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September 16, 2020

Hon. Gavin Newsom
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: Assembly Bill 2542 (Kalra) – Letter of Concern

Dear Governor Newsom:

The Judicial Council writes to inform you that while it very much appreciates the floor amendments made to AB 2542 on August 25, 2020, the council continues to have a considerable number of significant concerns.

As amended, AB 2542, among other things, (l) prohibits the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin, as specified; (2) allows a writ of habeas corpus to be prosecuted on the basis of that prohibition; and (3) requires the prosecution to disclose, pursuant to a written request, all evidence relevant to a potential violation of that prohibition.

As noted in the council's previous letters dated August 17, 2020 and August 29, 2020, the council appreciates the identified harm that AB 2542 seeks to remedy. However, the remedies and language as currently included in AB 2542 raise a number of significant concerns as outlined below. The Council has no objections to the policy the author is trying to achieve. Indeed, the Judicial Council's Strategic Plan embraces the importance of access to justice, and emphasizes a commitment to "remove all barriers to access and fairness by being responsive to the state's cultural, ethnic, socioeconomic, linguistic, physical, gender, and age diversities, and to all people."

To that end, the council's continued concerns are directed to the fair administration of justice, the substantial new impacts on court operations that would result from the bill, and areas of potential legal challenges as well as where clarifying language is necessary to avoid protracted litigation on the meaning of terms within the bill.

Due to the extremely compressed timeframes in this year's legislative calendar and the fact that this important and complex legislation was amended into a new bill in the Senate and did not receive a policy or fiscal committee hearing in the Assembly where it was approved on the concurrence file, the council strongly believes that AB 2542 needs more time for analysis and review to give full consideration to the large number of significant concerns relating to how courts can best address the issues the bill seeks to remedy.

Potential Constitutional Issues:[1]

- *Lack of Prejudice Standard:* The Judicial Council remains concerned that the bill continues to lack the "prejudice" or "prejudicial error" standard that courts apply in habeas corpus proceedings to determine whether there is a reasonable probability that the challenged evidence would have affected the outcome of the trial and therefore resulted in harm to the defendant. The council notes that prejudicial error in the proceedings as a legal standard is not synonymous with prejudicial feelings or animus towards another.

  Without a prejudice standard the bill will likely result in litigation on whether such a standard is required under the section 13 of Article VI of the California Constitution and, more specifically, whether the bill falls within the meaning of "a miscarriage of justice" as discussed in *People v. Sivongxxay* (2017) 3 Cal.5th 151, 181) ("The California Constitution imposes upon this court an obligation to conduct 'an examination of the entire cause' and reverse a judgment below for error only upon determining that a 'miscarriage of justice' has occurred. (Cal. Const., art. VI, § 13.) This provision informs the general rule in this state that to obtain reversal of the judgment based on a violation of a state statute, a defendant must demonstrate that it is 'reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*People v. Watson* (1956) 46 Cal.2d 818, 836)).[2]

  The council agrees that addressing structural errors caused by racial discrimination is a laudable goal, but given the breadth of the bill, these broadly stated violations do not

[1] The Judicial Council does not take formal positions on the constitutionality of legislation unless those positions are directly related to the Judicial Branch as a separate branch of government. To that end, the comments listed below are solely intended to flag constitutional issues identified by our subject matter experts as potential areas of litigation relating to the bill and are **not** intended to be read as legal conclusions regarding the legality of AB 2542.

[2] The California Supreme court has indicated that a showing of prejudice is required for habeas petitions grounded on some constitutional violations of fundamental constitutional rights: (See *In re Richards* (2016) 63 Cal.4th 291, 312-313 [habeas corpus petition based on false evidence]; *In re Clark* (1993) 5 Cal.4th 750, citing *In re Martin* (1987) 44 Cal.3d 1, 50-51 [habeas corpus petition based on prosecutorial witness intimidation in violation of a criminal defendant's right to present a defense]; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692

necessarily result in errors that render a trial fundamentally unfair. However, while the author's office has asserted that the constitution does not require a prejudice standard for AB 2542, the council's subject matter experts disagree that violations of Penal Code section 745 (a)[3] are analogues to constitutional violations that courts have found per se reversible because without a showing of prejudice there is no showing that the proceedings have been tainted by discrimination. In fact, current jury instructions provide guidance to jurors in considering bias statements made or bias demeanor exhibited by a witness in determining the witness's credibility or believability[4]. If a jury found a witness's testimony not credible but found credible the testimony of other witnesses or other evidence sufficient for a finding of guilt, this bill, without a showing of prejudice to the outcome of the trial, would require invalidation of the jury's decision.

Finally, the council is concerned that the lack of a prejudice standard will raise questions under California Constitution Article I., § 28 (a)(6), which provides that "[v]ictims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end."

- *Remedies:* The council is concerned that the remedy for a violation of AB 2542 provided in 745(e)(1)(D) that would permit a court to dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges against a defendant if it determines that it would be in the interest of justice, could be read as impermissibly transferring the executive branch function of bringing charges from prosecutors to the judicial branch.

- *Potential Conflict with Death Penalty Proposition*: While the amendments to section 745(e) provide "except for an initiative approved by the voters," section 745(e)(3) still provides that "when the court finds there has been a violation of subdivision (a), the defendant shall not be

(*Strickland*) [habeas corpus petition based on claim of ineffective assistance of counsel in violation of the constitutional right to counsel]; *In re Cordero* (1988) 46 Cal.3d 161, 180 (*Cordero*) [same].)

To establish prejudice for ineffective assistance of counsel, *the petitioner must show a reasonable probability* that they would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra,* 466 U.S. at pp. 688, 691-692; *Cordero*, *supra*, 46 Cal.3d at p. 180.) "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624].) "The likelihood of a different result must be substantial, not just conceivable." (*Id.*, at p.112.) This is the same standard applied in reviewing under California Constitution, article VI, section 13 for "a miscarriage of justice" as discussed in People v. *Watson* (1956) 46 Cal.2d 818, 836. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, fn. 4 [the Watson standard is the same standard as the prejudice prong under Strickland].) For habeas corpus claims based on false evidence, the standard for determining prejudice is the same as the *Watson* test, a reasonable probability the false testimony affected the outcome. (*In re Richards* (2016) 63 Cal.4th 291, 312-313.)

[3] Unless otherwise indicated, all references are to the Penal Code and as proposed to be added to the Penal Code by AB 2542.

[4] See CALCRIM 105 and 226.

eligible for the death penalty." The council remains concerned that this language would lead to litigation relating to Proposition 7 (§ 190), which does not permit legislative amendment of its statutory provisions without voter approval. (*People v. Cooper* (2002) 27 Cal.4th 38, 44 (holding that "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval. (Cal. Const., art. II, § 10, subd. (c)").

Substantial New Burdens on Courts

- *Prospective Impacts:* The council remains concerned about the substantial new burdens that AB 2542 will place on courts. It appears that the bill contemplates hearings occurring during trial to determine whether the provisions of the bill have been violated, which could result in cumbersome and time-consuming trials. The necessity of extensive memorandums of points and authorities by counsel and hearing oral argument due to the wide net cast by the bill would substantially extend trial time. Moreover, the council continues to be concerned that minitrials would result at sentencing, thereby extending court calendars.

- *Retroactive Impacts:* The council appreciates the amendments stating that section 745 applies "only prospectively." However, the prospective application of section 1437(f), which permits a writ of habeas corpus to be prosecuted based on a violation of 745(a) would be made clear if it was also amended to expressly state that it applies "only prospectively." The council is concerned that without that clear statement and in light of the legislative intent expressed in section 1 of the bill, there will be litigation on whether the habeas corpus provisions are only prospective. In addition, AB 2542 adds new subdivision (a)(3) to section 1437.7 to allow a convicted individual who is no longer incarcerated to file a motion to vacate their conviction based on a violation of 745(a), in addition to the motions currently permitted under that section based on immigration consequences or new evidence. Notably, while the amendments to 1437(f) state that it applies to judgments entered on or after January 1, 2021, new 1473(a)(3) makes no reference to that date nor prospective application, which will likely lead to litigation about whether the legislature intended to make this new grounds for relief retroactive. As noted in the council's letter on August 17, 2020, if the bill is interpreted as retroactive, this would result in substantial new costs and burdens on courts.

- The council conservatively estimates that AB 2542 would have court workload impacts of between $5 million to $10 million annually for prospective application of its terms and potentially more than $30 million in one-time workload costs if interpreted to apply retroactively. Any new unfunded workload in the courts as a result of this bill could result in delays of court services, prioritization of cases, and may impact access to justice.

Vague, Ambiguous, and Inconsistent Language:

The council continues to believe that many of the bill's terms must be clarified to avoid litigation on their meaning, as well as assist courts in the practical implementation of AB 2542, including, among others:

- 745(a): "*on the basis of race, ethnicity, or national origin"*

The meaning of "on the basis of" remains unclear as to whether the nexus relates only to subdivision (a)(1), (2) and (3) or other circumstances.

- 745(a)(1)(2): *"bias"*

  The term "bias" should be clarified. Subdivision (h)(3) uses an "objective observer" test for "racially discriminatory language." It is unclear whether an objective test or subjective intent, or balancing test, or equal protection-type test is required. Also, it is unclear what reference point should be used for the "objective observer." What standard should be used to determine the types of language that would be considered racially discriminatory language vs racially neutral language by an "objective observer"? Would expert testimony be necessary?

- 745(a)(2)(3)*: "used racially discriminatory language or otherwise demonstrated bias or animus based on race, ethnicity, or national origin, whether or not purposeful or directed at a defendant" (emphasis added)*

  The council appreciates the amendments that clarify that the racially discriminatory language pertains to the language relating to the defendant that occurred during the trial by, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror. However, the council remains concerned that the language does not address how "whether or not purposeful" will be proved and believes that the language must be clarified. Whether language used during trial is racially discriminatory or racially neutral is a factor for the jury to decide in determining the credibility or believability of the witness. For example, judges often elect to instruct the jury to disregard a statement by a witness, but the bill does not contemplate that as a remedy.

- 745(a)(3): *"was a factor in the exercise of peremptory challenges"*

  The council remains concerned about whether "was a factor in the exercise of peremptory challenges" is meant to incorporate the new standards set forth in AB 3070 (Weber, as amended August 21, 2020). Or does it set up a wholly different, undefined standard? The council continues to believe that this provision must be deleted as AB 3070 appears to cover the issue of peremptory challenges addressed by this subparagraph. As currently written, the statute would have the effect of potentially providing habeas relief in every case where peremptory challenges were held to have been properly exercised based on the existing law at the time.

- 745(e): *"the court shall impose a remedy specific to the violation found from the following list of remedies" … "(e)(1) Before a judgment has been entered, the court may impose any of the following remedies":*

  The council remains concerned that this subdivision improperly removes judicial discretion; and recommends replacing "shall" with "may." A judicial officer should have the discretion to impose a sanction that is appropriate under the circumstances and should not be limited in the ability to fashion a remedy. As mentioned previously, a judge may elect to instruct the jury as to what may be an appropriate remedy under the circumstances. Additionally, paragraph (2)(A)

of this subdivision states *"if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (4) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred."* The council notes that this language is unworkable as a court cannot vacate a conviction and at the same time modify the judgment. If a conviction is vacated, there is no basis to modify the judgment unless the court has authority to enter a new conviction and enter a new judgment. However, this raises due process issues. Thus, this language must be clarified.

- 745(e)(1)(a) *"reseat a juror removed by use of a peremptory challenge"*

  The council remains concerned that this remedy is not feasible because the juror would have already been excused and released from service. Also, it is unclear if the provision is limited to peremptory challenge violations under this section or applies to all of the remedies other than reseating the juror applicable to other violations that might occur during trial. To avoid potential confusion, the reference to reseating the juror should be deleted since remedies related to peremptory challenge violations are covered in AB 3070. Additionally, inconsistencies between the two bills may raise interpretation issues.

In closing, while the Judicial Council appreciates the goals of the legislation, the council continues to have a considerable number of significant concerns about AB 2542 in its current form. Given these concerns, more time for analysis and review is necessary to give full consideration to the revisions needed to sufficiently address the important issues raised by the author.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,

Sent September 16, 2020

Cory T. Jasperson
Director, Governmental Affairs

CTJ/SR/jh
cc: Hon. Ash Kalra, Member of the Assembly
Mr. Anthony Williams, Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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TANI G. CANTIL-SAKAUYE
Chief Justice of California
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MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

August 29, 2020

California State Senate
Members of the Senate
State Capitol
Sacramento, California 95814

Subject: Assembly Bill 2542 (Kalra), as amended August 25, 2020–Letter of Concerns

Dear Members of the Senate:

The Judicial Council very much appreciates the amendments made to AB 2542 on August 25, 2020, however, the council respectfully regrets to inform you that a considerable number of significant concerns remain. The bill, among other things, (l) prohibits the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin, as specified; (2) allows a writ of habeas corpus to be prosecuted on the basis of that prohibition; and (3) requires the prosecution to disclose, pursuant to a written request, all evidence, within its possession or control, relevant to a potential violation of that prohibition.

As noted in our letter of August 17, 2020, the council appreciates the harm that AB 2542 seeks to remedy, and as previously noted, the Judicial Council's Strategic Plan embraces the importance of access to justice, and emphasizes a commitment to "remove all barriers to access and fairness by being responsive to the state's cultural, ethnic, socioeconomic, linguistic, physical, gender, and age diversities, and to all people."

To that end, the council's continued concerns remain directed to the fair administration of justice, the substantial new impacts on court operations that would result from the bill and identifying areas of potential legal challenges as well as where clarifying language will help avoid protracted litigation on the meaning of terms within the bill.

Due to the compressed timeframes in this year's legislative calendar, the council continues to strongly believe that AB 2542 needs more time for analysis and review to give full consideration to

the large number of significant concerns relating to how courts can best address the issues that AB 2542 seeks to remedy.

Potential Constitutional Issues:

- *Lack of Prejudice Standard:* The bill continues to lack a requisite prejudice standard. Without such a standard, the bill would cast a wide net resulting in substantial new burdens on courts and could lead to potential litigation on whether such a standard is required under the California Constitution.

  Unlike habeas corpus proceedings where a showing of prejudice is required,[1] AB 2542 does not require this longstanding standard to determine whether a violation of the terms of the bill resulted in actual "prejudice" to the defendant or that there is a reasonable probability of a different result or a finding of a miscarriage of justice. This could raise issues under section 13 of Article VI of the California Constitution.[1]

  While the author's office has asserted that the constitution does not require a prejudice standard for AB 2542, our subject matter experts disagree that violations of Penal Code section 745 (a)[2] are analogues to constitutional violations where courts have found per se reversible because without a showing of prejudice there is no showing that the proceedings have been tainted by discrimination. In fact, current jury instructions provide guidance to jurors in considering bias statements made or bias demeanor exhibited by a witness in determining the witness's credibility or believability. If a jury found a witness's testimony not credible but found credible the testimony of other witnesses or other evidence sufficient for a finding of guilt, this bill, without a showing of prejudice, would require invalidation of the jury's decision. The council agrees that addressing structural errors caused by racial discrimination is a laudable goal, but given the breadth of the bill, these broadly stated violations do not necessarily result in errors that render a trial fundamentally unfair. Thus, the council remains concerned that litigation would result

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[1] The California Supreme court has indicated that a showing of prejudice is required for habeas petitions grounded on some constitutional violations of fundamental constitutional rights: (See *In re Richards* (2016) 63 Cal.4th 291, 312-313 [habeas corpus petition based on false evidence]; *In re Clark* (1993) 5 Cal.4th 750, citing *In re Martin* (1987) 44 Cal.3d 1, 50-51 [habeas corpus petition based on prosecutorial witness intimidation in violation of a criminal defendant's right to present a defense]; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 (*Strickland*) [habeas corpus petition based on claim of ineffective assistance of counsel in violation of the constitutional right to counsel]; *In re Cordero* (1988) 46 Cal.3d 161, 180 (*Cordero*) [same].)

To establish prejudice for ineffective assistance of counsel, *the petitioner must show a reasonable probability* that they would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra,* 466 U.S. at pp. 688, 691-692; *Cordero*, *supra*, 46 Cal.3d at p. 180.) "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624].) "The likelihood of a different result must be substantial, not just conceivable." (*Id*., at p.112.) This is the same standard applied in reviewing under California Constitution, article VI, section 13 for "a miscarriage of justice" as discussed in People v. *Watson* (1956) 46 Cal.2d 818, 836. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, fn. 4 [the Watson standard is the same standard as the prejudice prong under Strickland].) For habeas corpus claims based on false evidence, the standard for determining prejudice is the same as the *Watson* test, a reasonable probability the false testimony affected the outcome. (*In re Richards* (2016) 63 Cal.4th 291, 312-313.)

[2] Unless otherwise indicated, all references are to the Penal Code and as proposed to be added to the Penal Code by AB 2542.

regarding whether the bill falls within the meaning of "a miscarriage of justice" as discussed in *People v. Sivongxay* (2017) 3 Cal.5th 151, 186 fn. 16).

- *Potential Conflict with Death Penalty Proposition*: While the amendments to section 745(e) provide "except for an initiative approved by the voters," section 745(e)(3) still provides that "when the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty." The council remains concerned that this language would lead to litigation relating to Proposition 7 (§ 190), which does not permit legislative amendment of its statutory provisions without voter approval. (*People v. Cooper* (2002) 27 Cal.4th 38, 44 (holding that "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval. (Cal. Const., art. II, § 10, subd. (c)").

Substantial New Burdens on Courts

- *Prospective Impacts:* The council remains concerned about the substantial new burdens that the bill would place on courts. It appears that the bill contemplates hearings occurring during trial to determine whether the provisions of the bill have been violated, which would result in cumbersome and time-consuming trials. The necessity of extensive memorandums of points and authorities by counsel and hearing oral argument due to the wide net cast by the bill would substantially extend trial time. Moreover, the council continues to be concerned that minitrials would result at sentencing, thereby extending court calendars.

- *Retroactive Impacts:* The council appreciates the amendments stating that section 745 applies only prospectively, however, the prospective application would be made clear if section 1437(f) was also amended to expressly state that the application is prospective. The council is concerned that without that clear statement and in light of the legislative intent expressed in section 1 of the bill, there would be litigation on whether the habeas corpus provisions are prospective. As noted in the council's August 17, 2020 letter, if the bill is interpreted as retroactive, this would result in substantial new costs and burdens on courts.

Vague, Ambiguous, and Inconsistent Language:

The council continues to believe that many of the bill's terms, as amended August 25, 2020, would benefit from clarification to avoid litigation on the meaning of the terms of the bill, as well as assist courts in the practical implementation of its terms, including, among others:

- 745(a): "*on the basis of race, ethnicity, or national origin"*

  The meaning of "on the basis of" remains unclear as to whether the nexus relates only to subdivision (a)(1), (2) and (3) or other circumstances.

- 745(a)(1)(2): *"bias"*

  The term "bias" would still benefit from clarification. Subdivision (h)(3) uses an "objective observer" test for "racially discriminatory language." It is unclear whether an objective test or

subjective intent, or balancing test, or equal protection-type test is required. Also, it is unclear what reference point should be used for the "objective observer." What standard should be used to determine the types of language that would be considered racially discriminatory language vs racially neutral language by an "objective observer"? Would expert testimony be necessary?

- 745(a)(2)(3)*: "used racially discriminatory language or otherwise demonstrated bias or animus based on race, ethnicity, or national origin, whether or not purposeful or directed at a defendant" (emphasis added)*

  The council appreciates the amendments that clarify that the racially discriminatory language pertains to the language relating to the defendant that occurred during the trial by, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror. However, the council remains concerned that the language does not address how "whether or not purposeful" will be proved and believes that the language requires clarification. Whether language used during trial is racially discriminatory or racially neutral is a factor for the jury to decide in determining the credibility or believability of the witness. For example, judges often elect to instruct the jury to disregard a statement by a witness, but the bill does not contemplate that as a remedy.

- 745(a)(3): *"was a factor in the exercise of peremptory challenges"*

  The council remains concerned about whether "was a factor in the exercise of peremptory challenges" is meant to incorporate the new standards set forth in AB 3070 (Weber, as amended August 21, 2020). Or does it set up a wholly different, undefined standard? The council continues to believe that less confusion would ensue if this provision is deleted as AB 3070 appears to cover the issue of peremptory challenges addressed by this subparagraph. As currently written, the statute would have the effect of potentially providing habeas relief in every case where peremptory challenges were held to have been properly exercised based on the existing law at the time.

- 745(e): *"the court shall impose a remedy specific to the violation found from the following list of remedies" (e)(1) Before a judgment has been entered, the court may impose any of the following remedies:*

  The council remains concerned that this subdivision improperly removes judicial discretion; and recommends replacing "shall" with "may." A judicial officer should have the discretion to impose a sanction that is appropriate under the circumstances and should not be limited in the ability to fashion a remedy. As mentioned previously, a judge may elect to instruct the jury as may be an appropriate remedy under the circumstances. Additionally, paragraph (2)(A) of this subdivision states *"if the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (4) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred."* The council is concerned that

this language is unworkable as a court cannot vacate a conviction and at the same time modify the judgment. If a conviction is vacated, there is no basis to modify the judgment unless the court has authority to enter a new conviction and enter a new judgment. However, this raises due process issues. Thus, this language needs to be clarified.

- 745(e)(1)(a) *"reseat a juror removed by use of a peremptory challenge"*

  The council remains concerned that this remedy is not feasible because the juror would have already been excused and released from service. Also, it is unclear if the provision is limited to peremptory challenge violations under this section or applies to all of the remedies other than reseating the juror applicable to other violations that might occur during trial. To avoid potential confusion, it seems appropriate to delete the reference to reseating the juror since remedies related to peremptory challenge violations are covered in AB 3070. Additionally, inconsistencies between the two bills may raise interpretation issues.

In closing, while the Judicial Council appreciates the goals of the legislation, the council continues to have a considerable number of significant concerns about AB 2542 in its current form. Given these concerns, we urge that the necessary, adequate time be given for analysis and review to provide full consideration to the revisions needed to sufficiently address the important issues raised by the bill.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,

Sent August 29, 2020

Cory T. Jasperson
Director, Governmental Affairs

CTJ/SR/jh

cc: Hon. Ash Kalra, Assemblymember, Twenty-Seventh Assembly District
Ms. Stella Choe, Counsel, Senate Public Safety Committee
Mr. Shaun Naidu, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Public Safety Fiscal Consultant, Senate Republican Caucus
Ms. Cheryl Anderson, Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Public Safety Consultant, Assembly Republican Caucus
Mr. Jessie Romine, Budget Analyst, Department of Finance
Mr. Anthony Williams, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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August 18, 2020

Hon. Anthony J. Portantino, Chair
Senate Appropriations Committee
State Capitol, Room 3086
Sacramento, California 95814

Subject: AB 2542 (Kalra), as amended August 1, 2020 – Fiscal Impact Statement

Dear Senator Portantino:

Assembly Bill 2542, among other things, (1) prohibits the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin, as specified; (2) allows a writ of habeas corpus to be prosecuted on the basis of that prohibition; and (3) requires the prosecution to disclose, pursuant to a written request, all evidence relevant to a potential violation of that prohibition.

We conservatively estimate that AB 2542 will have court workload impacts of between $9.3 million and $40.6 million annually.

Fiscal Impacts
The provisions of this bill create both a retroactive and a prospective workload impact on the courts as the bill applies to both existing adult and juvenile criminal cases as well as previously adjudicated cases, with no apparent limitations on when the adjudication occurred.

Retroactive Workload
We used court data on criminal case adjudications for only the past 10 years to estimate the potential number of convictions that are retroactively eligible for relief under this bill. We note that the bill, as currently drafted, applies to felony, misdemeanor and juvenile delinquency cases.

Between FY 2009 and FY 2018 courts handled approximately 10.2 million criminal felony, misdemeanor and juvenile delinquency cases. Determining the number of cases that are retroactively eligible is difficult, but if *only* 1 percent of these criminal cases were eligible for relief, this would translate to approximately 100,000 cases. Feedback from courts indicates it is reasonable to estimate a court could spend between 3 minutes and 15 minutes on each petition to determine if it meets the "prima facie" standard for additional review hearings. Table 1 presents the workload calculations associated with processing retroactively eligible petitions.

Table 1:

Case Estimate	**Processing Time (*per case*)**	**Workload Impact**
100,000	3 minutes	$4,800,000
	15 minutes	$24,000,000

Although there are many variables that influence whether a petition will be able to meet the "prima facie" standard for an additional review hearing, if *only* 5% of the estimated potentially eligible petitions (100,000) are granted additional review, this would translate to 5,000 cases. Feedback from courts indicates it is reasonable to estimate that the additional review hearings could last between 30 minutes and 90 minutes per case. Table 2 presents the workload calculations associated with holding additional review hearings for eligible petitions.

Table 2:

Case Estimate	**Processing Time (*per case*)**	**Workload Impact**
5,000	30 minutes	$2,400,000
	90 minutes	$7,200,000

Prospective Workload
To develop an estimate of the prospective workload costs of this bill we used criminal court disposition data on the number of adult and juvenile criminal cases adjudicated in the past 5 years to estimate the potential number of cases that may be challenged under the provisions of this bill[1].

Over the past 5-years dispositions of criminal felony, misdemeanor and juvenile cases have declined at an average of 7% per year. Applying this rate of decline to the approximately 681,000 criminal case disposed of in 2018-19 translates to an estimate of approximately 634,000 criminal cases that could potentially be impacted by the bill. Although there are many variables that influence whether the defense may challenge the prosecution of their client's case, if *only* 5% of these challenges are made based on the estimate of 634,000 potentially eligible cases, this would translate to 30,000 cases.

[1] Based on the 5-year average rate of change in criminal case disposition. Criminal disposition data was obtained from the 2019 Court Statistics Report, available at www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf

Feedback from courts indicates it is reasonable to estimate a court could spend between 3 minutes and 15 minutes on each case to determine if it meets the "prima facie" standard for an additional review hearing. Table 3 presents the workload calculations associated with handling the types of challenges permitted by this bill that could be raised in future criminal cases.

Table 3:

Case Estimate	Processing Time (*per case*)	Workload Impact
30,000	3 minutes	$1,400,000
	15 minutes	$7,200,000

Although there are many variables that influence whether or not the defense may be able to prove the prosecution of their client's case meets the 'prima facie" standard for an additional review hearing, if *only* 5% of the 30,000 cases are granted additional review, this would translate to approximately 1,500 cases. Feedback from courts indicates it is reasonable to estimate that the additional review hearings could last between 30 minutes and 90 minutes per case. Table 4 presents the workload calculations associated with handling the additional review hearings required by this bill in future criminal cases.

Table 4:

Case Estimate	Processing Time (*per case*)	Workload Impact
1,500	30 minutes	$700,000
	90 minutes	$2,200,000

The council has provided a separate letter to the Senate Appropriations Committee that elaborates on a variety of procedural and practical concerns this bill creates.

If you have any questions, please feel free to contact Mark Neuburger at (916) 323-3121 or mark.neuberger@jud.ca.gov.

Sincerely,

Mailed August 18, 2020

Cory T. Jasperson
Director, Governmental Affairs

CTJ/MN/jh
cc: Members, Senate Appropriations Committee
Hon. Ash Kalra, Member of the Assembly
Mr. Shaun Naidu, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Public Safety Fiscal Consultant, Senate Republican Caucus
Mr. Jessie Romine, Budget Analyst, Department of Finance
Mr. Anthony Williams, Deputy Legislative Affairs Secretary, Office of the Governor
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August 17, 2020

Hon. Anthony Portantino, Chair
Senate Appropriations Committee
State Capitol, Room 3086
Sacramento, California 95814

Subject: Assembly Bill 2542 (Kalra), as amended August 1, 2020 – Letter of Concerns
Hearing: Senate Appropriations – August 17, 2020

Dear Senator Portantino:

The Judicial Council has a considerable number of significant concerns about AB 2542, as amended in the Senate on August 1, 2020. The bill, among other things, (1) prohibits the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin, as specified; (2) allows a writ of habeas corpus to be prosecuted on the basis of that prohibition; and (3) requires the prosecution to disclose, pursuant to a written request, all evidence relevant to a potential violation of that prohibition.

While the council has significant concerns, the council appreciates the harm identified that AB 2542 seeks to remedy and has no objections to the policy the author is trying to achieve. Indeed, the Judicial Council's Strategic Plan embraces the importance of access to justice, and emphasizes a commitment to "remove all barriers to access and fairness by being responsive to the state's cultural, ethnic, socioeconomic, linguistic, physical, gender, and age diversities, and to all people[1]."

[1] See *Goal I: Access, Fairness, and Diversity* of the Strategic Plan which provides "California's judicial branch serves an increasingly diverse population. The branch must work to remove all barriers to access and fairness by being responsive to the state's cultural, ethnic, socioeconomic, linguistic, physical, gender, and age diversities, and to all people. *Branch efforts in this regard must include ensuring that the courts are free from both bias and the appearance of bias*, meeting the needs of increasing numbers of self-represented litigants, remaining receptive to the

To that end, the council's comments are directed to the fair administration of justice, the substantial new impacts on court operations that will result from the bill, and identifying areas of potential legal challenges as well as where clarifying language will help avoid protracted litigation on the meaning of terms within the bill.

Due to the compressed timeframes in this year's legislative calendar, AB 2542 needs more time for analysis and review to give full consideration to the large number of significant concerns.

Potential Constitutional Issues:

The Judicial Council does not take formal positions on the constitutionality of legislation unless those positions are directly related to the Judicial Branch as a separate branch of government. To that end, the comments listed below are solely intended to flag constitutional issues identified by our subject matter experts as potential areas of litigation relating to the bill and are **not** intended to be read as legal conclusions regarding the legality of AB 2542.

- *Lack of Prejudice Standard:* Unlike habeas corpus proceedings where a showing of prejudice is required,[2] AB 2542 does not require the court to determine whether a violation of the terms of the bill resulted in actual "prejudice" to the defendant or that there is a reasonable probability of a different result or a finding of a miscarriage of justice. This could raise issues under section 13 of Article VI of the California Constitution.[1] While the author's office has indicated that the constitution does not require a prejudice standard for AB 2542, our subject matter experts believe that

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needs of all branch constituents, ensuring that court procedures are fair and understandable, and providing culturally responsive programs and services. Finding effective strategies for removing barriers in all case types will require a continued branchwide commitment to innovation, excellence in public service, and strong leadership at local and state levels" (emphasis added).

[2] The California Supreme court has indicated that a showing of prejudice is required for habeas petitions grounded on some constitutional violations of fundamental constitutional rights: (See *In re Richards* (2016) 63 Cal.4th 291, 312-313 [habeas corpus petition based on false evidence]; *In re Clark* (1993) 5 Cal.4th 750, citing *In re Martin* (1987) 44 Cal.3d 1, 50-51 [habeas corpus petition based on prosecutorial witness intimidation in violation of a criminal defendant's right to present a defense]; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 (*Strickland*) [habeas corpus petition based on claim of ineffective assistance of counsel in violation of the constitutional right to counsel]; *In re Cordero* (1988) 46 Cal.3d 161, 180 (*Cordero*) [same].)

To establish prejudice for ineffective assistance of counsel, *the petitioner must show a reasonable probability* that they would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra,* 466 U.S. at pp. 688, 691-692; *Cordero*, *supra*, 46 Cal.3d at p. 180.) "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624].) "The likelihood of a different result must be substantial, not just conceivable." (*Id.*, at p.112.) This is the same standard applied in reviewing under California Constitution, article VI, section 13 for "a miscarriage of justice" as discussed in People v. *Watson* (1956) 46 Cal.2d 818, 836. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407, fn. 4 [the Watson standard is the same standard as the prejudice prong under Strickland].) For habeas corpus claims based on false evidence, the standard for determining prejudice is the same as the *Watson* test, a reasonable probability the false testimony affected the outcome. (*In re Richards* (2016) 63 Cal.4th 291, 312-313.)

violations of Penal Code section 745 (b)(2)[3], particularly by minor actors involved in the trial or situations not directed at the defendant, are not analogues to constitutional violations that courts have found to be per se reversable because without a showing of prejudice there is no showing that the proceedings have been tainted by discrimination. The council agrees that addressing structural errors caused by racial discrimination is a laudable goal, but given the breadth of the bill, these broadly stated violations do not necessarily result in errors that render a trial fundamentally unfair. Thus, the council is concerned that they may not fall within the meaning of "a miscarriage of justice" as discussed in *People v. Sivongxay* (2017) 3 Cal.5th 151, 186 fn. 16).

- *Potential Issues with Discovery*: Although additional discovery obligations in the post-conviction context do not raise constitutional concerns, however, to the extent that section 745(e) is construed to modify section 1054.1 in the pre-trial or trial context, it may be viewed as modifying Proposition 115 (Cal. Const., Article I, § 30; § 872) and could potentially be challenged as unconstitutional unless it is passed by a two-thirds majority. (see *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564.)

- *Potential Issues Under Marsy's Law*: California Constitution Article I., § 28 (a)(6), provides that "[v]ictims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end." The council believes that AB 2542 is subject to potential challenge on the basis that it conflicts with Marsy's Law, especially if no showing of prejudice warranting reversal of long since adjudicated cases is required, and convictions are vacated without a showing of a miscarriage of justice simply because the rules of court procedure are changed after the court procedure is over.

- *Mistrial-Potential Double-Jeopardy Issues:* The council believes that, to avoid litigation on potential double-jeopardy grounds, section 745 (f)(2)(A) should be amended to clearly state that if a mistrial is declared, the defendant must specifically request this remedy.

- *Potential Conflict with Death Penalty Proposition*: To the extent that section 745(f)(3) is interpreted to eliminate the death penalty upon a finding that 745(a) is violated, this could raise legal challenges relating to Proposition 7 (§ 190), which does not permit legislative amendment of its statutory provisions without voter approval. (*People v. Cooper* (2002) 27 Cal.4th 38, 44 (holding that "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval. (Cal. Const., art. II, § 10, subd. (c)").

[3] Unless otherwise indicated, all references are to the Penal Code and as proposed to be added to the Penal Code by AB 2542.

Substantial New Burdens on Courts

- *Prospective Impacts:* It appears that the bill contemplates hearings occurring during trial to determine whether the provisions of the bill have been violated, which will result in cumbersome and time-consuming trials. Further, jurors will be placed on hold during such proceedings and the pretrial time estimates regarding jury service commitments will have to be adjusted. Moreover, the council is concerned that minitrials will result at sentencing, thereby extending court calendars. For example, a protracted hearing may be required to determine whether or not "a longer or more severe sentence was imposed on the defendant than was imposed on other individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where sentencing occurred." Finally, the often vague and ambiguous language of the bill as currently drafted will likely result in litigation at both the trial and appellate court level on the meaning of its provisions.

- *Retroactive Impacts:* The bill as currently written has the potential to apply to any past criminal conviction without limit or a finding of prejudice. Any criminal conviction without regard to conviction date is eligible for a determination of whether a challenge meets the prima facie case provisions of the bill, which is exacerbated by the lack of a prejudice requirement which would help reduce challenges that did not negatively impact the trial. It is uncertain by the language of the bill what evidence is required to make a prima facie case. There is potential for over burden on the courts time and resources to weed out meritless cases. However, on cases that have been determined to have merit and the conviction is overturned, courts may need to have new trials. For older cases, both the initial determination and the new trial will be quite challenging in light of court record retention requirements under Government Code section 68152. And again, the often vague and ambiguous language of the bill as currently drafted will likely result in litigation at both the trial and appellate court level on the meaning of its provisions.

Vague, Ambiguous, and Inconsistent Language:

To avoid litigation, the council believes that many of the bill's terms would benefit from clarification, including:

- 745(a): "*on the basis of race, ethnicity, or national origin"*

  The meaning of "on the basis of" is unclear. Subdivision (b) purports to list situations in which subdivision (a) is satisfied, but the introductory language in subdivision (b) does not purport to be exclusive; if it is merely illustrative, what additionally does "on the basis of" mean or include? Is "on the basis of" meant to suggest a causal link between the "seeking or obtaining" of the "criminal conviction" (or the seeking, obtaining, or imposition of a sentence) and the improper basis of race, ethnicity, or national origin?

- 745(b): *"bias"*

  The term "bias" would benefit from clarification. Subdivision (i)(2) uses an "objective observer" test for "racially discriminatory language." It is unclear whether an objective test or a more subjective, equal protection-type test is required. Also, it's unclear whether or not the term refers to explicit bias but not implicit bias/unconscious bias. If it includes unconscious bias, it's unclear how that would be proved and whether it had any impact on the trial, for example would courts look to evidence showing unconscious bias in 2021 or when the trial occurred?

- 745(b)(2)*: "used racially discriminatory language or otherwise demonstrated bias or animus based on race, ethnicity, or national origin, <u>whether or not purposeful</u> or directed at a defendant" (emphasis added)*

  This section appears to create a serious remedy (mistrial, new trial, vacating a conviction) for conduct beyond the scope of harm it seeks to address. It appears to apply the remedy to conduct that may not have contributed to, or had anything to do with, the underlying conviction. Further, the definition of discriminatory language in subdivision (i)(2) would not appear to apply to "demonstrated bias or animus". As a result, in applying this subparagraph, litigation may result on the following issues:

  - Does this mean the person used racial language ever in their life or in connection with the case? The bill does not appear to limit the proceedings to those involving the defendant's case. For example, what if the racially discriminatory language is directed toward law enforcement and their tactics? What if the trial involves a hate crime or rival gang violence? Is the mere mention of racially discriminatory language without context a violation of the bill?

  - Is the intent that the demonstrated bias or animus in violation of the bill includes bias about a race other than the defendant's? What if the bias statement was about a race other than the defendant's and the person using the language is of the same race as the defendant?

  - Does it matter if the person who violated this bill is only tangentially related to the investigation or prosecution?

  - Is the objective observer's perspective of bias based on current perceptions now or the perception when the offending event happened?

The council notes if this provision is amended to pertain to bias against the defendant this would clarify the language because as written it could be read to include bias against a victim, a witness, one of the professional participants in the trial, or even someone not connected to the trial.

- 745(b)(3): *"was a factor in the exercise of peremptory challenges"*

  Is the phrase "was a factor in the exercise of peremptory challenges" meant to incorporate the new standards set forth in AB 3070 (Weber, as amended August 13, 2020)? Or does it set up a wholly different, undefined standard? The council notes that less confusion will ensue if this provision is deleted as AB 3070 appears to cover the issue of peremptory challenges addressed by this subparagraph. As currently written, the statute will have the effect of potentially providing habeas relief in every case where peremptory challenges were held to have been properly exercised based on the existing law at the time.

- 745 (b)(4): *"a conviction for an offense for which convictions are more frequently sought or obtained against people who share the defendant's race, ethnicity, or national origin than for defendants of other races, ethnicities, or national origins in the county where the convictions were sought or obtained"*

  When read in conjunction with 745(i)(1), the two provisions appear to create a presumption that convictions obtained for an offense for which one race, ethnicity or national origin is more often prosecuted or convicted is invalid subject to rebuttal by the prosecution upon a showing of "race-neutral reasons for the disparity." But in the experience of our subject matter experts, there are some crimes that more frequently involve certain groups in certain communities. For example, membership in certain gangs is usually based on race or ethnicity and neighborhood. If most of the reckless use of firearm cases in a particular area are committed by a specific gang, or if most of the securities fraud cases in a particular area are committed by white persons, this provision would seem to make those convictions invalid. There appears to be no mechanism to establish a neutral reason for the disparity not based on invidious discrimination.

- 745 (b)(5)(A)-(B): "*a longer or more severe sentence"*

  The council is concerned that minitrials will result at sentencing that will place a significant new burden on courts and result in appellate review of the meaning of these terms. For example, if the person before the court were sentenced in line with other individuals who committed the same offense, would it be a violation if in the aggregate, persons of the defendant's race, etc., received a more severe sentence? Further, does the disparity result in a per se violation or can race-neutral factors such as the circumstances of the offense, the victim impact and the background of the offender demonstrate that the sentence was not imposed "on the basis of race?"

- 745 (c): *"may file a petition for writ of habeas corpus or a motion under Section 1473.7"*

  It is unclear whether the bill confers standing on persons who are confined or in constructive custody, as well as, on those no longer confined or in constructive custody. Section 1473.7 only confers standing to those defendants who have suffered "prejudicial error" damaging their ability to understand immigration consequences or who have newly

discovered evidence of actual innocence. Thus, the statute does not contemplate the harm identified in section 745, The council believes that the bill should be clarified as to whether it intends to refer to section 1473 (confined or in constructive custody) or 1473.7 (no longer confined and not in constructive custody), or both.

- 745(f): *"the following remedies shall be imposed"*

  This subdivision removes judicial discretion; and the council recommends replacing "shall" with "may."

- 745(f)(1): *"reseat a juror removed by use of a peremptory challenge"*

  The council believes that this is not feasible because the juror would have already been excused and released from admonitions. Also, it's unclear if the provision is limited to peremptory challenge violations under this section or all of the remedies other than reseating the juror applicable to other violations that might occur during trial. To avoid potential confusion, it seems appropriate to delete the reference to reseating the juror since remedies related to peremptory challenge violations are covered in AB 3070.

- 745 (g): "*This section also applies to … the juvenile justice system."*

  The council believes that the bill should be amended to clarify whether or not the "juvenile justice system," is intended to include dependency as well as delinquency.

- 745 (f): "*... A petition raising a claim of this nature for the first time, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed to be a successive or abusive petition. If the petitioner ~~already~~ has a habeas corpus petition ~~on file~~ pending in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745"*

  The council believes that adding "abusive" clarifies this language (see *In re Martinez* (2009) 46 Cal.4th 945, 956.) In addition, the council believes subdivision (f) should be amended to provide that if the court determines that the petitioner makes a prima facie showing, the court shall issue an order to show cause (OSC) and that if a prima facie showing is made and the petitioner is indigent and has requested counsel, the court shall appoint counsel to represent the petitioner (see § 1170.95(c)).

- 745(i)(1): *"More frequently sought or obtained" or "more frequently imposed"… committed the same offense"*

  The terms "significant difference" and "frequently" would benefit from clarification.

- 745(i)(2): "*Racially discriminatory language"; "racially charged;" "racially coded"*

  This paragraph would benefit from clarification on whether or not it includes or excludes language used by witnesses unrelated to law enforcement, the prosecution, and victims. Further, it is unclear whether or not it applies to today's standards or the standards that existed when the statement was made.

In closing, while the Judicial Council appreciates the goals of the legislation, it has a considerable number of significant concerns about AB 2542 in its current form. Given these concerns, more time for analysis and review is necessary to give full consideration to the revisions needed to sufficiently address the important issues raised by the bill.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,

Mailed August 17, 2020

Cory T. Jasperson
Director, Governmental Affairs

CTJ/SR/jh
cc: Members, Senate Appropriations Committee
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