

**RACIAL JUSTICE ACT:  
BACKGROUND, RECENT  
AUTHORITY AND  
APPLICATION**

# HISTORICAL BACKGROUND

The Civil  
War/Emancipation

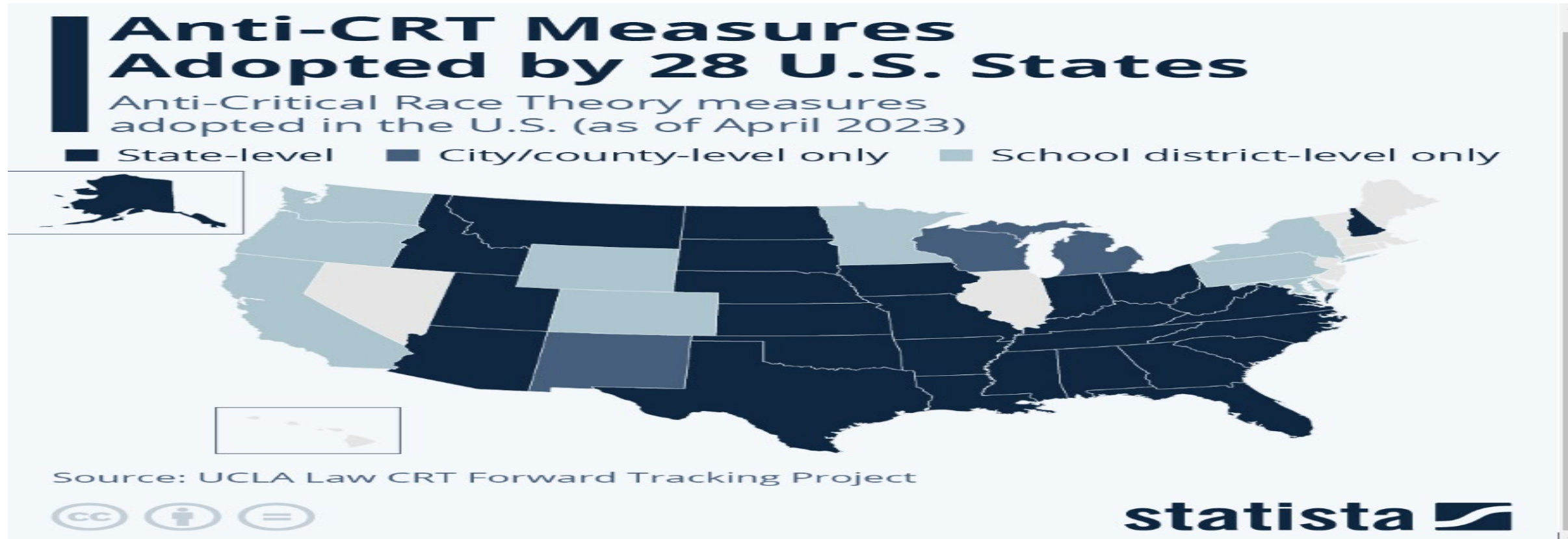
The “Black  
Codes”

Post-Civil  
War/Civil Rights  
Amendments

# Actual Bans On Diversity and Inclusion Training as of October 18, 2024

The map below shows the 28 states where laws banning critical race theory and/or diversity and inclusion training have actually passed. It is worth noting that many of these laws have been expanded dramatically to include any discussion of LGBTQ issues, women's health issues or any subject that would make a certain group uncomfortable.

<https://www.statista.com/chart/29757/anti-critical-race-theory-measures/>



# The Kentucky General Assembly Overrode A Veto To Pass A Critical Race Theory Ban on April 13, 2022

- On April 13, 2022, the Kentucky General Assembly voted to override Governor Beshear's veto of Senate Bill 1, a bill to censor discussions between teachers and students and hold teachers criminally liable for any violations. Like several other bills passed during the 2022 legislative session, Senate Bill 1 is a solution in search of a non-existent problem. It will impair students' ability to engage with and understand the world in which they exist, and will create a culture of fear in the classroom. <https://www.courier-journal.com/story/news/politics/ky-general-assembly/2022/04/13/kentucky-legislature-runs-through-overrides-andy-beshear-vetoes/7294045001/>

# There Are Critical Race Theory Bans In California!

- More than half of U.S. states have passed measures against the teaching of critical race theory - for example in schools or government employee trainings. Another dozen have seen successful initiatives on a smaller scale, with single cities, counties or school districts (or both) establishing such laws and directives. This is according to a tracking project at the University of California Los Angeles law school.
- <https://www.statista.com/chart/29757/anti-critical-race-theory-measures/>

## Seven California School Districts Ban DEI!

- Almost all states that haven't yet passed any such measures have seen them proposed on the state level, the exceptions being California, Vermont and Delaware. **In California, however, seven school districts have already decided to prohibit or limit the teaching DEI, including in (1) Murrieta Valley Unified School District , (2) Newport-Mesa Unified, (3) Orange County, (4) Paso Robles, (5) Placentia-Yorba Linda Unified School District, (6) Ramona School Board Temecula Valley Unified School District, AND (7) Visalia Unified School Board.** A few states with no finalized laws or directives on any level remain: They are Illinois, Nevada, Vermont, Delaware, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey and Hawaii.  
<https://www.statista.com/chart/29757/anti-critical-race-theory-measures/>

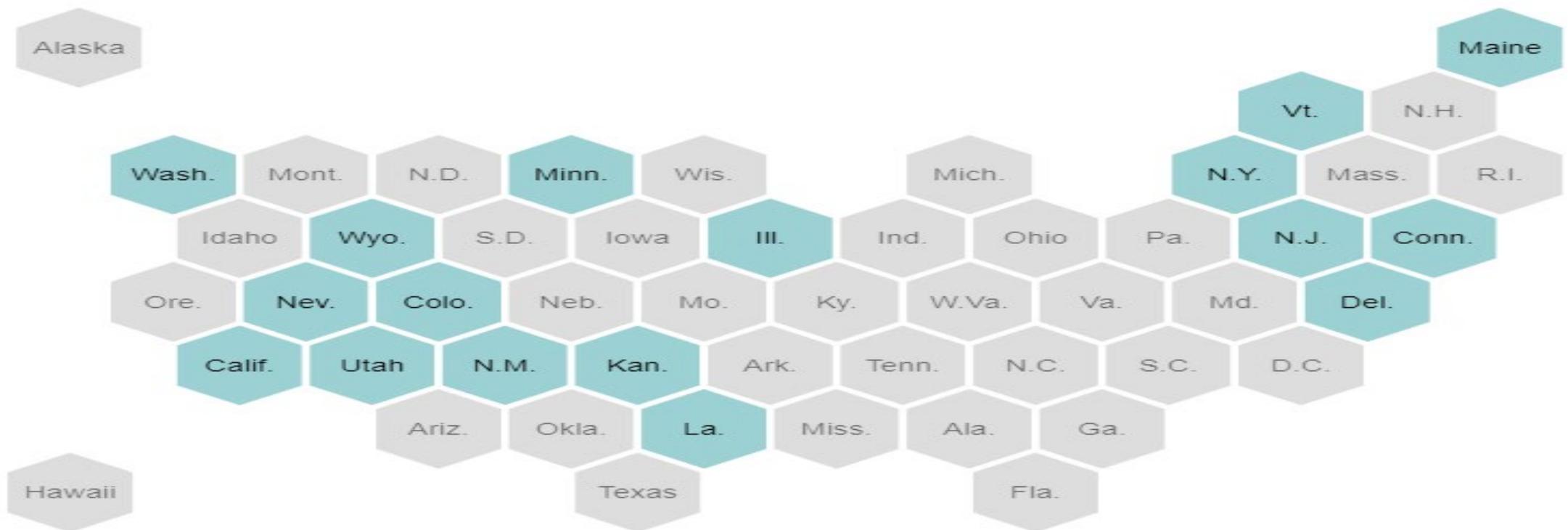
# 567 Anti-CRT Laws Introduced In The USA

- The newly released report State of Black America by the National Urban League identifies 567 anti-CRT laws introduced in the U.S. In the opinion of the report, the limitation on CRT are limiting the civil rights of Americans, including Black Americans. Critical Race Theory is a framework that sees race not mainly as a biological factor, but as a social construct and sees racism not only as an individual's biases but as embedded in society..
- <https://www.statista.com/chart/29757/anti-critical-race-theory-measures/>

# States That Have Passed Laws Expanding Diversity and Inclusion Training as of October 18, 2024

17 states to expand education on racism, bias, the contributions of specific racial or ethnic groups to U.S. history, or related topics.

<https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism>





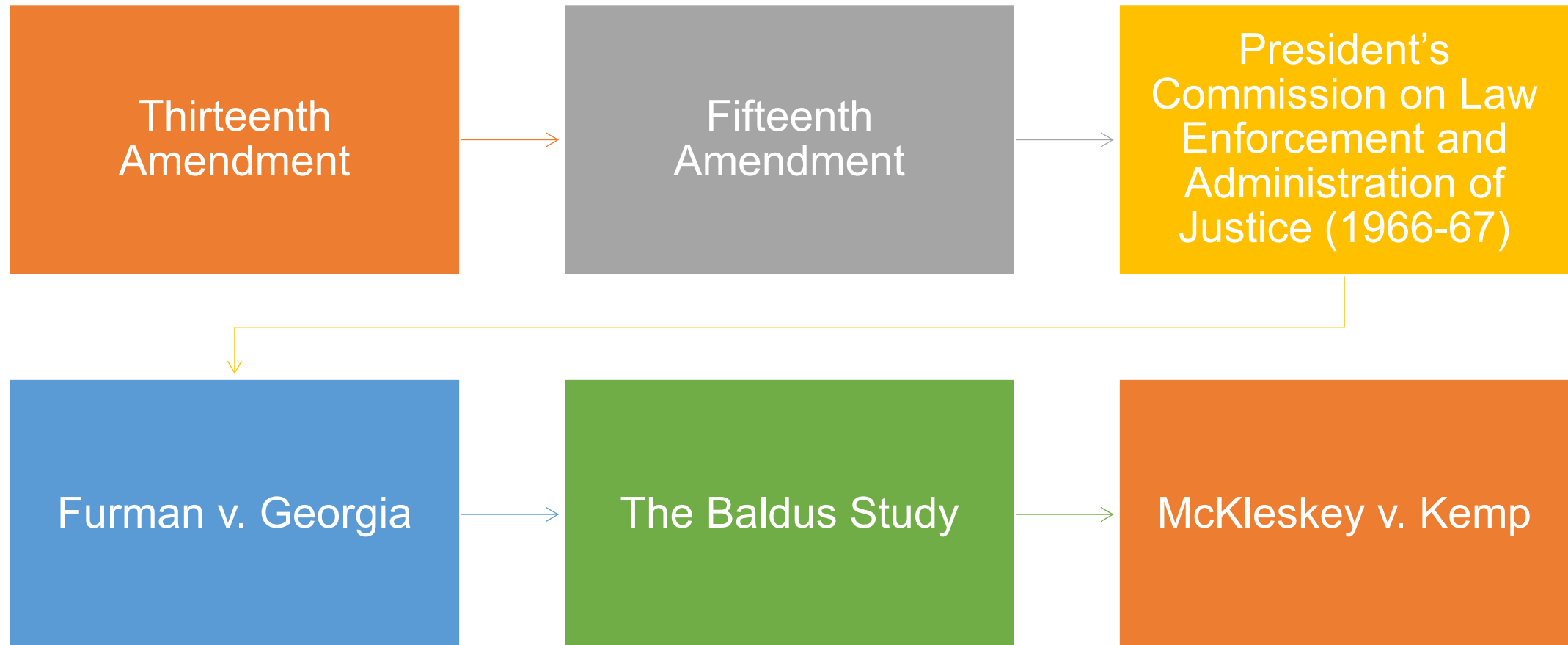
# The Civil War and Emancipation

- The 3/5ths Clause of the Constitution [1 in 6 are enslaved when Constitution is signed]
  - 3/5ths of an enslaved person would be counted for purposes of determining congressional representation.
  - Of course, did not provide for representation of the rights or interests of those enslaved.
  - Increased political power of slave-holding states because enslaved people outnumbered free.
  - Set the tone for dehumanizing and denial of legal rights including the right to vote, marry, form families, work/earn a living

# The “Black Codes” in Confederate States

- The “Black Codes”:
  - Forced the newly freed to sign contracts of servitude
    - Oppressive terms
    - Rendered newly freed people vulnerable
  - Dictated where newly free could live and with whom

# Post-Civil War and Civil Right Amendments



# 13<sup>th</sup> Amendment

Section 1: Neither slavery nor involuntary servitude, **except as a punishment for crime whereof the party shall have been duly convicted**, shall exist within the United States, or any place subject to their jurisdiction.

# 15<sup>th</sup> Amendment

- Voting Rights
- But many barriers, poll tax etc...
- Including physical violence (that went unpunished) in contrast to easy prosecutions and convictions (for “spitting on the sidewalk”).
- Disproportionate number of incarcerated are POC (and poor)
- Disproportionate numbers of POC receive harsher sentences

President's  
Commission on  
Law Enforcement  
and  
Administration of  
Justice (1966-67)

Conclusion:  
“significant racial  
discrimination exists in  
the application of the  
death sentence.”

# Furman v. Georgia (1972)

SCOTUS reversed death penalty sentences of four black defendants because of the “uncontrolled discretion of judges or juries” – i.e. it violated due process as arbitrary. Justice Douglas concurring said it violated the 8th Amendment ban on cruel and unusual punishment because imposition of the sentence was “selective and irregular.”

# California Racial Justice Act of 2020

01

Goal: Eliminate racial bias from California's criminal justice system and provide remedies to eliminate discriminatory practices.

02

Seeks to ensure that individuals have access to all relevant evidence regarding potential discrimination related to convictions or sentences, including statistical data.

03

Amends Penal Code Sections 745, PC 1473, 1473.7





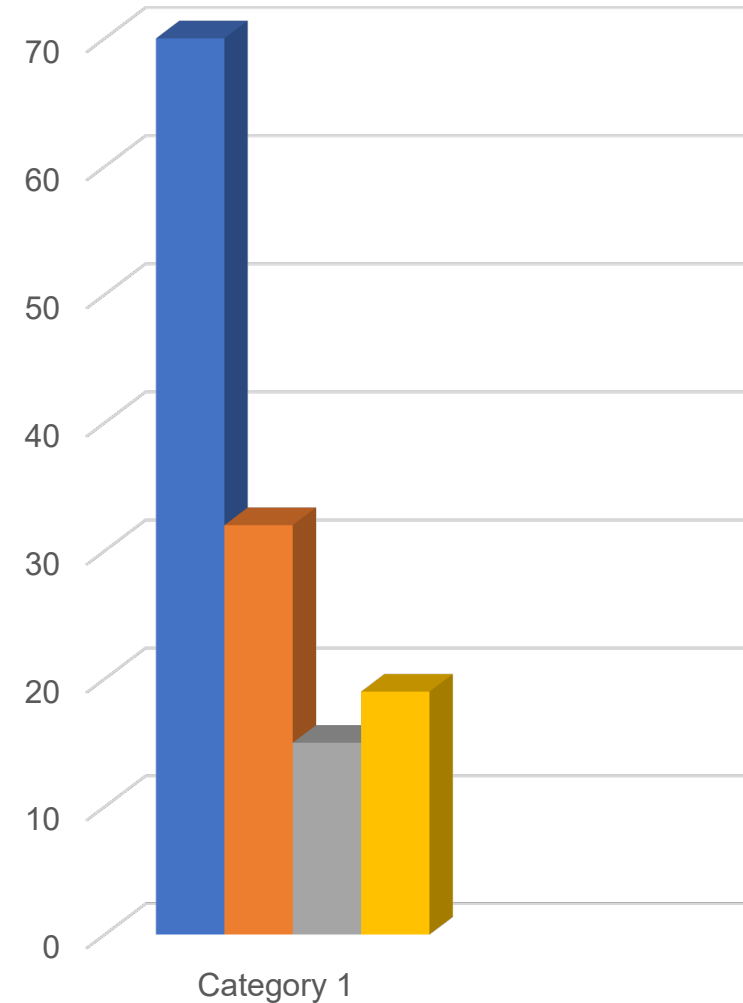
# **MCCLESKEY V. KEMP (1987)**

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# Baldus Study (1970s)

*Professor Baldus authored a groundbreaking study that found that people accused of killing white victims were four times as likely to be sentenced to death as those accused of killing Black victims.*

- **70% - Black defendants/White victims;**
- **32% - White defendants/ White victims;**
- **15% - Black defendants/Black victims;**
- **19% - White defendants / Black victims.**



# McCleskey v. Kemp (1987)



## What is the Baldus Study?

Defendant argued that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment:

1. Persons who murder whites are more likely to be sentenced to death than persons who murder blacks;
2. Black murderers are more likely to be sentenced to death than white murderers.

## Supreme Court's Response:

"At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."

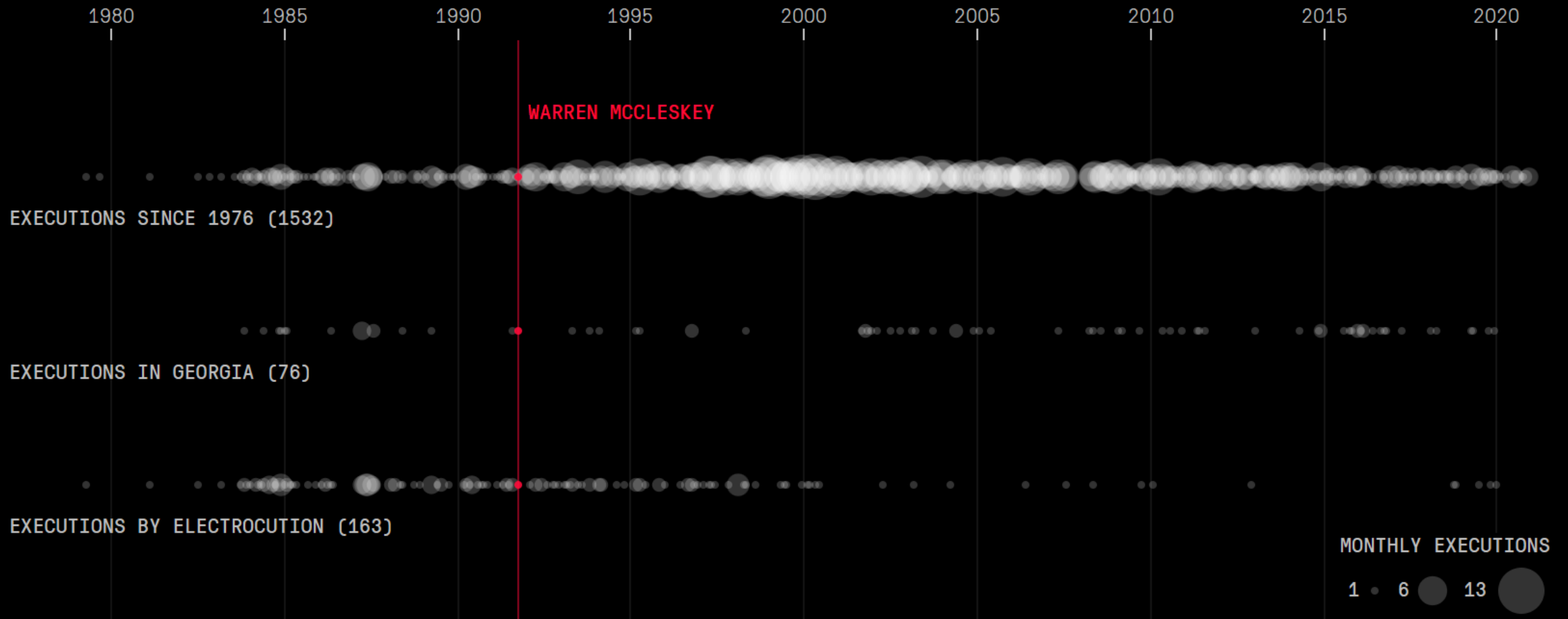
"McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility -- or indeed even the right -- of this Court to determine the appropriate punishment for particular crimes."

# “TOO MUCH JUSTICE”

“Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that, if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. ***The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role.***” (Mr. Justice Brennan)



■ **Warren McCleskey** was the **155th person executed** in the United States since 1976, the 15th person executed in Georgia, and the 90th person executed by electrocution.



# Federal Attempt to Pass RJA

- Would require a court to strike a death sentence where there is unrebutted statistical showing of racial imbalance in administration of sentencing.
- Eliminated the requirement to show discriminatory motive or purpose in the defendant's particular case. Upon showing prima facie case of discrimination the burden shifted to the state to rebut that discrimination played a role in sentencing.

# Federal Attempt to Pass RJA (cont.)

- Failed in the Senate
- A few states passed similar acts but did not gain nationwide traction instead moving toward moratorium on death sentences entirely.
- We know, however, racial discrimination is persistent across the administration of justice, not just in application of the death penalty.
- GOA has confirmed it and Federal Bureau of Prisons statistics on inmates confirm it, among many other sources.
- California Legislature has confirmed.



# **PARADIGM SHIFT**



# California Racial Justice Act of 2020

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*Thus, RJA does not require:*

Intentional / Purposeful  
Discrimination



Prejudicial Impact

# A note about Prejudice Standards...

## Structural

- **Prejudicial Per Se**
- This applies to errors that are constitutional in scope and affect the foundation and integrity of the trial.


*This applies to RJA. If there is a violation, a remedy **SHALL** be imposed.*



## Harmless BRD

- **“Chapman Error”**
- The question is whether court can find beyond a reasonable doubt that the error was harmless to the integrity of the proceeding.

*This applies **ONLY** to petitions for which judgment was entered before 1/1/21, and only certain violations.*



## Reasonably probable it had an effect

- **“Watson Error”**
- Applicable generally to state law errors
- Requires “a reasonable chance, more than an abstract probability,” that error affected outcome of trial.



# PC 745

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Violation – Procedure – Hearing

Pen. Code,  
§ 745,  
subd. (a)(1)

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“The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.”

# **RJA: PRIMARY PROVISIONS of 745**

Identifies five statutory violations

Defines the process for determining violations

Establishes remedies for violations

# PC § 745: VIOLATIONS

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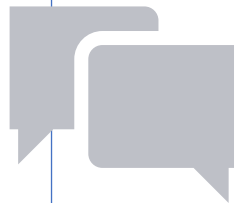
# The Five Violations of the Act



(a)(1) Exhibited Bias/  
Animus Against D



(a)(3) Charged with or  
Convicted of More Serious  
Offense

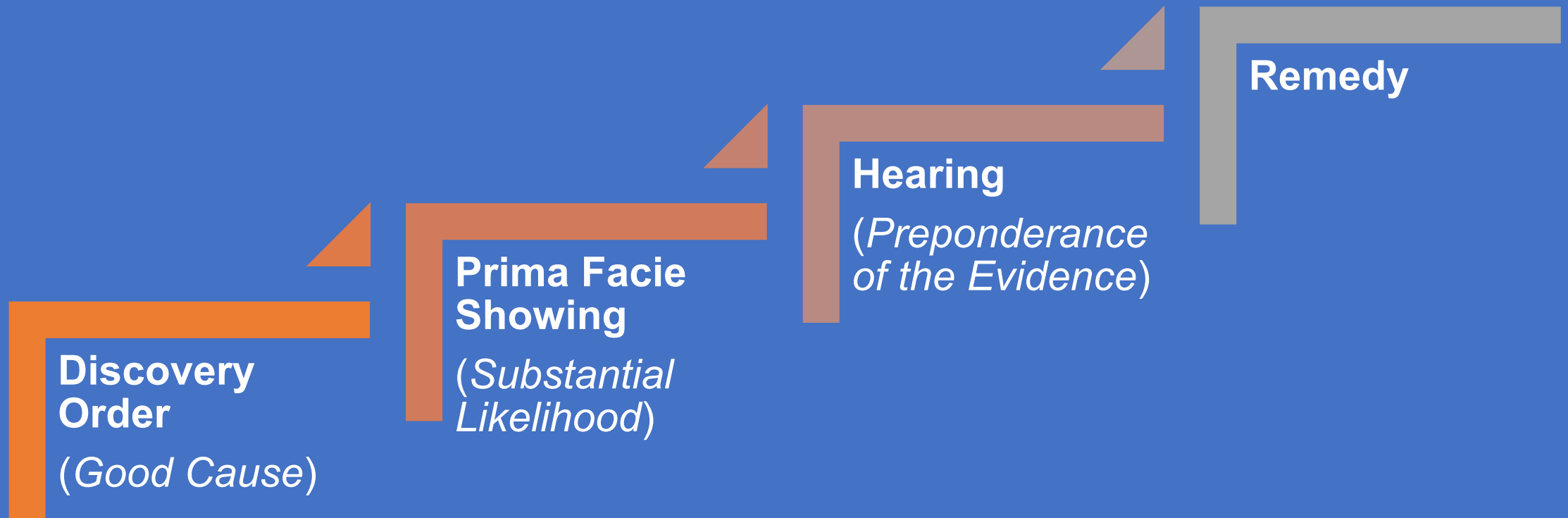


(a)(2) During trial used  
Racially Discriminatory  
Language Against D or  
Exhibited Bias



(a)(4) Longer More Severe  
Sentences: Defendant or  
Victim (2 Types)





# Order of Operations



# Discovery

§ 745, subd. (d)

**What may a  
Court  
order?**

**Discovery of all evidence  
relevant to a potential  
violation of the Act that is  
in the possession or  
control of the state.**



# ***What must the discovery motion contain?***

A description of the type of records or information the defendant seeks.

Upon a showing of **GOOD CAUSE**, the court shall order the records to be released.

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# What is Good Cause?

“A plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act ‘could or might have occurred’ in his case.”

*(Young v. Superior Court (2022) 79 Cal. App. 5th 138, 159-60)*

# Racial Profiling

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“While that kind of charge has never been recognized under the equal protection clause, it is now cognizable under section 745, subdivision (a)(1) of the RacialJustice Act.” (*Young at p. 160.*)

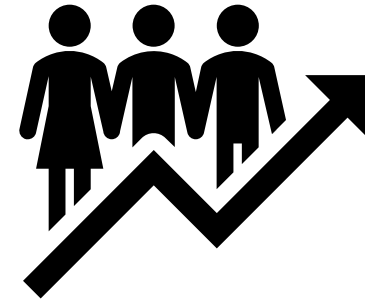


# When is discovery most often sought?

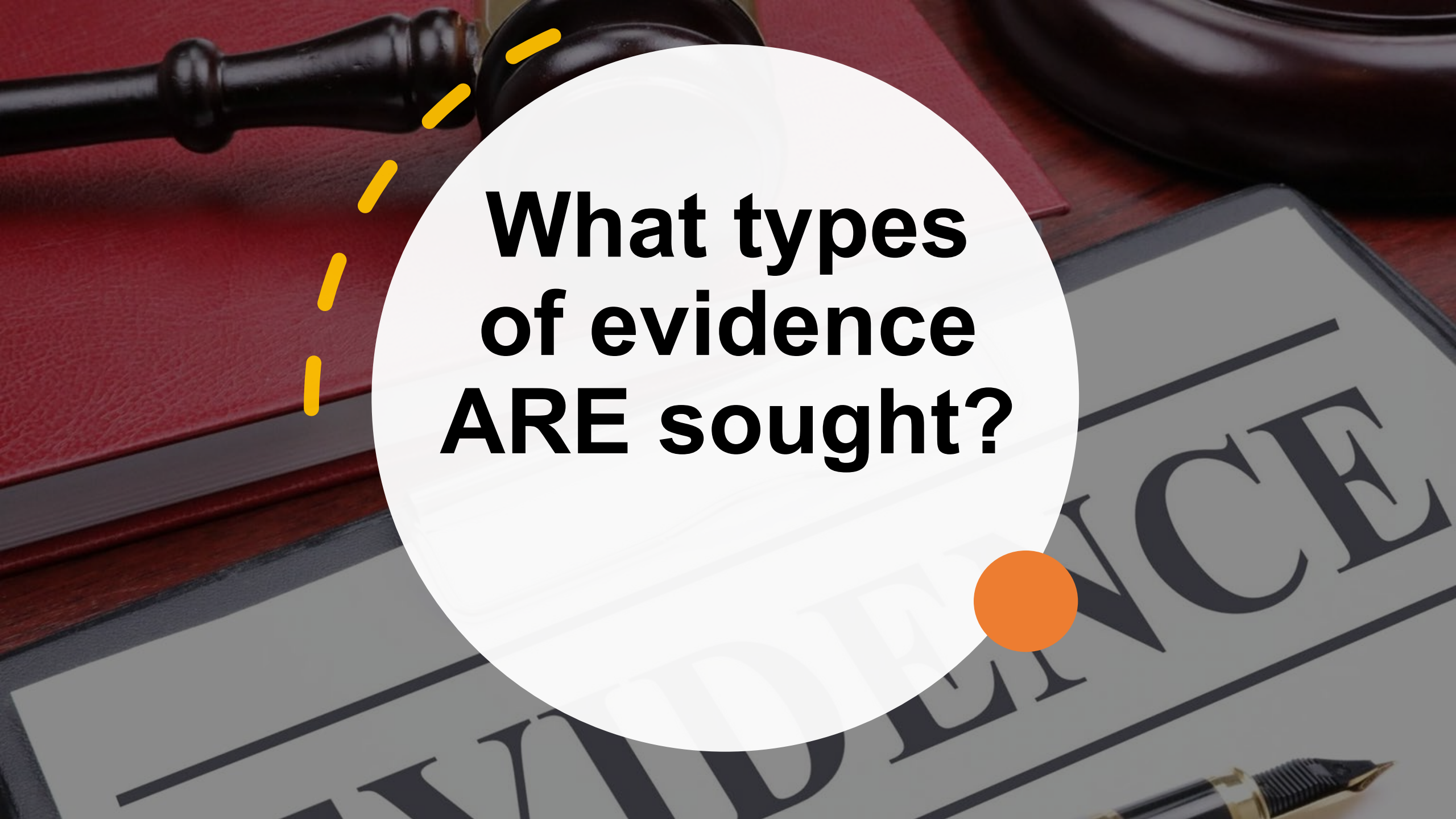
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Discriminatory charging



Discriminatory sentencing

A close-up photograph of a wooden gavel resting on a red leather-bound book. In the foreground, a grey document with the word 'EVIDENCE' printed in large, bold, black letters is visible. A white circular graphic with a dashed yellow border and an orange dot is overlaid on the center of the image, containing the text.

**What types  
of evidence  
ARE sought?**





## § 745(h)(1)

- **Statistical evidence**
- **Aggregate data**
- **Nonstatistical evidence**
- **Expert Opinions**

# Shaping a Discovery Order

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(1) whether the material required is adequately described,

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(2) whether the requested material is reasonably available to the government entity from which it is sought (and not readily available to the defendant from other sources),

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(3) whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest,

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(4) whether the defendant has acted in a timely manner,

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(5) whether the time required to produce the requested information will necessitate the unreasonable delay of defendant's trial,

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(6) whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and

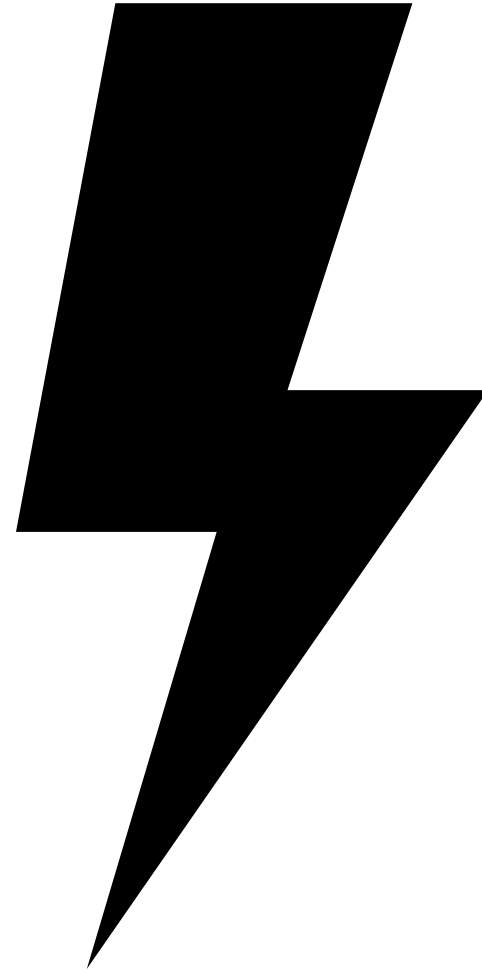
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(7) whether the defendant has shown a sufficient plausible justification for the information sought

# Speedy Trial

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*A trial court may have to grant a continuance to enable a defendant to request and then analyze discovery obtained under the Act.*



# How may the Court protect privacy rights or privileges?

## Redact

- Permit Prosecution to Redact Discovery

## Protective Order

- Issue a Protective Order

## Not Release

- If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records.

# PC § 745: Prima Facie Showing

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(p. 3-4 of materials)

# What should Defendant do?

*State fully with particularity the facts upon which relief is sought*

*Include copies of reasonably available documentary evidence in support*



# THE HEARING

(p. 2-4 of materials)

# The Hearing



“**[D]efendant produces facts** that, if true, establish that there is a substantial likelihood that a violation ... 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” (PC § 745(h)(2))





# Timing of Hearing

- Timing is not specified – discretion of court
  - Remedy based on time of hearing
  - Whether jeopardy has attached
  - Not required to “drop everything”
  - Potential of laches if not raised timely



# Who Hears the Motion?

- Trial Judge
  - Unless the motion is based upon judicial misconduct
    - Ct must self-disqualify on motion only – PC § 745(b)
    - Motion served on all parties
    - Motion promptly referred to PJ of court
    - Assigned judge hears all matters related to motion, including selection of remedy
-

# Evidence per § 745(c)(1)

Both parties may offer evidence “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

# Consideration of the Evidence

Explicit or Implicit Bias

- Unintentional
- Unconscious

Incorrect standard to conclude a person must “know” the race of the party to violate 745

Statistical evidence and aggregated data are admissible and are not character evidence

Need not prove *intentional discrimination*

***People v. Coleman*** (2024) 98  
Cal.App.5th 709 Review denied  
5/1/24 (p.1 of materials)

## **Court of Appeal**

*Defense counsel did not violate the Racial Justice Act by advising defendant to testify authentically, which was sound advice and was not shown to reflect racial animus or bias, even if counsel might have used slang terms regarding defendant's manner of speaking.*



# Supreme Court in Denying Review, Justice Evans writing separately (concurrency by J. Liu)

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*Advisements to "sound ghetto," "sound hood," and "sound like a thug" are wholly different from general advice that one should testify authentically. These specific terms have deeply racialized and pejorative meanings that are widely known. They are laden with negative stereotypes including associations with heightened criminality, violence, and reduced humanity. In my view, these particular advisements, standing alone, would be sufficient to infer Coleman's counsel exhibited at least implicit bias. However, it is unclear from the record whether counsel advised Coleman in this exact manner.*

**OUR ADVICE: CONDUCT AN EVIDENTIARY HEARING AND FIND OUT**





*Preponderance of the Evidence*

**STANDARD  
OF PROOF:**



Findings of  
Court  
§ 745(c)(3)

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Required on record at end of  
hearing

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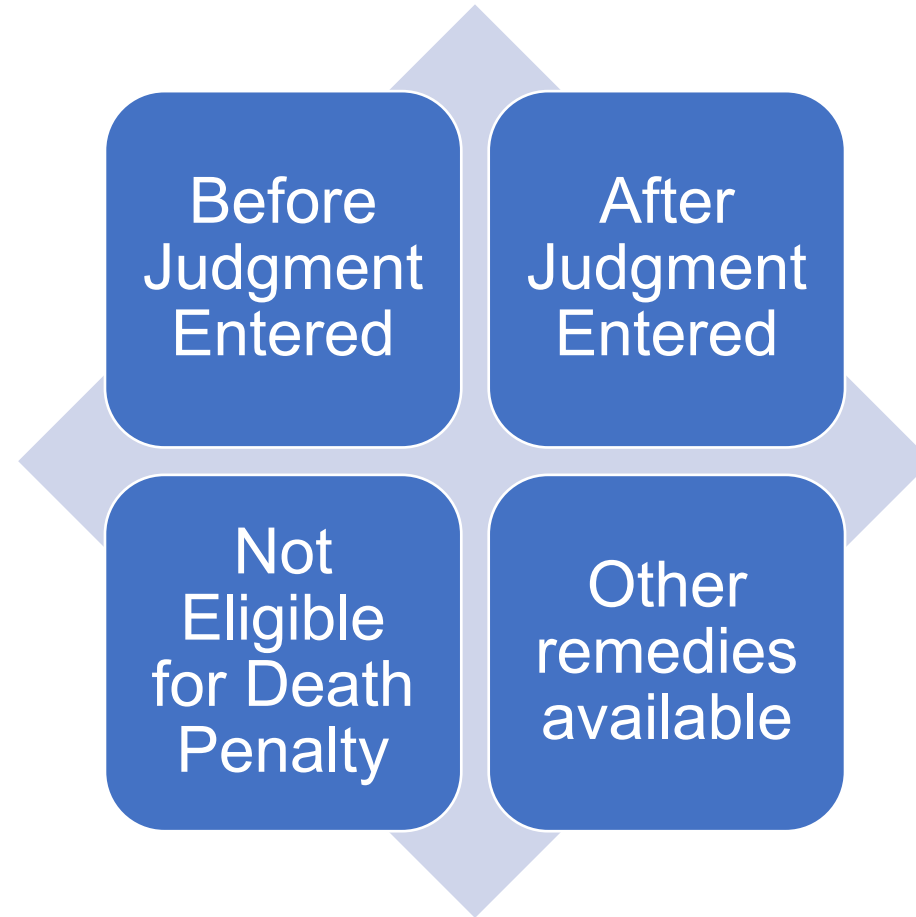
May be oral or written

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Should include reasons for  
decision on violation and selection  
of remedy if violation found



# Violation of § 745(a)



# Before Judgment: Specific to Violation

Declare a mistrial

Discharge & empanel new jury

If in the interests of justice

- Dismiss enhancements
- Dismiss special circumstances
- Dismiss special allegations
- Reduce one or more charges

# Remedy

Related to the Violation

Proportional

Abuse of discretion: does it exceed the bounds of reason or is it arbitrary, whimsical or capricious?

# What can be dismissed?

<ul style="list-style-type: none"><li>• Conduct and status enhancements</li><li>• Special Circumstances allegations</li><li>• Special allegations</li></ul>	Yes
<ul style="list-style-type: none"><li>• Underlying counts or charges</li></ul>	No
<ul style="list-style-type: none"><li>• Find a LIO or LRO</li></ul>	Option

# Violation found during Proceedings

Start at  
the point  
where  
violation  
occurred

- Arraignment
- Readiness conference
- Preliminary Examination
- Motions
- Jury Trial
- Probation Violating

# After Judgment:

*Sought or  
Obtained (a)*

Vacate	Vacate the conviction and sentence
Find	Find it is legally invalid
Order	Order new proceedings

**After  
Judgment:**

***Charged or  
Convicted  
(a)(3)***

Modify to lesser  
included or lesser  
related offense

Resentence



# Forfeiture

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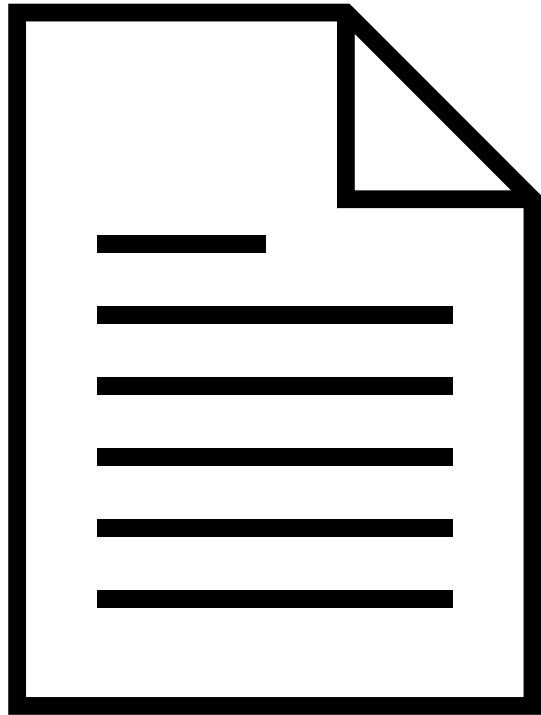
- A defendant may forfeit a 745 claim made for the first time on direct appeal unless there is an exception to the forfeiture doctrine that applies

*People v. Lashon* (2024) 98 Cal.App.5th 804



Vacate	Vacate the sentence
Find	Find legally invalid
Impose	Impose new sentence

**After  
Judgment:  
*Sentenced (a)(4)***

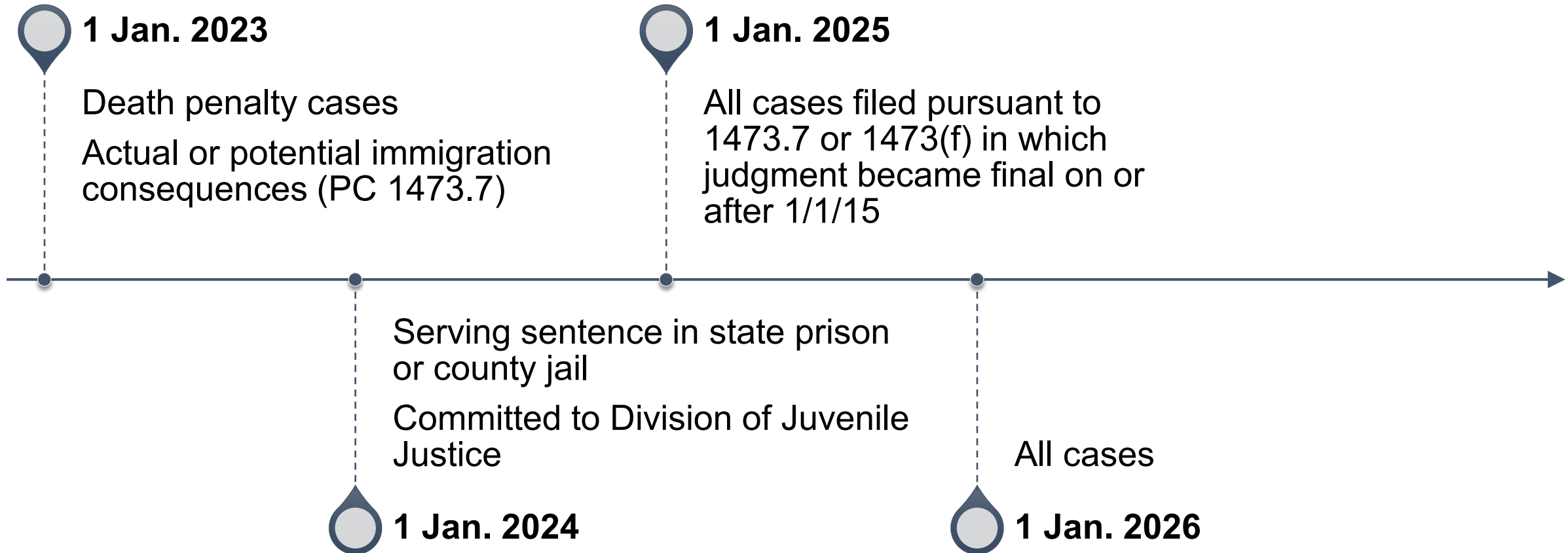


# Habeas and Motions to Vacate

PC 1473

PC 1473.7

# Retroactivity



# Pen. Code § 1473(e)

Staggered effective  
date per PC § 745(j)

“[A] writ of habeas corpus may . . . be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745. . . .”

PC § 1473.7

VACATURE  
MOTION

Adds PC § 745(a)  
violations as grounds for  
relief

Motion must be filed  
“without undue delay” from  
when discovered or should  
have been discovered



# Relief if Out of Custody?

PC § 1473.7(a)

***SHALL GRANT THE MOTION TO VACATE THE  
CONVICTION OR SENTENCE***



**YOUR  
QUESTIONS?**

