
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1118 **Hearing Date:** June 6, 2023
Author: Kalra
Version: May 18, 2023
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Criminal procedure: discrimination*

HISTORY

Source: American Friends Service Committee
Ella Baker Center for Human Rights
California Coalition for Women Prisoners
Californians United for a Responsible Budget
Coalition for Humane Immigrant Rights
Initiate Justice
NextGen

Prior Legislation: AB 256 (Kalra), Ch. 739, Stats. 2022
AB 2542 (Kalra), Ch. 317, Stats. 2020

Support: Alliance for Boys and Men of Color; Anti-Recidivism Coalition; Asian Prisoners Support Committee; California Alliance for Youth and Community Justice; California Catholic Conference; California Innocence Coalition; California Public Defenders Association; Center on Juvenile and Criminal Justice; Communities United for Restorative Youth Justice; Fair Chance Project; Fresno Barrios Unidos; John Burton Advocates for Youth; League of Women Voters of California; Legal Services for Prisoners with Children; San Francisco Public Defenders Association; Showing Up for Racial Justice; Silicon Valley De-Bug; Sister Warriors Freedom Coalition; Smart Justice California; The W. Haywood Burns Institute

Opposition: None known

Assembly Floor Vote: 65 - 0

PURPOSE

The purpose of this bill is to clarify that a defendant can raise a claim alleging a violation of the California Racial Justice Act (CRJA) on direct appeal, as specified.

Existing law establishes the CRJA which prohibits the state from seeking or obtaining a criminal conviction or seeking, obtaining or imposing a sentence on the basis of race, ethnicity, or national origin. (Pen. Code, § 745.)

Existing law provides that a violation of the CRJA is established if the defendant proves, by a preponderance of the evidence, any of the following:

- The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin;
- 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, except as specified;
- 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;
- 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; or,
- 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. (Pen. Code, § 745, subd. (a).)

Existing law provides that the CRJA applies to all cases in which the judgment is not final. (Pen. Code, § 745, subd. (j)(1).)

Existing law also provides that the CRJA shall also apply retroactively, as follows:

- a) Commencing January 1, 2023, to all cases in which, at the time of the filing the petition raising a claim of a violation of the CRJA, the petitioner is sentenced to death or to cases in which a motion to vacate a judgment is filed because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final;
- b) Commencing January 1, 2024, to all cases in which, at the time of the filing of the petition raising a claim of a violation of the CRJA, the petitioner is currently serving a sentence in the state prison or in a county jail on a realigned felony, or committed to DJJ for a juvenile disposition, regardless of when the judgment or disposition became final;

- c) Commencing January 1, 2025, to all cases raising a claim of a violation of the CRJA in which judgment became final for a felony conviction or juvenile disposition that resulted in commitment to DJJ on or after January 1, 2015; and,
- d) Commencing January 1, 2026, to all cases raising a claim of a violation of the CRJA in which judgment was for a felony conviction or juvenile disposition that resulted in commitment to DJJ, regardless of when the judgment or disposition became final. (Pen. Code, § 745, subd. (j)(2)-(4).)

Existing law states that for petitions (motions) that are filed in cases for which judgment was entered before January 1, 2021, and only in those cases, if the petition is based on exhibited bias or animus or the use of discriminatory language, as provided, the petitioner shall be entitled to relief as specified, unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment. (Pen. Code, § 745, subd. (k).)

Existing law states that a writ of habeas corpus may be prosecuted after a judgment has been entered, based on evidence of a violation of the CRJA. Incorporates the same timelines applicable CRJA motions based on finality of judgment and nature of the case. (Pen. Code, § 1473, subd. (f).)

Existing law states that if the petitioner already has a habeas corpus petition on file in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained or imposed in violation of the CRJA. (Pen. Code, § 1473, subd. (f).)

Existing law requires the petition to state if the petitioner requests appointment of counsel, and the court to appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of the CRJA or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. (Pen. Code, § 1473, subd. (f).)

Existing law states that if a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of the CRJA, the trial court shall hold a hearing. A motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court. (Pen. Code, § 745, subd. (c).)

Existing law provides that at the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of the CRJA has occurred. (Pen. Code, § 745, subd. (c)(1).)

Existing law states that the defendant has the burden of proving a violation of the CRJA by a preponderance of the evidence; the defendant does not need to prove intentional discrimination. (Pen. Code, § 745, subd. (c)(1).)

Existing law states that before a judgement has been imposed, if the court finds by a preponderance of evidence a violation of the CRJA, the court may impose any of the following remedies:

- Declare a mistrial, if requested by the defendant;
- Discharge the jury panel and empanel a new jury;
- If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce more or more charges. (Pen. Code, § 745, subd. (e)(1).)

Existing law states that when a judgement has been entered, if the court finds that only the sentence was sought, obtained or imposed in violation of the CRJA, the court shall vacate the sentence, find that it is legally invalid and impose a new sentencing, but shall not impose a sentence greater than that previously imposed. (Pen. Code, § 745, subd. (e)(2)(B).)

Existing law prohibits the imposition of the death penalty on a defendant when the court finds that there has been a violation of the CRJA. (Pen. Code, § 745, subd. (e)(3).)

Existing law clarifies that the remedies available under the CRJA do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law. (Pen. Code, § 745, subd. (e)(4).)

Existing law states that the CRJA applies to adjudications and dispositions in the juvenile delinquency system and that its provisions do not prevent the prosecution of hate crimes. (Pen. Code, § 745, subd. (f) & (g).)

Existing law provides the following definitions for purposes of the CRJA:

- “More frequently sought or obtained” or “more frequently imposed” means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.
- “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.
- “Relevant factors,” as that phrase applies to sentencing, means the factors in the California Rules of Court that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions.
- “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.

- “State” includes the Attorney General, a district attorney, or a city prosecutor.
- “Similarly situated” means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant’s conviction history may be a relevant factor to the severity of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence. (Pen. Code, § 745, subd. (h).)

Existing law states that a defendant may file a motion in the trial court, or if judgement has been imposed, may file a petition for writ of habeas corpus or a motion to vacate the conviction or sentence in a court of competent jurisdiction alleging a violation of the CRJA. (Pen. Code, § 745, subd. (b).)

This bill clarifies that a defendant may file a motion or a petition for a writ of habeas corpus or a motion to vacate the conviction or sentence in a court of competent jurisdiction alleging a violation of the CRJA.

This bill specifies that for claims based on the trial record, a defendant may raise a claim alleging a violation of the CRJA on direct appeal from the conviction or sentence. The defendant may also move to stay the appeal and request remand to the superior court to file a motion.

This bill fixes an erroneous cross reference in the CRJA.

COMMENTS

1. Need for This Bill

According to the author of this bill:

In 2020, the Legislature passed AB 2542 (Kalra), the California Racial Justice Act (RJA), to address racial discrimination and bias in criminal proceedings across the state. Acting upon the promise to ensure all Californians have access to the protections of the RJA, last session, AB 256 (Kalra) made the law retroactive with a phased-in timeline for individuals to file petitions.

Under existing law, defendants can file a motion for an RJA violation through a trial court, or if a judgment has been imposed, they can file a petition for a writ of habeas corpus. However, questions have been raised as to whether habeas petitions are the exclusive avenue for a post-conviction RJA challenge or whether individuals can file claims on direct appeal if the violation is apparent on the trial record. In this scenario, the case would be more efficiently decided through the appeals process as opposed to the habeas route, which requires more litigation and judicial resources.

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. This is particularly important for individuals with death sentences, as it can take a decade or more for their direct appeal to be decided. These individuals are also unlikely to have habeas attorneys assigned to them due to the unavailability of qualified counsel, making it nearly impossible to litigate their RJA claims in a timely fashion.

2. Background: CRJA

In *McCleskey v. Kemp*, the United States Supreme Court rejected the defendant's claim that the Georgia capital punishment statute violates the equal protection clause of the 14 Amendment. The defendant argued "that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 291-292.) In support of his claim, the defendant proffered a statistical study indicating that, even after taking into account nonracial variables, defendants who were charged with killing whites 4.3 times more likely to receive the death penalty in Georgia as opposed to killing blacks, and in general black defendants were 1.1 times more likely to receive a death sentence than other defendants. The Court assumed the validity of the study which conducted an extensive examination of over 2,000 murder cases that occurred in Georgia during the 1970s. The study indicated that black defendants who kill white victims have the greatest likelihood of receiving the death penalty. (*McCleskey v. Kemp, supra*, 481 U.S. at p. 287.)

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

The defendant's claim that Georgia's capital sentencing system violates the Eighth Amendment was also rejected by the Court. The Court concluded that the defendant's sentence was not disproportionate to other death sentences imposed in the state and the fact that the capital sentencing statute gives jurors discretion does not make the application of the law arbitrary and capricious because focused discretion is fundamental in the criminal justice system. (*Id.* at p. 311-312.)

The Court acknowledged that biased decision making may affect sentencing. (*McCleskey v. Kemp, supra*, 481 U.S. at p. 309.) However, the Court suggested that the legislature, not the judiciary, was the proper branch to engineer remedies to these systemic problems. (*Id.* at p. 319.)

In response, the Legislature passed AB 2542 (Kalra), Statutes of 2020, the CRJA, which allows a defendant to seek relief because their case was impacted by racial bias. This Act allows racial bias to be shown by, among other things, statistical evidence that convictions for an offense were more frequently sought or obtained against people who share the defendant's race, ethnicity or national origin than for defendants of other races, ethnicities or national origin in the county

where the convictions were sought or obtained; or longer or more severe sentences were imposed on persons based on their race, ethnicity or national origin or based on the victim's race, ethnicity or national origin. Racial bias may also be shown by evidence that a judge or attorney, among other listed persons associated with the defendant's case, exhibited bias towards the defendant, or, in court and during the trial proceedings, used racially discriminatory language or otherwise exhibited bias or animus, based on the defendant's race, ethnicity or national origin. The Act does not require the discrimination to have been purposeful or to have had a prejudicial impact on the defendant's case.

As originally enacted, the CRJA applied only to judgments of conviction occurring on or before January 1, 2021. AB 256 (Kalra), Chapter 739, Statutes of 2022, created a timeline for retroactive application of the CRJA. AB 256 made additional substantive, technical, and clarifying changes. These changes included imposing a standard of prejudice for certain petitions (i.e., motions) filed in cases in which the judgment was entered before January 1, 2021. In that subset of cases, in particular, if the petition (motion) is based on exhibited bias or animus or the use of discriminatory language, the petitioner would be entitled to relief unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment. (Pen. Code, § 745, subd. (k).)

This bill would make additional clarifying changes to the CRJA. It would specify that a CRJA claim based on the trial record may be raised on direct appeal from the conviction or sentence, not just in a habeas petition. (*In re Carpenter* (1995) 9 Cal.4th 634, 646 [“Appellate jurisdiction is limited to the four corners of the record on appeal . . .”].) This bill would also clarify that the defendant/appellant may move to stay the appeal and request remand to the superior court to file a CRJA motion. This may be necessary to permit the trial court to rule on the claim in the first instance, and to allow the parties to fully litigate the issue. (See *Gray I CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897 [“[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. Thus, we ignore arguments, authority and facts not presented and litigated in the trial court”] (citation and quotations omitted); see also *People v. Welch* (1993) 5 Cal.4th 228, 237 [“Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”].)

Generally, a trial court loses jurisdiction once an appeal is filed. But in other post-conviction relief contexts, stays and remands have been permitted by the courts – for example to file a petition to vacate a felony murder conviction and be resentenced under SB 1437 (Skinner), Chapter 1015, Statutes of 2018. (See *People v. Martinez* (2019) 31 Cal.App.5th 719, 729 [“A Court of Appeal presented with such a stay request and convinced it is supported by good cause can order the pending appeal stayed with a limited remand to the trial court for the sole purpose of permitting the trial court to rule on a petition under section 1170.95.”].)

This bill would also clarify that a CRJA motion does not have to be filed during trial, in particular.

3. Recent CRJA Rulings

In 2021, a defendant who had been charged with possession of a controlled substance for sale filed a motion to compel disclosure of relevant data pursuant to the CRJA, including all individuals against whom the same charges had been filed in the previous 5 years; police reports

from the charges in those cases; the disposition of those cases; individuals against whom the district attorney declined to prosecute for the same charges; the sentencing of those cases; and criminal history of each defendant in those cases. (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 145-146.) In order to establish good cause for this information, the defendant cited statewide data showing that Black drivers are more likely than drivers of other races to be subject to a police traffic stop and vehicle search. (*Ibid.*) The trial court denied the defendant's discovery motion. The appellate court disagreed and held in order to establish good cause for discovery under CRJA, a defendant is required only to advance a plausible factual foundation, based on specific facts, that a violation of the CRJA "could or might have occurred" in his case. (*Id.* at p. 159.)

In 2022, a judge in Contra Costa County ruled that the prosecution's use of rap lyrics against two black defendants injected racial bias into the criminal trial in violation of the CRJA and ordered a new trial. Both defendants had been convicted of murder in 2017 and subsequently challenged their convictions questioning the use of rap lyrics and Facebook posts at trial. The court, citing expert testimony, found that "whether purposefully or not, the prosecution's use of their rap lyrics as evidence of their involvement in the killing and gang membership 'premiered their convictions on racially discriminatory evidence.' . . . 'It primed the jurors' implicit bias regarding negative character evaluations of African American men as rap artists and as being associated" with criminal behavior.'" (Michael Levensen, Judge Overturns Murder Convictions, Citing Use of Rap Lyrics at Trial, NY Times (Oct. 4, 2022) < <https://www.nytimes.com/2022/10/04/us/california-racial-bias-gary-bryant-diallo-jackson.html> > [as of May 30, 2023].)

Last month, another judge in Contra Costa County dismissed gang enhancements against four defendants under the CRJA finding that county prosecutors have disproportionately targeted Black people with special circumstances gang enhancements which authorizes a sentence of life in prison without parole. Using data from prosecutors and defense attorneys, the court found that the data showed that Black people were from six to eight percent more likely to be charged with special circumstance gang enhancements than people who weren't Black. The enhancements were dismissed but the prosecution may continue to prosecute the underlying counts of murder and conspiracy. (Nate Gartrell, *Judge Finds Contra Costa DA's Filing Practices are Racist*, Mercury News (May 19, 2023) < <https://www.mercurynews.com/2023/05/19/judge-finds-contra-costa-das-gang-filing-practices-are-racist-dismisses-special-circumstances-charges-in-murder-case/> > [as of May 30, 2023].)

4. Argument in Support

According to NextGen California, a co-sponsor of this bill:

In 2020, the Legislature passed AB 2542 (Kalra), the California Racial Justice Act (RJA), which established a process for individuals to address harms caused by racial discrimination and bias in criminal proceedings. Questions have been raised as to whether habeas petitions are the exclusive avenue for a post-conviction RJA challenge or whether individuals can file claims on direct appeal if the violation is apparent on the trial record. In this scenario, the case would be more efficiently decided through the appeals process as opposed to the habeas route, which requires more litigation and judicial resources. 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 will enact several narrow, technical reforms to ensure that the basic civil rights protections provided by the RJA can be accessed in an efficient and effective manner. Specifically, it clarifies that RJA claims can be raised on appeal, or, if additional evidence is needed, permits individuals to request a stay of an appeal and remand to the trial court to file a motion. It also clarifies that a case need not be set for trial to file an RJA motion.

-- END --