." (Cal. Const., art. VI, § 10.) However, while "[a]ll courts in California have original habeas corpus jurisdiction, . . . that does not mean all courts must exercise it in all circumstances. A higher court 'has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court.'" (***Robinson* v. *Lewis*** (2020) 9 Cal.5th 883, 895.) The California Supreme Court has stated that "[p]etitioners should first file a petition for a writ of habeas corpus challenging a judgment in the superior court that rendered the judgment. If the superior court denies the petition, the petitioner may then file a new petition in the Court of Appeal. The superior court that rendered the judgment is best equipped to consider the claim in the first instance, to hold an evidentiary hearing when necessary, and to grant relief if appropriate. A petition filed in a superior court that did not render the judgment is subject to transfer to the court that did render the judgment." (***Ibid***.)

Accordingly, the petition under section 1473 alleging a violation of section 745 should first be filed in the superior court that rendered the judgment. And, more particularly, to the judge that actually imposed the judgment or sentence as, in most cases, it is *that* judge who will be in the best position to conduct the hearing and/or resentence the defendant. This is because the

rationale for requiring the petition to be first filed in the superior court rendering the judgment also supports requiring the petition to be first filed with the actual judge who rendered the judgment. (**See *Berman* v. *Cate*** (2010) 187 Cal.App.4th 885, 892 ["If the challenge is to a *particular* judgment or sentence, ... [¶] ... an evidentiary hearing is necessary [or] another court ... *is better situated to conduct a hearing*," the petition should be transferred to *the court which rendered the judgment*.], emphasis added.)

3. Can a petition based on a claim of a violation of section 745(a) be barred if a claim of a similar nature could have been raised in an earlier habeas petition?

The California Supreme Court has held that where a petitioner is filing a habeas petition raising claims already adjudicated or new claims with no serious attempt to justify why such claims were not raised on appeal or in an earlier habeas corpus petition, such a successive petition may be deemed abusive, and a reviewing court may deny the petition without having to pass on the substantive merits of the abusive claims. (**See *In re Reno*** (2012) 55 Cal.4th 428, 443; **see also *In re Clark*** (1993) 5 Cal.4th 750, 769 ["This court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. Entertaining the merits of successive petitions is inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ."]; **but see *Briggs* v. *Brown*** (2017) 3 Cal.5th 808, 842 [Under ***In re Clark*** (1993) 5 Cal.4th 750, 797 "successive petitions are permitted even 'absent justification for the failure to present all known claims in a single, timely petition,' if the prisoner can establish that a 'fundamental miscarriage of justice occurred.'"].)

As suggested in this IPG, section VII-6 at pp. 205-206, it is quite possible for a defendant raising a new habeas petition pursuant to section 1473.7(f) to have previously filed a habeas petition and that previous habeas petition may even have involved claims alleging racial discrimination in some aspect of the case.

To avoid summary dismissal of a claim alleging a violation of section 745 when a defendant has previously filed a habeas petition, section 1473.7(f) included language stating: "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." (Emphasis added.)

Thus, a court may summarily dismiss a habeas petition raising an allegation that section 745 was violated on grounds it is "successive or abusive" only if the previous habeas petition was of the same "nature" as the claim raised under section 745. And *not even then* if the claim is based on "new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence." (Pen. Code, § 1473.7.)

***Editor's note:** This language may be void in a death penalty case to the extent it is inconsistent with the rules governing successive or abusive petitions as described in Penal Code section 1509(d). Penal Code section 1509, subdivision (d) requires that "a successive petition whenever filed" be dismissed unless the court finds the prisoner actually innocent or ineligible for the death penalty." Section 1509(d) would govern in a death penalty case because it was enacted by a voter initiative. (**See** Prop. 66, § 6, approved Nov. 8, 2016, eff. Oct. 25, 2017; **see** this IPG, section VII-4-E at pp. 194-195.)

AB 2542 did not define what it means for a previous claim to be of the "nature" of a section 745 claim. The term "nature" is commonly used in both statutory language and case law. (**See e.g.**, Lab. Code, § 2775(b)(1)(C) [defining person as independent contractor rather than employee unless, inter alia, the "person is customarily engaged in an independently established trade, occupation, or business of the same *nature* as that involved in the work performed"]; Wat. Code, § App. § 74-5 [allowing other political subdivisions to exercise powers within a water district "although such powers may be of the same *nature* as the powers of said district"]; ***People* v. *Wesson*** (2006) 138 Cal.App.4th 959, 969–970 [proper to use evidence of defendant's prior sex offenses under sections 1108 and 352 because the "prior offense of forcible oral copulation was of the same class and *nature* as the charged offenses of forcible sexual penetration and sodomy, and thus relevant."]; ***People* v. *Hutson*** (1967) 251 Cal.App.2d 935, 941 [declining to apply rule requiring jury instruction on voluntariness to requiring instruction on other areas relating to statements because the "matters which must necessarily be placed before the jury in such an instance are not of the same *nature* as those which are presented to a jury on the question of voluntariness."].)

How similar the previous claim must be to the new claim under section 745 to be considered in the "nature" of the section 745 claim will have to be ironed out. Claims of violations of paragraphs (3) or (4) of subdivision (a) of section 745 are less likely to have arisen in past habeas petition than claims involving violations of paragraphs (1) or (2) of subdivision (a) and thus are less likely to be summarily dismissed. And the differences between a selective prosecution claim and a section 745(a)(3) claim, with only the former requiring a showing of

intentional discrimination (**see** this IPG, section IV-8-A at pp. 62-63) may render the two claims sufficiently distinct to prevent their treatment as being of the same nature.

4. May a pending habeas petition be amended to include a claim that section 745 was violated?

In general, courts reviewing a petition for writ of habeas corpus will assume the petition includes all claims then known to the petitioner and that "[t]he inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect." (***In re Morgan*** (2010) 50 Cal.4th 932, 940 [citing to ***In re Clark*** (1993) 5 Cal.4th 750, 781].) Courts will not "routinely delay action on a filed petition to permit amendment and supplementation of the petition." (***Ibid***.) Although there are exceptions, such as when there is a critical shortage of qualified counsel willing to accept appointment as habeas corpus counsel in a capital case. (***In re Morgan*** (2010) 50 Cal.4th 932, 940.)

Penal Code section 1473(f), however, states: "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." (Emphasis added.)

5. Is a defendant entitled to the appointment of counsel after filing a petition for habeas relief based on a violation of section 745?

Penal Code section 1473(f), in pertinent part, provides: "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."

6. Is a defendant filing a habeas petition based on a section 745 violation entitled to seek discovery, and is that discovery as expansive (or as limited) as the discovery authorized under section 745(d)?

The question of what rules govern discovery when a defendant files a petition for a writ of habeas may get a little complicated.

Section 745(d) governs the discovery obligation when a section 745 motion has been filed. Subdivision (d) permits the filing of a discovery motion in conjunction with the section 745 but only provides a *right* to disclosure of the evidence sought "[u]pon a showing of good cause." (Pen. Code, § 745(d); **see also** this IPG, section V-5 at pp. 133-151.) This right to discovery exists independently of the general discovery statute enacted by Proposition 115 (Pen. Code, § 1054 et seq.) that governs disclosure in criminal cases. (**See** this IPG, section V-12 at p. 164.)

Discovery *in habeas cases* is not dictated by the general discovery statute enacted by Proposition 115. "The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis." (***In re Scott*** (2003) 29 Cal.4th 783, 813.) "Proposition 115's discovery provisions all deal with the underlying trial. For this reason, . . . they do not apply to habeas corpus matters (although they may provide guidance in crafting discovery orders on habeas corpus)." (***People* v. *Pearson*** (2010) 48 Cal.4th 564, 573; ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 479; **accord *In re Scott*** (2003) 29 Cal.4th 783, 813–814.) "Proposition 115's discovery provisions are a bad fit for habeas corpus. The issue on habeas corpus is not defendant's guilt or innocence or the appropriate punishment but whether the defendant … can establish some basis for overturning the underlying judgment." (***People* v. *Pearson*** (2010) 48 Cal.4th 564, 573.)

Discovery Requests in Cases Not Governed by Penal Code Section 1054.9

In a case *not governed by section 1054.9*, can a defendant file a request for discovery before, in conjunction with, or after, filing a petition for habeas relief based on an alleged violation of section 745? The general rule in such cases is that a defendant is not entitled to postconviction discovery until an order to show cause has issued. (**See *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 728 [and noting "the superior court has no jurisdiction to order pre-petition, postconviction discovery except as authorized by section 1054.9."].) Section 1473(f) does not suggest that the rules relating to a discovery request are any different for habeas petitions based on a section 745 violation than in any other habeas petition. And thus, the general rule should govern in cases in which the discovery request is for materials to support a claim that section 745 has been violated. However, once an order to show cause *has* issued, a court issuing the order likely has some flexibility in granting discovery subject to the parameters laid out in section 745 itself such as that the evidence be relevant, that the materials be "in the possession or control of the state," and that there be a showing of "good cause" for disclosure. (**See** Pen. Code, § 745(d); this IPG, respectively, sections V-3 at pp. 122-

128, V-4 at pp. 128-133, and V-5 at pp. 133-151.) The court would not be bound by the limitations set out in section 1054.9 on discovery. Presumably, in deciding what discovery to order, the court hearing the habeas petition would be *guided* by section 745(d). (**Cf.**, ***People* v. *Pearson*** (2010) 48 Cal.4th 564, 573 [Proposition 115's discovery provisions "do not apply to habeas corpus matters (although they may provide guidance in crafting discovery orders on habeas corpus.)"].)

Discovery Requests in Cases Governed by Penal Code Section 1054.9

Penal Code section 1054.9 governs discovery in cases where "a defendant is or has ever been convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more" and defendant is prosecuting "a postconviction writ of habeas corpus or a motion to vacate a judgment" or is preparing "to file that writ or motion." (Pen. Code, § 1054.9(a).) Pursuant to section 1054.9, "on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (b) or (d), order that the defendant be provided reasonable access to any of the materials described in subdivision (c)." (***Ibid***.) Subdivision (c) provides: "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." (Pen. Code, § 1054.9(c).)

In cases governed by section 1054.9, a defendant ***can*** likely file a request for discovery before filing a petition for habeas relief based on an alleged violation of section 745. "Section 1054.9 provides a mechanism for convicted defendants to obtain discovery to assist in preparing a habeas corpus petition *even before* an actual petition has been filed." (***Bracamontes* v. *Superior Court*** (2019) 42 Cal.App.5th 102, 110 citing to ***In re Steele*** (2004) 32 Cal.4th 682, emphasis added.) The California Supreme Court has interpreted the word "'prosecution' flexibly to include cases in which the movant is preparing the petition as well as cases in which the movant has already filed it." (***In re Steele*** (2004) 32 Cal.4th 682, 691.) "Reasonably construed, the statute permits discovery as an aid in preparing the petition, which means discovery may come before the petition is filed. (***Ibid***.)

Section 1054.9, subdivision (b) does not create a broader postconviction discovery right than the right to discovery at trial. (**See *Bracamontes* v. *Superior Court*** (2019) 42 Cal.App.5th 102, 110 citing to ***In re Steele*** (2004) 32 Cal.4th 682, 696.) Under the definition of "discovery materials" in section 1054.9(c), a defendant seeking discovery to support a habeas petition governed by section 1054.9 must show *entitlement* to receive the discovery sought at trial.

Unlike material favorable evidence under ***Brady***, or the evidence described in Penal Code section 1054.1, a defendant is not *entitled* to receive discovery bearing on a section 745 motion at trial unless it is requested. Thus, a defendant who did not make a section 745 motion (or request for materials to support a claim of discriminatory prosecution) at trial would not subsequently be entitled to that unrequested discovery in a case subject to Penal Code section 1054.9. Moreover, even if a defendant were entitled to discovery bearing on a section 745 motion that was not requested at trial, the defendant would still have to make the requisite showing that the evidence is relevant, in the possession of the state as the term "possession" is used in section 745, and that there was good cause for disclosure before he or she would be entitled to that discovery in conjunction with the habeas petition. (**See** this IPG, sections V-3 at pp. 122-128 [discussing what constitutes "relevant" evidence under § 745], V-4 at pp. 128-132 [discussing what constitutes "possession and control" under § 745] and V-5 at pp. 133-151 [discussing what constitutes "good cause" under § 745].)

Editor's note:** It is open question whether a prosecutor who becomes aware of information that would definitively establish a violation of section 745 (for example, that the defendant was charged and convicted of enhancement based solely on his race, ethnicity, or national origin) would have an ethical duty to disclose this information. Such a duty would not be covered by Rule of Professional Conduct 3.8, which deals with the duty to disclose evidence that would show a defendant did not *commit* an offense. But keep in mind that "after a conviction the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of ... information that casts doubt upon the *correctness* of the conviction." (People* v. *Curl*** (2006) 140 Cal.App.4th 310, 318, citing to ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25, emphasis added; **see also *Brady* v. *Maryland*** (1963) 373 U.S. 83, 87 ["the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt *or to punishment* . . ."], emphasis added.)

7. When, if at all, should a court issue an order to show cause when a defendant files a petition for habeas relief based on a violation of section 745?

Penal Code section 1473(f) states a "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." (Pen. Code, § 1473(f).)

This is consistent with what happens when habeas relief is sought in general. (**See *Maas* v. *Superior Court*** (2016) 1 Cal.5th 962, 974 ["If the court determines that the petition states a prima facie case for relief on a claim that is not procedurally defective, the court issues the writ of habeas corpus, or an order to show cause."].)

Also, in general, in assessing whether a habeas petitioner has made out a prima facie case, and before an order to show cause issues, the court "may request an informal response from the petitioner's custodian or the real party in interest" in order "[t]o assist the court in determining the petition's sufficiency." (***Maas* v. *Superior Court*** (2016) 1 Cal.5th 962, 974; ***People* v. *Romero*** (1994) 8 Cal.4th 728, 737; Cal. Rules of Court, rule 4.551(b).)

A. What is a "prima facie" case for purposes of section 1473(f)?

There are two different *potential* definitions of a "prima facie" case under section 1473(f). And there are arguments that can be made in support of adopting either definition.

One definition is the standard definition of a "prima facie" case in any habeas petition. Under that definition, a prima facie case is established by a petition when the petition "states facts that, if true, entitle the petitioner to relief—and also whether the stated claims are for any reason procedurally barred." (***Maas* v. *Superior Court*** (2016) 1 Cal.5th 962, 974; ***People* v. *Romero*** (1994) 8 Cal.4th 728, 737.)

Another potential definition of a "prima facie" case is the definition provided in Penal Code section 745 itself: "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." (Pen. Code, § 745(h)(2).)

Judge Couzens suggests the standard definition of a "prima facie" case in habeas proceedings should be adopted, postulating that "[n]othing in the amendment of section 1473 changes the basic procedures for the initiation and pursuit of proceedings for a writ of habeas corpus outlined in sections 1473, et seq., nor the procedures outlined in the California Rules of Court, rules 4.545 – 4.552." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 36.) And states that "[t]here is no indication the Legislature intended the stricter definition of 'prima facie showing' in section 745 to apply to proceedings for habeas relief under section 1473." (***Ibid***.)

However, there are four reasons why it might be more appropriate to use the definition of "prima facie" provided in section 745. First, section 1473 does not make mention in any other subdivision of requiring a "prima facie" showing. It is understood that a "prima facie" showing (as that term is generally defined for habeas petitions) must be made before a court may issue an order to show cause. (**See** Cal. Rules of Court, 4.551(c)(1) ["The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause."].) Unless the definition of "prima facie" in subdivision (f) of section 1473 is the definition utilized in section 745(h)(2), the inclusion of the language in section 1473 requiring a prima facie showing before issuing an order to show cause is redundant. (**See *Pacific Legal Foundation* v. *Unemployment Ins. Appeals Bd***. (1981) 29 Cal.3d 101, 114 ["Wherever reasonable, interpretations which produce internal harmony, *avoid redundancy*, and accord significance to each word and phrase are preferred.", emphasis added.].) Second, another requirement of subdivision (f) is that the "court shall appoint counsel if the petitioner cannot afford counsel and . . . the *petition alleges facts that would establish a violation of subdivision (a) of Section 745*." (Pen. Code, § 1473(f).) This standard is identical to the prima facie standard used for habeas petitions in general. There would not be a need to use this language (rather than simply stating that appointment "is required when the petitioner makes a prima facie case") unless there was a distinction being drawn between how a "prima facie" case should be treated for purposes of habeas petitions in general and what a "prima facie" case means for purposes of section 745 and 1473(f). Third, unlike most habeas petitions, there is no requirement that prejudice be shown to prevail on habeas petition alleging a violation of section 745. (**See** this IPG, sections IV-5-B at p. 50; VII-6 at p. 205-209; X-13-A at pp. 229-230.) Because of this lesser standard, there would be an additional reason to impose the greater "prima facie" requirement of section 745(h). Fourth, considering that it is more onerous for the state to defend an old conviction being challenged on habeas on grounds of a section 745 violation than a new allegation, it should not be *easier* to obtain an evidentiary hearing years later than at the initial trial.

***Editor's note:** For a discussion of what would constitute a "prima facie" case of a section 745 violation, **see** this IPG, section VI-I at pp. 168-170.

8. What happens if a court determines a petitioner has *not* made a prima facie showing that the petitioner is entitled to relief?

Penal Code section 1473(f) states: "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."

9. Is an evidentiary hearing *required* if a court determines a petitioner has made a prima facie showing that the petitioner is entitled to relief?

If a defendant makes a prima facie showing of a section 745 violation (however that showing is defined), the court *may* be *required* to hold an evidentiary hearing.

Under California Rule of Court, Rule 4.551, once an order to show cause has issued, the responding party must be given an opportunity to file a return and the petitioner given a chance a chance to file a denial. (**See** Cal. Rules of Court, 4.551(d)&(e); **see also *In re Figueroa*** (2018) 4 Cal.5th 576, 587.) Rule 5.551 then provides: "Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must *either* grant or deny the relief sought by the petition *or* order an evidentiary hearing." (Cal. Rules of Court, 4.551(f).) An evidentiary hearing is not required in all circumstances. Rather, an evidentiary hearing is only "required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is *a reasonable likelihood* that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." (***Ibid***; **see also *People* v. *Duvall*** (1995) 9 Cal.4th 464, 478 ["When, after considering the return and the traverse, the court finds material facts in dispute, it *may* appoint a referee and order an evidentiary hearing be held . . . Conversely, '[w]here there are no disputed factual questions as to matters outside the trial record, the merits of a habeas corpus petition can be decided without an evidentiary hearing.'"]; ***In re Figueroa*** (2018) 4 Cal.5th 576, 587 ["Under unusual circumstances ... this court *may* decline to order a hearing and simply decide the case."], emphasis added throughout.)

In contrast to the general rule regarding evidentiary hearings, Penal Code section 1473(f) provides: "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." (Emphasis added.)

It is possible the authors of AB 2542 did not intend to set up a structure distinct from Rule 4.551 (and case law consistent with that rule). But if they did not, then the language in subdivision (f) is redundant. As written, subdivision (f) appears to require an evidentiary hearing if the court issues an order to show cause unless the prosecution concedes the motion.

10. Can or must the petitioner be present at the evidentiary hearing?

In contrast to California Rule of Court 4.551(f), which requires that the petitioner "be produced at the evidentiary hearing unless the court, for good cause, directs otherwise", subdivision (f) of section 1473 states: The defendant shall appear at the hearing *by video unless counsel indicates that their presence in court is needed*." (Emphasis added.)

11. Do the ordinary rules of evidence, including the hearsay rule, apply at the evidentiary hearing?

The evidentiary hearing at a habeas proceeding is subject to the rules of evidence, including the hearsay rule, as codified in the Evidence Code. (***In re Rosenkrantz*** (2002) 29 Cal.4th 616, 675; ***In re Fields*** (1990) 51 Cal.3d 1063, 1070; Evid. Code, § 300.) Section 1473(f) does not suggest the rules of evidence are inapplicable. However, it is not clear to what extent the evidentiary rules governing the hearing authorized by section 745 are constrained by, supersede, or are incorporated by section 1473(f) and the general rules governing evidentiary hearings occurring during habeas proceedings. (**See** this IPG, section VI-5 and 6 at pp. 176-177 [discussing what evidentiary rules apply at hearing authorized by section 745(c)(1)].)

12. What is the burden of proof at the evidentiary hearing?

"Generally, of course, habeas corpus claims must surmount the presumption of correctness we accord criminal judgments rendered after procedurally fair trials. "'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the

finality of criminal proceedings so demands, and due process is not thereby offended.'"" (***In re Lawley*** (2008) 42 Cal.4th 1231, 1240 citing to ***People* v. *Duvall*** **(**1995) 9 Cal.4th 464, 474 and ***People* v. *Gonzalez*** (1990) 51 Cal.3d 1179, 1260.) "Petitioner bears the burden of proving, by a preponderance of the evidence, the facts on which his claim depends." (***In re Large*** (2007) 41 Cal.4th 538, 549.) This is the same burden of proof placed on a petitioner in order to prevail on a section 745 motion in the trial court. (**See** Pen. Code, § 745(a)&(c)(2); this IPG, section IV-5-A at p. 49.)

However, because a section 745 claim does not necessarily attack the procedural fairness of a trial, it is *possible* (but, for several reasons, not probable) that a court could require the defendant to show that the violation of section 745 "completely undermine[d] the entire structure of the case upon which the prosecution was based" (***In re Lawley*** (2008) 42 Cal.4th 1231, 1240) in order to grant relief to a habeas petitioner.

13. What will a defendant have to establish to prevail on a post-conviction habeas petition based on section 745?

To prevail on a post-conviction habeas petition, the petitioner will have to establish, by at least a preponderance of the evidence, all the elements of the specific subdivision petitioner is alleging was violated.

As to the elements of a section 745(a)(1) violation, **see** this IPG, section IV-6 at pp. 50-55.
As to the elements of a section 745(a)(2) violation, **see** this IPG, section IV-7 at pp. 57-61.
As to the elements of a section 745(a)(3) violation, **see** this IPG, section IV-8 at pp. 61-99.
As to the elements of a section 745(a)(4)(A) violation, **see** this IPG, section IV-9 at pp. 99-108.
As to the elements of a section 745(a)(4)(B) violation, **see** this IPG, section IV-10 at pp.108-110.

A. Does the defendant have to show any actual prejudice (i.e., that defendant was deprived of a fair trial) to obtain habeas relief based on a violation of section 745?

In general, a defendant cannot prevail on a habeas petition without establishing he or she has been prejudiced (i.e., that the defendant was deprived of a fair trial or suffered actual harm from the violation). (**See e.g., *In re Harris*** (1993) 5 Cal.4th 813, 826 ["petitioner must show that the [constitutional] defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice."]; ***In re***

Cox (2003) 30 Cal.4th 974, 1008–1009 [in order to obtain habeas relief under Pen. Code, § 1473(b)(1) on grounds false evidence was introduced at trial, petitioner must show that "there is a 'reasonable probability' that, had it not been introduced, the result would have been different."]; ***In re Hardy*** (2007) 41 Cal.4th 977, 1025 [in "habeas corpus petition alleging trial counsel's investigation or presentation of evidence was incompetent," petitioner must show prejudice, i.e., that "it is reasonably probable that the result would have been different" but for counsel's incompetent errors]; Pen. Code, § 1473.5 [habeas relief may be granted if competent and substantial testimony on intimate partner battering was not presented "and is of such substance that, had the competent and substantial expert testimony been presented, 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."].)

However, it appears there is no requirement that the petitioner show prejudice to prevail at a post-conviction habeas proceeding premised on a violation of section 745. (**See** Sen. Pub. Safety Com., Analysis of Sen. Bill No. 2542 (2019-2020 Reg. Sess.) 8/1/20 version at p. 13 ["Unlike existing habeas provisions, the bill's habeas provision does not require a showing that the bias was prejudicial to the criminal proceedings."]; Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 24.) Section 1473(f) does not specify that prejudice must be shown. And to establish a violation of section 745 in the trial court, there is no requirement defendant show prejudice either. (**See** this IPG, section IV-5-B at p. 50 and VII-4-A at p. 189; **but see** VII-6 at pp. 205-209 [discussing when the California Constitution may preclude dismissal or vacating of a conviction if no prejudice is shown].)

B. Does the defendant have to show that he or she did not unduly delay in bringing a habeas petition based on a section 745 violation?

In general, a habeas petition may be denied if it is untimely. "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner." (***In re Reno*** (2012) 55 Cal.4th 428, 459; **see also** ***In re Douglas*** (2011) 200 Cal.App.4th 236, 245 ["unreasonable delay also bars consideration of a petition for writ of habeas corpus under the doctrine of laches" and "[a]pplication of the doctrine is appropriate where the delay is unreasonable and has prejudiced respondent."].) Moreover, "'It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief.'" (***In re Reno*** (2012) 55 Cal.4th 428, 459.) "In determining whether a petition is timely, the basic issue is whether it was ""filed as promptly as the circumstances allow."""" (***In re Taylor***

(2019) 34 Cal.App.5th 543, 555 citing to ***In re Reno*** (2012) 55 Cal.4th 428, 460; **see also *People* v. *Miller*** (1992) 6 Cal.App.4th 873, 882 [an adequate explanation for delay is a *prerequisite* to our consideration of a collateral attack on the judgment"] emphasis added.) However, "substantial delay is ""measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim."""" (***Ibid***.)

Section 1473(f) does not purport to depart from this rule and so a belated section 1473(f) petition should be subject to denial. Indeed, there is language in section 1473 indirectly accepting this principle. Specifically, section 1473(f) states: "A petition raising a claim of this nature [i.e., an allegation section 745 was violated] 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." (Emphasis added.)

Obviously, unless the claim alleging a violation of section 745 would overlap with a claim alleging discrimination (**see** this IPG, section VII-6 at pp. 207-209 [describing existing laws prohibiting discrimination in criminal proceedings], a claim of a section 745 violation could not be raised until after section 745 went into effect. Thus, a section 745 claim (not overlapping with existing law prohibiting discrimination in criminal proceedings) that involves a criminal case that had not yet resulted in judgment would *not* be barred as untimely unless there is significant delay in seeking habeas corpus relief that occurs *after* January 1, 2021.

> ***Editor's note:** If section 745 is ultimately made retroactive (**see** this IPG, section IV-19 at p. 119 [discussing a bill that would make both sections 745 and 1473 retroactive]), a defendant could potentially make a section 745 claim based on an alleged violation occurring 50 years ago – so long as the defendant makes the claim relatively promptly after the law that makes section 745 retroactive goes into effect.

14. What habeas relief should be granted if a violation of section 745 is found to have occurred?

"The scope of a court's authority in granting habeas corpus relief is quite broad. '[A] court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." (***In re Duval*** (2020) 44 Cal.App.5th 401, 411 citing to ***In re Harris*** (1993) 5 Cal.4th 813, 851.) That said, the granting of habeas relief generally results in the conviction being vacated and the parties being placed in the same

position as if the conviction did not occur. "The scope of a writ of habeas corpus is broad, but in this case, as in most cases, it is designed to correct an erroneous conviction. It achieves that purpose by invalidating the conviction and restoring the defendant to the position she or he would be in if there had been no trial and conviction." (***In re Cruz*** (2003) 104 Cal.App.4th 1339, 1346.) "When a writ of habeas corpus vacates a judgment, the parties are placed in the same position as if the first trial had never occurred, and defendant is not in jeopardy until the retrial jury is sworn." (***People* v. *Cooper*** (2007) 149 Cal.App.4th 500, 522; ***Sons* v. *Superior Court*** (2004) 125 Cal.App.4th 110, 118; **but see *In re Martinez*** (2017) 3 Cal.5th 1216, 1224 [granting of relief based on insufficient evidence to convict a petitioner would bar retrial].)

Section 1473 does not specify which remedies are available when the habeas petition is granted based on a violation of section 745. However, it is reasonable to believe that the remedies available post-judgment as described in paragraphs (2) and (3) of subdivision (e) of section 745 will at least provide guidance in deciding what remedy should be imposed. (**See** this IPG, section VII-5 at pp. 199-205.) However, it is possible that the remedy imposed *must* conform to the remedies provided in paragraphs (2) and (3). Albeit given the broad discretion provided to courts reviewing habeas petitions in general, additional remedies could potentially be imposed as well. (**See** Pen. Code, § 745(b)(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."].)

Editor's note:** Judge Couzens speculates that "[i]f the violation relates only to sentencing under section 745, subdivision [a](4), [it is] likely the sentence will be considered 'unauthorized' and may be returned to the trial court for resentencing. (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at p. 37 citing to ***In re Birdwell (1996) 50 Cal.App.4th 926, 931.) It *is* likely that courts will find it proper for a case to be returned to the trial court for resentencing when there has been a violation of subdivision (a)(4) or, in certain circumstances, subdivision (a)(3). However, it may or may not be correct to categorize the sentence originally imposed as "unauthorized" where the trial court *had* jurisdiction to impose the sentence and the sentence *was lawful* until defendant subsequently made and prevailed on a section 745 motion. (**Compare *People* v. *Nick*** (1985) 164 Cal.App.3d 141, 145 [distinguishing (at least for purposes of determining whether the new sentence could exceed the original sentence) between cases where the original sentence imposed was not authorized by law and cases "where the original judgment and sentence are authorized and within the court's jurisdiction but are simply incorrect or erroneous *for some other reason*, such as violation of section 654." (Emphasis added.)].)

Vacating the judgment may be barred as a remedy (regardless of whether the remedy is imposed in the context of a habeas petition) by article VI, section 13 of the California Constitution in the absence of a showing of prejudice. (**See** this IPG, section VII-6 at pp. 205-209.)

15. Is section 1473(f) retroactive?

Penal Code section 1473(f) permits a habeas petition alleging 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*." (Emphasis added.) Thus, on its face, section 1473(f) does not apply retroactively to judgments entered before January 1, 2021. However, there is a currently a bill pending in the legislature (AB 256) that would render section 1473(f) retroactive "regardless of when judgment was entered."

16. If habeas relief is granted and the defendant is going to be resentenced, does Marsy's Law require the victim be given notice of, and have a right to appear at that resentencing?

Under the California Constitution, as amended by Marsy's Law, victims of crimes have both collective and individual rights. (**See** Cal. Const., art. I, § 28(a)(3)&(4)&(f).) Several *individual* (and enforceable) rights are *undoubtedly* implicated by any resentencing that occurs after the granting of a habeas petition based on a violation of section 745 if the resentencing potentially results in an immediate or accelerated release of the defendant. Such a resentencing should easily be characterized as a "post-conviction release proceeding" or "post-judgment release decision."

Among these rights: (i) the right to "reasonable notice of all public proceedings . . . upon request . . . of all . . . post-conviction release proceedings, and to be present at all such proceedings" (§ 28(b)(7)) and (ii) the right "[t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue" (§ 28(b)(8)). (**See *People* v. *Lamoureux*** (2019) 42 Cal.App.5th 241, 265 ["Both the Legislature and courts have recognized that victims may exercise these rights during postjudgment proceedings that existed at the time the electorate approved Marsy's Law, as well as postjudgment proceedings that did not exist when Marsy's Law was approved."]; **see also** Cal.

Const., art. I, § 28(b)(12) [providing victims right "[t]o be informed, upon request, of the . . . sentence, . . ., or other disposition of the defendant, the scheduled release date of the defendant, and the release of. . . the defendant from custody"]; § 28(b)(16) [providing victims the right "[t]o have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made"].)

Because the right to notice and participation are contingent upon the victim's request, if a victim has not registered with the Department of Corrections for notification, prosecutors may need to take it upon themselves to notify the victims of the potential resentencing.

Editor's note:** The collective rights of crime victims are embodied in subdivision (a) of article 1, section 28 of the California Constitution. Some of these rights are also potentially implicated by section 1473(f), including: (i) "the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State"; and (ii) the right to "finality in their criminal cases" and an end to the suffering experienced by crime victims and their loved one imposed by the continual threat that "post-judgment proceedings that challenge criminal convictions" will upend the conviction or sentence of those who perpetrated crimes against the victims. (**See** Cal. Const., art. I, § 28(a)(5) & (6).) However, for better or worse, courts have held subdivision (a) does not provide an "independent source of enforceable rights." (People* v. *Marquez*** (2020) 56 Cal.App.5th 40, 47; ***People* v. *Lombardo*** (2020) 54 Cal.App.5th 553, 563; ***People* v. *Lamoureux*** (2019) 42 Cal.App.5th 241, 266.)

A. Does the California constitution, as amended by Marsy's Law, preclude the creation of a new post-judgment ground for vacating a conviction?

Paragraph (6) of subdivision (a) of article 1, section 28 of the California Constitution states: "Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end."

However, any argument that the creation of new avenue for vacating a conviction post-judgment violates section 28(a)(6) of article 1 is unlikely to prevail (regardless of the argument's intrinsic merits). This is because a functionally identical argument was repeatedly raised and rejected in multiple analogous challenges to the validity of SB 1437, which enacted a

new avenue (Pen. Code, § 1170.95) for defendants to vacate convictions based on changes to the law of felony murder. "It would be anomalous and untenable for us to conclude, as the People impliedly suggest, that the voters intended to categorically foreclose the creation of any new postjudgment proceedings not in existence at the time Marsy's Law was approved simply because the voters granted crime victims a right to a 'prompt and final conclusion' of criminal cases." (***People* v. *Johns*** (2020) 50 Cal.App.5th 46, 69; ***People* v. *Lamoureux*** (2019) 42 Cal.App.5th 241, 265; **see also *People* v. *Marquez*** (2020) 56 Cal.App.5th 40, 47 [listing every published opinion rejecting the claim that a crime victim's right (as bestowed by Marsy's Law) to a prompt and final conclusion of criminal cases was violated just because the postjudgment procedure under section 1170.95 allows convictions to be re-opened].)

16. Can the granting of habeas relief based on an alleged violation of section 745 be appealed by the People and what is the standard of review?

Penal Code section 1506 permits the People to appeal a grant of a habeas relief: "An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court."

However, section 1506 no longer governs appeals in habeas cases involving capital punishment Court. Such appeals are governed by Penal Code section 1509.1. (**See *Briggs* v. *Brown*** (2017) 3 Cal.5th 808, 840.)

"On an appeal from an order granting a petition for habeas corpus after an evidentiary hearing, basic principles of appellate review apply, and thus, questions of fact and questions of law are reviewed under different standards." (***In re Douglas*** (2011) 200 Cal.App.4th 236, 242.) Findings of fact by the trial court are "accorded due deference under the substantial evidence standard. (***Ibid***.) However, the reviewing court "independently reviews questions of law, such as the selection of the controlling rule." (***Ibid***.) "Mixed questions of law and fact are reviewed under the clearly erroneous standard if the inquiry is predominantly factual, but are reviewed de novo if the application of law to fact is predominantly legal." (***Ibid***.)

XI. New Subdivision (a)(3) of Penal Code section 1473.7 (Post-Judgement Petitions Alleging Violations of Section 745 When Defendant is No Longer in Custody) and Selected Issues Arising in its Application.

AB 2542 amended Penal Code section 1473.7 to permit post-verdict challenges for alleged violations of section 745 by defendants who were out of custody and thus unable to make the challenge via a habeas petition.

1. The relevant statutory language of Penal Code section 1473.7

In pertinent part, section 1473.7 provides:

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

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

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

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

(e) When ruling on the motion:

(1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a). . . .

(3) If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea.

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

2. Can a defendant file a post-judgment motion claiming a violation of section 745 without being in custody or while serving a sentence?

Section 1473.7 expressly permits "[a] person who is no longer in criminal custody [to] file a motion to vacate a conviction or sentence" on the basis that "[a] conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745." (Pen. Code, § 1473.7(a)(3).)

"Criminal custody" includes constructive criminal custody. Section 1473.7 was crafted "to provide a remedy for those who are no longer eligible to seek habeas relief because they are no longer in criminal custody." (***People* v. *Bran*** [unreported] 2020 WL 5200643, at p. *7.) "Actual incarceration in prison or jail is not required for a petition for writ of habeas corpus; persons on bail, probation, parole, or committed to a state hospital are considered to be in constructive custody for purposes of habeas corpus writ review." (***People* v. *Bran*** [unreported] 2020 WL 5200643, at p. *6.) Hence, defendants who are on bail, probation, parole, mandatory supervision, or who are committed to a state hospital must use section 1473, not section 1473.7, to challenge a conviction.

3. Is there any due diligence requirement imposed on defendants filing post-judgment motions pursuant to section 1473.7(a)(3) claiming violations of section 745?

Subdivision (c) of section 1473.7 states: A motion pursuant to paragraph (2) or (3) of subdivision (a) *shall be filed without undue delay* from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section or Section 745." (Pen. Code, § 1473.7(c), emphasis added.)

Obviously, the motion seeking relief under section 1473.7 could not be expected to be filed before January 1, 2021 since (i) the amendments allowing a motion claiming a violation of section 745 did not go into effect until that date and (ii) section 745 itself only applies "prospectively in cases in which judgment has not been entered prior to January 1, 2021" (Pen. Code, § 745(j)). However, *post*-January 1, 2021, it appears that the motion may be rejected if there is "undue delay" in filing from motion after discovery of the evidence that provides a basis for relief under section 745.

There are not a lot of cases interpreting what constitutes "undue delay" for purposes of section 1473.7. In ***People* v. *Rodriguez*** (2019) 38 Cal.App.5th 971, the court held defendant's motion claiming prejudicial error affected the defendant's ability to understand the immigration consequences of the plea was timely where defendant filed his motion only seven months after enactment of the statute authorizing the filing of such motions and less than one month after the Court of Appeals, in opinion issued in connection with defendant's previous appeal, advised defendant that he now had remedy under this newly enacted statute. (***Id***. at pp. 978-980.)

To interpret what constitutes "undue delay" courts may look at what constitutes untimely filing in the habeas context (**see** this IPG, section X-13-B at p. 230). And a defendant who could file a habeas petition under section 1473 based on a violation of section 745 while in custody, but does not, may be held to have unduly delayed in filing a section 1473.7 motion. (**See *People* v. *Aguilar*** [unreported] 2019 WL 2222038, at *6 [finding defendant's motion under section 1473.7 claiming actual innocence was untimely since, inter alia, "[n]othing stopped him from seeking habeas relief while he remained in custody" under § 1473(a).)].)

A. Can a defendant file a section 1473.7 petition based on an alleged violation of section 745 if defendant has previously filed a habeas petition based on the same allegation?

"Successive petitions for *writ of habeas corpus* are generally not permitted because they are considered wasteful of judicial resources and undermine the finality of judgments." (***People* v. *Jung*** (2020) 59 Cal.App.5th 842, 855, emphasis added; this IPG, section X-3 at pp. 219-221.) However, "[a] motion under section 1473.7 is *not* a petition for writ of habeas corpus but a statutorily authorized and defined means to challenge a judgment on the grounds specifically identified in the statute." (***People* v. *Jung*** (2020) 59 Cal.App.5th 842, 855, emphasis added Thus, a defendant is not technically barred from filing both a section 1473 (while in custody) and 1473.7 motion (while out of custody). However, assuming the underlying claim is the same, "[i]ssues of inefficiency, waste, and finality of judgments can be dealt with, if necessary, by applying principles of collateral estoppel to decisions and findings rendered in prior habeas corpus proceedings." (***Ibid*** [and assuming an order denying the defendant's petitions for writ of habeas corpus *should be* given collateral estoppel effect].)

4. Is a defendant entitled to the appointment of counsel after filing a motion for relief pursuant to section 1473.7(a)(3)?

Unlike section 1473, section 1473.7 makes no mention of any right to appointment of counsel. And "neither the federal nor the state Constitution mandates an unconditional right to counsel to pursue a collateral attack on a judgment of conviction." (***People* v. *Rodriguez*** (2019) 38 Cal.App.5th 971, 982.) However, in the context of a section 1473.7 motions based on a claim a conviction was legally invalid due to a prejudicial error damaging the ability to meaningfully understand the adverse immigration consequences of the plea, courts have held that, where an *indigent* moving party has set forth factual allegations *stating a prima facie* case for entitlement to relief under the statute, counsel must be appointed. (**See *People* v. *Rodriguez*** (2019) 38 Cal.App.5th 971, 981-984; ***People* v. *Fryhaat*** (2019) 35 Cal.App.5th 969, 982; ***People* v. *Arteaga*** [unreported] 2021 WL 974009, at p. *4; ***People* v. *Guzman*** [unreported] 2020 WL 4435543, at *7 [review granted (Oct. 21, 2020)]; ***People* v. *Marroquin*** [unreported] 2020 WL 6778434, at p. *4.) It is unlikely a different rule will be applied when the basis for the section 1473.7 motion is an alleged violation of section 745.

Moreover, since the rule is derived from case law, the "prima facie" showing required for purposes of appointment of counsel is probably not going to be the definition of a "prima facie" case used in section 745. Rather, it is likely to be the standard test for whether a petitioner has made out a "prima facie" case, i.e., whether the petition "states facts that, if true, entitle the petitioner to relief—and also whether the stated claims are for any reason procedurally barred." (***Maas* v. *Superior Court*** (2016) 1 Cal.5th 962, 974; ***People* v. *Romero*** (1994) 8 Cal.4th 728, 737.)

5. Is a defendant filing a motion for relief pursuant to section 1473.7(a)(3) based on a section 745 violation entitled to seek discovery, and is that discovery as expansive (or as limited) as the discovery authorized under section 745(d)?

Section 1473.7 makes no mention of discovery procedures. And there are no cases interpreting what, if any discovery, a defendant filing such a motion can or should be provided. It is possible no discovery is authorized. It is also possible that the general flexible approach to discovery in the context of habeas petitions will be applied in the context of a collateral attack

on a judgment of conviction by a defendant who is not in custody. (**See** this IPG, section X-6 at pp. 221-224 [discussing discovery for purposes of a section 1473(f) motion].) Or that the discovery authorized would be governed (and constrained) by section 745(d). (**See** this IPG, section V at pp. 119-167.). If so, the defendant would have to make *at least* the same showing that the evidence sought is relevant (**see** this IPG, section V-3 at pp. 122-128), that it is possessed by the state (**see** this IPG, section V-4 at pp. 128-133) and that there is good cause for the discovery (**see** this IPG, section V-5 at pp. 133-151) as required under section 745(d).

6. Is a defendant required to make any showing before the court must grant a hearing on the motion for relief pursuant to section 1473.7 based on a claimed violation of section 745?

Penal Code section 1473.7(d), in relevant part, states: "All motions ***shall*** be entitled to a hearing." (Emphasis added.) Does this mean that a defendant who simply alleges a violation of section 745 without *any* showing whatsoever that section 745 has been violated is automatically entitled to a hearing?

How to interpret section 1473.7 in general is somewhat of a mystery. Although the various legislative analyses discuss habeas proceedings, none touch upon 1473.7. It is quite possible courts will interpret section 1473.7(d) literally. (***People* v. *Diosdado*** [unreported] 2021 WL 386932, at *3 ["The issue before us is not whether section 1473.7 mandates a hearing. It clearly does."].) However, section 745 *itself* does not automatically provide for a hearing based simply on the filing of a section 745 motion. Rather, it requires a "prima facie" showing (i.e., the production of "facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred") before a court must hold a hearing. (**See** Pen. Code, § 745(c)&(h)(2); this IPG, section VI-1 at pp. 168-170.) When the basis for the 1473.7 motion is an alleged violation of section 745, courts may interpret section 1473.7(d) as implicitly assuming this prima facie requirement must be met before a hearing is ordered.

Indeed, it does not make much sense to require a hearing absent such a showing in the context of a section 1473.7 motion (when a defendant is not in criminal custody) but impose a prima facie showing in the habeas context (when a defendant is in criminal custody). (**Cf., *People* v. *Bran*** [unreported] 2020 WL 5200643, at p. *6, fn. 6 [calling defendant's assertion that section 1473.7 provides for a "more favorable standard of relief" than is available on habeas as "counterintuitive."].) However, this contrast cuts both ways as the ordinary rules of statutory

interpretation would suggest the inclusion in section 1473(f) of the requirement that the petitioner make "a prima facie showing that the petitioner is entitled to relief" before a court must issue an order to show cause means the absence of comparable language in section 1473.7 is intentional. (**See *In re Jennings*** (2003) 106 Cal.App.4th 869, 888 ["It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes."].)

Note that a hearing does not have to be held "[i]f the prosecution has no objection to the motion." (Pen. Code, § 1473.7(d).) In that circumstance, "the court may grant the motion to vacate the conviction or sentence without a hearing." (***Ibid***.)

7. Does the "hearing" have to be an evidentiary hearing, and if so, do the rules of evidence, including the hearsay rule, apply at hearings under section 1473.7(d)?

The statute does not state the "hearing" required under section 1473.7(d) must involve the taking of evidence. Ordinarily, however, hearings in the course of post-judgment collateral attacks or resentencing requests which are necessary to resolve any disputed factual issues, including credibility determinations *do* involve the taking of evidence. (**See e.g., *People v. Duvall*** (1995) 9 Cal.4th 464, 478 [habeas]; ***People* v. *Romanowski*** (2017) 2 Cal.5th 903, 916 [noting that when eligibility for resentencing under Pen. Code § 1170.18 turns "on facts that are not established by either the uncontested petition or the record of conviction" an "evidentiary hearing" may be required]; ***People* v. *Banda*** (2018) 26 Cal.App.5th 349, 357 [courts deciding whether to grant relief under Health and Safety Code section 11361.8 "could consider facts beyond the record of conviction, and could do so in an evidentiary hearing"].)

Accordingly, it is likely that the hearing contemplated under section 1473.7 is an *evidentiary* hearing. And that the ordinary rules of evidence will apply at that hearing. (**See** this IPG, section VI-5 & 6 at pp. 176-177 [discussing issue in context of initial section 745 hearing]; X-11 at p. 228 [discussing issue in context of section 1473 habeas hearing].)

8. What will a defendant have to establish to prevail on a post-judgment motion pursuant to section 1473.7(a)(3) claiming a violation of section 745?

Penal Code section 1473.7(e)(1), in pertinent part, states: "The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." To establish a violation of subdivision (a)(3), a defendant must establish by a preponderance of the evidence all the elements of a section 745 violation.

As to the elements of a section 745(a)(1) violation, **see** this IPG, section IV-6 at pp. 50-55.
As to the elements of a section 745(a)(2) violation, **see** this IPG, section IV-7 at pp. 57-61.
As to the elements of a section 745(a)(3) violation, **see** this IPG, section IV-8 at pp. 61-99.
As to the elements of a section 745(a)(4)(A) violation, **see** this IPG, section IV-9 at pp. 99-108.
As to the elements of a section 745(a)(4)(B) violation, **see** this IPG, section IV-10 at pp.108-110.

A. Does the defendant had to show any actual prejudice (i.e., that defendant was deprived of a fair trial) to obtain relief under section 1473.7(a)(3) based on a violation of section 745?

Nothing on the face of section 1473.7(a)(3) states a defendant must establish "prejudice" in order to obtain relief for a violation of section *745*. (Compare Pen. Code, § 1473.7(a)(1) [allowing relief where a conviction or sentence is "legally invalid due to *prejudicial error* damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea"], emphasis added.)

Moreover, section 745 itself does not require a showing of prejudicial error either. (**See** this IPG, section IV-5-B at p. 50; VII-4-A at p. 189.) However, the showing of prejudice may be required nonetheless for certain violations of section 745 lest there be a violation of the California Constitution. (**See** this IPG, section VII-6 at pp. 205-209.)

9. Must the defendant be present at the hearing?

Section 1473.7(d) expressly states: "Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present."

10. If a defendant's motion under section 1473.7(a)(3) is granted, what remedy for the violation should be imposed?

Based on the language of section 1473.7 itself, the statutory remedy if a defendant can show a "conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision (a) of Section 745" is to vacate the conviction or sentence. (Pen. Code, § 1473.7(a) & (e)(1).) It, thus, stands to reason that "[i]f the defendant establishes bias in the seeking or obtaining of a conviction under section 745, subdivisions (a)(1), (2), or (3) [**see** this IPG, sections IV-5-10 at pp. 49-111], the proper remedy would be to vacate the conviction. If the defendant establishes bias in the seeking, obtaining or imposing the sentence under section 745, subdivision (4), the proper remedy would be to vacate the sentence, but leave the underlying conviction intact." (Couzens, R. "Assembly Bill 2542: California Racial Justice Act of 2020, [Rev. 1/12/21] at pp. 38-39; **but see** this IPG, section XI-12 at p. 243 [conviction can be effectively vacated by defendant's withdrawal of plea even if only sentence is overturned for violation of section 745(a)(4)].)

Note that vacating the conviction might run afoul of article VI, section 13 of the California Constitution if the violation did not prejudice the defendant. (**See** this IPG, section VII-6 at pp. 205-209.)

11. If a defendant's motion is granted and the defendant is going to be resentenced, does Marsy's Law require the victim be given notice of, and have a right to appear at, that resentencing?

The victims of the crime sought to be vacated should have the right to notice and be heard at any resentencing pursuant to section 1473.7 for the same reasons that the victim would have a right to notice of (and the right to be heard) at any resentencing hearing pursuant to Penal Code section 1473(f). (**See** this IPG, section X-16 at pp. 233-235.)

12. If a section 1473.7 motion is granted, can the People retry the defendant?

A section 1473.7 motion is a collateral attack on a conviction. (**See** Black's Law Dictionary (11th ed. 2019) [defining "collateral attack" as [a]n attack on a judgment in a proceeding other than a direct appeal"].) "[E]xcept for reversals based on the legal insufficiency of the evidence at trial, it is established that the double jeopardy clause in the federal and state Constitutions

does not prevent the People from retrying a defendant whose conviction is set aside through direct appeal *or collateral attack*." (***In re Cruz*** (2003) 104 Cal.App.4th 1339, 1348–1349, emphasis added.)

If a *sentence* is vacated, then there usually is no need to re-try the defendant. However, pursuant to section 1473.7(e)(3), "[i]f the court grants the motion to vacate a conviction *or sentence* obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea." (Emphasis added.) Thus, even if only a sentence has been vacated, the defendant is allowed to withdraw his or her plea, effectively vacating the underlying *conviction* as well.*

> ***Editor's note:** This seems an odd result when only the sentence has been found to violate section 745(a)(4). It is possible to explain it by the fact subdivision (e)(3) was originally conceived in the context of a motion based on a section 1473.7*(a)(1)* claim that the conviction or sentence was "invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences *of a plea of guilty or nolo contendere*." (Pen. Code, § 1473.7(a)(1), emphasis added.) In that context it makes more sense. Quite possibly the drafters of AB 2542 simply overlooked the potential application of subdivision (e)(3) to a challenge to a sentence based on a section *745(a)(4)* challenge. But it is also possible the drafters wanted to permit a defendant to have the option of withdrawing their plea if they negotiated a plea to a more serious sentence than would have been offered to, or imposed upon, a defendant not belonging to defendant's group.

Of course, since section 1473.7(a)(3) motions are filed by defendants who have already served their sentence, the People will not have the same incentive to re-try the case just to preserve the conviction. But if the People choose to re-try the case, they should be able to do so.

If the defendant opts to withdraw his plea, it is an open question whether the People could then re-try defendant on all the charged counts - even those dismissed pursuant to the original plea - and whether the defendant could then be sentenced on those counts.

Section 1473.7 does not speak to the issue at all. Section 745(e)(2)(B), in pertinent part, states that when only the sentence was obtained in violation of section 745, the court may impose a new sentence but that "the court shall not impose a new sentence greater than that previously imposed." But even assuming section 745(e)(2)(B) would limit the remedies available under section 1473.7 in general, if a defendant chooses to withdraw his plea, a new sentence is not being imposed – so the limitation of 745(e)(2)(B) may very well be inapplicable regardless.

Ordinarily, if a defendant is permitted to withdraw a plea, the People are entitled to go forward on any counts dismissed pursuant to that plea. (**See *People* v. *Superior Court (Garcia)*** (1982) 131 Cal.App.3d 256, 258–259 ["familiar and basic principles of law reinforced by simple justice require that when an accused *withdraws* his guilty plea the status quo ante must be restored. When a plea agreement has been rescinded the parties are placed by the law in the position each had before the contract was entered into."], emphasis added; **see also *People* v. *Hanson*** (2000) 23 Cal.4th 355, 360, fn. 2.) Unless a court were to find that a new *conviction* followed by a sentencing constituted a "resentencing" for purposes of section 745 (and impliedly, section 1473.7), then a defendant who wishes to withdraw his or her plea based on a violation of section 745(a)(4) alone (and *in lieu of obtaining* a resentencing) would potentially be subject to prosecution on any count dismissed pursuant to the plea bargain.

13. Is section 1473.7(a)(3) retroactive?

Section 1473.7 does not expressly state it is not retroactive. However, section 1473.7 requires that the defendant show a violation of Penal Code section 745(a). (**See** Pen. Code, § 1473.7(a)(3).) And section 745 cannot be violated unless the violation occurred in a case in which "judgment has not been entered prior to January 1, 2021." (**See** Pen. Code, 745(j).) Thus, section 1473.7 cannot apply retroactively to cases whose judgments pre-dates January 1, 2021. However, there is a currently a bill pending in the legislature (AB 256) that would render section 1473(f) retroactive "regardless of when judgment was entered."

14. Can the granting of section 1473.7 relief based on an alleged violation of section 745 be appealed by the People, and what is the standard of review?

The People should be able to appeal a grant of section 1473.7 relief pursuant to Penal Code section 1238, subdivision (a) under one or more of the following paragraphs: (5) ["An order made after judgment, affecting the substantial rights of the people."]; (6) ["An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense."]; or (8) [An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy."].)

"In general, [appellate courts] review orders granting or denying motions to vacate convictions for abuse of discretion. [Citation.] To the extent [a] decision rests on a question of statutory interpretation, however, [the] review is de novo." (***People* v. *Perez*** (2020) 47 Cal.App.5th 994, 997-998 [applying this standard to review of a denial of a motion to vacate convictions under Penal Code section 1473.7].) However, at least in deciding whether to vacate a conviction for prejudicial error that affected a defendant's ability to meaningfully understand the actual or potential immigration consequences of a plea as described in subdivision *(a)(1)* of section 1473.7, the reviewing court will apply an independent standard of review. (***People* v. *Vivar*** (Cal., May 3, 2021, No. S260270) 2021 WL 1726827, at pp.*6-*7.)

XII. Is AB 2542 a Law Imposing an Unfunded Mandate?

Subject to certain exceptions not applicable to the imposition of new costs created by the enactment of Penal Code section 745, the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service." (Cal. Const., art. XIIIB, § 6.)

A "program" is defined as a program which carries out the "governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (***County of Los Angeles* v. *Commission on State Mandates*** (2003) 110 Cal.App.4th 1176, 1189 citing to ***County of Los Angeles* v. *State of California*** (1987) 43 Cal.3d 46, 56.) "A program is 'new' if the local governmental entity had not previously been required to institute it." (***County of Los Angeles* v. *Commission on State Mandates*** (2003) 110 Cal.App.4th 1176, 1189 citing to ***City of San Jose* v. *State of California*** (1996) 45 Cal.App.4th 1802, 1812.) "State mandates are requirements imposed on local governments by legislation or executive orders." (***County of Los Angeles* v. *Commission on State Mandates*** (2003) 110 Cal.App.4th 1176, 1189 citing to ***County of Los Angeles* v. *State of California*** (1987) 43 Cal.3d 46, 50.)

A statute or executive order that imposes a requirement that is mandated by a *federal law* or regulation and results in costs mandated by the federal government is not an unfunded mandate, unless the statute or executive order mandates costs that exceed the federal mandate. (Govt. Code, § 17556(c), emphasis added.) Subdivision (c) of section 17556 encompasses laws

that are mandated by the *federal constitution*. (**See *San Diego Unified School Dist*. v. *Commission on State Mandates*** (2004) 33 Cal.4th 859, 885 [recognizing school district not entitled to reimbursement to the extent new statute merely implements federal due process law].) However, no specific provision in Government Code section 17556 exempts laws imposing costs to implement the state constitution. (**Contrast** N.J. Const. art. VIII, § 2, ¶ 5(c) [creating exemption for laws or rules or regulations "which implement the provisions of this Constitution"].) Section 17556 does not treat statutes that impose "duties that are necessary to implement, or are expressly included in, a *ballot measure* approved by the voters in a statewide or local election" as subject to the law regarding unfunded mandates." (Govt. Code, § 17556(f), emphasis added.)

"The Legislature has created a set of remedies if a local government claims a violation of section 6." (***Tri-County Special Educ. Local Plan Area* v. *County of Tuolumne*** (2004) 123 Cal.App.4th 563, 571.)* Local government includes district attorney's offices. (**See e.g.**, ***County of San Diego* v. *Commission on State Mandates*** (2018) 6 Cal.5th 196, 203.)

Editor's note:** "[L]ocal governments are not required to implement a program if a court, the Legislature, or the Commission on State Mandates (hereafter, the Commission) has identified the program as a new mandate or a mandate for a higher level of service, and if the Legislature has 'specifically' identified the program as a mandate for which no funding is provided. (Gov. Code, § 17581, subd. (a).) To meet the requirement of being specifically identified by the Legislature, the program must be 'included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.' (Gov.Code, § 17581, subd. (a)(2).) If these conditions are met, the local government is permitted to make its own determination not to implement the mandate." (Tri-County Special Educ. Local Plan Area v. County of Tuolumne*** (2004) 123 Cal.App.4th 563, 571-572.) The Legislature did not "specifically" identify AB 2542 as creating any mandated programs for which no funding was provided.

"[W]hen the Legislature now enacts a statute imposing obligations on a local agency without providing adequate funding to allow the locality to discharge those obligations, the local entity may file a 'test claim' with the Commission. ([Gov. Code,] § 17521; **see *Lucia Mar Unified School Dist*. v. *Honig*** (1988) 44 Cal.3d 830, 833 [alternate citation omitted].) The Commission then decides, after a hearing, whether the statute that is the subject of the test claim under review (i.e., the test claim statute) mandates a new program or an increased level of service and, if so, the amount to be reimbursed. ([Gov. Code,] §§ 17551, 17557.) Either the local agency or the state may challenge the Commission's decision in court by filing a petition

for writ of administrative mandate. ([Gov. Code,] § 17559, subd. (b).)" (***County of San Diego* v. *Commission on State Mandates*** (2018) 6 Cal.5th 196, 202.)

"In addition, after spending funds on state mandated programs, the local government may file a claim for reimbursement with the Commission, whose decision is judicially reviewable. (Gov. Code, § 17559.) If the Legislature refuses to fund a program identified by the Commission as a reimbursable state mandate, the local government may file an action for declaratory relief in 'the Superior Court of the County of Sacramento ... to declare the mandate unenforceable and enjoin its enforcement.' (Gov. Code, § 17612, subd. (c).)" (***Tri-County Special Educ. Local Plan Area* v. *County of Tuolumne*** (2004) 123 Cal.App.4th 563, 572.)

"These avenues for relief from duties imposed by state mandate are exclusive. (***Central Delta Water Agency* v. *State Water Resources Control Bd.*** (1993) 17 Cal.App.4th 621, 641, 21 Cal.Rptr.2d 453.) 'Until [local agencies] have exhausted their administrative remedy before the Commission, [they] cannot know whether the statute imposes a state-mandated cost' (***ibid***.) or whether that cost will be reimbursed pursuant to the Commission's award on a claim. Without first exhausting the administrative remedies, the local agency cannot claim a section 6 violation in defense of its failure to perform its duty. (**See *Central Delta Water Agency*, *supra***, at p. 641.) After a determination by the Commission that reimbursement is due, but only then, may the local government bring a traditional mandamus action or proceed pursuant to Government Code section 17612." (***Tri-County Special Educ. Local Plan Area* v. *County of Tuolumne*** (2004) 123 Cal.App.4th 563, 572–573.)

The argument (which counties may choose not to make) for why AB 2542 imposed an unfunded mandate on county government is the following:

AB 2542 did not provide for any funding to support the costs associated with implementation of sections 745, 1473(f) and 1473.7(a)(3). However, these sections impose new costs on local government, i.e., counties and, in particular, county district attorney offices. These costs can potentially be enormous, especially if courts interpret the discovery obligations imposed on prosecutor's office in an expansive fashion (**see** Pen. Code, § 745(d); this IPG, section V at pp. 119-167) or if courts treat the standard for obtaining an evidentiary hearing as a low barrier (**see** Pen. Code, § 745(d); this IPG, section VI at pp. 168-186). These costs are potentially overwhelming if section 745 is made retroactive.

The Senate Committee on Appropriations analysis of AB 2542 estimated the costs to the state (*assuming retroactivity*) in the following manner:

> Between FY 2009 and FY 2018 courts handled approximately 10.2 million criminal felony, misdemeanor and juvenile delinquency cases. Determining the number of cases that are retroactively eligible is difficult, but if only 1 percent of criminal cases disposed of since FY 2008 apply for habeas relief pursuant to AB 2542, it would translate to 100,000 petitions. Feedback from the courts indicates a general estimate of between three minutes and 15 minutes would be spent to review each petition to determine if it meets the "prima facie" standard for an additional review hearings. For 100,000 petitions, that would equal a workload cost for the courts of between $4.8 million $24 million.
>
> Although there are many variables that influence whether a petition will be able to meet the prima facie standard for an additional review hearing, if only 5 percent of the estimated potentially eligible petitions are granted additional review, it would result in *5,000* additional review hearings that are estimated to take between 30 minutes and 90 minutes per case. This equates to an increased workload cost to the courts of between $2.4 million and $7.2 million.
>
> Additionally, AB 2542 likely would produce additional costs to CDCR to transport incarcerated individuals to and from court for habeas corpus petition hearings. There are many factors that affect the costs of out-of-institution transportation, including each person's escape risk and in-custody behavior, the distance from the person's housing facility to the courthouse, and the pace at which a court moves through its docket. Presuming that two correctional officers with regular hourly wages would transport one person with a total travel and court time of four hours, which is a conservative assumption, this bill would cost the department almost $300 per hearing. If the court and travel time were extended, department costs would rise commensurately. If CDCR is able to transport multiple inmates to a courthouse at one time, the per-incarcerated person costs would be lowered in turn.
>
> With respect to workload cost to the courts related to prospective cases, there were about 681,000 criminal cases disposed of in FY 2018, but factoring in an average of 7 percent decline in the disposition of cases over the past five years, a total universe of loosely 634,000 criminal cases annually would be a more realistic figure for the total number of cases that could be impacted by this bill. If 5 percent (30,000) of these cases resulted in challenges pursuant to AB 2542, at between three minutes and 15 minutes of reviewing time each, it would cost $1.4 million to $7.2 million in additional court workload. If 5 percent of the 30,000 challenges leads to an additional review hearing of between 30 minutes and 90 minutes per hearing, that would result in an additional workload cost to the courts of between $700,000 and $2.2 million. (**See** Sen. Approp. Com., Analysis of Assem. Bill No. 2542 (2019-2020 Reg. Sess.) [August 14, 2020 version].)

For a number of reasons, the Appropriations Committee significantly underestimated the state costs. First, the estimate only calculates the costs assuming that no habeas petitions will be filed by persons who were convicted before 2008. There are many persons in custody who are

serving sentences for crimes committed before 2008. Second, the calculations completely ignore the costs incurred by defendants filing petitions for relief under Penal Code section 1473.7, and since these petitions are not limited to persons in custody, any defendant ever convicted who is no longer in custody would be eligible. (**See** this IPG, section XI-2 at p. 237.) Third, the calculations completely ignore the costs of hearing discovery motions (**see** Pen. Code, §, 745(d); this IPG, section V-2 at pp. 121-122), the potential costs to the courts of providing discovery contained in court files if section 745 is found to require disclosure of that information (**but see** this IPG, section V-4-A at pp. 131-132) and the costs of handling in camera hearings for review of discovery that is subject to a privacy right or privilege and to determine if redaction is proper (**see** this IPG, section V-8, 9, and 10 at pp. 155-163). Fourth, the estimate of 30-90 minutes as the length of an average evidentiary hearing pursuant to section 745(c) is inconsistent with reality – given that the hearing contemplates the use of "statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses" not to mention the potential testimony of a court appointed expert. (**See** Pen. Code, § 745(c)(1); this IPG, section VI at pp. 168-186.)

Notwithstanding the unduly low estimate, even using the assumptions built into how the Appropriations Committee calculated state costs in assessing *local* costs for purposes of determining whether section 745 imposes an unfunded mandated, the costs imposed on local prosecutor's offices are potentially extraordinary (without retroactivity) and crushing (with retroactivity). The time and resources used in responding to all the new claims will vary depending on the nature of the claim. However, consider the following:

Assume a defendant is charged with assault with a deadly weapon and/or great bodily injury and seeks relevant discovery bearing on a claim made pursuant to Penal Code section 745(a)(3) that members of defendant's cognizable class were disproportionately charged with less serious but similar crimes like simple assault or battery in comparison to all other groups. Under any objectively reasonable approach, this comparison would require knowledge about the circumstances underlying the crimes purportedly based on the same or similar conduct and relevant characteristics of the defendants charged with those crimes such as their criminal history. Otherwise, the comparisons are meaningless. (**See** this IPG, sections IV-D and E at pp. 68-87.) With that in mind and depending on how far back in time a court decides it needs to go for comparison purposes, relevant evidence to the defense motion would necessarily require the disclosure of every criminal case ever filed in a county (for the comparison time

period) for assault with a deadly weapon or great bodily injury, simple assault, or the various crimes of battery. (**See** this IPG, section V-3-B at pp. 123-125.)

This would involve, at a minimum, obtaining all the case number dockets for persons charged with the same or similar offense (even assuming that police reports relating to persons arrested but not charged with the same or similar crime would not be considered relevant). Depending on whether the information has even been input into a computer system and on how difficult a search would be to capture the information, this could take anywhere from 30 minutes in county that has the data readily available to weeks in a county that has not compiled the data at all or has digitized only more recent data. Once those case files were identified, the files and information about the criminal history of the defendants would have to be pulled. Moreover, each file would have to be personally reviewed and redacted to comply with the state constitutional privacy laws and privileges that protect the victims as well as the defendants whose criminal records are confidential. (**See** this IPG, sections V-5-iv at pp. 144-148; V-8 at pp. 155-159; V-9 and V-10 at pp. 160-163.) If some of these records are sealed (e.g., juvenile records), additional costs in filing motions will accrue. (**See** this IPG, section V-4-B at p. 133.) Because these files can contain hundreds of pages and involve hours of videos, the review and redaction could take days.

Nevertheless, for purposes of illustration, assume each file only takes an hour to review and redact. In Santa Clara County alone in one year (2019) there were 372 separate counts of assault with a deadly weapon on at least 283 separate defendants; 326 separate counts of assault with great bodily injury on at least 213 separate defendants, 1, 473 counts of battery on at least 991 different defendants; and 84 counts of assault on 36 different defendants. That discovery would involve 1,466 different files. Even if each file could be identified, located, reviewed, and redacted to comply with state constitutional requirements in an hour's total time, that would require a prosecutor (and/or a paralegal) working approximately 8 months to handle the discovery request – at a cost of well over $100,000 in Santa Clara County just to go through the files for a single year. And that figure does not include the additional costs of preparing for an evidentiary hearing, litigating the motion, or hiring statistical experts.

Now add to the cost of handling new motions the cost of having to respond to 100,000 habeas petitions, 100,000 discovery requests, 100,000 ex parte hearings, and 5,000 evidentiary hearings involving cases dating back decades, and it is easy to see how the amount of resources local government will have to expend becomes debilitating.*

***Editor's note:** To the extent the costs associated with a section 745 motion overlap with the costs of enforcing the equal protection provisions of the federal Constitution, those costs potentially would not be recoverable.

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NEXT EDITION - ONE OF THE FOLLOWING: THE IMPACT OF THE INTRODUCTION OF INADMISSIBLE EVIDENCE (INADVERTENTLY OR NOT) AND HOW TO MITIGATE THE DAMAGE; THE IMPACT OF *HUMPHREY* ON BAIL HEARINGS; THE LATEST DEVELOPMENTS IN SEARCH AND SEIZURE; OR A PRINT ONLY EDITION ON PROTECTING CONFIDENTIAL INFORMATION AND INFORMANTS.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.