Assembly Bill 2542
California Racial Justice Act
Assembly Member Ash Kalra

SUMMARY

AB 2542 would establish the California Racial Justice Act (Act) which would prohibit the state from seeking or obtaining a criminal conviction, or from imposing a sentence, based upon race, ethnicity or national origin.

Specifically, the Act would make it possible for a person charged or convicted of a crime to challenge racial bias in their case, upon a prima facie showing, and through evidence of:

1) Exhibited racial bias by an attorney, judge, law enforcement officer, expert witness, or juror involved in the case.

2) Use of racially discriminatory language during the trial, whether or not purposeful or directed at a defendant.

3) Racial bias in jury selection, such as removing all or nearly all people of color from the jury.

4) Statistical disparities in charging and convictions – that is, evidence that people of one race are disproportionately charged or convicted of a specific crime or enhancement.

5) Statistical disparities in sentencing – that is, evidence that people of one race receive longer or more severe sentences, including the death penalty or life without parole.

BACKGROUND

On April 22, 1987 the US Supreme Court made a landmark ruling, on a 5-4 vote, in a case that has had a profound and lasting negative impact on the presence of racial bias and prejudice in the American Court System. The ruling, *McCleskey v. Kemp (No. 84-6811)*, known as the McCleskey case, established a precedent that has left the courts unable to effectively address racial discrimination in criminal cases.

Originating in Georgia, the case involved an African American man (Warren McCleskey) who was accused of killing a white police officer during a robbery and faced the death penalty. Mr. McCleskey's attorneys presented strong statistical evidence demonstrating that African American defendants were more likely to receive a death sentence than any other defendant.[1] They argued that this racial disparity violated Mr. McCleskey's 8th and 14th Amendment Rights.

Accepting this as true, writing for the majority, Justice Powell nevertheless ruled that statistical evidence was insufficient to show a constitutional violation, requiring instead that a defendant show "exceptionally clear proof" of discrimination under the facts of his or her own case. The majority's insistence on proof of intentional or purposeful discrimination established a legal standard nearly impossible to meet.

The McCleskey opinion has had far-reaching effects on a wide array of equal protection claims. In The Atlantic, Annika Neklason writes:

> The precedent impairs constitutional challenges based on widespread racial disparities not just in capital sentencing, but in the criminal-justice system more widely; it requires defendants to prove discrimination on a specific basis, providing clear evidence that they were explicitly targeted because of their race. If police officers, prosecutors, judges, or others don't openly acknowledge their own prejudices, defendants face a prohibitively high bar fighting for their Fourteenth Amendment rights in court.

Writing in the minority, Justice Brennan clearly summarized the rationale for the majority's opinion;

[1] NAACP Legal Defense and Educational Fund, Inc. Capitol Punishment; Case: Landmark: McCleskey V. Kemp https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp

although racial discrimination is pervasive in our justice system, the Court was afraid of having to recognize the harm racism and discrimination have in other types of criminal cases. Hence, the Court was afraid of "too much justice."

In fact, after retiring from the bench, Justice Powell expressed his regret in voting with the court's majority, and when asked if he could change his vote in a case, he said it would have been in the McCleskey case.[2]

Although racism and bias are pervasive and omnipresent in our criminal justice system, no provision of California law clearly states that racial discrimination is prohibited in seeking or obtaining criminal convictions or sentences.

Unfortunately, racial bias and discrimination permeate our criminal justice system, and many have accepted this as simply inevitable. California convictions and sentences are routinely upheld despite:

- Blatantly racist statements by attorneys, judges, jurors and expert witnesses;
- The exclusion of all, or nearly all Black or Latinx people from serving on a jury; and
- Stark statistical evidence showing systemic bias in charging and sentencing.

Californians have relied on state or federal constitutional provisions to challenge discrimination in the criminal justice system. However, it is clear, that these provisions have proven insufficient to address persistent racial discrimination in the criminal justice system because the courts have concluded that, due to the McCleskey case and others, proof of purposeful discrimination is required.

SOLUTION

The McClesky majority observed that State Legislatures concerned about racial bias in the criminal justice system could act to address it. Soon after the McCleskey case, Kentucky passed its own version of the Racial Justice Act. North Carolina also pursued a similar effort until a gerrymandered State Legislative majority overturned the law.

It is time for California to prohibit the use of race and ethnicity as a factor in the state's justice system across the board.

Further, California's Unruh Civil Rights Act prohibits racial discrimination in employment, housing and public accommodation. It is time to establish a statewide policy that makes it unlawful to discriminate against people of color in the state's criminal justice system.

The California Racial Justice Act will take a clear and profound step towards establishing a clear prohibition on the use of race, ethnicity or national origin in seeking or obtaining convictions or sentences.

CO-SPONSORS

- American Friends Service Committee
- Asian Americans Advancing Justice
- Ella Baker Center for Human Rights
- CA Coalition for Women Prisoners
- Californians United for a Responsible Budget
- League of Women Voters of California
- NextGen
- United Domestic Workers, AFSCME, Local 3930

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[2] Liptak, Adam. New York Times: *New Look at Death Sentences and Race*. April 29, 2008 https://www.nytimes.com/2008/04/29/us/29bar.html