No. A162850

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

CLEMON YOUNG JR.,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Parties in Interest.

Appeal from the Superior Court, County of Solano

The Honorable Jeffrey C. Kauffman

Superior Court Case No. FCR347170

APPLICATION TO FILE AMICI CURIAE BRIEF

and

[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court, Amici certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: September 9, 2021

By: *<u>/s/ Emi MacLean</u>*
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APPLICATION TO FILE AMICI CURIAE BRIEF

HON. JIM HUMES, ADMINISTRATIVE PRESIDING JUSTICE OF THE FIRST DISTRICT COURT OF APPEAL:

Pursuant to California Rules of Court, Rule 8.200(c), proposed amici curiae American Civil Liberties Union of Northern California ("ACLU-NC") and Equal Justice Society ("EJS"), collectively "Civil Rights Amici," respectfully request leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Petitioner.

The ACLU-NC is a regional affiliate of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. For decades, the ACLU-NC has advocated to advance racial justice for all Californians. The ACLU-NC has participated in cases, both as direct counsel and as amici curiae, involving the enforcement of constitutional guarantees of equal protection and due process for people of color, including in connection with harms resulting from their involvement with the criminal legal system.

The EJS is a national civil rights nonprofit organization whose mission is to transform the nation's consciousness on race through law, social science, and the arts. Through litigation, advocacy, and training, EJS combats racial and other forms of discrimination in schools, the criminal justice system, and other societal institutions. As an organization dedicated to fostering widespread understanding of implicit bias and its role in creating and perpetuating systemic discrimination, EJS has a strong interest

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in ensuring that the California Racial Justice Act is applied in a manner consistent with its purpose: to counter the near-impossible intent standard to prove discrimination in the criminal justice process.

Civil Rights Amici are nonprofit organizations with a vested interest in ensuring that the California Racial Justice Act is applied in a manner consistent with its purpose of addressing and ameliorating systemic racial disparities in the criminal legal system. As such, Civil Rights Amici respectfully request leave to submit the attached [Proposed] Amicus Curiae Brief in Support of Petitioner to present additional discussion in support of Petitioner's arguments on these issues.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the proposed Civil Rights Amici made a monetary contribution intended to fund the preparation or submission of this brief.

For all of the reasons set forth above, Civil Rights Amici respectfully request that they be granted leave to file the accompanying amici curiae brief.

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Dated: September 9, 2021

Respectfully by,

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TABLE OF AUTHORITIES

CASES

United States v. Taylor
(9th Cir. 1996) 96 F.3d 1452 37

United States v. Walker
(9th Cir. 1996) 108 F.3d 340 37

Ballard v. Superior Court
(Cal. 1966) 64 Cal.2d 159 38

Griffin v. Municipal Court
(1977) 20 Cal.3d 300 38

McCleskey v. Kemp
(1987) 481 U.S. 279 35

Murgia v. Municipal Court for Bakersfield Judicial District
(Cal. 1975) 540 P.2d 44 38

Oyler v. Boles
(1962) 368 U.S. 448 36

People v. Keenan
(Cal. 1988) 46 Cal.3d 478 38

People v. Montes
(Cal. 2014) 58 Cal.4th 809 .... 38, 39

People v. Suarez
(Cal. 2020) 10 Cal.5th 116 39

Pitchess v. Superior Court
(1974) 11 Cal.3d 531 .... 39, 41, 42

United States v. Armstrong
(1996) 517 U.S. 456 .... 36, 37, 38

United States v. Bass
(2002) 536 U.S. 862 38

United States v. Bourgeois
(9th Cir. 1992) 964 F.2d 935 38

Document received by the CA 1st District Court of Appeal.

United States v. Davis
(7th Cir. 2015) 793 F.3d 712 42

United States v. Hare
(4th Cir. 2016) 820 F.3d 93 37

United States v. Sellers
(9th Cir. 2018) 906 F.3d 848 .... 37, 42, 43

United States v. Turner
(9th Cir. 1997) 104 F.3d 1180 38

United States v. Washington
(3rd Cir. 2017) 869 F.3d 193 .... 36, 42

Warrick v. Superior Court
(2005) 35 Cal.4th 1011 41

Wayte v. United States
(1985) 470 U.S. 598 36

STATUTES

21 U.S.C. § 841 27

Pen. Code § 745 .... *passim*

Evid. Code § 1043 .... 41, 42

Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to 4 27

OTHER AUTHORITIES

AB 2542 .... 24, 35, 39, 40

Alexander, The New Jim Crow: Mass Incarceration in the Age of
Colorblindness (2010) 17

Am. Civ. Liberties Union, A Tale of Two Countries: Racially Targeted
Arrests in the Era of Marijuana Reform (2020) 22

Am. Bar Found., 2014 Annual Report (2014) 33

Ayres & Borowsky, *A Study Of Racially Disparate Outcomes In The
Los Angeles Police Department 6* (2008) 20

Document received by the CA 1st District Court of Appeal.

Barnes & Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias* (2018) 112 Nw. U. L.Rev. 1293 35

Beckett et al., *Race, Drugs, and Policing: Understanding Disparities In Drug Delivery Arrests* (2006) 44 Criminology 105 21

Bedejó, *Criminalizing Race: Racial Disparities in Plea Bargaining* (2018) 59 B.C. L.Rev. 1187 26

Butler, Race and Adjudication (2017) Acad. of J., Reforming Crim. J. 28, 29

CA. Dept. of J. Open J., *2018 Racial and Identity Profiling Act (RIPA)* 20

Camplain et al., *Racial/Ethnic Differences in Drug- and Alcohol-Related Arrest Outcomes in a Southwest County From 2009 to 2018* (2020) 110 Am. J. Pub. Health 28

Carson, *Prisoners in 2019* (Oct. 2020) U.S. Dept. of J. 29

Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System* (2016) 6 Wake Forest J. L. & Pol'y 441 34

Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction* (2002) 6 J. Gender Race & Just. 253 38

Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders* (2006), 36 Criminology 481 26

Davis, *Prosecution and Race: The Power and Privilege of Discretion* (1998) 67 Fordham L.Rev. 13 25

Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees* (2003) 41 Criminology 873 28

Dignity and Power Now, Impact of Disproportionate Incarceration of and Violence Against Black People with Mental Health Conditions In the World's Largest Jail System: A Supplementary Submission for the August 2014 CERD Committee Review of the United States (2014) 31

Document received by the CA 1st District Court of Appeal.

Drug Pol'y All., *The Drug War, Mass Incarceration and Race* (Jan. 25, 2018) 17, 21, 22, 30

Eberhardt, *Stanford Univ: SPARQ, Strategies for Change: Research Initiatives and Recommendations to Improve Police-Community Relations in Oakland, Calif.* (2016) 23, 34

Epp et al., Pulled Over: How Police Stops Define Race And Citizenship (2014) 19

Equal J. Initiative, *Racial Double Standard in Drug Laws Persists Today* (Dec. 9, 2019) 27

Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs* (2021) 58 Am. Crim. L.Rev. 1685 .... 27, 28

Foner, History of Black Americans: From Africa to the Emergency of the Cotton Kingdom (Aug. 21, 1975) 19

Gelman et al., *An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias* (2007) 102 J. of the Am. Stat. Ass'n 813 19

German*, Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement* (Aug. 27, 2020) Brennan Ctr. for J. 17

Graham, *Black People in California Are Stopped Far More Often by the Police* (Jan. 3, 2020) The Guardian 21

Graham & Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders* (2004) 28 Law & Hum. Behav. 483 32

Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing* (Jan. 12, 2021) ABA 19

Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* (May 2018) Vera Inst. of J. 19, 20, 25

Jampol, *Goodbye to the Defense of Selective Prosecution* (1997) 87 J. Crim. L. & Criminology 932 36

Document received by the CA 1st District Court of Appeal.

Johnson & Larroulet, *The "Distance Traveled": Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration* (2019) 36 J. Q. 1229 26

Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations* (2013) 16 N.Y.U. J. Legis. & Pub. Pol'y 919 .... 28, 33

Katz & Spohn, *The Effect of Race and Gender on Bail Outcomes: A Test of An Interactive Model* (1995) 19 Am. J. Crim J. 161 28

Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions* (2011) 49 Criminology 473 20

Kruse, *Comment, Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong (2005) 58 SMU L.Rev. 1523 38

Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing* (2014) 52 Criminology 514 33

Kutateladze et al., *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies* (2012) Vera Inst. of J. 25

Letter from Martin Hoshino, Judicial Council, to Diane F. Boyer-Vine, Legis. Couns., Erika Contreras, Sec'y of State, and E. Dotson Wilson, Chief Clerk of the Assembly, Jud. Council of Cal. (Feb. 14, 2019) 30

Loftstrom & Martin, *Progress Under Prop 47 but Racial Disparities Persist in California Arrests* (June 4, 2020) Pub. Policy Inst. Cal. .... 22|

May et al., *Pretext Searches and Seizures: In Search of Solid Ground* (2013), 30 Alaska L.Rev. 151. 20

Mayrack, *Wis. Sent'g Comm'n, Race and Sentencing in Wisconsin: Sentence and Offender Characteristics Across Five Criminal Offense Areas* (2007) 31

Owens et al., *Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco* (2017) 34

Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* (May 4, 2020) Nature Hum. Behav................. 20

Document received by the CA 1st District Court of Appeal.

Police Accountability Task Force, *Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve* (Apr. 2016) 20

Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2008) 84 Notre Dame L.Rev. 1195. 29

Schmitt et al., *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (Nov. 2017) U.S. Sent'g Comm'n 26

Shannon et al*., The Growth, Scope, and Distribution of People with Felony Records in the United States* (Sept. 11, 2017) Population Ass'n of Am. 1795 30

Siff, *A History of Early Drug Sentences in California: Racism, Rightism, Repeat* (August 10, 2021), Ohio State Legal Studies Research Paper No. 644, Fed. Sent'g Rep 18

Silva-Benham, *Yolo County District Attorney Data Portal Leads to Policy Change* (June 16, 2021) Daily Democrat 33

Smith et al., *Implicit White Favoritism in the Criminal Justice System* (2015) 66 Ala. L. Rev. 871 23

Smith & Levinson, *The Impact of Racial Bias in the Exercise of Prosecutorial Discretion* (2012) 35 Seattle Univ. L.Rev. 745 24

Sorensen et al., *Race and Gender Differences Under Federal Sentencing Guidelines* (2012) 102 Am. Econ. Rev. 256 33

Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities* (1990) 24 L. & Soc'y Rev. 1197 33

Stanford Open Policing Project (as of Sept. 5, 2021) 20

Starr & Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker* (2013) 123 Yale L.J.1 .... 25, 33

Stevenson & Mayson, *Pretrial Detention and Bail* (2017) 3 Acad. of J., Reforming Crim. J. 22

Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs* (May 10, 2021), Brennan Ctr. for J. 17, 18, 27

Document received by the CA 1st District Court of Appeal.

The Sent'g Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sept. 2014)....................................... 16

The Sent'g Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* 18

The Vera Inst., *Incarceration Trends in California: Incarceration in Local Jails and State Prisons* (Dec. 2019) 29

Totenberg, *Supreme Court Allows Prying Into Jury Deliberations If Racism Is Perceived* (Mar. 6, 2017) N.P.R. 29

Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences* (2007) 44 J. of R. in Crime and Delinq. 427.......... 25

Vitale, The End of Policing (Aug. 28, 2018) 19, 21

Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants* (2015) 14 Criminology & Pub. Pol'y 187 32

Document received by the CA 1st District Court of Appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States has a long history of disproportionate targeting of people of color for arrest, prosecution, and incarceration for drug-related offenses. Police and prosecutorial practices, sentencing guidelines, and the so-called "War on Drugs" have combined to create systemic biases and severe racial disparities at all levels of the criminal legal system.

Prior to the enactment of the California Racial Justice Act ("RJA"), a defendant was effectively barred from challenging unjust and racially biased prosecutions because, in order to succeed, such a claim required a showing of intentional discrimination. Information asymmetry and restrictions on access to discovery further limited a defendant's ability to advance a claim. California enacted the RJA to remove barriers to challenging racial bias in the criminal legal system. The RJA establishes that it is a violation of state law to "seek or obtain a criminal conviction" or sentence "on the basis of race, ethnicity, or national origin." (Pen. Code § 745(a)).[1] The plain language of the RJA, as well as its stated intent, allows defendants to access via discovery information in the government's control that may prove racial bias has impacted a case.

In Penal Code section 745(d), the RJA sets forth a "good cause" standard for obtaining discovery pursuant to its terms and goals. No

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[1] As relevant to the instant case, a defendant may establish a violation of the RJA by showing, with a preponderance of the evidence, that the defendant was charged or convicted of a more serious offense, or sentenced to a more severe sentence, than similarly situated defendants of other races, ethnicities, or national origins; and individuals of the defendant's race, ethnicity, or national origin were more often convicted of more serious offenses or sentenced to more severe terms. (Pen. Code §745(a)(4), (5)).

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appellate court has yet addressed the interpretation of the good cause standard, as it is used in the RJA. This Court should liberally interpret the good cause standard as used in this statute. Specifically, this Court should hold that the requirements of Penal Code section 745(d) have been met where a defendant presents some evidence of racial bias that may have infected their prosecution. Evidence of racial disparities in the criminal legal system supports claims that defendants of disadvantaged races have met their obligation to show good cause for discovery. Also, because prosecutions are shaped by racial disparities in initial police encounters, evidence of racial bias by a referring law enforcement officer should also satisfy the "good cause" standard. The very realities of racial bias in every aspect of criminal prosecutions that animated the passage of this statute, from policing to sentencing to appeals, must influence and guide how this Court applies and interprets its provisions. The RJA was enacted to remedy historical disparities and injustices in the criminal justice system, therefore the Court should avoid importing pre-RJA bars to discovery where they are not clearly implied by the statute.

Petitioner Clemon Young Jr. has met the RJA's good cause standard in this case. First, Mr. Young presented some of the voluminous body of evidence of racial bias in drug prosecutions in the county and in California specifically. Specifically, in support of his Penal Code section 745(d) motion, Mr. Young presented publicly available data concerning disproportionate traffic stops, searches, and use of force with Black motorists as compared to non-Black motorists. Mr. Young also made far

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more than a plausible showing that racial bias may have played a role in his arrest. In fact, the scenario is damning: Mr. Young is a Black man whose arrest was initiated by a police officer who deemed him suspicious merely because of the way he was looking at other officers while at a gas station. The officer followed Mr. Young and identified minor vehicle-related violations as cause for the stop. Then, despite a total lack of resistance on the part of Mr. Young, the officer used force to conduct the arrest. The evidence of racial bias by an arresting officer is a highly relevant factor in identifying plausible racial bias in the subsequent prosecution.

The RJA's "good cause" provision is a discovery standard. By providing both objective and circumstantial evidence that race may have played a role in his prosecution, Mr. Young has plainly met this low bar and shown that he is entitled to more information. Setting any higher bar for the disclosure of evidence of racial bias would allow the perpetuation of egregious discrimination in drug-related arrests and prosecutions. The RJA intended to confront and disrupt such systemic biases.

ARGUMENT

I. Racial Disparities in the Criminal Legal System Demonstrate Unjustified Bias Against Black People in Arrests, Charges, and Convictions.

From the inception of our country's legal codes to our present criminal legal system, race has played a major role in the perception and reality of who we criminalize.[2] While intentional racism has certainly

[2] The Sent'g Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sept. 2014) p. 3 <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-

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played a stark role in over-criminalization of Black people,[3] implicit biases, discriminatory policies, and legal barriers have coalesced to make the racial disparities in criminal arrests, prosecutions, and sentencing shockingly severe—particularly against Black people.[4] A major contributor to this trend has been the so-called "War on Drugs," which systemically (and purposefully[5]) intensified the over-incarceration of people of color through aggressive police practices, strict drug policies, and severe sentencing.[6]

As the RJA has made clear, existing racial disparities can, and should, be carefully considered when evaluating whether a charge may be tainted with racial bias. Accordingly, for the present matter, it is necessary to acknowledge what studies have long made clear: many laws

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and-Punishment.pdf> (as of Sept. 8, 2021) [synthesizing "two decades of research establishing that skewed racial perceptions of crime—particularly, white Americans' strong associations of crime with racial minorities—have bolstered harsh and biased criminal justice policies"].

[3] See German*, Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement* (Aug. 27, 2020), Brennan Ctr. for J., <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> (as of Sept. 8, 2021).

[4] Drug Pol'y All., *The Drug War, Mass Incarceration and Race*, (Jan. 25, 2018) <https://drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish.>

[5] Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs* (May 10, 2021), Brennan Ctr. for J. <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> (as of Sept. 8, 2021) ["Richard Nixon's domestic policy advisor John Ehrlichman revealed in a 1994 interview that the "War on Drugs" had begun as a racially motivated crusade to criminalize Blacks and the anti-war left."].

[6] See, e.g., Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) p. 60. ["Nothing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs."].

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criminalizing the possession and sale of drugs were founded on bias,[7] and these policies have led to the over-arrest, over-prosecution, and over-incarceration of Black people.[8] Before the RJA was passed, this pattern of racial disparity had been largely ignored or quietly accepted because—despite its real impact on active cases—discrimination could rarely be tethered to intentional animus. But in passing the RJA, the California legislature rejected such a limited view of racial bias. Racial disparities are created by various sources, including inequitable resources, legislative decisions, and police practices (particularly in "high crime rate" areas),[9] but they are all odious if they target one group for criminal charges more than others. For this reason, patterns of racial disparities showing that Mr. Young, and many like him, are arrested, charged, and sentenced for a drug offense ***because of their race*** warrant careful consideration.

A. Black People Are Disproportionately Stopped, Arrested, and Searched by Police, Particularly for Drug Offenses.

Widespread racial disparities in stops, arrests, searches, and detentions demonstrate how the criminal legal system is often tainted by

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[7] Taifa, *supra*, fn. 5; see also Siff, *A History of Early Drug Sentences in California: Racism, Rightism, Repeat* (August 10, 2021), Ohio State Legal Studies Research Paper No. 644, Fed. Sent'g Rep. <https://ssrn.com/abstract=3902544> ["As is often the case with drug laws, the true target of enforcement was unwanted people, not unwanted drugs."].

[8] Taifa*, supra*, fn. 5 ["Since the late 1980s, a combination of federal law enforcement policies, prosecutorial practices, and legislation resulted in Black people being disproportionately arrested."].

[9] The Sent'g Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (undated) <https://www.njjn.org/uploads/digital-library/resource_865.pdf> (as of Sept. 6, 2021).

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racial discrimination at even its very first point of contact with people. Racial discrimination has a long and entrenched history in U.S. policing. Policing was created in part to maintain slavery and enforce a system of racial apartheid throughout the Southern United States.[10] In fact, modern police forces have roots in slave patrols—gangs of white vigilantes that enforced slavery-related laws—as well as police enforcement of Jim Crow laws.[11] While some of the vilest laws that the earliest police forces sought to enforce have become extinct, the practice of targeting the Black community for criminalization has not. Black people continue to be stopped, searched, and arrested at much higher rates than others for the same conduct.[12]

Racial bias infects our system initially through the discretion exercised by police officers. Police officers are more likely to stop Black people than non-Black people for driving, walking, resting, or engaging in other innocuous behavior.[13] This is particularly true with traffic stops, even

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[10] Vitale, The End of Policing (Aug. 28, 2018) pp. 45-48.

[11] See Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing* (Jan. 12, 2021) ABA, p. 206 <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_ho me/civil-rights-reimagining-policing/how-you-start-is-how-you-finish> (as of Sept. 8, 2021); see also Foner, History of Black Americans: From Africa to the Emergency of the Cotton Kingdom (Aug. 21, 1975).

[12] See Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* (May 2018) Vera Inst. of Just. p.7 <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racialdisparities.pdf> (as of Sept. 8, 2021).

[13] Epp et al., Pulled Over: How Police Stops Define Race And Citizenship (2014) p. 7; Hinton, *supra*, fn. 12, at 7 [citing Gelman et al., *An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias* (2007) 102 J. of the Am. Stat. Ass'n 813, 821-22,

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when controlling for age and gender.[14] In contrast, studies have found that, after sunset, Black drivers comprise a smaller proportion of traffic stops—suggesting that a driver's visible Blackness is, in fact, a motivating factor for daytime stops.[15] California's statistics confirm that its policing practices are no different. In 2018, a study revealed that across law enforcement agencies, Black and Latinx people in California were disproportionately stopped by police officers, and Black people were stopped much more frequently than any other racial group.[16] In California's largest cities, Black

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<http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf> (as of Sept. 8, 2021)]. See also *ibid.* [citing Police Accountability Task Force, *Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve* (Apr. 2016) p. 8 <https://igchicago.org/wpcontent/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf> (as of Sept. 8, 2021)]; Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions* (2011) 49 Criminology 473, 490, 495-96 <https://www.google.com/search?q=Kochel%2C+et+al.%2C+Effect+of+Suspect+Race+on+Officers%E2%80%99+Arrest+Decisions+(2011)%2C+49+Criminology&rlz=1C1UEAD_enUS928US928&oq=Kochel%2C+et+al.%2C+Effect+of+Suspect+Race+on+Officers%E2%80%99+Arrest+Decisions+(2011)%2C+49+Criminology&aqs=chrome..69i57.17493086j0j0&sourceid=chrome&ie=UTF-8> (as of Sept. 8, 2021).

[14] Stanford Open Policing Project <https://openpolicing.stanford.edu/findings/> (as of Sept. 5, 2021); May et al., *Pretext Searches and Seizures: In Search of Solid Ground* (2013), 30 Alaska L.Rev. 151, 181.

[15] Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* (May 4, 2020) Nature Hum. Behav. <https://5harad.com/papers/100M-stops.pdf> (as of Sept. 5, 2021).

[16] See CA. Dept. of J. Open J., *2018 Racial and Identity Profiling Act (RIPA)* <https://openjustice.doj.ca.gov/exploration/stop-data/stop-data-2018> (as of May 18, 2021) [collecting stop data from law enforcement agencies across the state]. See also Ayres & Borowsky, *A Study Of Racially Disparate Outcomes In The Los Angeles Police Department 6*, (2008) p. 43 [Los Angeles police one-hundred and twenty-seven percent more likely to search Black individuals and forty-three percent more likely to search

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people were stopped at a rate multiple times their percentage of the population.[17] The study also confirmed that Black people are more likely to be detained, handcuffed, and searched than their white counterparts.[18] This data is particularly troubling when coupled with studies that show that, when officers search Black and Latinx people in California, officers are less likely to find drugs, weapons, or other contraband compared to when they search white people.[19]

Racial bias plays a particularly notable role in law enforcement decisions impacting arrests and prosecutions of drug offenses. This stems in part from the ill-conceived "War on Drugs" and drug policies which have encouraged aggressive policing in predominantly Black and Latinx communities.[20] Notably, the racial disparities in drug arrests can be traced directly to the exercise of police discretion. Research has consistently shown that Black neighborhoods, as well as illicit drug markets where there are more likely to be Black sellers than white sellers (as opposed to where there are the greatest drug sales overall), are more heavily surveilled by police.[21] It is this increased surveillance and law enforcement presence—

Latinx people than whites, even though they were less likely to be found with weapons or drugs].

[17] See Graham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves* (Jan. 3, 2020) The Guardian <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force> (as of Sept. 8. 2021)

[18] CA. Dept. of J. Open J, *supra*, fn. 16.

[19] *Ibid.*

[20] Drug Pol'y All., *supra*, fn. 4; Vitale, *supra*, fn. 10 at p. 138.

[21] See, e.g, Beckett et al., *Race, Drugs, and Policing: Understanding Disparities In Drug Delivery Arrests* (2006) 44 Criminology 105;

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and not the existence of more drug sales—that leads to unequal contact with law enforcement. Police routinely stop and search people for drugs in Black communities—at the park, on the street, in the train, at school, on their porches, or while driving.[22] In this way, law enforcement officials use their expansive power to harass and eventually criminalize Black people, while allowing others to engage in the same behaviors without interference.[23] This is true despite data and studies repeatedly showing that drug use and sales are consistent across racial and ethnic lines.[24] Furthermore, despite recent waves of drug legalization and decriminalization across the country, Black people are ***still*** more likely to be arrested for marijuana possession than white people in every state, including those that have legalized marijuana.[25] For all kinds of drug offenses, as of June 2020, almost all California counties reported an arrest rate for Black individuals that was at least double that of whites, while thirteen counties have rates at least ***five*** times that of whites.[26]

Stevenson & Mayson, *Pretrial Detention and Bail* (2017) 3 Acad. of J., Reforming Crim. J. 29.

[22] Am. Civ. Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020) p. 14 <https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf> (as of Sept. 8, 2021).

[23] *Ibid.*

[24] Drug Pol'y All., *supra*, fn. 4.

[25] Am. Civ. Liberties Union, *supra*, fn. 22, at pp. 5-6.

[26] Loftstrom & Martin, *Progress Under Prop 47 but Racial Disparities Persist in California Arrests* (June 4, 2020) Pub. Policy Inst. Cal. <https://www.ppic.org/blog/progress-under-prop-47-but-racial-disparities-persist-in-california-arrests/> (as of Sept. 8, 2021).

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A major explanation for racially disparate stops, arrests, and searches is that police officers tend to "interpret ambiguous behaviors performed by [B]lacks as suspicious [and criminal] while similar behaviors engaged in by whites would go unnoticed."[27] Such bias may not be intentional, but it does have a real impact on whether a Black person is arrested and ultimately charged for a crime.[28]

Mr. Young's experience in the instant case exemplifies the trends and data described above. The facts of his case strongly suggest that racially biased policing played a role in his underlying drug charge. A police officer followed Mr. Young after seeing him standing at a gas station, "watching [a] traffic stop." (Pet. for Writ of Prohibition, Ex. B, Mot. to Compel 4-5, 13.) This innocuous action was the ***sole*** basis of the officer's initial suspicion and caused him to follow Mr. Young. (*Id.*) Then, the officer stopped him purportedly based on the officer's identification that Mr. Young had an expired license plate and, later, that he made a right turn on a red light without stopping. (*Id.*) When stopped, Mr. Young volunteered that his license may have been suspended and that he had a small amount of marijuana. (*Id.*) The officer asserted the belief that, upon

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[27] Smith et al., *Implicit White Favoritism in the Criminal Justice System* (2015) 66 Ala. L.Rev. 871.
[28] See, e.g., Eberhardt, *Stanford Univ: SPARQ, Strategies for Change: Research Initiatives and Recommendations to Improve Police-Community Relations in Oakland, Calif.* (2016) <https://sparq.stanford.edu/opd-reports> (as of Sept. 8, 2021) [A study of Oakland Police Department finding that when officers reported being able to identify the race of the person before stopping them, the person stopped was much more likely to be Black than when officers could not tell the race].

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inspection, the quantity of marijuana may have been above the legal limit; transporting more than 28.5 grams of marijuana is an infraction. (*Id.*)

The initial pursuit was based on innocuous behavior, the stop was in response to a moving violation, and the offense under investigation was an infraction. Nonetheless, the officer drew a firearm on Mr. Young, removed him from his vehicle, and relied on the small quantity of marijuana to justify a search of the vehicle. (*Id.*) As myriad studies suggest, this kind of enforcement activity—and Mr. Young's entry into the criminal legal system—was likely motivated by his race. It is precisely this type of discrimination which "undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law." (*See* AB 2542, § 2(a).) And this is precisely the taint in the system that the California Legislature explicitly intended to "eliminate" with the RJA. (*See* AB 2542 § 2(i).)

B. Black People Are Disproportionately Prosecuted and Convicted of Drug Offenses Due to Systemic Racial Biases.

Prosecutors have a unique role in the criminal legal system: "[p]rosecutors enjoy more unreviewable discretion than any other actor in the criminal legal system" and wield substantial discretion over critical aspects of the legal process—including charging decisions, pretrial detention decisions and bail amounts, plea bargaining negotiations, and post-trial sentencing.[29] With such unfettered authority, prosecutors can

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[29] Smith & Levinson, *The Impact of Racial Bias in the Exercise of Prosecutorial Discretion* (2012) 35 Seattle Univ. L.Rev. 745, 805

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inject unchecked racial biases, prejudices, and stereotypes into prosecutorial decision-making. Prosecutorial bias is "a major cause of racial inequality in the criminal legal system."[30]

Biased prosecution decisions make it more likely that Black people will be prosecuted for more severe charges, receive less favorable plea deals, and be subject to harsher prison sentences when compared to their white counterparts.[31] In 2018, the Vera Institute of Justice reviewed thirty-four studies to examine the effect of prosecutorial decision-making on racial disparities at different discretion points throughout the life of a criminal case.[32]Among them, one study found that federal prosecutors are more likely to charge Black people than similarly situated white people with offenses that carry higher mandatory minimum sentences,[33] and

<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2082 &context =sulr> (as of Sept. 9, 2021).

[30] Davis, *Prosecution and Race: The Power and Privilege of Discretion* (1998) 67 Fordham L.Rev. 13, 17 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3499&context=flr.> It is well-accepted that prosecutors—like all people—harbor biases that influence their actions. For more, see *ibid.* at pp. 797-820.

[31] Hinton, *supra*, fn. 12 at p. 8 [citing Kutateladze et al., *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies (2*012) Vera Inst. of J. <https://www.vera.org/downloads/Publications/do-race-and-ethnicitymatter-in-prosecution-a-review-of-empirical-studies/legacy_downloads/race-andethnicity-in-prosecution-first-edition.pdf> (as of Sept. 8, 2021)].

[32] See Hinton, *supra*, fn. 12 at p. 8.

[33] *Ibid.* [citing Starr & Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker* (2013) 123 Yale L.J. 1 <https://www.yalelawjournal.org/article/mandatory-sentencing-and-racial-disparityassessing-the-role-of-prosecutors-and-the-effects-of-booker>]. Ethnicity can also impact the severity of a sentence. See, e.g., Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences* (2007) 44 J. of R. in Crime and Delinq.

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another study found that state prosecutors are more likely to charge Black people under habitual offender statutes than similarly situated white people.[34] Bias can also infect plea-bargaining decisions. White people are generally more likely than Black people to have their most serious charges dropped or reduced by prosecutors.[35] As a result, Black and Latinx people are more likely to plead guilty to felony offenses as compared to white people.[36] These decisions result in disproportionately higher sentences for Black people. A 2017 report from the United States Sentencing Commission found that Black males received sentences that are "on average 19.1 percent higher than similarly situated white males," and that violence in a defendant's history did not account for these demographic differences in sentencing.[37] Recent analyses concluded that cases involving Black and Latinx people involve fewer charge reductions throughout the legal process, which contribute to disparities in sentencing.[38]

427, 442 [Latino men almost twice as likely to receive a mandatory sentence as their white counterparts].

[34] Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders* (2006), 36 Criminology 481, 503.

[35] See generally Bedejó, *Criminalizing Race: Racial Disparities in Plea Bargaining* (2018) 59 B.C. L.Rev. 1187 <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3659&context=bclr> (as of Sept. 8, 2021).

[36] *Ibid*. p. 1191.

[37] Schmitt et al., *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (Nov. 2017) U.S. Sent'g Comm'n <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2017/20171114_Demographics.pdf> (as of Sept. 8, 2021).

[38] Johnson & Larroulet, *The "Distance Traveled": Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration* (2019) 36 J. Q. 1229, 1243.

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Racial bias is particularly pronounced in cases against Black people charged with drug offenses. Anti-drug laws have formalized and institutionalized racial bias in prosecutions. The Anti-Drug Abuse Act of 1986, for example, established the infamous hundred-to-one sentencing ratio between crack-cocaine and powder cocaine,[39] resulting in the harshest penalties for crack-cocaine users, the majority of whom were Black.[40] Shortly thereafter, Congress made crack-cocaine the ***only*** drug for which possession was a federal crime, and California enacted its own two-to-one sentencing ratio between crack-cocaine and powder cocaine.[41] While race-neutral on their face, these sentencing models used a thinly-veiled proxy for the race of drug users in order to give the criminal legal system the power to disproportionately arrest, charge, and imprison Black individuals.[42]

Poorly conceived policies have also limited discretion in drug prosecutions in ways that have disproportionately harmed Black people. For instance, the Comprehensive Crime Control Act of 1984 ("Crime Control Act") concretized many of the avenues for prosecutorial, law enforcement, and judicial discretion at the height of the War on Drugs. The Crime Control Act authorized the use of pretrial detention, restricted post-

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[39] Anti-Drug Abuse Act of 1986 § 1002, Pub. L. No. 99-570, 100 Stat. 3207, 3207-2 to 4 (codified as amended at 21 U.S.C. §841); Taifa, *supra*, fn. 6.

[40] See Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs* (2021) 58 Am. Crim. L.Rev. 1685, 1687.

[41] Equal J. Initiative, *Racial Double Standard in Drug Laws Persists Today* (Dec. 9, 2019) <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/> (as of Sept. 8, 2021).

[42] Exum, *supra*, fn. 40, p. 1694.

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conviction bail, and enhanced criminal forfeiture authority.[43] In so doing, the legislation enacted a "legal shield for discriminatory punishment" that became widely used, resulting in stark disparities between the court processing and incarceration rates of Black and white defendants.[44] Since the Crime Control Act's passage, studies have consistently shown that Black and Latinx defendants are less likely than whites to be offered a nonfinancial release option at booking,[45] less likely than whites to be cited and released rather than booked into county jail and charged,[46] and more likely to be denied bail overall.[47]

Moreover, throughout the criminal legal system, where discretion is authorized, law enforcement and court officials exercise discretion in ways that disproportionately harm Black people.[48] Once charged, Black defendants are more likely to be offered plea deals that include prison time

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[43] *Ibid.* pp.1693-94.
[44] *Ibid*.
[45] Katz & Spohn, *The Effect of Race and Gender on Bail Outcomes: A Test of An Interactive Model* (1995) 19 Am. J. Crim J. 161.
[46] Camplain et al., *Racial/Ethnic Differences in Drug- and Alcohol-Related Arrest Outcomes in a Southwest County From 2009 to 2018* (2020) 110 Am. J. Pub. Health. S85, S88 <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305409> (as of Sept. 8, 2021); Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations* (2013) 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 941 [citing a Justice Department survey of forty-five counties that found Black men sixty-six percent more likely to be in jail pretrial than white defendants, and Latinx defendants ninety-one percent more likely to be detained pretrial].
[47] Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees* (2003) 41 Criminology 873.
[48] Butler, *Race and Adjudication* (2017) Acad. of J., Reforming Crim. J. 211.

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than white or other minority defendants.[49] If defendants do go to trial, they are subject to bias in jury selection,[50] jury composition,[51] and jury deliberation.[52] Studies also show that judges frequently harbor implicit racial biases that influence decisions during trials.[53]

C. Black People Are Sentenced More Severely and Incarcerated at Higher Rates for Drug Offenses Due to Systemic Biases.

Discrimination in policing and biased prosecutorial decision-making further result in stark racial disparities in incarceration rates. Black people are overrepresented in state and federal prisons across the country—incarcerated at a rate of five times the rate of white people and two times the rate of Latinx people.[54] California-specific statistics also show that Black and Latinx people are consistently overrepresented among the state's jail and prison populations.[55] As of 2015, Black people constituted six

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[49] *Ibid.* p. 216.
[50] *Ibid.*
[51] *Ibid.*
[52] See, e.g, Totenberg, *Supreme Court Allows Prying Into Jury Deliberations If Racism Is Perceived* (Mar. 6, 2017) N.P.R. <https://www.npr.org/2017/03/06/518877248/supreme-court-allows-prying-into-jury-deliberations-if-racism-is-perceived> (as of Sept. 8, 2021).
[53] Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* (2008) 84 Notre Dame L.Rev. 1195, 1197.
[54] Carson, *Prisoners in 2019* (Oct. 2020) U.S. Dept. of J. p.10 <https://www.bjs.gov/content/pub/pdf/p19.pdf> (as of Sept. 8, 2021).
[55] See The Vera Inst., *Incarceration Trends in California: Incarceration in Local Jails and State Prisons* (Dec. 2019) <https://www.vera.org/downloads/pdfdownloads/stateincarceration-trends-california.pdf> (as of Sept. 8, 2021).

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percent of the state's overall population but twenty percent of the local jail population and twenty-eight percent of the state prison population.[56]

Racial discrepancies are increasing. The percentage of the Black population—and specifically the Black male population—with felony convictions has grown substantially. A 2017 study estimated that nationwide, the percentage of Black men who had experienced imprisonment increased from six percent in 1980 to fifteen percent in 2010.[57] As of 2010, one-third of adult Black males had a felony conviction, compared to thirteen percent of Black men in 1980.[58] The trend holds in California, as Black people are more likely to have a felony conviction relative to white people and are more likely to be imprisoned for their conviction.[59]

This disparity in incarceration is particularly pronounced for drug offenses. Nearly eighty percent of people in federal prison and almost sixty percent of people in state prison for drug offenses are Black or Latinx.[60]

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[56] *Ibid*.
[57] Shannon et al*., The Growth, Scope, and Distribution of People with Felony Records in the United States* (Sept. 11, 2017) Population Ass'n of Am. 1795, 1805.
[58] *Ibid.*
[59] See Letter from Martin Hoshino, Judicial Council, to Diane F. Boyer-Vine, Legis. Couns., Erika Contreras, Sec'y of State, and E. Dotson Wilson, Chief Clerk of the Assembly, Jud. Council of Cal. (Feb. 14, 2019) pp. 12, 17 <https://www.courts.ca.gov/documents/lr-2019-JC-disposition-of-criminal-casesrace-ethnicity-pc1170_45.pdf> (as of Sept. 8, 2021) [felony conviction rate for white people is fifty-five percent, but fifty-eight percent for Latinx people and sixty-two percent for Black people; and rates of prison sentences were twenty-eight percent for white people compared to thirty-eight to forty percent for Latinx and Black people].
[60] Drug Pol'y All., *supra*, fn. 4.

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Black persons, especially those struggling with substance abuse or mental illness, are less likely than white defendants to be offered alternatives to incarceration, like drug treatment courts or mental health diversions.[61]

D. The Bias of an Arresting Police Officer Cannot Be Detached from the Charging Decision.

An initial police encounter marked with racial bias will prejudice the impartiality of the subsequent prosecution and adjudication of the offense. Biased police encounters influence whether an individual will be brought into custody and charged at all, and the police assessment of an interaction is typically ***the*** basis for subsequent prosecutorial action, which directly influences the type and severity of the charges. This is especially true in the context of drug-related prosecutions where, as here, prosecutions stem from minor (and questionable) traffic stops.

The Attorney General suggests that racial bias can be segregated at each stage of the process. (See Return at 12-14.) Specifically, the Attorney General proffers that "racial animus or bias exhibited by an officer during [a] traffic stop and statistical data regarding traffic stops…does not

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[61] See, e.g., Dignity and Power Now, *Impact of Disproportionate Incarceration of and Violence Against Black People with Mental Health Conditions In the World's Largest Jail System: A Supplementary Submission for the August 2014 CERD Committee Review of the United States* (2014) <ttps://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17740_E.pdf.> (as of Sept. 8, 2021); See also Mayrack, *Wis. Sent'g Comm'n, Race and Sentencing in Wisconsin: Sentence and Offender Characteristics Across Five Criminal Offense Areas* (2007) p. 2 [Black individuals convicted of the most common type of drug felony in Wisconsin were more than twice as likely to receive a prison term as whites convicted of the same class of drug offense].

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necessarily establish good cause to demonstrate a charging disparity by the district attorney's office." (Return at 12.) The Attorney General's position, however, ignores the reality that outcomes at each stage of the prosecutorial process are heavily impacted by racial bias in earlier stages.[62] Evidence of a racially biased police stop and initial arrest ***will*** infect the integrity of a charging decision and subsequent prosecution and must be a relevant factor in analyzing the potential for prosecutorial bias under Penal Code section 745(a)(3).[63]

As laid out above, racial disparities are present at every point in the criminal legal system. Black people are disproportionately stopped by police officers, and these stops disproportionately turn into arrests. These arrests can create bias-tainted police reports or investigations. Prosecutors are then reliant on these reports and are more likely to use their discretion to prosecute Black defendants. Racially tinged language in police reports often influences a prosecutor in identifying the nature of the criminal activity and who is to blame. One study found that when primed with words that represent stereotypically Black concepts (e.g., "Harlem," "dreadlocks," "homeboy") law enforcement officers evaluated juvenile suspects as more culpable and deserving of punishment.[64] Racially charged police reports similarly impact whether an individual will be offered or granted bail, and

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[62] Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants* (2015)14 Criminology & Pub. Pol'y 187, 188.
[63] *Ibid.*
[64] Graham & Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders* (2004) 28 Law & Hum. Behav. 483, 483.

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whether a person is offered non-custodial plea deals.[65] Thus, race-based perceptions of criminality, which begin with the police, create a pipeline from a disproportionately high likelihood of being stopped, to being arrested, to being charged, to being targeted with a more serious offense,[66] and to eventually facing a harsher sentence. The pipeline also contributes to subsequent, and even harsher, penalties for later encounters with law enforcement.[67]

Examples across California demonstrate the close tie between police encounters and subsequent prosecutorial decisions. In Yolo County, a pilot program analyzed and disclosed data related to every aspect of the criminal legal system and found that the point in criminal prosecutions with the greatest racial disparity was the point of referral by local law enforcement to the district attorneys for prosecution—Black people were dramatically overrepresented at this stage.[68] A 2016 study in Oakland found similar

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[65] Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing* (2014) 52 Criminology 514, 531.
[66] Starr, *supra*, fn. 33.
[67] Jones, *supra*, fn. 46 at p. 938; Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities* (1990) 24 L. & Soc'y Rev. 1197, 1212; Am. Bar Found., 2014 Annual Report (2014) <http://www.americanbarfoundation.org/uploads/cms/documents/2014_ann ual rcport.pdf> (as of Sept. 8, 2021); Sorensen et al., *Race and Gender Differences Under Federal Sentencing Guidelines* (2012) 102 Am. Econ. Rev. 256, 259.
[68] See Silva-Benham, *Yolo County District Attorney Data Portal Leads to Policy Change* (June 16, 2021) Daily Democrat <https://www.dailydemocrat.com/2021/06/16/yolo-county-district-attorney-data-portal-leads-to-policy-change/> (as of Sept. 8, 2021) [despite Black people making up under three percent of the population of Yolo County,

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results—with disproportionate police stops of Black people and those stops far more likely to result in an arrest for Black people than for white people.[69] Similarly, a San Francisco study found that significantly disparate outcomes in case processing for defendants of different races was attributable most to the "ripple effect" of an individual's prior encounters with the criminal legal system and the fact that "[p]eople of color receive more serious charges at the initial booking stage, reflecting decisions made by [police] officers."[70]

Cumulative bias is less obvious and explicit than single instances of overt animus. Yet it has clear consequences and results in racial inequality enduring in the criminal legal system.[71] It is this tragic reality that the RJA set out to disrupt.

II. The RJA's Good Cause Standard Must Be Interpreted Liberally to Limit Racial Disparities in Drug Prosecutions.

For decades, evidence of racial bias has largely been ignored within criminal courthouses. Defendants were denied access even to basic information necessary to force discovery that could shed light on racial bias in drug prosecutions because of high evidentiary burdens. Under the RJA,

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"they made up about 10.5% of defendants referred to the prosecutor's office"].

[69] Eberhardt, *supra*, fn. 28 at p. 5.

[70] Owens et al., *Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco* (2017) pp. 2-3, 7-8 <http://sfpublicdefender.org/wp-content/uploads/sites/2/2017/06/quattronefullreport.pdf> (as of Sept. 8, 2021).

[71] Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System* (2016) 6 Wake Forest J. L. & Pol'y 441.

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this should no longer be the case. A robust interpretation of the discovery obligations in the RJA is necessary both to satisfy the text and legislative intent of the RJA, and to limit racial biases that undermine the integrity of the criminal legal system.

In enacting the RJA, the Legislature expressly distanced California from *McCleskey v. Kemp* (1987) 481 U.S. 279, where the U.S. Supreme Court acknowledged detailed statistical proof of racial bias in the implementation of the death penalty yet nonetheless swept this evidence aside and allowed executions to proceed. (AB 2542 § 2(f),(i) [citing *McCleskey*, at pp. 295-99, 312] ["Existing precedent [] accepts racial disparities in our criminal justice system as inevitable…It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable to actively work to eradicate them."].[72] With the RJA, the Legislature intended to upend systemic racial disparities—to do this, California defendants must have access to the records necessary to prove racial bias.

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[72] See generally Barnes & Chemerinsky, *What Can Brown Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias* (2018) 112 Nw. U. L.Rev. 1293, 1301-1306 ["requiring proof of discriminatory purpose in order to demonstrate an equal protection violation…[has] dramatically lessened the ability of claimants to use the Constitution to create a more just society"].

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A. The Pre-RJA Legal Standards for Discriminatory Prosecution, and for Discovery in Support of Such a Claim, Are Virtually Impossible to Meet.

Prior to the RJA, defendants were required to meet an inordinately high bar in order to challenge racial bias in the prosecution of a criminal case. Defendants rarely met that bar.[73]

The federal standard for proving race-based selective prosecution requires that a defendant demonstrate both discriminatory effect and discriminatory purpose. (*Oyler v. Boles* (1962) 368 U.S. 448.) But in nearly all criminal cases, the accused lack the evidence to make such a showing, because it rests under government control. (See*,* e.g., *Wayte v. United States* (1985) 470 U.S. 598, 624 (dis. opn. of Marshall, J.) ["[M]ost of the relevant proof in selective prosecution cases will normally be in the Government's hands."].) To obtain discovery for race-based selective prosecution, federal defendants have to reach a bar nearly as high as to prove the claim outright—producing "some evidence" of both discriminatory effect and discriminatory intent, including "evidence tending to show" that the prosecution declined to prosecute similarly situated suspects of other races on the same federal charges. (*United States v. Armstrong* (1996) 517 U.S. 456, 458, 469.) In myriad cases, including in the authoritative case of *United States v. Armstrong* itself, courts have

[73] *United States v. Washington* (3rd Cir. 2017) 869 F.3d 193, 216 [recognizing the "functional impossibility of *Armstrong*"]; Jampol, *Goodbye to the Defense of Selective Prosecution* (1997) 87 J. Crim. L. & Criminology 932 [noting that *United States v. Armstrong* made "the already difficult claim of race-based selective prosecution virtually impossible to prove"].

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denied defendants' attempts to make such a showing and to obtain discovery, even in the face of robust statistical evidence of racial disparities.[74]

The federal standard for discovery for a selective prosecution claim is nearly as rigorous as that for proving the claim itself. (*United States v. Sellers* (9th Cir. 2018) 906 F.3d 848, 852; see also *United States v. Hare* (4th Cir. 2016) 820 F.3d 93, 99 [the required showing for discovery is only "slightly lower" than the showing required to prove discriminatory purpose and effect].) It is unsurprising, therefore, that few federal defendants prevail on selective prosecution claims.[75] A defendant "cannot even get discovery

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[74] In *Armstrong*, a case concerning the alleged selective targeting of Black defendants for federal crack cocaine charges, the U.S. Supreme Court held that defendants did not make the required showing for discovery despite the presentation of evidence that: (1) in one year, the prosecutor's office only closed cases against Black defendants for the relevant underlying offenses; (2) white people were more likely to be tried in state than federal court for cocaine-based offenses; and that, (3) there was no racial disparity between ***users*** or ***dealers*** of drugs, but there was among those prosecuted for drugs between people of color and white people in the relevant geographical area (*Armstrong*, *supra*, 517 U.S. at 464; see also *United States v. Taylor* (9th Cir. 1996) 96 F.3d 1452 (unpub. opn.) [defendant did not meet the required *Armstrong* standard for discovery despite submitting evidence including (1) that most defendants charged with crack offenses in his jurisdiction were Black; (2) that investigations for crack-related offenses are concentrated on predominantly Black areas; and (3) that whites are considerably less likely than Black individuals to be arrested for cocaine or crack offenses, and when arrested for crack offenses, whites are far less likely to be prosecuted in federal court than are Black suspects].)

[75] In most cases, courts have found the evidence of defendants lacking under the *Armstrong* standard, i.e., defendants did not sufficiently prove that other suspects of different races were not prosecuted for ***the same offense*** (*United States v. Taylor*, *supra*, 96 F.3d at p. 1452 (unpub. opn.); *United States v. Walker* (9th Cir. 1996) 108 F.3d 340 (unpub. opn.)); for not showing that non-prosecuted suspects were sufficiently similarly situated in

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without evidence, and one can rarely get evidence which will satisfy a court without discovery."[76]

Prior to the RJA, California caselaw also required that selective prosecution claims demonstrate intentional discrimination. (*Murgia v. Municipal Court for Bakersfield Judicial District* (Cal. 1975) 540 P.2d 44. 51.) California courts held that discovery motions based on a claim of discriminatory prosecution must "describe the requested information with at least some degree of specificity and must be sustained by plausible justification." (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306; *Ballard v. Superior Court* (Cal. 1966) 64 Cal.2d 159, 167.) The California Supreme Court held that such 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. Keenan* (Cal. 1988) 46 Cal.3d 478, 506; see also *People v. Montes* (Cal. 2014) 58 Cal.4th 809, 829 [similar to *Armstrong*, a defendant

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other ways (see, e.g., *United States v. Turner* (9th Cir. 1997) 104 F.3d 1180; *United States v. Bass* (2002) 536 U.S. 862 (per curiam)); for not selecting a control group of suspects of other races from a sufficiently reasonable period of time (*United States v. Bourgeois* (9th Cir. 1992) 964 F.2d 935); and for not ensuring a sufficiently similar control group of suspects of different races. (See, e.g., *United States v. Turner*, *supra*, 104 F.3d at p. 1185 [Black defendants failed to meet the *Armstrong* standard where they showed that the State of California only prosecuted a handful of white defendants for the same crack-cocaine offense, but failed to show that the crack cocaine sellers prosecuted by California were "gang members who sold large quantities of crack].)

[76] Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction* (2002) 6 J. Gender Race & Just. 253, 267; see also Kruse, *Comment, Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong (2005) 58 SMU L.Rev. 1523, 1534.

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must offer some evidence of both discriminatory effect and discriminatory intent to compel discovery on a selective prosecution claim].) Under this standard, and as with federal jurisprudence, California courts have rejected statistical evidence that does not focus on the same charging authority, does not provide evidence of people of other races who were eligible to be charged with the same offense, or where the facts were distinguishable (see, e.g., *Montes*, *supra*, 58 Cal.4th 809; *People v. Suarez* (Cal. 2020) 10 Cal.5th 116), thereby denying defendants access to the very types of case-specific information that would prove their claim. This circular defense makes prosecutorial bias nearly impenetrable.

B. The RJA Creates a Liberal Standard for Discovery.

The pre-RJA standard set a bar that was virtually impossible to reach; the Legislature squarely rejected that standard. The RJA compels, "[u]pon a showing of good cause," that a court order the government to disclose information to permit a defendant to make the case for discriminatory prosecution. (Pen. Code § 745(d).) The good cause threshold for discovery under the RJA must be very low. Indeed, the text of the statute expressly intends to establish mechanisms for California defendants to challenge entrenched racial bias—"in any form or amount"—in the criminal legal system. (*See* AB 2542 § 2(i).) The prevailing "good cause" standard which governs *Pitchess* motions (motions for the disclosure of evidence of law enforcement misconduct) should serve as the ceiling for what a defendant must show to compel discovery in the context of a Penal Code § 745(d) motion. Borrowing from this standard, good cause under the

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RJA should require ***at most*** a plausible showing of an RJA violation. This should be met easily with objective evidence (like statistical racial disparities) and a showing that racial bias may have played a role in the underlying case. Statistical evidence showing stark racial disparities at every stage of the criminal legal system (as presented in this brief) favor findings of RJA violation plausibility for purposes of discovery. In cases where there is some evidence of law enforcement bias, as there is here, existing caselaw supports a ***particularly*** low threshold showing to satisfy the good cause standard. The standard for discovery under Penal Code section 745(d) is low, and is easily met in the instant case.

1. The RJA Lowered the Burden of Proof for Racial Justice Challenges and Related Discovery.

The California Legislature passed the RJA to lower the burden of proof required to challenge racial bias in prosecutions, and to permit defendants to access discovery to such an end. The RJA eliminates the requirement that a defendant show purposeful discrimination—either to make a threshold showing for discovery or to prevail on a claim. (AB 2542 § 2(c) [racial bias persists in the criminal legal system because "proof of purposeful discrimination is often required, but nearly impossible to establish"].) The Legislature also rejected the requirement that a defendant show discrimination to compel disclosure. (See AB 2542 § 2(j) ["It is the [] 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."].) The good cause threshold for discovery therefore cannot be

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interpreted to require proof of a violation, i.e., actual proof of discriminatory prosecution—which was the very circularity that gave rise to the need for the RJA. The undeniable information asymmetry further supports a very low threshold for discovery under the RJA.

2. Comparable Legal Standards Urge that the RJA's Good Cause Discovery Standard Require No More Than a Plausible Claim of a Violation.

All parties and amici accept that the good cause standard which governs the compelled disclosure of law enforcement personnel records is most analogous to the case at bar. (See, e.g., Return at 10; Pet. for Writ of Prohibition, Ex. B, Mot. to Compel 8-9.) This standard is set out in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and codified in California Evidence Code section 1043(b). Good cause for a *Pitchess* motion "is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.'" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) In the context of a *Pitchess* motion, a defendant meets their burden of showing "plausibility" where the defendant presents a "scenario…that might or could have occurred." (*Id.* at 1026.) Relatedly, "good cause" for discovery under the RJA should require at most a plausible claim of an RJA violation. The overwhelming objective evidence of racial disparities throughout the criminal legal system—detailed above and acknowledged in the RJA's legislative findings—should inform and influence what is deemed plausible in an individual case.[77]

[77] Racial discrimination endemic in the criminal legal system—from start to finish—makes racial bias against Black people almost inherently plausible.

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Under the express terms and goals of this statute, *Pitchess* should serve as the upper limit to what should be required for a defendant to make a threshold showing for discovery under Penal Code section 745(d). The RJA is clear that it intended to ensure access to information to upset a system where discriminatory prosecution claims were all but impossible. Courts should not introduce requirements not expressly elaborated or clearly implied in the law. While the regulatory framework governing *Pitchess* motions requires that a petitioner make a showing of "materiality…to the subject matter," Evid. Code section 1043(b)(3), no such showing is required for good cause discovery under the RJA and none should be read into the statute. (Cf. Return at 11.)

3. Evidence of Bias from a Referring Law Enforcement Officer Must Meet the Good Cause Standard for Discovery.

Where, as here, objective data about racial bias in the prosecution of drug offenses is coupled with circumstantial evidence of racially biased policing by the referring law enforcement agency, the Court should find that the defendant easily meets the good cause standard for discovery. As discussed in Section I.D above, racial bias animating law enforcement decisions infects all subsequent decisions made in the course of a prosecution. Even in the pre-RJA context, courts recognized a lesser standard for discovery in race-based selective ***enforcement*** cases, at least in connection with certain types of offenses. (*United States v. Sellers*, *supra*, 906 F.3d at 852; *United States v. Washington*, *supra*, 869 F.3d at pp. 219-21; *United States v. Davis* (7th Cir. 2015) 793 F.3d 712, 720 [each a

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selective enforcement challenge in a stash house reverse-sting case].) In these cases, courts have differentiated selective enforcement in part because "law enforcement officers do not enjoy the same strong presumption that they are constitutionally enforcing the laws that prosecutors do." (*Sellers*, *supra*, 906 F.3d at 853.) This same justification supports a particularly low threshold showing for good cause discovery where there is some evidence of racial bias by law enforcement in an underlying case.

4. The Good Cause Standard for Discovery Is Easily Met Here.

The standard advanced by the District Attorney and apparently accepted by the Superior Court below[78] would negate the legislative intent of the RJA. The standard proposed by the Attorney General is also overly demanding. The Attorney General asks this Court to ignore the significance of the law enforcement activity which preceded the initial charge as well as the objective evidence Mr. Young put forward in support of his discovery motion. (Return at 8, 12-15. See Pet. for Writ of Prohibition, Ex. B, Mot. to Compel 10-12 [Petitioner's evidence from public sources in support of motion].) The threshold showing for discovery is easily met here.

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[78] Pet. for Writ of Prohibition, Ex. D, Tr. of Proceedings 10-12 ["there isn't a lot of guidance, having looked at the statute…I'm going to deny your request at this point because I don't—I'm not comfortable with making this requirement in this situation because there's so little guidance, and it's unclear whether or not there needs to be any other information other than simply the race of your clients to require it…I'm happy to get further guidance because it is not clear to me what simply indicates, whether you have the race of the defendants being the only reason we get into a consideration request under Penal Code Section 745"].

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The circumstantial evidence of a plausible RJA violation need not be as compelling as it is in Mr. Young's case for discovery to be met, however. Where a defendant presents some evidence and a showing that racial bias may have played a role in the underlying case, the defendant should meet this standard and discovery should be required.

III. Conclusion

For the reasons elaborated above, Amici urge this Court to recognize a liberal good cause standard in California Pen. Code section 745(d), consistent with the plain text and legislative intent of the RJA. Amici further urge this Court to find that Mr. Young has met the standard here.

Dated: September 9, 2021

Respectfully by,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 8,320 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: September 9, 2021

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