_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: “AN ACT GENERALLY REVISING CRIMINAL JUSTICE LAWS; PROVIDING FOR A RACIAL JUSTICE ACT; PROVIDING LEGISLATIVE INTENT; PROHIBITING A CONVICTION BASED ON RACE, ETHNICITY, OR NATIONAL ORIGIN; ESTABLISHING ACTS THAT CONSTITUTE A VIOLATION; ALLOWING A CHALLENGE TO AN INVALID SENTENCE; EXTENDING HABEAS CORPUS TO CLAIMS OF VIOLATIONS OF THE ACT; PROVIDING REMEDIES; PROVIDING DEFINITIONS; AND AMENDING SECTIONS 46-21-101 AND 46-22-101, MCA.”

WHEREAS, discrimination in our criminal justice system based on race, ethnicity, or national origin ("race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice" (Rose v. Mitchell, 443 U.S. 545, 556 (1979) (quoting Ballard v. United States, 329 U.S. 187, 195 (1946))). The United States Supreme Court has also recognized "the impact of..... evidence [of racial bias] cannot be measured simply by how much airtime it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses" (Buck v. Davis, 137 S. Ct. 759, 777 (2017)). Discrimination undermines public confidence in the fairness of the state’s system of justice and deprives Montanans of equal justice under law; and

WHEREAS, a United States Supreme Court justice has observed, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination" (Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 572 U.S. 291, 380-81 (2014) (Sotomayor, J., dissenting)). We must acknowledge and seek to remedy the impact of race in our justice system; and

WHEREAS, even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms; and

WHEREAS, current legal precedent often countenances racially biased testimony, including expert testimony, and arguments in criminal trials. A court upheld a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery (United States v. Shah, 768 Fed. Appx. 637, 640 (9th Cir. 2019)). Existing precedent has provided no recourse for a defendant whose own attorney harbors racial animus towards the defendant's racial group, or toward the defendant, even when the attorney routinely used racist language and "harbor[ed] deep and utter contempt" for the defendant's racial group (Mayfield v. Woodford, 270 F.3d 915, 924-25 (9th Cir. 2001) (en banc); id. at 939-40 (Graber, J., dissenting)). Some courts have held that appellate courts must defer to the rulings of judges who make racially biased comments during jury selection (People v. Williams, 56 Cal. 4th 630, 652 (2013); see also id. at 700 (Liu, J., concurring)) and at other points in the proceedings. See Peek v. State 488 So. 2d 52 (Fla. 1986), in which the court recognized the inappropriateness of the trial judge saying that "since the n-----s are here, maybe we can go ahead with the sentencing phase," but declined to reverse the conviction on these grounds (but did reverse on other grounds); and

WHEREAS, existing precedent may tolerate the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials, at least until these remarks and language reach a very high threshold. For example, in a case alleging racially incendiary remarks by a prosecutor, Montana courts have held that "it is not enough that the prosecutor's remarks are undesirable or even universally condemned; rather the question is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process" (State v. Haithcox, 2019 MT 201, 397 Mont 103, 447P. 2d 452 (Mont. 2019)); and

WHEREAS, other courts have upheld convictions in cases in which prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that these statements are "highly offensive and inappropriate" (Duncan v. Ornoski, 286 Fed. Appx. 361, 363 (9th Cir. 2008); see also People v. Powell, 6 Cal.5th 136, 182-83 (2018)). Because the use of animal imagery is historically associated with racism, the use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system (Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, and Matthew Christian Jackson, Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology (2008) Vol. 94, No. 2, 292-293; Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an

Integrated Response, 86 Fordham Law Review, Volume 86, Issue 6, Article 24 3091, 3105-06 (2018)); and

WHEREAS, when racism infects a criminal proceeding, under current legal precedent, the results can stand because proof of purposeful discrimination is often required, but nearly impossible to establish. Existing precedent also accepts racial disparities in our criminal justice system as inevitable. Most famously, in 1987, the United States Supreme Court found that there was "a discrepancy that appears to correlate with race" in death penalty cases in Georgia, but the court would not intervene without proof of a discriminatory purpose, concluding that we must simply accept these disparities as "an inevitable part of our criminal justice system" (McCleskey v. Kemp, 481 U.S. 279, 295-99, 312 (1987)). In dissent, one justice described this as a fear of too much justice" (Id. at p. 339 (Brennan, J., dissenting)); and

WHEREAS, when it is alleged that the state excluded jurors in a racially discriminatory manner, Montana law currently requires a defendant to show purposeful discrimination so that the state need only provide a neutral explanation for the strike, and "unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral" (State v. Warren, 395 Mont. 15, 439 P.3d 357, 2019 MT 49 (Mont. 2019)). This standard allows for subtle forms of discrimination in jury selection that do not amount to purposeful discrimination; and

WHEREAS, there is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decisionmaking in the criminal justice system; and

WHEREAS, judges across the country are recognizing that current law, as interpreted by the high court, is insufficient to address discrimination in our justice system (State v. Saintcalle, 178 Wash. 2d 34, 35 (2013); Ellis v. Harrison, 891 F. 3rd 1160, 1166-67 (9th Cir. 2018) and 947 F. 3d 555 (9th Cir. 2020 (en banc) (Nguyen, J., concurring)), (in which defendant's lawyer was found to be "a virulent racist who believe in the racial inferiority of racial minorities," reversal required); Turner v. Murray, 476 U.S. 28, 35 (1986); People v. Bryant, 40 Cal.App.5th 525 (2019) (Humes, J., concurring)).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 5] may be cited as the "Montana Racial Justice Act of 2021".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 5], unless the context clearly indicates otherwise, the following definitions apply:

(1) "More frequently sought or obtained" or "more frequently imposed" means that statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.

(2) "Prima facie showing" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of [section 4] occurred.

(3) "Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including but not limited to racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases in which the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(4) "State" includes the attorney general, a county attorney, or a city prosecutor.

(5) "Substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

NEW SECTION. **Section 3. Legislative intent.** It is the intent of the legislature:

(1) to eliminate racial and ethnic bias from the state's criminal justice system because racism or ethnic bias in any form or amount, at any stage of a criminal proceeding, is intolerable, is inimical to a fair criminal justice system, is a miscarriage of justice under Article VII of the Montana constitution, and violates the laws and the Montana constitution. Implicit bias, although often unintentional and unconscious, may inject racism or ethnic bias and unfairness into proceedings similar to intentional bias.

(2) to not punish this type of bias, but rather to remedy the harm done to the defendant's case and to

the integrity of the judicial system;

(3) to ensure that race or ethnicity plays no role at all in seeking or obtaining convictions or in sentencing;

(4) to reject the conclusion that racial or ethnic disparities within our criminal justice system are inevitable and to actively work to eradicate them;

(5) to provide remedies that will eliminate racially or ethnically discriminatory practices in the criminal justice system and address intentional discrimination; and

(6) to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.

NEW SECTION. **Section 4. Conviction based on race, ethnicity, or national origin prohibited.** The state may not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin;

(2) during the defendant's trial or proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This subsection does not apply if the person speaking is:

(a) describing language used by another that is relevant to the case so that its probative value substantially outweighs the resulting prejudice; or

(b) giving a racially neutral and unbiased physical description of the suspect.

(3) race ethnicity, or national origin was a factor in the exercise of peremptory challenges. The defendant need not show that purposeful discrimination occurred in the exercise of peremptory challenges to demonstrate a violation of this section.

(4) the defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county or judicial district where the convictions were sought or obtained; or

(5) (a) a longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county or judicial district where the sentence was imposed; or

(b) a longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in the county or judicial district where the sentence was imposed.

NEW SECTION. **Section 5. Remedies.** (1) A defendant may file a motion in district court or, if judgment has been imposed, may file a petition for writ of habeas corpus in a court of competent jurisdiction, alleging a violation of [section 4].

(2) If a motion is filed in district court and the defendant makes a prima facie showing of a violation of [section 4], the court shall hold a hearing. If the allegations involve the judge, the hearing must be conducted by a different judge.

(3) At the hearing, evidence may be presented by either party, including but not limited to statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert.

(4) The burden of proving a violation of [section 4] by a preponderance of the evidence is on the defendant.

(5) At the conclusion of the hearing, the court shall make findings on the record.

(6) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of [section 4] in the possession or control of the state. A motion filed under this subsection must describe the type of records or information the defendant seeks. On a showing of good cause, the court shall order the records to be released. On a showing of good cause, the court may permit the prosecution to redact information prior to disclosure.

(7) Except for a ballot initiative passed by the voters, if the court finds, by a preponderance of evidence, a violation of [section 4], the court shall impose a remedy specific to the violation found from the list contained in subsection (8) or (9).

(8) Before a judgment has been entered in a criminal proceeding, the court may impose any of the following remedies:

(a) reseat a juror removed by use of a peremptory challenge;

(b) declare a mistrial, if requested by the defendant;

(c) discharge the jury panel and empanel a new jury; or

(d) if the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(9) (a) When a judgment has been entered in a criminal proceeding, if the court finds that a conviction was sought or obtained in violation of [section 4], the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with [section 4]. If the court finds that the only violation of [section 4] that occurred is based on [section 4(4)] 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. On resentencing, the court may not impose a new sentence greater than that previously imposed.

(b) When a judgment has been entered, if the court finds the sentence was sought, obtained, or imposed in violation of [section 4], the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court may not impose a new sentence greater than that previously imposed.

(10) When the court finds there has been a violation of [section 4], the defendant may not be sentenced to death as provided in Title 46, chapter 18, part 3.

(11) The remedies available under this section do not foreclose any other remedies available under the United States constitution, the Montana constitution, or any other law.

(12) The provisions of this section also apply to adjudications and dispositions made pursuant to the Youth Court Act in Title 41, chapter 5.

(13) This section may not prevent the prosecution of crimes pursuant to 45-5-221 or 45-5-222 or a training or reporting requirement of 44-2-117.

(14) A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of [section 4].

Section 6. Section 46-21-101, MCA, is amended to read:

"**46-21-101. When validity of sentence may be challenged.** (1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, that a violation of [section 4] occurred, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

(2) ~~If~~ Except as provided in [sections 1 through 5], if the sentence was imposed by a justice's, municipal, or city court, the petition may not be filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed with the district court in the county where the lower court is located."

Section 7. Section 46-22-101, MCA, is amended to read:

"**46-22-101. Applicability of writ of habeas corpus.** (1) Except as provided in subsection (2), every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) ~~The~~ Except as provided in subsection (3), the writ of habeas corpus is not available to attack the

validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. The relief under this chapter is not available to attack the legality of an order revoking a suspended or deferred sentence.

(3) (a) The writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of [section 4] if judgment was entered on or after [the effective date of this act].

(b) 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, may not be considered a successive or abusive petition. If the petitioner has a habeas corpus petition 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 [section 4]. The petition must state if the petitioner requests appointment of counsel, and the court shall appoint counsel if the petitioner cannot afford counsel. The petition alleges facts that would establish a violation of [section 4]. Newly appointed counsel may amend a petition filed before the counsel's appointment.

(c) The court shall review a petition raising a claim pursuant to [section 4] and shall determine if the petitioner has made a prima facie showing of entitlement to relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause why relief may not be granted and hold an evidentiary hearing, unless the state declines to show cause.

(d) The defendant shall appear at the hearing by audio-video communication unless counsel indicates that the defendant's presence in court is needed.

(e) If the court determines that the petitioner has not established a prima facie showing of entitlement to relief, the court shall state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion."

NEW SECTION. **Section 8. Codification instruction.** [Sections 1 through 5] are intended to be codified as an integral part of Title 46, chapter 1, and the provisions of Title 46, chapter 1, apply to [sections 1 through 5].

NEW SECTION. **Section 9. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- END -