The RJA On Appeal Part II:
Implicit Bias and Language-Based Claims

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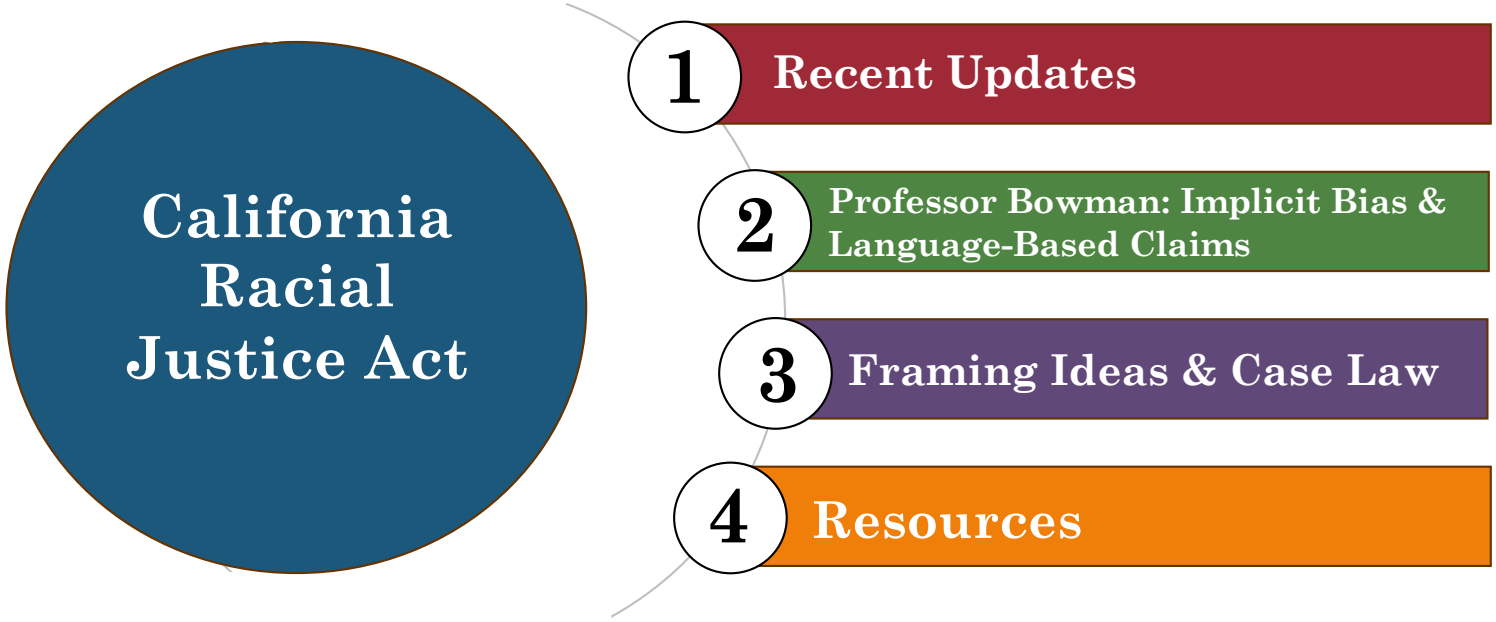
Overview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Recent Updates

People v. Lashon (2023) 95 Cal.App.5th 136
Ordered Depublished (Nov. 15, 2023)

First Appellate District, Division Three directed to vacate its decision and reconsider in light of Assembly Bill No. 1118

On direct appeal, defendant argued implicit racial bias by the trial judge violated the CRJA under Penal Code section 745, subd. (a)(2). Although no contemporaneous objection in the trial court, the defendant claimed the forfeiture rule did not apply in part because trial counsel could not object under the circumstances or an objection would have been futile.

Division Three of the First Appellate District deemed the claim forfeited.

Defendant's petition for review was granted on November 15, 2023, with the California Supreme Court transferring the matter back to the Court of Appeal "with directions to vacate its decision and reconsider the cause in light of Assembly Bill No. 1118."

The CSC also ordered the opinion depublished thus it is no longer citable.

Stay & Remand

PC 745(b):

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

Legislative history suggests broad application and stay procedure should be available for all RJA claims:

> "In other cases already on appeal, counsel may identify an RJA issue that requires additional evidence outside the record and may wish to pursue this claim before the appeal is decided. In these cases, it is more efficient to stay the appeal and remand the case to the trial court for an RJA motion to be filed rather than require a new habeas petition." (AB 1118, Senate Committee on Public Safety June 6, 2023.)

Advantages of filing for a stay and remand under new PC 745(b) include:

1 No successive habeas concerns

Won't preclude client's chance to develop other claims in future habeas.

2 Will allow PC 745(b) motion to be made in superior court

Chance to fully litigate claim, seek discovery, present additional evidence (experts, statistics, etc.).

Denial of that motion can then be challenged in pending appeal. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 729 ["In those cases where a stay is granted and . . . the petition is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision."])

3 No Need to Expand Appointment

May be advantageous in COA districts that are habeas-hostile.

4 Timing Considerations

May be most expeditious path to relief.

- With prior *Awad* stays, courts sometimes act quickly.

BUT: Some stays drag on for months as hearing gets repeatedly continued in trial court; appellate counsel has to keep COA updated with status.

Caution when requesting a stay: In a case currently being litigated in the First District Court of Appeal, a request for a stay and remand under AB 1118 was denied.

The Attorney General opposed the request on the grounds that the defendant had not established the requisite good cause because: (1) the defendant had plenty of time to litigate RJA claims in the months prior to his sentencing; and (2) *Awad* was inapposite because unlike the *Awad* defendant, a defendant seeking a remand for RJA purposes did not face a "Hobson's choice" because the defendant had other options – writ of habeas corpus for example.

Still consider filing a request for a stay and remand, but support your requests with as much supporting authority and documentation as possible to establish good cause for the request."

Prejudice [required for (a)(1) and (a)(2) claims only]

Section 745, subdivision (k) states that a prejudice analysis is only required in pre-January 1, 2021 judgments

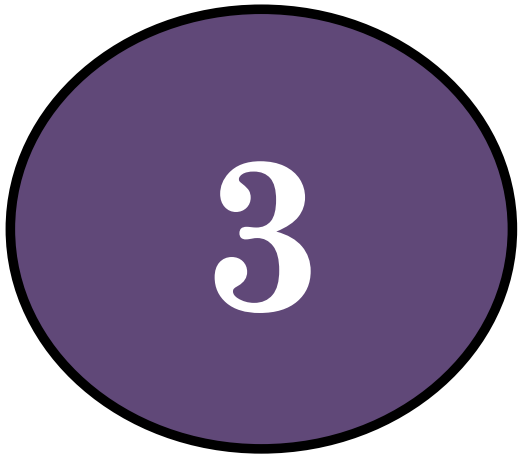
BUT: be prepared to discuss prejudice anyway

- Federalized claims
- IAC claims (but see, *Simmons*)
- Potentially pre-2021 judgments, but post-2021 resentencings

Ensuring an adequate record for appeal

- Make a record in the trial court
- On appeal
  - Voir Dire
  - Jury Questionnaires
  - Opening Statements
  - Settle the record

Implicit Bias & Language-Based Claims



Framing Ideas & Case Law

PC 745(h)(4): "Racially discriminatory language" defined

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

Arguing Language-Based Claims on Appeal

1

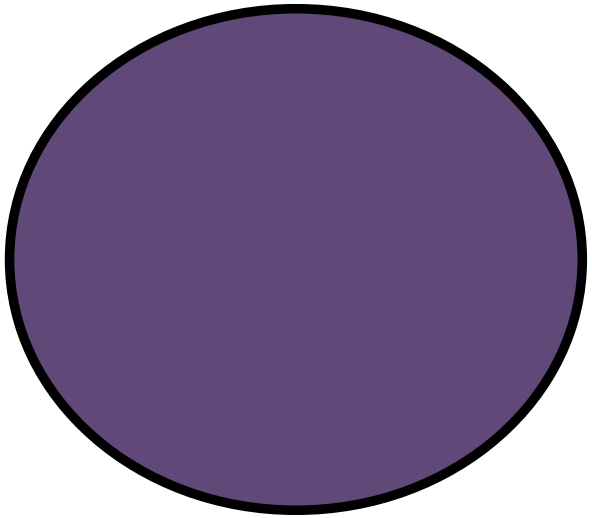
Identify the language (inc. circumstances around its utterance(s))

2

Explain why (using social science research, law reviews, etc.) the language is likely to invoke stereotypes

3

Argue why, in the context of the case (including the facts of the case, the use of rhetorical techniques such as repetition, links to the credibility determination, etc.) an objective observer would (should?) conclude that the language implicitly or explicitly appeals to racial bias



Lean in to the Legislation

Assembly Bill No. 242 – 2019 Cal Stats. ch. 418

Requiring Judicial Council to develop training on implicit bias

A.B. 242

(b) It is the intent of the Legislature to ameliorate bias-based injustice in the courtroom.

AB 242, 2019 Cal Stats. ch. 418

(a) The Legislature finds and declares all of the following:

(1) All persons possess implicit biases, defined as positive or negative associations that affect their beliefs, attitudes, and actions towards other people.

(2) Those biases develop during the course of a lifetime, beginning at an early age, through exposure to messages about groups of people that are socially advantaged or disadvantaged.

(3) In the United States, studies show that most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent.

(4) People also have negative biases toward members of other socially stigmatized groups, such as Native Americans, immigrants, women, people with disabilities, Muslims, and members of the LGBTQ community.

(5) Judges and lawyers harbor the same kinds of implicit biases as others. Studies have shown that, in California, Black defendants are held in pretrial custody 62 percent longer than White defendants and that Black defendants receive 28 percent longer sentences than White defendants convicted of the same crimes.

(6) Research shows individuals can reduce the negative impact of their implicit biases by becoming aware of the biases they hold and taking affirmative steps to alter behavioral responses and override biases.

A.B. 2542 (2020 Cal Stats. ch. 317)
The California Racial Justice Act of 2020

A.B. 2542

(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)).

The Court in *Young v. Superior Court* (2022) 79 Cal.App.5th 138 recited the Legislative findings that:

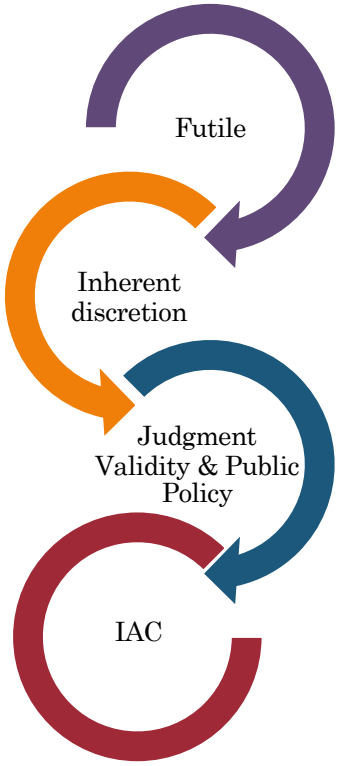
"[e]ven though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms.... Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish." (Assem. Bill No. 2542 (2019–2020 Reg. Sess.) § 2, subd. (c) (Assembly Bill 2542).) "***Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system***." (Assem. Bill 2542, § 2, subd. (i); *Young, supra* 79 Cal.App.5th at 149, emphasis added.)

The Legislature's declarations and findings expressly repudiate certain federal authority [See A.B. 2542, 2020 stats. ch. 317]

- "§2, subd. (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)).

- §2, subd. (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)).

Be prepared to address forfeiture if no RJA-specific objection below.



Objection would have been futile, especially if discriminatory act was by trial court or defense counsel. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Court has the **inherent discretion** to reach the issue. (*In re P.O.* (2016) 246 Cal.App.4th 288, 297–98, *People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.)

Claim **"fundamentally affects the validity of the judgment** [citation], [and] . . . **important issues of public policy** are at issue [citation]." (*In re J.C.* (2017) 13 Cal.App.5th 1201, 1206.)

Backup **ineffective assistance of counsel** argument, as in *Simmons*.

Remedy

- Straight reversal under the RJA if a prima facie case made
  - AB1118 – based on the record
  - If fully litigated below
- At a minimum, request reversal and remand for a new (or initial) RJA hearing
- Be creative

Framework Idea #1a - cognizable

Prosecutorial statements

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

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

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

A. Argument summary.

B. The Racial Justice Act

C. Standard of review: de novo

D. The proceedings in the trial court

E. Cognizability [Forfeiture discussion]

F. The record demonstrates a prima facie case that the prosecutor violated the RJA.

G. The prosecutor's comments violated the Fourteenth Amendment to the United States Constitution

H. Prejudice is not required under the RJA

I. If a prejudice analysis applies, the error was prejudicial under state and federal law

J. Conclusion: Remedy

Framework Idea #1b – forfeited/backup IAC

Prosecutorial statements

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

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

Straight IAC claim

II. Appellant was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments if defense counsel's failure to object to the prosecutor's statements under the RJA forfeited the issue.

A. Argument summary.

B. Legal principles (IAC/Racial Justice Act)

C. The proceedings in the trial court

D. Defense counsel was ineffective because the record demonstrates a prima facie case that the prosecutor violated the RJA.

E. Prejudice is not required under the RJA [cite to *Simmons*]

F. If a prejudice analysis applies, the error was prejudicial

G. Conclusion: Remedy

Framework Idea #2

Prosecutorial statements

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

RJA motion filed and denied before judgment

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

A. Argument summary

B. The Racial Justice Act

C. The proceedings in the trial court

D. The record demonstrates a prima facie case that the prosecutor used racially discriminatory language or otherwise exhibited bias

E. The trial court should have vacated appellant's conviction or least held an evidentiary hearing

F. The prosecutor's comments violated the Fourteenth Amendment to the United States Constitution and were prejudicial

G. Conclusion: Remedy

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

The Violation:

The prosecutor cross examined the defendant about his skin tone; asked him to confirm that he was light skinned; and noted that "sometimes people mistake you for something other than Black."

During rebuttal, the prosecutor suggested the defendant was lying based on his skin tone and "ethnic presentation."

Trial counsel does not raise RJA claim in motion for new trial held three days after the effective date of the RJA.

Client gets life sentence for attempted murder.

The Appeal

Appellant argues the prosecutor violated PC 745(a)(2), and that trial counsel was ineffective for failing to raise the violation at sentencing.

The Attorney General concedes the error and agrees with appellant that the court could not apply harmless error standard.

&

The Holdings

Violation of PC 745(a)(2)

Prejudicial Ineffective Assistance of Counsel

RJA Violation = Structural Error

No Violation of the California Constitution's Separation of Powers Clause

Language-Based Unpublished Cases
People v. Johnson (2022 Cal.App.Unpub. LEXIS 7947)

The Alleged Violation:

Human trafficking case.

Criminal profile evidence was admitted under section 1107.5 to supposedly assist the jury in understanding the effects of trafficking on victims. The expert's related testimony included the terms "gorilla pimp" and suggested defendants were guilty because they acted in a manner consistent with certain categories of typified "pimp" behavior and which aggravated implicit biases and reinforced prejudices of a "stereotypical Black pimp victimizing innocent and vulnerable, often [W]hite, young victims." The defendants argued that the prosecutor used the evidence to link him to the stereotypical portrait of a sex trafficker, which in turn stemmed from a racial trope and influenced the verdict.

The Appeal

Co-appellants argued that the trial court's admission of certain expert witness testimony was founded on stereotypical "profile evidence" infused with racial bias requiring reversal under the RJA. Appellants argued the evidence violated PC 745(a)(2), and that trial counsel was ineffective for failing to object.

Among other arguments, the Attorney General argued that even if the RJA applied to the case, there would be no violation because "this was not a trial marked by racial overtones" and the jury found the defendant guilty of sex trafficking "by virtue of the overwhelming evidence of his guilt."

The Holdings

"Isolated use" of the term in the context of the expert's testimony.

While the court did not "condone" the language used and felt some of the language identified "raises concerns," the court found no RJA violation.

In a footnote, the court acknowledged a recent decision out of Washington state where the court reversed a conviction based on the prosecutor's introduction at trial of the concept of "gorilla pimp." (*State v. McKenzie* (Wash. Ct. App. 2022) 21 Wash.App.2d 722, 723.)

Language-Based Unpublished Cases
People v. Nieto (2023 Cal.App.Unpub. LEXIS 3802)

The alleged violation: prosecutor analogizing to defendant as a predatory animal

Reached claim on the merits, but agreed with the AG that "[t]o the extent the prosecutor's comments implied that [Nieto] was a human predator, that was a fair description of [the] defendant [based on his conduct]. . . ."

"[W]e conclude that referencing predatory behaviors, without more, does not indicate racial animus sufficient to support a violation of the CRJA. Of course, we recognize that while referring to predatory behavior is generally race-neutral, under certain circumstances such language could be used to invoke racist tropes."

Appears to apply de novo review to 745 (a)(2) claim.

"Thus, while we join the call for courts and counsel to 'be aware of explicit and implicit racial biases' and 'to be vigilant in their efforts to ensure compliance with the Racial Justice Act and the provision of fair trials' (*id.* at p. 96 [maj. opn.]), after thoroughly reviewing Nieto's trial we reject his CRJA claim."

Language-Based Unpublished Cases
People v. Weathersby (2023 Cal.App.Unpub. LEXIS 1361)

The alleged violation: prosecutorial misconduct during closing argument

Defendant argues the prosecutor committed misconduct by referring to him as a "monster" during closing argument, which dehumanized him in front of the jury, and that the word "monster" has "racial overtones" which violated section 745, subdivisions (a)(1) and (a)(2).

The AG argued forfeiture for not objecting or requesting an admonition below, and that in any case there was no error or prejudice.

The court agreed with the AG. Court relied on precedent to support their holding. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 180 ["[c]losing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence"]; *People v. Farnam* (2002) 28 Cal.4th 107, 168 [no misconduct where "the prosecutor referred to defendant as 'monstrous,' 'cold-blooded, vicious, and a 'predator' "]; *People v. Harrison* (2005) 35 Cal.4th 208, 246, [referring to defendant as "evil" was within the permissible scope of closing argument].)

Not prejudicial because "these brief and isolated alleged epithets could not have been prejudicial under any standard in light of the record and the overwhelming evidence of guilt." (*Id.* at p. 35.)

Language-Based Unpublished Cases
People v. Mejia-Picazo (2023 Cal.App.Unpub. LEXIS 3725)

The alleged violation: prosecutorial misconduct adducing improper evidence

During the prosecution's examination of a detective, the prosecutor asked him whether he engaged in small talk, in English, with defendant during the booking process. The witness responded affirmatively, and opined defendant understood English because they were able to communicate. In clarifying that defendant spoke English, the prosecutor elicited testimony that defendant had been in the United States for over 10 years. Defense counsel objected.

The trial court initially undertook a lengthy monologue explaining to the jury why such testimony was improper. The trial court subsequently denied the defense's request for a mistrial, but expressed significant concern about the prosecutor's conduct and told the jury to disregard all that they had heard. An RJA claim was raised on appeal.

Held: (1) assuming the prosecutor erred, there was no prejudice because "any harm was remedied by the trial court's admonishment to the jury. The court gave a prompt and thorough admonition, identifying for the jury the exact material at issue, explaining why it was improper, and instructing them to disregard all testimony on the issue"; (2) RJA claim forfeited by defense counsel's failure to object or bring a motion on that ground.

A useful Pre-RJA case:
***People v. Thompson* (2022) 83 Cal.App.5th 69**

The Appeal

Defendant argued that during jury voir dire the prosecutor committed misconduct and violated his Sixth and Fourteenth Amendment rights when he told the prospective jurors part of the fable of the scorpion and the frog because it was character argument and racially discriminatory. (See *People v. DelRio* (2020) 54 Cal.App.5th 47, 54 ["There is a fable about the frog and the scorpion. It stresses the scorpion will sting, no matter what, because that is in its nature"].)

The Holding

Majority opinion: forfeited and due to absence of a record establishing the breadth of juror familiarity with the fable, it would be speculative to conclude "the jury construed or applied any of the remarks in an objectionable fashion."

A useful Pre-RJA case:
***People v. Thompson* (2022) 83 Cal.App.5th 69**

Majority Opinion

"[B]ecause the recitation of the fable was incomplete, and absent a record establishing the breadth of juror familiarity with the fable, it would be mere speculation whether 'there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion.' (Citation.) Nevertheless, courts and counsel must be aware of explicit and implicit racial biases. 'The Legislature has acknowledged that all persons possess implicit biases [citation], that these biases impact the criminal justice system [citation], and that negative implicit biases tend to disfavor people of color.' (Stats. 2020, ch. 317, § 2, subd. (g).) We strongly encourage judicial officers and counsel to be vigilant in their efforts to ensure compliance with the Racial Justice Act and the provision of fair trials."

Concurring Opinion, Justice Lie

"What this trial court likely did not then perceive, absent more explicit argument by defense counsel, was that deployment of the fable in the trial of a Black man—particularly one charged with a violent and ostensibly motiveless crime—echoed a durable racist trope of the "other" as intrinsically predatory, subhuman in its irrationality, and prone to repay trust with treachery …

Explicit reference to Thompson's race was likewise unnecessary in this context: before the presentation of evidence or even opening statement, the prospective jurors had no foundational facts from which to infer anything about Thompson's nature; what they knew of him at that point, beyond the charges of which he was presumed innocent, was that he was Black."

Another pre-RJA example:
People v. Sta Ana (2021) 73 Cal.App.5th 44

A clinical psychologist testified as an expert on "forensic psychology, specifically with respect to suggestibility and compliance" and testified as to his conclusion following an examination of the defendant that included an IQ test. After counsel finished their questioning, the court asked the following hypothetical: "The test, does it take into consideration ethnic background, or maybe nationality? Say, for example, the same questions asked of a white male of his age that grew up in the City of Boston versus someone that grew up in a rice pa[dd]y, in some field somewhere in a different count[r]y? Would it be answered the same way?"

People v. Sta Ana (2021) 73 Cal.App.5th 44

Appellate Challenge: Judicial Bias

Held: "We do not condone the trial court's language choice, but we cannot on this record conclude that 'the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' (Citation.) It appears that the court's problematic example was intended, perhaps ironically, to better understand whether the tests might contain cultural bias, or could control for possible bias in some way. The trial court's misguided word choice was mitigated by the witness's dexterous pivot to the effects of the Spanish language and the educational systems of Spain, Mexico and Argentina on the test answers. The expert's response simultaneously shifted the focus from inferences about defendant's background derived from stereotypes and addressed the issue of cultural bias in the tests themselves.

People v. Garcia (2022) 85 Cal.App.5th 290

Denial of a request for a continuance to seek discovery under the RJA:

Defense counsel had less than a week after she was appointed to familiarize herself with the case, prepare the sentencing brief, and marshal facts for and prepare a motion for discovery under the CRJA. Was able to provide some information, but no enough specific to the case or county. (See § 745, subd. (a)(1)–(4).)

Held: Based on the record, there was no indication whether and to what extent such county-level information was likely to have been readily available to counsel in the short time frame between her appointment and the sentencing hearing.

The Appeal

Defendant's first appeal was remanded for resentencing and this appeal followed that resentencing. Appellant argued that it was error for the trial court to deny the request for a continuance in order for defense counsel to develop the factual record to establish an RJA violation.

The Attorney General contended the trial court reasonably denied the continuance request because defense counsel was ready to proceed on the issues properly before the court, and the court's jurisdiction was strictly limited to the instructions given by this court on remand from the prior appeal.

&

The Holdings

Standard of review: abuse of discretion

Prejudice: found prejudicial under any standard based on deprival of opportunity to develop record.

Practice note: This is an excellent opinion in support of the argument that RJA claims may be raised at resentencing. (See *id*. at p. 298.)

Procedural RJA Issues:
Young v. Superior Court (2022) 79 Cal.App.5th 138

Denial of Discovery under Section 745, subd. (d):

To establish good cause for discovery under the RJA, "a defendant is required only to advance a plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case"

"Plausible justification" is even more relaxed than the "relatively relaxed" *Pitchess* standard

Court must weigh *Alhambra* factors to decide scope of disclosures (i.e., whether material adequately described, availability, risk of unreasonable delay, undue burden, confidentiality & privacy rights.)

Young cautions: Once a plausible justification is established, it will likely be an abuse of discretion for the court to deny a motion.

Procedural RJA Issues:
UNPUBLISHED: *In re J.S. (2022 Cal.App.Unpub. LEXIS 6253)*

Denial of Discovery under Section 745, subd. (d):

The juvenile court denied a discovery motion, finding the minor, J.S., had not established the good cause required under section 745, subdivision (d). Following the guidance of *Young v. Superior Court* (2022) 79 Cal.App.5th 138, the court concluded that J.S. established the threshold showing of plausible justification for discovery under the Act.

Standard of review: abuse of discretion.

Court notes: once the defendant has established plausible justification for the information sought, it will likely be an abuse of discretion for the court to totally deny the discovery request.

Bottom Line

Counsel should:

1. Conduct holistic appraisal of case, considering strength of RJA claim vs. other claims on appeal, length of sentence, quality of trial court representation (e.g., whether county has strong PD office/conflict panel), etc.

2. Consult with your project.

Resources

Project Point People:

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Resources:

- FDAP's J. Bradley O'Connell's State Habeas Corpus Manual:
- OSPD Sharepoint
- Ella Baker Center for Human Rights – Racial Justice Act Guide: https://ellabakercenter.org/rja-info/

Sources [many thanks in particular to William Safford, Esq. & Joseph Doyle, Esq.]

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