California State Assembly

PUBLIC SAFETY

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AGENDA

Tuesday, July 13, 2021
9 a.m. -- State Capitol, Room 4202

SPECIAL ORDER

1.	SB 2	Bradford	Peace officers: certification: civil rights.

REGULAR ORDER OF BUSINESS

HEARD IN FILE ORDER

2.	SB 586	Bradford	Criminal fees.
3.	SB 483	Allen	Sentencing: resentencing to remove sentencing enhancements.
4.	SB 248	Bates	Sexually violent predators: open court proceedings.
5.	SB 504	Becker	Elections: voter registration.
6.	SB 775	Becker	Felony murder: resentencing.
7.	SB 472	Caballero	Social Innovation Financing Program.
8.	SB 827	Public Safety	Public Safety Omnibus.
9.	SB 334	Durazo	Detention facilities: contracts.
10.	SB 446	Glazer	Factual innocence.
11.	SB 804	Glazer	California Conservation Corps: forestry training center: formerly incarcerated individuals: reporting.
12.	SB 262	Hertzberg	Bail.
13.	SB 98	McGuire	Public peace: media access.
14.	SB 264	Min	Firearms: state property.
15.	SB 491	Nielsen	Cigarette and Tobacco Products Licensing Act of 2003.
16.	SB 715	Portantino	Criminal law.
17.	SB 420	Umberg	Unemployment insurance: Unemployment Insurance Integrity Enforcement Act.
18.	SB 35	Umberg	Elections: prohibited activities.
19.	SB 357	Wiener	Crimes: loitering for the purpose of engaging in a prostitution offense.

COVID FOOTER

SUBJECT:

We encourage the public to provide written testimony before the hearing by visiting the committee website at https://apsf.assembly.ca.gov/. Please note that any written testimony submitted to the committee is considered public comment and may be read into the record or reprinted. All are encouraged to watch the hearing from its live stream on the Assembly's website at https://www.assembly.ca.gov/todaysevents. Any member of the public attending a hearing in the Capitol will need to wear a mask at all times while in the building. We encourage the public to monitor the committee's website for updates.

Date of Hearing: July 13, 2021
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 2 (Bradford) – As Amended July 7, 2021

SUMMARY: Grants new powers to the Commission on Peace Officers Standards and Training (POST) by creating a process to investigate and determine the fitness of a person to be a peace officer, and to decertify peace officers who are found to have engaged in "serious misconduct." Makes changes to the Tom Bane Civil Rights Act by eliminating specified immunity provisions. Specifically, **this bill**:

New Disqualifying Provisions for Peace Officers

1) Specifies that any person who, after January 1, 2022, has been convicted of a crime based upon a verdict or finding of guilt of a felony by the trier of fact, or upon the entry of a plea of guilty or nolo contendere to a felony, is disqualified from being a peace officer, even if the court sets aside, vacates, withdraws, expunges or otherwise dismisses or reverses the conviction, unless the court finds the person to be factually innocent of the crime for which they were convicted at the time of entry of the order.

2) Provides that any person who has been discharged from the military for committing an offense, as adjudicated by a military tribunal, which would have been a felony if committed in this state, is disqualified from being a peace officer.

3) Provides that any person who has been convicted of, or adjudicated through an administrative, military, or civil judicial process, for any act that is a violation of specified offenses against public justice, including falsifying records, bribery, or perjury, is disqualified from being a peace officer.

4) Provides that any person who has been issued peace officer certification and has had that certification revoked by POST, or who has voluntarily surrendered that certification permanently, or having met the minimum requirement for issuance of certification, has been denied issuance of certification, is disqualified from being a peace officer.

5) Provides that any person whose name is listed in the National Decertification Index of the International Association of Directors of Law Enforcement Standards and Training, or other database designated by the federal government, or whose certification as a law enforcement officer in that jurisdiction was revoked for misconduct, or who, while employed as a law enforcement officer, engaged in serious misconduct that would have resulted in their certification being revoked by POST if employed as a peace officer in this state, is disqualified from being a peace officer.

6) Requires the Department of Justice (DOJ) to supply POST with necessary disqualifying felony and misdemeanor conviction data for all persons known to be current/former peace

officers.

7) Provides that POST shall be permitted use of the information from DOJ for de-certification purposes and that the data, once received by POST, will become information releasable under the California Public Records Act (CPRA), including documentation of the person's appointment, promotion, and demotion dates, as well as certification/licensing status and reason/disposition for leaving service.

New Powers and Accountability Division for POST

8) Grants POST the power to investigate and determine the fitness of any person to serve as a peace officer within the POST training program, as specified, in the State of California

9) Grants POST the power to audit any law enforcement agency that employs peace officers, as specified, without cause and at any time.

10) Creates a Peace Officer Standards Accountability Division within POST.

11) Provides that the primary responsibilities of the accountability division shall be to review investigations conducted by law enforcement agencies or any other investigative authority and to conduct additional investigations, as necessary, into serious misconduct that may provide grounds for decertification, present findings and recommendations to the advisory board created by this bill and to POST, and bring proceedings seeking the revocation of certification of peace officers as directed by the board and POST.

12) Requires the accountability division to be staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of decertification investigations, prosecutions, and administrative proceedings against peace officers.

13) Requires POST to establish procedures for accepting complaints from members of the public regarding peace officers or law enforcement agencies that may be investigated by the accountability division or referred to the peace officers' employing agency or the Department of Justice (DOJ).

The Advisory Board

14) Requires the Governor to establish the Peace Officer Standards Accountability Advisory Board by January 1, 2023.

15) Provides that the advisory board's purpose is to make recommendations on the decertification of peace officers to POST.

16) Provides that the protection of the public shall be the highest priority for the advisory board as it upholds the standards for peace officers in California, and that whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

17) Provides that the advisory board shall consist of nine members, as follows:

a) One member shall be a peace officer or former peace officer with substantial experience at a command rank, appointed by the Governor;

b) One member shall be a peace officer or former peace officer with substantial experience at a management rank in internal investigations or disciplinary proceedings of peace officers, appointed by the Governor;

c) Two members shall be members of the public, who shall not be former peace officers, who have substantial experience working at nonprofit or academic institutions on issues related to police accountability. One of these members shall be appointed by the Governor and one by the Speaker of the Assembly;

d) Two members shall be members of the public, who shall not be former peace officers, who have substantial experience working at community-based organizations on issues related to police accountability. One of these members shall be appointed by the Governor and one by the Senate Rules Committee;

e) Two members shall be members of the public, who shall not be former peace officers, who have been subject to wrongful use of force likely to cause death or serious bodily injury by a peace officer, or who are surviving family members of a person killed by the wrongful use of deadly force by a peace officer, appointed by the Governor; and,

f) One member shall be an attorney, who shall not be a former peace officer, with substantial professional experience involving oversight of peace officers, appointed by the Governor

18) Provides that each member of the advisory board shall be appointed for a term of three years and shall hold office until the appointment of the member's successor or until one year has elapsed since the expiration of the term for which the member was appointed, whichever occurs first. Of the members initially appointed to the board, three shall be appointed for a term of one year, three for a term of two years, and three for a term of three years.

19) Provides that vacancies occurring on the advisory board shall be filled by appointment for the unexpired term of a person with the same qualification for appointment as the person being replaced.

20) Provides that no person shall serve more than two terms consecutively.

21) Provides that the Governor shall remove from the advisory board any peace officer member whose certification as a peace officer has been revoked, and that the Governor may, after hearing, remove any member of the board for neglect of duty or other just cause.

22) Provides that the Governor shall designate the chair of the board from among the members of the board and that the person designated as the chair shall serve as chair of the board at the pleasure of the Governor.

23) Provides that the advisory board shall annually select a vice chair from among its members and that a majority of the members of the board shall constitute a quorum.

24) Requires each member of the board shall receive a per diem of $350 for each day actually spent in the discharge of official duties, including reasonable time spent in preparation for public hearings, and that members of the advisory board shall be reimbursed for travel and other expenses necessarily incurred in the performance of official duties.

25) States that upon request of an advisory board member based on financial necessity, POST shall arrange and make direct payment for travel or other necessities rather than providing reimbursement.

26) Requires the advisory board to meet as required to conduct public hearings, but no fewer than four times per year.

27) Provides that at each public hearing, the board must review the findings of investigations presented by the division of accountability and must make a recommendation on what action should be taken on the certification of the peace officer involved.

POST Certification Program

28) Requires POST to establish a certification program for peace officers, as specified.

29) States that a certificate or proof of eligibility to be a peace officer shall be considered the property of POST.

30) States that persons who are determined by POST to be eligible to be peace officers may make application for the certificates, provided they are employed by an agency which participates in the POST program.

31) Requires any agency appointing an individual, who does not already have a basic certificate, as specified, and who is not eligible for a certificate to make an application for proof of eligibility within 10 days of appointment.

32) Grants POST the authority to suspend, revoke, or cancel any peace officer certification.

33) Requires POST to assign each person who applies for or receives certification a unique identifier that shall be used to track certification status from application for certification through that person's career as a peace officer.

34) Requires an agency that employs peace officers to employ as a peace officer only individuals with current, valid certification, except that an agency may provisionally employ a person for up to 24 months, pending certification by POST, provided that the person has received certification and has not previously been certified or denied certification.

35) Provides that deputy sheriffs who are employed to perform duties exclusively or initially relating to custodial assignments, as specified, must obtain valid certification pursuant to these provisions upon reassignment from custodial duties to general law enforcement duties

36) Requires POST to issue a basic certificate or proof of eligibility to specified peace officers, on January 1, 2022, who are eligible for a basic certificate or proof of eligibility but have not applied for a certification.

37) Requires as of January 1, 2023 that any peace officer who does not possess a basic certificate and who is not yet or will not be eligible for a basic certificate, to apply POST for proof of eligibility.

38) Defines "certification" as a valid and unexpired basic certificate or proof of eligibility issued by POST.

Grounds for Certificate Revocation, Investigation, Appeal

39) Requires that a certified peace officer have their certification revoked, and an applicant have their application for certification denied, upon a determination that the peace officer or applicant has done any of the following:

a) The person is or has become ineligible to hold office as a peace officer, as specified; or

b) The person has been terminated for cause from employment as a peace officer for, or has, while employed as a peace officer, otherwise engaged in, any "serious misconduct," as defined.

40) Requires POST to adopt, by regulation, a definition of "serious misconduct," that shall serve as the criteria to be considered for certification ineligibility or revocation.

41) Requires the definition of "serious misconduct" to include all of the following, without limitation:

a) Acts of dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting of, or investigation of misconduct by, a peace officer or custodial officer, including, but not limited to, false statements, filing false reports, tampering with, falsifying, destroying, or concealing evidence, perjury, and tampering with data recorded by a body-worn camera or other recording device for purposes of concealing misconduct;

b) Acts of abuse of power, including, but not limited to, intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest;

c) Acts of physical abuse, including, but not limited to, the unauthorized use of force;

d) Sexual assault, as specified;

e) Acts demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner;

f) Acts that violate the law and are sufficiently egregious or repeated as to be inconsistent with an officer's obligation to uphold the law or respect the rights of members of the

public, as determined by the POST;

g) Participation in a law enforcement gang or other organization that engages in a pattern of rogue on-duty behavior that violates the law or fundamental principles of professional policing, including, but not limited to, unlawful detention, use of excessive force, falsifying police reports, fabricating evidence, targeting persons for enforcement based solely on protected characteristics of those persons, theft, use of alcohol or drugs on duty, protection of other members from disciplinary actions, and retaliation against other officers who threaten or interfere with the activities of the group; and,

h) Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to these provisions.

42) Requires, beginning no later than January 1, 2023, that each law enforcement agency be responsible for the completion of investigations of allegations of serious misconduct by a peace officer, regardless of their employment status.

43) Provides that the division of accountability shall promptly review any grounds for decertification received from an agency.

44) Provides that the division of accountability will have the authority to review any agency or other investigative authority file, as well as to conduct additional investigation, if necessary, and specifies that the authority to review such files is limited for purposes of decertification.

45) Provides that the advisory board may request that the division of accountability review an investigative file or recommend that POST direct the division of accountability to investigate any potential grounds for decertification of a peace officer, based upon a majority vote.

46) Provides that POST, in its discretion, may direct the division of accountability to review an investigative file; and, either upon its own motion or in response to a recommendation from the board, may direct the division to investigate any potential grounds for decertification of a peace officer.

47) Provides that the division of accountability, in its discretion, may investigate without the request of the commission or board, any potential grounds for revocation of certification of a peace officer.

48) Grants broad powers of investigation to the division of accountability within POST, including subpoena powers to compel the production of witness testimony and documents, with contempt-of-court penalties for persons who do not comply.

49) Requires that an investigation shall be completed within three years after the receipt of the completed report of the disciplinary or internal affairs investigation from the employing agency, as specified, however, no time limit shall apply if a report of the conduct was not made to POST.

50) Requires that an investigation be considered completed upon a notice of intent to deny or revoke certification, as specified.

51) Provides that the time limit shall be tolled during the appeal of a termination or other disciplinary action through an administrative or judicial proceeding or during any criminal prosecution of the officer.

52) Requires POST to consider the officer's prior conduct and service record, and any instances of misconduct, including any incidents occurring beyond the time limitation for investigation in evaluating whether to revoke certification for the incident under investigation.

53) Provides that an action by an agency or decision resulting from an appeal of an agency's action does not preclude action by POST to investigate, suspend, or revoke an officer's certification pursuant to these provisions.

54) Requires that, upon arrest or indictment of an officer for specified crimes, or discharge from any law enforcement agency for grounds that constitute disqualification from being a peace officer, or "serious misconduct," or separation from employment of an officer during a pending investigation into allegations of "serious misconduct," the executive director must order the immediate temporary suspension of any certificate held by that officer upon the determination by the executive director that the temporary suspension is in the best interest of the health, safety, or welfare of the public.

55) Requires the temporary order of suspension to be made in writing and to specify the basis for the executive director's determination. Following the issuance of a temporary suspension order, proceedings of POST in the exercise of its authority to discipline any officer shall be promptly scheduled, as specified. The temporary suspension shall continue in effect until issuance of the final decision on revocation or until the order is withdrawn by the executive director.

56) Requires POST to retain records of an investigation of any person for 30 years following the date that the investigation is deemed concluded. Authorizes POST to destroy records prior to the expiration of the 30-year retention period if the subject is deceased and no action upon the complaint was taken by POST beyond the initial intake of such complaint.

57) Provides that any peace officer may voluntarily surrender their certification permanently. Voluntary permanent surrender of certification shall have the same effect as revocation. Voluntary permanent surrender is not the same as placement of a valid certification into inactive status during a period in which a person is not actively employed as a peace officer. A permanently surrendered certification cannot be reactivated.

58) Provides that POST may initiate proceedings to revoke an officer's certification for conduct which occurred before January 1, 2022, only for either of the following:

   a) Acts of dishonesty and sexual assault, as specified, or unauthorized use of deadly force that resulted in death or serious bodily injury; and

   b) If the employing agency makes a final determination regarding its investigation of the misconduct after January 1, 2022.

59) Specifies that POST may consider the officer's prior conduct and service record in determining whether revocation is appropriate for serious misconduct.

60) Provides that upon the completion of an investigation, if the division of accountability finds reasonable grounds for revocation of a peace officer's certification, it shall take the appropriate steps to promptly notify the officer involved, in writing, of its determination and reasons therefore, and shall provide the officer with a detailed explanation of the decertification procedure and the officer's rights to contest and appeal.

61) Provides that upon notification, the officer may, within 30 days, file a request for a review of the determination by the advisory board and POST. If the officer does not file a request for review within 30 days, the officer's certification shall be revoked without further proceedings. If the officer files a timely review, the board shall schedule the case for hearing.

62) Provides that the advisory board shall only recommend revocation if the factual basis for revocation is established by clear and convincing evidence.

63) Requires POST to review all recommendations made by the advisory board and provides that POST's decision shall be based on whether there is evidence that reasonably supports the board's recommendation.

64) Provides that in any case in which POST reaches a different determination than the board's recommendation, it shall set forth its analysis and reasons for reaching a different determination in writing.

65) Requires POST to return any determination requiring action to be taken against a peace officer's certification to the division, which shall initiate proceedings for a formal hearing before an administrative law judge in accordance with the Administrative Procedure Act, as specified, which shall be subject to judicial review as set forth in that Act.

66) Provides that, notwithstanding other provisions of law, the hearings of the advisory board and the review by POST under these provisions, administrative adjudications held pursuant to these provisions, and any records introduced during those proceedings, shall be public.

67) Requires POST to publish the names of any peace officer whose certification is suspended or revoked and the basis for the suspension or revocation and shall notify the National Decertification Index of the International Association of Directors of Law Enforcement Standards and Training of the suspension or revocation.

Reporting Potential Grounds for Revocation to POST

68) Requires, beginning January 1, 2023, any agency employing peace officers to report to POST within seven days, in a form specified by POST, any of the following events:

a) The employment, appointment, or termination or separation from employment or appointment, by that agency, of any peace officer. Separation from employment or appointment includes any involuntary termination, resignation, or retirement;

b) Any complaint, charge, or allegation of conduct against a peace officer employed by that agency that could render a peace officer subject to revocation of certification by POST, as specified;

c) Any finding or recommendation by a civilian oversight entity, including a civilian review board, civilian police commission, police chief, or civilian inspector general, that an officer employed by that agency engaged in conduct that could render a peace officer subject to revocation of certification by POST, as specified;

d) The final disposition of any investigation that determines an officer engaged in conduct that could render a peace officer subject to revocation of certification by POST, as specified, regardless of the discipline imposed; and,

e) Any civil judgment or court finding against an officer based on conduct, or settlement of a civil claim against an officer or an agency based on allegations of officer conduct that could render a peace officer subject to revocation of certification by POST, as specified.

69) Requires by July 1, 2023, that any agency employing peace officers shall report to POST any of the events described above that occurred between January 1, 2020 and January 1, 2023.

70) Requires an agency employing peace officers to make available for inspection or duplication by POST any investigation into a complaint, charge, or allegation of conduct against a peace officer employed by that agency that could render the peace officer subject to revocation, including any physical or documentary evidence, witness statements, analysis, and conclusions, for up to two years after reporting of the disposition of the investigation, as specified.

71) Provides that in a case of separation from employment or appointment, the employing agency shall execute and maintain an affidavit-of-separation on a form adopted by POST describing the reason for separation and shall include whether the separation is part of the resolution or settlement of any criminal, civil, or administrative charge or investigation. Provides that the affidavit shall be signed under penalty of perjury and submitted to POST.

72) Provides that an officer who has separated from employment or appointment shall be permitted to respond to the affidavit-of-separation, in writing, to POST, setting forth their understanding of the facts and reasons for the separation, if different from those provided by the agency.

73) Provides that before employing or appointing any peace officer who has previously been employed or appointed as a peace officer by another agency, the agency shall contact POST to inquire as to the facts and reasons an officer became separated from any previous employing agency. POST shall, upon request and without prejudice, provide to the subsequent employing agency any information regarding the separation in its possession.

74) Provides that civil liability shall not be imposed on either a law enforcement agency or POST, or any of the agency's or commission's agents, for providing information pursuant to this section in a good faith belief that the information is accurate.

75) Provides that POST shall maintain the information reported pursuant to this section, in a form determined by POST, and in a manner that may be accessed by the subject peace officer, any employing law enforcement agency of that peace officer, any law enforcement agency that is performing a pre-employment background investigation of that peace officer, or POST, when necessary for the purposes of decertification.

76) Requires POST to notify the head of the agency that employs the officer of all of the following:

a) The initiation of any investigation of that officer by the division of accountability, unless such notification would interfere with the investigation;

b) A finding by the division of accountability, following an investigation, of grounds to take action against the officer's certification or application;

c) A final determination by POST as to whether action should be taken against an officer's certification or application; and,

d) An adjudication, after hearing, resulting in action against an officer's certification or application.

77) Requires, if the certificate of an officer is temporarily suspended or revoked, that POST notify the district attorney of the county in which the officer is or was employed of this fact.

78) Requires these notifications to include the name of the officer and a summary of the basis for the action requiring notification.

79) Requires POST to make such inquiries as may be necessary to determine whether every city, county, city and county, and district receiving state aid, as specified, is adhering to the established standards for recruitment, training, certification, and reporting.

Reporting Requirements of the Advisory Board

80) Requires the advisory board to prepare an annual report on the activities of POST, the advisory board, and the accountability division, and subject agencies regarding peace officer certification that includes all of the following:

a) The number of applications for certification and the number of certifications granted or denied;

b) The number of employments, appointments, terminations, separations from employment of any peace officer, complaints charges and allegations of conduct that render a peace officer subject to revocation of certification, findings or recommendations by a civilian oversight entity that could render a peace officer subject to revocation of certification, final dispositions of any investigation that determines an officer engaged in conduct that could render a peace officer subject to revocation of certification, and any civil judgment or court finding against an officer based on conduct, or settlement of a civil claim against an officer or an agency based on allegations of officer conduct that could render a peace

officer subject to revocation of certification;

c) The criteria and process for review and investigation by the division of accountability, the number of reviews, and the number of investigations conducted by the division.

d) The number of notices sent by the division of accountability regarding a finding of reasonable grounds for revocation of a peace officer's certification, the number of requests for review received, and the number of revocations or denials made without review;

e) The number of review hearings held by the advisory board and POST and the outcomes of those review hearings;

f) The number of administrative hearings held on revocations and the number of revocations resulting from those hearings;

g) Any cases of judicial review of commission actions on revocation and the result of those cases;

h) The number of certifications voluntarily surrendered and the number placed on inactive status;

i) Any compliance audits or reviews conducted pursuant to this chapter and the results of those audits; and,

j) Any other information the board deems relevant to evaluating the functioning of the certification program, the decertification process, and the staffing levels of the division.

Bane Act Amendments

81) Eliminates specified immunity provisions for peace officers and custodial officers, or public entities employing peace officers or custodial officers sued under the Bane Act.

EXISTING LAW:

1) Requires peace officers to meet all of the following minimum standards:

a) Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as specified;

b) Be at least 18 years of age;

c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record;

d) Be of good moral character, as determined by a thorough background investigation;

e) Be a high school graduate, pass the General Education Development Test or other high school equivalency test approved by the State Department of Education that indicates

high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university;

f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer:

i) Physical condition shall be evaluated by a licensed physician and surgeon; and

ii) Emotional and mental condition shall be evaluated by either of the following:

(1) A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry, and has a specified amount of experience; or

(2) A psychologist licensed by the California Board of Psychology with a specified amount of experience. (Gov. Code, § 1031.)

2) Specifies that the peace officer requirements do not preclude the adoption of additional or higher standards, including age. (Gov. Code, § 1031, subd. (g).)

3) Specifies that the following persons are disqualified from being a peace officer, except as specified:

a) Any person who has been convicted of a felony;

b) Any person who has been convicted of any offense in any other jurisdiction which would have been a felony if committed in this state;

c) Any person who has been convicted of a crime based upon a verdict or finding of guilt of a felony by the trier of fact, or upon the entry of a plea of guilty or nolo contendere to a felony. This paragraph shall apply regardless of whether, the court declares the offense to be a misdemeanor or the offense becomes a misdemeanor by operation of law;

d) Any person who has been charged with a felony and adjudged by a superior court to be mentally incompetent;

e) Any person who has been found not guilty by reason of insanity of any felony;

f) Any person who has been determined to be a mentally disordered sex offender; or

g) Any person adjudged addicted or in danger of becoming addicted to narcotics, convicted, and committed to a state institution, as specified. (Govt. Code, § 1029, subd. (a)(1)-(7).)

4) States that each law enforcement agency shall make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency. (Pen. Code, § 832.12, subd. (a).)

5) Requires a peace officer seeking employment with a law enforcement agency to give written permission for the hiring department or agency to view his or her general personnel file and any separate file designated by a law enforcement agency. (Pen. Code, § 832.12, subd. (a).)

6) States that for purposes of performing a thorough background investigation for applicants not currently employed as a peace officer, an employer shall disclose employment information relating to a current or former employee, upon request of a law enforcement agency, if all of the following conditions are met (Gov. Code, § 1031.1):

   a) The request is made in writing;

   b) The request is accompanied by a notarized authorization by the applicant releasing the employer of liability; and,

   c) The request and the authorization are presented to the employer by a sworn officer or other authorized representative of the employing law enforcement agency.

7) Requires every peace officer candidate be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

8) Requires proof of the employment history check be documented by a written account of the information provided and source of that information for each place of employment contacted. All information requests shall be documented. (Cal. Code Regs., tit. 11, § 1953, subd. (e)(6).)

9) States that if a peace officer candidate was initially investigated in accordance with all current requirements and the results are available for review, a background investigation update, as opposed to a complete new background investigation, may be conducted for either of the following circumstances: (Code of Regulations, Title 11, § 1953, subd. (f)(a).)

   a) The peace officer candidate is being reappointed to the same POST-participating department. Per regulations, a background investigation update on a peace officer who is reappointed within 180 days of voluntary separation is at the discretion of the hiring authority; or

   b) The peace officer candidate is transferring, without a separation, to a different department; however, the new department is within the same city, county, state, or district that maintains a centralized personnel and background investigation support division.

10) Requires each department or agency in this state that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public. (Pen. Code, § 832.5, subd. (a)(1).)

11) Requires complaints and any reports or findings relating to these complaints be retained for a period of at least five years. (Pen. Code, § 832.5, subd. (b).)

12) Specifies prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints, as specified, shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law. (Pen. Code, § 832.5, subd. (b).)

13) States that each law enforcement agency shall annually furnish to the DOJ a report of all instances when a peace officer employed by that agency is involved in any of the following: (Government Code, § 12525.2, subd. (a).)

   a) An incident involving the shooting of a civilian by a peace officer;

   b) An incident involving the shooting of a peace officer by a civilian;

   c) An incident in which the use of force by a peace officer against a civilian results in serious bodily injury or death; and,

   d) An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

14) Specifies that each year, the DOJ shall include a summary of information contained in the use of force reports received through the department's OpenJustice Web portal. (Government Code, § 12525.2, subd. (c).)

15) Includes within DOJ's annual reporting requirements the number of citizens' complaints received by law enforcement agencies which shall indicate the total number of these complaints, the number alleging criminal conduct of either a felony or misdemeanor, and the number sustained in each category. (Pen. Code, § 13012, subd. (e).)

16) Provides, under the Tom Bane Civil Rights Act, that if a person or persons, whether or not acting under color of law, interfere, or attempt to interfere, by threat, intimidation, or coercion, with the exercise or enjoyment by any individual of any rights secured by the Constitution or laws of the United States, or by the Constitution or laws of the state of California, the Attorney General, or any district attorney or city attorney, is authorized to bring a civil action for injunctive and other equitable relief, as well as a civil penalty. (Civ. Code, § 52.1, subd. (b).)

17) Authorizes an individual whose exercise or enjoyment of their rights has been interfered with, or attempted to be interfered with, to institute and prosecute in their own name and on their own behalf a civil action for damages, including, but not limited to, damages under Section 52 of the Civil Code, injunctive relief, reasonable attorney's fees and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct, as described. (Civ. Code § 52.1(c), subd. (i).)

18) Provides that if a court issues a temporary restraining order or a preliminary or permanent injunction in Bane Act actions ordering a defendant to refrain from conduct or activities, the order issued shall indicate that a violation of it is a crime. (Civ. Code § 52.1, subds. (e) and

(j).)

19) Provides, under the Government Claims Act, that unless a statute provides otherwise, a public entity is not liable for injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. However, a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of their employment if the act or omission would otherwise have given rise to a cause of action against that employee. (Gov. Code § 814 et seq.)

20) Provides that a public employee is not liable for injury caused by their instituting or prosecuting any judicial or administrative proceeding within the scope of their employment, even if the employee acts maliciously and without probable cause. (Gov. Code § 821.6.)

21) Provides that a public entity is not liable for an injury proximately caused by any prisoner or an injury to any prisoner. (Gov. Code § 844.6.)

22) Provides that neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in the employee's custody; but, except as otherwise provided, a public employee, and the public entity where the employee is acting within the scope of employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and the employee fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay. (Gov. Code § 845.6.)

23) Provides for the indemnification of public employees, as specified. It requires a public entity to pay a judgment or settlement of a claim or action to which it has agreed if an employee or former employee of a public entity requests the public entity to defend the employee against any claim or action against the employee for an injury arising out of an act or omission occurring within the scope of their employment as an employee of the public entity, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, except as provided. A public entity is only authorized to pay that part of a claim or judgment that is for punitive damages under certain circumstances. (Gov. Code §§ 825, 825.2.)

24) Provides the limited circumstances under which a public entity may recover from an employee the amounts paid for claims or judgments. (Gov. Code §§ 825.4, 825.6.)

25) Establishes the Peace Officer Procedural Bill of Rights (POBOR), which provides protections for persons employed as peace officers in disciplinary proceedings. (Gov. Code, § 3300, et. seq.)

26) Provides, under POBOR, that when a peace officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted with the following conditions:

a) The interrogation shall be conducted at a reasonable hour; if the interrogation occurs during off-duty time of the officer being interrogated, the officer must be compensated for any off-duty time in accordance with regular department procedures, and the officer shall not be released from employment for any work missed.

b) The officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation.

c) All questions directed to the officer under interrogation shall be asked by and through no more than two interrogators at one time.

d) The officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

e) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

f) The officer shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action.

g) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding, except as specified.

h) The complete interrogation of the officer may be recorded provided that the officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.

i) The officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential, and no notes or reports that are deemed to be confidential may be entered in the officer's personnel file.

j) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

k) The officer shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. (Gov. Code, § 3303.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "For years, there have been numerous stories of bad-acting officers committing misconduct and not facing any serious consequences. These officers remain on the force after pleading down to a lesser crime, if prosecuted and convicted at all. Other times, these problematic officers resign or are fired from their employer only to get rehired at another law enforcement agency and continue to commit serious acts of misconduct. California does not have a uniform, statewide mechanism to hold law enforcement officers accountable. Allowing the police to police themselves has proven to be dangerous and leads to added distrust between communities of color and law enforcement. Furthermore, the Bane Act has been under assault and its original intent undermined. Federal courts have made the doctrine of qualified immunity a more potent obstacle to achieving justice for violations of rights under the federal civil rights law. Revisions are needed to address and clarify a number of recent negative court decisions that brought the Bane Act further out of alignment with its counterpart in federal law. Given the federal issue of qualified immunity, the Bane Act must be a strong resource to defend California civil rights. SB 2 creates a fair and impartial statewide process with due process safeguards to revoke a law enforcement officer's certification for a criminal conviction and certain acts of serious misconduct without regard to conviction. Additionally, the bill will allow individuals to bring actions for wrongful death in certain circumstances, and eliminate specific immunities for law enforcement officers sued under the Bane Act. Law enforcement officers are entrusted with great powers to carry a firearm, stop and search, use force, and arrest; to balance this, they must be held to a higher standard of accountability."

2) **POST Certification:** POST was created by the legislature in 1959 to set minimum selection and training standards for California law enforcement. Their mandate includes establishing minimum standards for training of peace officers in California. (Pen. Code § 13510, subd. (a).) As of 1989, all peace officers in California are required to complete an introductory course of training prescribed by POST, and demonstrate completion of that course by passing an examination. (Pen. Code, § 832, subd. (a).)

   POST issues seven professional certificates to peace officers. The Basic Certificate is awarded to currently full-time peace officers of a POST-participating agency who have satisfactorily completed the prerequisite Basic Course requirement and the employing agency's probationary period. Other certificates that POST provides to officers include the Intermediate, Advanced, Supervisory, Management, Executive, and Reserve Officer.

   Existing law provides for peace officers who complete basic training to be bestowed with a peace officer certificate. This bill would supplant the existing peace officer certificate, deeming all currently valid certificates to be expired as of January 1, 2023. In its place, peace officers would have to not only complete basic training, but they would also be subject to an investigation into any instances of "serious misconduct" that could make them ineligible to be a peace officer under the new certification scheme.

   Government Code section 1031 establishes the minimum standards needed to qualify as a peace officer. That statute requires a background check, but the statute does not provide a further description of the requirements of that background check generally, nor does it specify what type of background check is required for an individual that is currently a peace

officer and is applying for a job as a peace officer with a new law enforcement agency.

Given the liability risk of hiring an officer with a disciplinary record as a peace officer, one would expect that hiring agencies would be vigilant in checking on an applicant's employment background, particularly if that employment was with another law enforcement agency. Existing law requires a peace officer seeking employment with a law enforcement agency to give written permission for the hiring department or agency to view his or her general personnel file. (Pen. Code, § 832.12, subd. (a).) Nonetheless, there have been reports that certain law enforcement agencies routinely make hiring decisions either unaware, or untroubled by problematic instances of past conduct. (*See e.g.* Du Sault, '*Second-chance' P.D.: McFarland hired police with troubled records, from DUIs to fraud*, The Desert Sun, Nov. 11, 2019, available at: https://www.desertsun.com/story/news/2019/11/11/mcfarland-california-hired-police-troubled-records-duis-fraud-banning/4169426002/, [as of June 21, 2021] ("One cop was accused in a lawsuit of having sex with a teenage police explorer scout; another of threatening to jail women if they did not have sex with him. At least three more had DUIs.")

3) **Peace Officer Decertification:** California is one of only four states in the nation that does not have a process for the decertification of peace officers when they engage in acts of misconduct that could disqualify them from being employed as a peace officer. Other professions that involve a large degree of public trust have robust organizations that may decertify persons from practicing in a field (*e.g.* the State Bar of California for attorneys, or the Medical Board of California for doctors). In California we already have POST certification, but in 2003 POST lost the ability to deny or revoke an officers' certification by statute.

   This bill would establish a new procedure to revoke an officer's certification. To investigate allegations of behavior that could result in decertification, this bill would require POST to establish a new division to be known as the Peace Officer Standards Accountability Division. The division's primary responsibility would be to review local law enforcement agency investigations into possible misconduct that could cause a peace officer to lose their certificate. This bill would require, as of 2023, that local law enforcement agencies submit information to the division of accountability that one of its officers has engaged in conduct that could be grounds for decertification. This bill requires agencies to report to POST on any potential grounds of decertification that occurred on or after January 1, 2020 and allows investigations into conduct that occurred prior to that for the most serious forms of misconduct, including acts of dishonesty, sexual assault, and unlawful use of force. Most investigations by the division of accountability would begin based upon a report from the local agency, but the division of accountability would also be authorized to initiate investigations into any potential grounds for decertification in its discretion.

   This bill seeks to establish time limits within which investigations must be completed. The time limit to complete an investigation would depend on whether the allegation of serious misconduct came from a law enforcement agency, or was initiated by some other method. Investigations based law enforcement reports would be limited to three years. Investigations started internally, or based upon a public request or complaint would not be subject to a time limitation.

   This bill would also require the establishment of a mostly-civilian advisory board, the Peace

Officer Standards Accountability Advisory Board. The board's primary responsibility would be to review investigations by the accountability division and make a recommendation to POST as to whether a subject of an investigation should be decertified or not. The board would need to find by clear and convincing evidence that the factual basis for decertification was established in order to recommend decertification to POST.

The makeup of this advisory board is different than nearly any other disciplinary board in the State, in that most disciplinary boards are composed in such a way that a small majority of the members come from the actual profession for which they are imposing disciplinary decisions. For example, eight of the fifteen medical board seats are filled by physicians. The same is true for the dentistry board and five of the nine seats on the nursing board are filled by nurses. This board, by contrast, would require that seven of the nine seats be filled by people who are not, and have never been, peace officers. There is also no provision that would require training for board members on the rules and procedures of the decertification process, standards of use of force and lawful arrest, etc. It may be important for board members to have some level of training on pertinent legal issues prior to making decertification decisions.

When the division of accountability makes a determination that a peace officer has committed an act that subjects them to decertification, it is required to provide written notice to that officer. The officer then has 30 days to appeal the decision to the advisory board. The board would determine whether there was clear and convincing evidence to establish a factual basis for decertification. Upon making such a finding it would recommend that POST decertify the officer. POST's decision on whether to decertify would then be based on whether or not there was evidence that reasonably supports the board's recommendation.

The investigative process would culminate with a proceeding before an administrative law judge. The administrative hearing would be conducted pursuant to the Administrative Procedure Act, which requires specific procedural safeguards for due process protections. Such protections are substantially less than those provided during a criminal trial. In certain circumstances the administrative proceeding could be referred for judicial review.

4) **"Serious Misconduct" Definition:** This bill would require revocation of peace officer certification if an investigation determines that the peace officer has (1) become ineligible to hold office as a police officer under the existing disqualification provisions or (2) been terminated for cause from employment as a peace officer or has otherwise engaged in any of the enumerated acts of "serious misconduct." This bill would also direct POST to adopt a regulation that defines "serious misconduct," but also requires all of the following to be included in POST's definition:

- Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting or investigation of misconduct by a peace officer;
- Abuses of power, including intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest;
- Physical abuse, including unauthorized use of force;
- Sexual assault;

- Demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner;

- Violations of the law or other acts that are sufficiently egregious or repeated so as to be inconsistent with an officer's obligation to uphold the law or respect the rights of members of the public;

- Participation in a law enforcement gang or other organization that engages in a pattern of rogue on-duty behavior that violates the law or fundamental principles of professional policing, including, but not limited to, unlawful detention, use of excessive force, falsifying police reports, fabricating evidence, targeting persons for enforcement based solely on protected characteristics of those persons, theft, use of alcohol or drugs while on duty, protection of other members from disciplinary actions, and retaliation against other officers who threaten or interfere with the activities of the group; and,

- Failing to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to the provisions of this bill.

The list of behavior that constitutes "serious misconduct" covers a wide swath of illicit activity. It would cover the intentional killing of a civilian when the officer knows that deadly force is not justified; it would also appear to cover an officer refusing to implicate their partner in some kind of less serious misconduct, even if the non-cooperating officer did not commit any misconduct other than the refusal to cooperate. A finding that a peace officer engaged in any of the categories of conduct described above would require decertification. It may be desirable to allow some discretion so that an officer who has an otherwise exemplary record does not get permanently banned from being a peace officer as a result of one relatively minor transgression.

In addition, some of the categories of serious misconduct may be overbroad:

a) *Participation in a Law Enforcement Gang*: Mere participation, without any parameters, may be problematic as a ground for decertification. "Participation" is a term that is subject to a broad interpretation. (*See Russello v. United States*, (1983) 464 U.S. 16, 21-22.) At times the United States Supreme Court has interpreted the word to include involuntary or coerced participation. (*See PA Dep't of Corrections v. Yeskey* (1998), 524 U.S. 206, 211; *see also Negusie v. Holder* (2009) 555 U.S. 511, 544, (Dis. opn. of Thomas, J., suggesting that the plain meaning of the word "participation" includes actions that are coerced.) The First Amendment right to freedom of association may also be implicated. (*Nichols v. Dancer* (9th Cir. 2009) 567 F.3d 423.) Would getting a tattoo that is representative of a law enforcement gang, without ever performing any kind of illicit conduct be grounds for decertification under this bill? Would attending an event hosted by a member of a law enforcement gang be considered "participation?" What if the officer was forced to engage in those activates?

b) Violations of the Law or Other Acts: "Violations of the law or other acts that are sufficiently egregious or repeated as to be inconsistent with an officer's obligation

to uphold the law or respect the rights of members of the public" is also susceptible to a broad interpretation. Officers tasked with the enforcement of traffic violations who receive repeated speeding tickets or other moving violations, could arguably be subject to mandatory, permanent revocation of their certification on the basis that they have repeatedly violated the law and their obligation to uphold it. Is permanent loss of the ability to be a peace officer proportionate to minor, non-criminal violations of law?

c) *Failing to cooperate with an investigation into potential police misconduct*: The "failure to cooperate with an investigation" ground for decertification does not take into account constitutional and statutory protections to which officers may be entitled during an investigation. For example, the Fifth Amendment to the United States Constitution grants the privilege against self-incrimination. Individuals who are suspected of a crime, including peace officers, are constitutionally allowed to refuse to answer questions if their responses may incriminate them. Other state law, such as the Peace Officer Procedural Bill of Rights (POBOR), anticipates the self-incrimination issue and requires that when it appears the officer may be charged with a crime, they must be informed of their right to refuse to answer questions. (*See* Gov. Code, § 3303, subd. (h).) If the officer refuses to answer, on the grounds that the response may be incriminating, that triggers a *Lybarger* warning, which informs the officer that they are being compelled to answer and that their statements may not be used against them in subsequent a criminal proceeding. (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.) This bill does not contain a similar component, which raises the question of how peace officers' invocation of the constitutional or statutory rights will be observed in the context of a failure to cooperate. For more information regarding the Peace Officers Procedural Bill of Rights, see comment 6, below.

It may be worth considering an amendment to narrow these categories of the "serious misconduct" definition, particularly in light of the fact that permanent decertification is the only possible sanction in this bill; it does not allow for intermediate sanctions.

5) **Intermediate Sanctions:** Most disciplinary processes allows the licensing authority to impose intermediate sanctions, in addition to revoking a person's license altogether. Intermediate sanctions may include professional reprimand, placing the person on probationary status, mandatory training, suspension of the license or certificate, or fines. The decertification process established by this bill to address peace officer misconduct appears to be different from any other licensing agency in California, as well as most or all other police decertification processes in other states, because it does not provide for any kind of sanction other than decertification. For example, the State of Massachusetts recently passed its own police decertification bill. (Mass. Statutes of 2020, Chapter 253, available at: https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter253, [as of July 7, 2021].) The Massachusetts bill specifically allows for retraining and suspension in addition to revocation of a peace officer certificate. (*Id.* at Sec. 10, subds. (b) – (d).)

This bill does not allow for an officer to be suspended as a punishment although it does allow POST to temporarily suspend an officer's certificate during the pendency of an indictment for an offense that would disqualify the person from being a peace officer, or when the officer has been terminated or otherwise separated from employment on account of serious

misconduct. However, once an investigation into serious misconduct is complete, the only possible sanction is decertification.

Because the only possible punishment under this bill is permanent decertification, investigators may be reluctant to vigorously pursue violations that they perceive to be less serious in nature. An investigator who knows that the only possible outcome is permanent disqualification may be more willing to overlook evidence or find ambiguities in the investigation in a way that they would not if they knew that the officer may only be suspended or retrained. Additionally, intermediate sanctions can provide an opportunity for an individual with an otherwise promising career to address underlying issues that led to the misconduct. It may be worth considering the possibility of intermediate sanctions for some of the categories of serious misconduct described above.

6) **Peace Officer Procedural Bill of Rights (POBOR)**: In certain circumstances, this bill would create an investigative process independent of the existing, administrative disciplinary process for law enforcement officers who remain employed by their local agency. Specifically, the division of accountability would have independent investigative authority to review local agency investigations that did not result in termination of employment and conduct additional investigation when necessary. POST would also have the authority to direct the division of accountability to investigate an incident, and the advisory board would be able to request the division of accountability conduct an investigation upon a majority vote.

The existing administrative process provides officers with a number of statutory protections, known as the Peace Officer's Procedural Bill of Rights (POBOR). Those protections include notice of an interrogation, specific rules on the timing of interrogations, the right to be represented during the interrogation, the right invoke the privilege against self-incrimination and be granted immunity for the responses to potentially incriminating statements, among others. (Gov. Code § 3303.) By its terms, POBOR only applies when a peace officer is investigated by the employing agency. (*Id.*, (specified protections apply when the officer is "under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action.").) However, in certain circumstances, California courts have found that POBOR applies even when the investigating agency is not the employer. (*See CCPOA v. California* (2000) 82 Cal.App.4th 294, 306-307.) In *CCPOA v. California*, for example, the California Court of Appeal found that POBOR applied even though the DOJ, not the officer's employer, was the investigating agency. The reasoning adopted by the court was that the employing agency (California Department of Corrections and Rehabilitation, then called the California Department of Corrections) was "acting in concert" with DOJ. (*Id.* at 307.) Specifically, the court noted that CDCR "order[ed] the correctional officers to cooperate with the DOJ investigation, [] delivered interviewees to DOJ investigators, and threatened them with arrest and/or discipline if they asserted their rights during interrogation by DOJ agents." (*Ibid.*)

This bill does not cross-reference the POBOR statutes. Absent direction from the Legislature, the courts may have to decide when and whether POBOR is applicable to POST decertification investigations. How courts decide whether POBOR is applicable or not may depend on the degree of cooperation between POST's division of accountability and the employing agency. This may require local chiefs to walk a fine line of cooperating with POST to provide investigation materials and make officers available for interviews, without

becoming "inextricably intertwined" in the investigation. (*Id.* at 306.)

One indication that POBOR may not apply to the provisions of this bill can be found in the time limits for investigations. This bill provides that "notwithstanding any other law," the division of accountability must complete investigations of serious misconduct within three years of receipt of a complaint from a law enforcement agency. Existing law, under POBOR, requires investigations into any act, omission, or other allegation of misconduct that could result in punitive action or denial of promotion, to be completed within one year. (Gov. Code, § 3304, subd. (d).) This bill would therefore supersede the one year time limit in POBOR. Does this mean that the other provisions of POBOR should not be followed during investigations of serious misconduct?

7) **"Skelly" Hearings and Finality of Local Adjudications**: One other complication that this bill presents in terms of its interaction with existing law concerns the finality of local agency adjudications. Under existing law, before an agency can take punitive action against a peace officer, POBOR requires an administrative hearing, commonly referred to as a "Skelly hearing." At a Skelly hearing, peace officers are entitled to the following: (1) notice of the intended disciplinary action; (2) a copy of all materials upon which the action is based (including material which was available for review by the individual responsible for imposing discipline, regardless of whether such information was, in fact, reviewed); and, (3) an opportunity to respond orally or in writing to an impartial reviewer prior to the effective date of the disciplinary action. (California Statewide Law Enforcement Association (CSLEA) Legal FAQ, available at: https://cslea.com/legal/legal-faq/, [as of July 8, 2021].)

Officers whose discipline is not resolved at the Skelly hearing stage are entitled to an evidentiary hearing before an Administrative Law Judge employed by the State Personnel Board. The administrative hearing is very similar to a civil trial. The burden of proof is preponderance of the evidence, and it rests with the agency to demonstrate there was just cause for the discipline as well as the appropriate penalty for such conduct. Each side has the right to conduct discovery, to make opening statements and closing arguments, to call and cross-examine witnesses, and introduce documentary and other evidence. The accused employee also has the right to testify in his or her own behalf. At the conclusion of the hearing, the administrative law judge will prepare a proposed decision for consideration by the five-member State Personnel Board (SPB). The SPB need not accept the administrative law judge's decision and may make modifications consistent with the SPB Rules. The Board is also free to make changes relative to the penalty recommended by the administrative law judge or to reject the recommended decision and hear the case itself. Once any changes are made to the decision, the Board will adopt the decision as its own. Both the employee and the agency have the right of appeal to Superior Court if they are dissatisfied with the Board's decision. (*Id.*)

This bill would similarly provide for an evidentiary hearing at the conclusion of POST's determination that an officer should be decertified. Pursuant to the APA, there would also be an opportunity to appeal the decision on decertification to Superior Court. Therefore, an officer who has already appealed to Superior Court following their Skelly hearing and appearance before the SPB, may have to go through a substantially similar set of hearings and then appear in Superior Court a second time, on an issue that has previously been litigated in the same forum. Opponents to this bill assert that two legal doctrines – claim preclusion and/or issue preclusion – would prohibit the Superior Court from hearing the same

case again and coming to a different determination. For officers who have been exonerated, or otherwise found to have committed no serious misconduct during a Skelly hearing and the attendant appeal process, it may be futile for POST to launch an investigation, provide the necessary hearings and due process, only to wind up back in Superior Court with a judge who will be unable to disturb the determination made in Superior Court following the Skelly hearing.

8) **National Decertification Index**: The National Decertification Index is a nationwide aggregation of information that allows hiring agencies to identify peace officers who have had their license or certification taken away for misconduct. (Final Report of the President's Task Force on 21st Century Policing (2015), May 2015, p. 29, available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf , [as of June 21, 2021].) It was designed as a solution to the problem "wherein a police officer is discharged for improper conduct and loses his/her certification in that state . . . [only to relocate] to another state and hire on with another police department." (*Id.* at p. 29-30.) This bill would provide that any person who is listed in the National Decertification Index, or other designated federal database, is disqualified from being a peace officer in California. It would also require POST to publish the name of any peace officer whose certification is revoked or suspended and the basis for doing so in the National Decertification Index.

9) **Bane Act Provisions**: The California Government Claims Act (Tort Claims Act) provides a general immunity from liability for harms that public employees may cause, unless another statute provides for liability. Government Code Section 825(a) provides that public entities must indemnify public employees for judgments of compensatory damages, and provides that they may indemnify public employees for punitive damages if they were acting in the course and scope of employment, acting in good faith, and payment would be in the best interests of the public entity.

   Government Code Section 821.6 grants absolute immunity to public employees for any injury caused by their instituting or prosecuting any judicial or administrative proceeding within the scope of their employment, even if they act maliciously and without probable cause. Some courts have interpreted this immunity broadly to apply to conduct during an investigation leading up to institution of a proceeding. Government Code Sections 844.6, and 845.6 generally grant absolute immunity to public employees for injuries caused to a prisoner, or for failure to provide or obtain medical care for a person in custody.

   This bill would expressly state that these immunities do not apply to any cause of action brought under the Bane Civil Rights Act brought against a peace officer or the peace officer's employing agency. In addition, this bill expressly states that it would not affect existing judicial and prosecutorial immunity for individual attorneys acting on behalf of a prosecutor's office in a prosecutorial capacity. The Bane Act deals with civil liability for public employees and is therefore outside the normal jurisdiction of this committee. This bill is double-referred to the Assembly Judiciary Committee. For a more in-depth analysis of the Bane Act please review the Assembly Judiciary Committee analysis dated May 20, 2021.

10) **Arguments in Support**:

   a) According to the bill's co-sponsor, *ACLU California Action*: "Nationwide, 46 states have the authority to revoke a peace officer's certificate for misconduct, commonly known as

decertification. California is one of only four that do not. In 2003, under pressure from the law enforcement lobby, the legislature removed the authority of the California Commission on Peace Officer Standards and Training (POST) to deny or cancel a peace officer's certification, leaving the continued employment of officers accused of misconduct or abuse of authority to local law enforcement agencies, and allowing many disreputable officers to jump from one local police department to another.

"Following the enactment of SB 1421 (Skinner, Chapter 988, Statutes of 2018), which disclosed the hidden records of peace officer misconduct, there have been numerous revelations of officers committing misconduct without facing any real consequences. Many problem officers remain on the force after pleading down to a lesser crime, if they are prosecuted at all. Others resign or are fired by one department, only to get rehired at another and go one to commit further serious acts of misconduct. This bill would bring an end to the state's shameful dereliction of duty, returning California to the nearly universal recognition across the country that local law enforcement cannot be relied upon to protect our residents from people that should not be peace officers.

"SB 2 would create a two-track process for decertification. If an officer is fired for serious misconduct, including excessive force, sexual misconduct or abuse, or concealing or fabricating evidence, decertification would be warranted as a matter of course. If an officer engages in misconduct without being terminated, decertification would be discretionary based on a further investigation and review. The states that have the most effective decertification schemes, Georgia and Florida, provide a discretionary process where the administering entity can look at other less serious misconduct not tied to a criminal conviction or an officer's firing.

"Furthermore, the decertification process increases accountability of peace officers at the statewide level in various ways. The bill requires law enforcement agencies to report to POST all fired officers or officers that resign in lieu of a termination, requires hiring agencies to contact POST and inquire as to the facts and reasons for an officer being separated from their former employer before hiring the officer, and adds the names of decertified officers to a national database.

"We appreciate that SB 2 has been improved from the final version of SB 731. Specifically, the composition of the Advisory Board has been changed from 6-3 to 7-2 to increase the numbers of civilians and reduce the law enforcement representation. Massachusetts, which just passed their own version of decertification, has a 6-3 civilian to law enforcement board. Our co-sponsor coalition wanted to ensure that California's law has the strongest public representation.

"Furthermore, our coalition has made it clear that impacted families have a strong desire to hold previous bad actors accountable. SB 2 therefore allows the Commission to look back at specific instances of officer misconduct when the officer renews their certification in the future. Failure to do so would treat some officers differently for the same wrongdoing. The specific acts of misconduct align with those crimes highlighted in Penal Code section 832.7 under SB 1421. Those crimes are uses of force against a person that results in death or great bodily injury, sexual assault, and acts of dishonesty."

b) According to the *California Innocence Coalition*: "The California Innocence Coalition writes in strong support of SB 2, the Kenneth Ross Jr. Police Decertification Act of 2021. The California Innocence Coalition consists of the three innocence projects in California, the California Innocence Project, the Northern California Innocence Project and the Loyola Project for the Innocent. The mission of our projects is to protect the rights of the innocent by litigating their cases to bring them home and to promote a fair and effective criminal legal system by advocating for change in California laws and policy. Collectively, the California Innocence Coalition has won the freedom of over 70 wrongly imprisoned individuals who collectively lost over 800 years in prison for crimes they did not commit. Since 1989, there have been 223 exonerations in the state of California.1 Of these cases, almost half have involved police officer misconduct.

"Following the passage and enactment of Senate Bill 1421 (Skinner, Chapter 988, Statutes of 2018), which permitted inspection of certain acts of officer misconduct via Public Records Act requests, there have been numerous stories of officers committing misconduct and not facing any consequences. These officers remain on the force after pleading down to a lesser crime- if prosecuted and convicted at all. Other times, these officers resign or are fired from their employer, only to get rehired at another law enforcement agency and continue to commit serious acts of misconduct. SB 2 would bring California in line with the majority of the nation in creating a statewide structure with due process safeguards to revoke certificates from people that should no longer be law enforcement officers.

"SB 2 would increase accountability for law enforcement officers that commit serious misconduct and violate a person's civil rights. Specifically, the bill will create a fair and impartial statewide process to revoke professional certificates issued to officers for serious misconduct by creating the Peace Officer Standards Accountability Division to investigate and prosecute proceedings to take action against a peace officer's certification. The bill would also require the division to review and investigate grounds for decertification and make findings as to whether grounds for action against an officer's certification exist. The bill would require the division to notify the officer subject to decertification of their findings and allow the officer to request review. The formation of a commission with diverse stakeholders in the criminal legal system will help increase transparency and accountability. Both are integral to restoring trust in our communities and the integrity of prosecutions.

"Additionally, this bill seeks to address and clarify court decisions that have made meaningful remedy for civil rights violations under the Bane Act essentially useless. The Bane Act is California's most broadly applicable and essential civil rights law. Bane Act claims are included whenever constitutional or other rights are violated by government or private actors, most commonly from law enforcement's use of excessive force or false arrest."

11) **Arguments in Opposition**:

a) According to the *Peace Officer's Research Association of California*: "PORAC fully supports the license revocation of officers who demonstrate gross misconduct in law enforcement. We cannot allow this in our profession. In fact, PORAC has been at the table, proposing legislative solutions to create a fair and equitable process for revoking an

officer's license to practice law enforcement. However, as written, SB 2 would over-ride due process, establishing a 9-person panel to oversee the license revocation process that includes 7 members of the public with no requirements for expertise power or prior experience in the practice of public safety or law enforcement, with one of the seven actually biased against the peace officer, and only 2 members with expertise or prior experience. If a doctor's actions were being reviewed for potential discipline, would we want someone with no medical experience deciding whether that doctor's actions were reasonable?

"In addition, this body will have complete investigatory authority to overturn local agency and District Attorney recommendations and discipline. Ultimately, it will have to end a peace officer's career with little or no due process for the officer.

"No one wants to see bad officers removed from law enforcement more than good officers do. When an officer acts in a way that is grossly inconsistent with the missions and goals of our profession, it gives all law enforcement a bad name, and only harms our ability to build back the community trust we need to carry out our duties safely and effectively. However, SB 2 reaches far beyond the police licensing process. Ultimately, this bill creates an inherently amateurish and potentially biased panel to oversee the process of revoking an officer's license to practice law enforcement, ignoring our country's tradition of due process and subjecting officers to a biased review of their actions where guilt is assumed, and the deck is stacked against them.

"Peace officers cannot possibly do their job if there's always a lingering fear that even if they do the job by the book and up to policy standard, they could still potentially face a civil action. No employee should have to work under those conditions. Again, PORAC is strongly opposed to SB 2."

b) According to the *California Police Chiefs Association*: "In addition to our significant concerns regarding the [] liability provisions, the proposed decertification section is laden with major policy and cost concerns. Again, while we fully support a comprehensive decertification process that includes robust oversight, the proposed system under SB 2 fails to meet basic standards of fairness and impartiality.

"First, SB 2 creates the Peace Officer Standards Accountability Advisory Board (Board) within the Commission on Peace Officers Standards and Training (POST). The Board is made up of seven civilians and only two peace officers, whose charge is to direct investigations and ultimately make recommendations to the full POST Commission for decertification. Although this appears to be only an advisory role, the bill states that the POST Commission "shall adopt the board's recommendation unless it is without a reasonable basis." This line virtually ensures the POST Commission will have to follow the recommendation of the civilian-led Board.

"No other professional licensing or certificate board is made up of a majority of non-professionals. The Medical Board is made up of a majority of doctors, the Dental Board is made up of a majority of dentists, the State Bar is made up of a majority of lawyers. This is because they have the requisite experience and training to understand the profession. CPCA understand that having non-professionals is important to include in the process to gain outside perspectives and build additional trust in our criminal justice

system, but giving the authority contemplated in SB 2 to a board where 7 out of the 9 appointees have not been a peace officer is unreasonable. Furthermore, there is no requirement that the civilian members of the Board demonstrate an ability to be impartial, and at least one member (person or family member subject to wrongful force) will in all likeliness be prejudiced against law enforcement. We do not impanel juries with such bias, nor should we accept a certification board with such predispositions.

"Another grave concern is the vague, broad, and often subjective categories the bill lists to identify what "serious misconduct" triggers a lifetime decertification. Furthermore, SB 2 merely requires that the individual officer "engaged" in serious misconduct – not that they were found guilty, terminated, or even disciplined. In any of these cases, SB 731 states the peace officer "shall have their certification revoked" for any of the following:

(1) Acts of dishonesty, physical abuse, and abuse of power. By qualifying these as "acts of" this statute remains open ended to what will ultimately fall into these categories.

(2) Participation in a "law enforcement gang" that engages in rogue on-duty behavior, which includes use of alcohol or other substances. While CPCA does not condone substance abuse while on duty, often times this can be related to trauma and PTSD the officer is experiencing and we do not feel a lifetime ban is commensurate with that level of misconduct that can be treated and corrected. Additionally, the use of alcohol is not necessarily indicative of what would normally be considered gang activity.

(3) Acts that violate the law and are inconsistent with an officer's obligation to uphold the law or respect the rights of members of the public. This is an incredibly broad and vague statement that could mean anything the Board decides.

(4) Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to this chapter. This may include evoking the Fifth Amendment or asking for representation before an interview.

"Given these broad categories, the Board is also authorized to investigate without the request of the commission or board, any potential grounds for revocation of certification of an officer regardless if the local agency or court during and appeals finds the misconduct unfounded or the officer innocent. This double jeopardy concern is compounded due to the fact SB 2 is retroactive, meaning this civilian-led Board will be potentially reviewing any case of alleged prior misconduct.

"Next, SB 2 states that the information, documents, and hearings held pursuant to this new law would all be made public. CPCA fully supports a transparent process, but this section ignores laws meant to protect victims, health records, minors, and others who have their personal information contained with police reports and investigations. Additionally, there is no mention of protecting sensitive information that may be used in future criminal cases. This section jeopardizes the privacy of innocent individuals and the impartiality of our judicial system.

"Another concern is that SB 2 also requires each law enforcement agency to submit to POST "any complaint, charge, or allegation of conduct against a peace officer employed by that agency that could render a peace officer subject to revocation of certification by the commission." Since that includes virtually any misconduct, as described above, and because SB 2 is retroactive, it will create an administrative nightmare in preparing and forwarding every allegation (even if completely unfounded).

"This entire complex and oftentimes overlapping and duplicative system is ostensibly funded by forcing peace officers to pay a licensing fee. No other public safety employee has such a charge, which will likely fall on the backs of local governments already hurting financially due to COVID-19. Even with the fees outlined in SB 2, the system envisioned by the current language – which essentially sets up a state-run bureaucracy for investigating thousands of complaints – would necessitate POST hiring hundreds of new staff and investigators. Given the depth of these investigations, our cost estimate places the overall annual funding needed to run such a system upwards of a hundred million dollars. Why would the state spend such resources to duplicate investigations that are already made public and can be reviewed by POST? Instead, POST should play an oversight role in reviewing the local investigations and hold agencies accountable for the thoroughness of that review."

12) **Related Legislation**:

a) AB 60 (Salas) would add criteria disqualifying individuals from serving as a peace officer and establish a peace officer decertification process within POST. AB 60 is pending in this committee.

b) AB 17 (Cooper) is substantially similar to AB 60. AB 17 is pending in this committee.

c) AB 26 (Holden) would disqualify a person from being a peace officer if they have been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or death or to have failed to intercede in that incident as required by a law enforcement agency's policies. AB 26 is pending a hearing in the Senate Public Safety Committee.

d) AB 958 (Gipson) would require all law enforcements agencies to maintain a policy that prohibits participation in a law enforcement "clique" and makes a violation of that policy grounds for termination. AB 958 is pending a hearing in the Senate Public Safety Committee.

e) AB 718 (Cunningham) would require investigations into allegations that a law enforcement officer engaged in certain conduct, such as discharging a firearm or using force that resulted in death or great bodily injury, be completed regardless of whether the officer voluntarily separates from the agency before the investigation is completed. AB 718 is pending in the Senate Appropriations Committee.

f) SB 16 (Skinner) expands the categories of police personnel records that are subject to disclosure under the California Public Records Act. SB 16 will be heard in this committee today.

13) **Prior Legislation**:

a) SB 731 (Bradford), of the 2019-2020 Legislative Session, was similar to this bill and would have created a process for decertification of police officers. SB 731 was never heard on the Assembly Floor.

b) AB 1022 (Holden), of the 2019-2020 Legislative Session, would have disqualified a person from being a peace officer if they have been found by a law enforcement agency that employees them to have either used excessive force that resulted in great bodily injury or death or to have failed to intercede in that incident as required by a law enforcement agency's policies. AB 1022 was held on the Senate Appropriations Suspense File.

c) AB 1506 (McCarty), Chapter 326, Statutes of 2020, requires a state prosecutor to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian, as defined.

d) SB 1421 (Skinner), Chapter 988, Statutes of 2018, subjected specified personnel records of peace officers and correctional officers to disclosure under the California Public Records Act (PRA).

REGISTERED SUPPORT / OPPOSITION:

Support

California- Stop Terrorism and Oppression by Police (STOP) Coalition (Co-Sponsor)
Communities United for Restorative Youth Justice (CURYJ) (Co-Sponsor)
Youth Justice Coalition (Co-Sponsor)
ACLU California Action
Advancement Project
Against Bigotry, Responding With Action (ABRA)
Alameda County Public Defender's Office
All Home
Alliance San Diego
American Federation of State, County and Municipal Employees Local 3299
Anti Police-terror Project
Asian Prisoner Support Committee
Asian Solidarity Collective
Bend the Arc: Jewish Action
Black Leadership Council
Black Lives Matter - Los Angeles
Brotherhood Crusade
CA State NAACP
California Alliance for Youth and Community Justice
California Department of Insurance
California Faculty Association
California Federation of Teachers Afl-cio
California for Safety and Justice
California Immigrant Policy Center

California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent
California Labor Federation
California Labor Federation, Afl-cio
California Nurses Association
California Public Defenders Association (CPDA)
Children's Defense Fund - CA
Chispa, a Project of Tides Advocacy
City of Compton
City of Compton Office of The City Manager
Clergy and Laity United for Economic Justice
Community Advocates for Just and Moral Governance
Community Agency for Resources Advocacy and Services
Consumer Attorneys of California
Courage California
Del Cerro for Black Lives Matter
Democratic Party of Contra Costa County
Democratic Party of The San Fernando Valley
Democratic Woman's Club of San Diego County
Democrats of Rossmoor
Disability Rights California
Dolores Huerta Foundation
Drug Policy Alliance
East Bay for Everyone
East Valley Indivisibles
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC)
Equal Rights Advocates
Essie Justice Group
Everytown for Gun Safety Action Fund
Family Violence Law Center
Fresno Barrios Unidos
Friends Committee on Legislation of California
Fund Her
Giffords
Hillcrest Indivisible
Indivisible CA Statestrong
Indivisible East Bay
Indivisible South Bay LA
Indivisible Yolo
Initiate Justice
John Burton Advocates for Youth
Justice Reinvestment Coalition of Alameda County
Kensington Community Church
Kern County Participatory Defense
LA Voice
Law Enforcement Accountability Network
Law Enforcement Action Partnership
League of Women Voters of California

Legal Services for Prisoners With Children
London & Gonzalez Advocacy
Long Beach Immigrant Rights Coalition
Los Angeles County District Attorney's Office
Los Angeles Lgbt Center
Mexican American Bar Association of Los Angeles County
Mid-city Community Advocacy Network
Mission Impact Philanthropy
Moms Demand Action for Gun Sense in America
Mosques Against Trafficking
National Action Network - Sacramento Chapter
National Association of Social Workers, California Chapter
National Council of Jewish Women
National Institute for Criminal Justice Reform
Nextgen California
Oakland; City of
Oc Emergency Response Coalition
Organizers in Solidarity
Pacifica Social Justice
Palomar Uu Fellowship
People's Budget Orange County
Pico California
Pillars of The Community
Prosecutors Alliance California
Public Health Institute
Recording Industry Association of America
Riseup
Roots of Change
Sag-aftra, Afl-cio
Salesforce
San Diegans for Justice
San Diego Continuing Education
San Diego Progressive Democratic Club
San Francisco Bay Area Rapid Transit District (BART)
San Francisco Board of Supervisors
San Francisco Public Defender
San Jose State University Human Rights Institute
Santa Monica Coalition for Police Reform
Sd-qtpoc Colectivo
Seiu California
Showing Up for Racial Justice (SURJ) Contra Costa County CA
Showing Up for Racial Justice (SURJ) Long Beach
Showing Up for Racial Justice - San Francisco (surj Sf)
Showing Up for Racial Justice North County San Diego
Showing Up for Racial Justice San Diego
Silicon Valley Leadership Group
Smart Justice California
Social Workers for Equity & Leadership
Students Demand Action for Gun Sense in America

Team Justice
Technet-technology Network
Think Dignity
Together We Will/indivisible - Los Gatos
UC Berkeley's Underground Scholars Initiative (USI)
Udw/afscme Local 3930
Uprise Theatre
We the People - San Diego
White People 4 Black Lives
Yalla Indivisible
Young Women's Freedom Center

Oppose

Arcadia Police Officers' Association
Association for Los Angeles Deputy Sheriffs
Association of California Cities - Orange County (ACC-OC)
Association of Orange County Deputy Sheriffs
Association of Probation Supervisors of Los Angeles County
Burbank Police Officers Association
California Association of Highway Patrolmen
California Association of Joint Powers Authorities
California Coalition of School Safety Professionals
California Correctional Peace Officers Association (CCPOA)
California Family Council
California Fraternal Order of Police
California Peace Officers Association
California Police Chiefs Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
City of Murrieta
City of Oceanside
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers Association
Deputy Sheriffs Association of San Diego
Fontana Police Officers Association
Fullerton Police Officers' Association
Hawthorne Police Officers Association
Inglewood Police Officers Association
Kerman; City of
Laguna Beach Police Employees' Association
League of California Cities
Long Beach Police Officers Association
Los Angeles County Probation Managers Association Afscme Local 1967
Los Angeles Police Protective League
Los Angeles School Police Officers Association
Newport Beach Police Association
Pacific Justice Institute

Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Public Risk Innovation, Solutions, and Management (PRISM)
Riverside Police Officers Association
Riverside Sheriffs' Association
Sacramento County Deputy Sheriffs' Association
San Bernardino County Safety Employees' Benefit Association
San Diego District Attorney Investigator's Association
San Diego Police Officers Association
San Francisco Police Officers Association
Santa Ana Police Officers Association
Upland Police Officers Association

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: July 13, 2021
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 586 (Bradford) – As Amended May 25, 2021

SUMMARY: Repeals various administrative fees that agencies and courts are authorized to impose in order to fund elements of the criminal justice system, and eliminates outstanding debt incurred as a result of the fees. Specifically, **this bill**:

1) Eliminates the requirement that a person granted probation in a child abuse case pay for the full costs of child abuse treatment counseling.

2) Repeals the prohibition against terminating probation in a child abuse case until all fees for the child abuse treatment counseling program have been paid.

3) Eliminates the ability of the court to charge a person granted diversion up to $500 if a felony and up to $300 if a misdemeanor to cover laboratory analysis fees.

4) Eliminates a county's ability to impose a fee to cover the cost of collecting a diversion restitution fee.

5) Eliminates a county's ability to impose a fee to cover the cost of collecting a restitution fine.

4) Eliminates the ability of an employer to deduct a fee for setting up a restitution payment plan and for subsequent deductions.

5) Makes the $500 domestic violence fee subject to the defendant's ability to pay. Requires a court to waive the fee if the defendant does not have the ability to pay.

6) Provides that at any time a county may choose not to collect the domestic violence fee or the domestic violence program fee and may vacate or declare satisfied any unpaid fees.

7) Provides that unpaid fees in a domestic violence case shall not be a bar to ending probation.

8) Provides that if at any time there is permanent funding sufficient to replace the average annual domestic violence fee revenue appropriated in the budget, then the authority to impose a fee shall not be operative.

7) Eliminates the ability of the entity collecting restitution from a person granted probation to add an administrative fee to cover the costs of collection.

8) Eliminates the requirement that a person over the age of 21 pay a reasonable fee not to exceed the cost of testing when convicted of a drug offense.

9) Eliminates the court's authority to order a person to pay for the reasonable costs of incarceration in county jail or another local detention facility.

10) Eliminates the court's authority to order a person sentenced to prison to pay all or part of the cost of confinement.

11) Eliminates the ability to charge a fee when probation is transferred to another county.

12) Eliminates the ability to charge a fee to set up an installment account to pay fines and fees and for processing of installments.

13) Eliminates all fees relating to drug diversion treatment programs.

14) Repeals the $300 civil penalty assessment for a failure to appear in court or failure to pay all or part of a court-ordered fine.

15) Eliminates the ability of the court to impose interest on unpaid restitution ordered as a condition of probation.

16) Eliminates ability of CDCR and the counties to collect an administration fee to cover the actual cost of collecting restitution and the restitution fine.

17) Repeals the authority of a county to charge $15 for a violation of a written promise to appear on any Vehicle Code violation.

18) Eliminates the ability to charge for the failure to pay an installment associated with Vehicle Code violations.

19) Provides that as of January 1, 2022, a number of fees that are repealed by this bill are no longer enforceable or collectible and that any remaining amounts are to be vacated.

20) Permits a civil action by an individual against an ignition interlock (IID) provider who fails to comply with specified requirements in the Business and Professions Code and Vehicle Code.

21) Requires every IID provider to report annually to the Department of Consumer Affairs, Bureau of Automotive Repair, the provider's fee schedule, the total number of people for whom income verification was conducted, the number of people for whom a reduction of charges was made, and the amount of the reductions, among other information.

22) Makes various technical and conforming changes.

23) Contains legislative findings and declarations.

EXISTING LAW:

1) Allows for probation in specified child abuse cases with specified requirements including mandatory counseling and provides that the terms of probation shall not be lifted until all reasonable fees due the counseling program have been paid in full, unless the court

determines the defendant does not have the ability to pay and waives the fees. (Pen. Code, §§ 273a; 273d; 273.1.)

2) Provides that a judge may require a fee of a person convicted of a felony enrolled in a diversion program to cover the actual costs of lab fees, not to exceed $500 for a felony and up to $300 for a person charged with a misdemeanor. (Pen. Code, §§ 1001.15 & 1001.16.)

3) Allows a county to impose a fee to cover the actual administrative costs of the collection of a restitution fee. (Pen. Code, §§ 1001.90 & 1202.4.)

4) Allows restitution to be deducted from a person's wages and allows an employer to deduct $5 for the first payment and $1 for every subsequent payment from the person's wages. (Pen. Code, § 1202.42.)

5) Requires in domestic violence convictions, a minimum fee of $500 to be paid and the money used for domestic violence programs special fund in the counties and to the controller for use in the Domestic Violence Restraining Order Reimbursement Fund, and in the Domestic Violence Training and Education Fund. If the court waives the fee it must state its reasons on the record. Probation shall not be terminated until fees are paid. (Pen. Code, § 1203.097.)

6) Provides that when a court grants probation and orders the person to pay restitution to the victim, the entity collecting the restitution may add a fee to cover the actual administrative cost of the collection, not to exceed 15 percent. This money goes to the general fund of the County. (Pen. Code, § 1203.1, subd. (l).)

7) Provides that a person who is granted probation for the unlawful possession, use, sale or other furnishing of a controlled substance shall submit to drug and substance abuse testing, and, if the defendant is an adult over 21 years of age, the court shall order the defendant to pay a reasonable fee, not to exceed the actual cost of testing. (Pen. Code, § 1203.1ab.)

8) Provides that when a person is convicted of an offense and ordered to serve time in a county jail or other local detention facility, as part of a term of probation or conditional sentence, upon a determination of an ability to pay, the court may order a person to pay a portion of the reasonable costs of incarceration. (Pen. Code, § 1203c.)

9) Provides that if a person is ordered to be confined in state prison, after a determination of an ability to pay, the person can be ordered to pay all or a portion of the reasonable cost of confinement. (Pen. Code, § 1203.1m.)

10) Provides that every person convicted of a misdemeanor and not granted probation and every person convicted of an infraction can petition for a dismissal any time one year from the date of judgement to have the conviction dismissed when the person has met the requirement of the underlying sentence and led an upstanding life. A person who petitions for a dismissal for a charge may be required to reimburse the county and court for the costs of services rendered in an amount not to exceed $60. (Pen. Code, § 1203.4a.)

11) Provides for a procedure for a court to transfer a case where a person is on probation or mandatory supervision to the person's home county and to allow any local fees to be paid by

the defendant to the collection program for the transferring court. (Pen. Code, § 1203.9.)

12) Allows a person to pay a criminal fine through an installment plan, in which case the court or collecting agency can collect a fee for the processing of the installment account. (Pen. Code, § 1205.)

13) Sets forth the basic requirements for an approved drug treatment program and includes a fee schedule. (Pen. Code, § 1211.)

14) Provides for a $300 fee to be imposed on a person who fails to appear in court, in addition to any other penalties. (Pen. Code, § 1214.1.)

15) Allows a court to impose interest on any unpaid restitution balance. (Pen. Code, § 1214.5.)

16) Allows a restitution fine to be deducted from an incarcerated person's trust account and includes an administrative fee of up to 10%. (Pen. Code, §§ 2085.5 & 2085.6.)

17) Provides that a county may require the court to impose an assessment of $15 on a person who fails to appear on a Vehicle Code infraction. (Veh. Code, § 40508.5.)

18) Allows a person to make installment payments to pay for a fine associated with an infraction, and if a person fails to make an installment, a civil assessment may be imposed, and requires the defendant to pay a processing fee. (Veh. Code, § 40510.5.)

19) Provides that the Office of Traffic Safety shall adopt standards for installation, maintenance, and servicing of ignition interlock device, and provides for penalties if the standards are violated. (Bus. & Prof. Code, § 9882.14.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "California law currently allows counties and courts to charge administrative fees to people in the criminal legal system. These administrative fees can quickly add up to thousands of dollars for a single person and function as a regressive tax on low-income people, especially people in Black and Brown communities. People and their families experience these fees as another form of punishment after already having served time, paid fines, or faced other consequences.

   "The Financial Justice Project San Francisco conducted a study of criminal fees and found three major problems:

   i. Criminal justice administrative fees are primarily charged to low-income people who cannot afford to pay.
   ii. Criminal justice administrative fees create barriers for people to re-enter the community and can increase the likelihood of recidivism.

iii. Criminal justice administrative fees are counterproductive, ineffective, and an anemic source of revenue.[1]

"While counties are authorized to charge administrative fees to pay for costs associated with the system, counties net little revenue from these fees. For example, in Glenn County, the rate of collection for incarceration fees was consistently below 25 percent. And, in Los Angeles County, the collection rate for 'administrative' fees was as low as 1.7 percent. Because of the high costs and low returns associated with trying to collect fees from low-income people, most of the fee revenue pays for collection activities. The reality is the people in the system are just too poor to pay this fees; US Department of Justice data shows that approximately 80 percent of Californians in jail are indigent.[2]

"In theory, one of the seemingly sensible thing to do in the context of fees, is to base it on a person's ability to pay. However, when there are so many poor people in the system, and the cost of processing and collections is as high as 69 cents on the dollar collected, it no longer makes fiscal sense to spend money on creating bureaucracy that create further challenges and obstructions for the masses. Further, while an ability to pay model could make sense in theory if there were more affluent people in the system, the Debt Free Justice Coalition found that in practice, application of the ability to pay programs vary widely by counties. Many courts do not conduct these determinations, and for those that do, few guidelines exist.

"SB 586 would end the assessment and collection of 22 administrative fees imposed against people in the criminal legal system and modify other sections of the Penal Code and Business and Professions Code pertaining to domestic violence counseling programs, payments to shelters, and ignition interlock device civil actions and reporting respectively.

"By doing so, SB 586 would dramatically reduce the suffering caused by court-ordered debt and enhance the economic security of system-involved populations. This bill is a critical next step at the intersection of racial justice and budget equity in California because it ends the practice of using administrative fees to balance the state and county budgets on the backs of those in the Black and Brown communities who are negatively impacted, and who then have a harder time climbing out of the trenches of debt to achieve stability and upward mobility on account of the burden the debt holds over them."

2) **Financial Implications for Criminal Defendants**: "As legislative and other policy makers are becoming increasingly aware, the growing use of … fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant's commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation. "What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large. … Debt-related mandatory court appearances and probation and parole conditions leave debtors

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[1] The Financial Justice Project San Francisco, *Criminal Justice Administrative Fees: High Pain for People, Low Gain for Government*, (May 22, 2018). http://test-sfttx.pantheonsite.io/sites/default/files/2019-09/Hig%20Pain%20Low%20Gain%20FINAL_04-24-2019.pdf.

[2] U.S. DOJ, Defense Counsel in Criminal Cases (2000), https://bjs.ojp.gov/content/pub/ascii/dccc.txt

vulnerable for violations that result in a new form of debtor's prison. ... Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations such as child support, and lead to financial insecurity—all of which can lead to recidivism." (Citation omitted.) These additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay.'" (*People v. Duenas* (2019) 30 Cal.App.5th 1157, 1168, quoting *People v. Neal* (2018) 29 Cal.App.5th 820, 827.)

3) **Growth of Uncollected Debt**: While criminal fines, fees, and penalties have climbed steadily, government entities tasked with collecting these fines have realized diminishing returns from collection efforts. Government resources can be wasted in futile collection attempts. A San Francisco Daily Journal article from several years ago noted, "When it comes to collecting fines, superior court officials in several counties describe the process as 'very frustrating,' 'crazy complicated' and 'inefficient.'" (See *State Judges Bemoan Fee Collection Process*, San Francisco Daily Journal, 1/5/2015 by Paul Jones and Saul Sugarman.)

   Simply put, criminal defendants can generally not produce a substantial flow of money for fines. That well will quickly run dry. In the same Daily Journal article, the Presiding Judge of San Bernardino County was quoted as saying "the whole concept is getting blood out of a turnip." (*Daily Journal*, *supra.*) The article noted in particular that "Felons convicted to prison time usually can't pay their debts at all. The annual growth in delinquent debt partly reflects a supply of money that doesn't exist to be collected." (*Ibid.*)

   The most recent Overview of Criminal Fine and Fee System prepared by the Legislative Analyst's Office (LAO) this year and presented to the Senate Budget Subcommittee No. 5 on Corrections, Public Safety, Judiciary, Labor and Transportation, states that, "The judicial branch reports $8.6 billion in fines and fees remained outstanding at the end of 2019-20." (*Overview of Criminal Fine and Fee System,* May 13, 2021, p. 4 < https://lao.ca.gov/Publications/Detail/4427>.) The LAO notes that, "[t]he total amount of fine and fee revenue distributed to state and local governments has declined since 2010-11." (*Id.* at p. 5.)

4) **Recent Repeal of Criminal Justice Administrative Fees**: Last year, AB 1896 (Committee on Budget), Chapter 92, Statutes of 2020, eliminated roughly 20 criminal justice administrative fees. This included the repeal of statutes associated with public defense fees, cost of counsel, public defender registration fee, public defense fees for minors, recovery of costs associated with arrest, the $25 administrative-processing fee and $10 citation-processing fee, the interstate compact supervision fee, fees associated with alternative custody, fees associated with electronic monitoring, and probation department investigation/progress report fees. The repeal of those fees became effective July 1, 2021. The budget trailer bill provided that the unpaid balances related to the aforementioned eliminated fees were uncollectible. Finally, the budget trailer bill appropriated $65,000,000 annually from the General Fund to the Controller beginning in the 2021-22 fiscal year to the 2025-26 fiscal year, inclusive, to backfill revenues lost from the repeal of the fees.

   Similarly, the May Revision to this year's budget includes "$300 million one-time federal American Rescue Plan Act of 2021 (ARPA) funds to support additional relief for low-income Californians in the form of a debt forgiveness program to eliminate debt owed on

existing fines and fees for traffic and non-traffic infraction tickets issued between January 1, 2015 and June 30, 2021. Specifically, under this program an individual could apply to have 100 percent of their debt forgiven upon submission of an application verifying their low-income status. The one-time funding covers implementation costs for the trial courts and the backfill of lost revenues that would have otherwise been allocated for court operations and to local governments." (See Judicial Branch Budget Summary, p. 149, available at: http://www.ebudget.ca.gov/budget/2021-22MR/#/BudgetSummary) Elimination of fees is also being proposed.

In light of the FY 2020-21 budget actions that were just implemented and the currently-proposed budget actions, should the proposals made in the bill be addressed through the budget process rather than in this committee?

5) **County Maintenance of Effort Obligations to the State**: With the passage of the Trial Court Funding Act of 1997, existing state and county financing provisions of law were repealed and the state assumed responsibility to fund the trial courts. However, as part of providing the counties relief from direct responsibility to fund the trial courts, counties were required to make payments to the state into the Trial Court Trust Fund. These are known as maintenance of effort obligations (MOEs). The amount of payment to the state was tied to and capped at the amounts of county general fund money provided to fund the courts in FY 1994-1995, and specified fine and penalty revenues the county remitted to the state in FY 1994-1995. Over time, both the amounts and the number of counties obligated have changed as a result of legislation. (See https://www.courts.ca.gov/documents/tcbac-20151216-fms-item9-informational.pdf.)

In a 2016 report, *Improving California's Criminal Fine and Fee System*, the Legislative Analyst's Office discussed the relationship of county MOEs to the fines and fee system. The LAO noted that, "local governments currently receive about 40 percent of criminal fine and fee revenue—about $820 million in 2013–14—for a variety of purposes." (p. 21, available at: https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf .) Additionally, "counties often use their share of fine and fee revenue to meet their maintenance–of–effort (MOE) obligations to the state." (*Id.* at p. 22.) According to the LAO, "counties currently remit about $660 million annually to the state to meet these obligations. In 2013–14, counties received $657 million in fine and fee revenue—nearly the same amount owed to the state." (*Ibid.*) The LAO suggested that, "one promising mechanism available to the Legislature for mitigating the impact on many counties is through reducing or eliminating the MOEs they are currently required to pay to the state related to trial court operations." (*Ibid.*)

This bill would repeal numerous fines and fees that are being collected by the counties, but it does not change the obligations of the counties that are intertwined with the collection of these monies. Should the Legislature consider the aforementioned approach suggested by the LAO to mitigate the financial impact that this bill would have on the counties?

6) **Argument in Support**: According to the *American Civil Liberties Union California Action*, "The ACLU California Action is proud to cosponsor your SB 586, which would end the assessment and collection of the numerous administrative fees imposed against people in the criminal legal system. By eliminating these racially disparate fees, California will further reduce the suffering caused by the imposition of court-ordered debt, and enhance the

economic security and wellness of populations with system involvement. This is a vital step towards racial justice, budget equity, and a legal system that does not fund itself by stripping wealth from Black and Brown communities. By ending the collection, and writing-off all debt from previously assessed fees, SB 586 helps undo the economic harm from decades of racially biased policing and court decisions and improves California's ability to weather the current economic crisis caused by COVID-19.

"In California, low-income people of color are overrepresented at every stage in the criminal legal system. As a result, they are more likely to face higher fee burdens and the collateral consequences that stem from being unable to pay off related debt. Eliminating criminal administrative fees will allow former system-involved people and their families to devote their already limited resources to critical needs like food, education, housing, and health insurance. Additionally, because the vast majority of people in the criminal legal system are low-income, collection rates on criminal administrative fees are minimal and only decrease as debt grows older. Criminal administrative fees are an unreliable and inefficient revenue source.

"SB 586 will continue the trajectory of justice on criminal fines and fees in California. Recognizing the extreme harm caused by criminal administrative fees to individuals, families, and communities, Governor Newsom signed AB 1869 into law, abolishing 23 fees in the criminal legal system effective July 1, 2021. SB 586 builds upon this important work by eliminating many of the over 60 fees that remain."

7) **Argument in Opposition**: According to the *California District Attorneys Association*, "CDAA understands the Legislature's concern with the consequences of imposing fines and assessments when a defendant cannot afford to pay. As prosecutors our only interest is in maintaining justice and justice services for all citizens. For this reason we would support legislation that requires a court find a defendant has the ability to pay prior to imposition of a particular fee. This is in line with the Court of Appeal's decision in *People v. Duenas* (2019) 30 Cal.App.5th 1157. Such a requirement would ensure we are not penalizing poverty while still permitting the collection of monies to support critical justice infrastructure.

"Wholesale elimination and cancellation of fee assessments and payments will be unduly detrimental to programs that benefit victims and even defendants in criminal cases. For example, the interest fee currently authorized by Penal Code section 1214.5 helps support county law libraries (See Gov. Code, § 68085.1, subd. (c)(1)(C)) which can be critical resources for persons in criminal and civil cases who might not otherwise have access to legal materials or professionals.

"Numerous other fees eliminated by SB 586 help fund the collection and distribution of victim restitution payments. (See Pen. Code, §§ 1203.1, 2805.5, 2805.6, 2805.7.) Other fees eliminated by your bill support the victim restitution fund. (See Pen. Code, §§ 1001.90, 1202.4(l).) Victims of crime are often members of underrepresented populations impacted by unemployment and indigency issues of their own. Victims rely on restitution payments to help put their lives back together after the impacts of crime."

8) **Prior Legislation**:

a) AB 1869 (Committee on Budget), Chapter 92, Statutes of 2020, eliminated multiple fees in the criminal legal system effective July 1, 2021 and made the unpaid balances related to the aforementioned eliminated fees uncollectible.

b) SB 144 (Mitchell), of the 2019-2020 Legislative Session, would have eliminated the authority to collect many fees connected to criminal arrests, prosecution, and conviction related to administration of the criminal justice system, and would have made the unpaid balance of most court-ordered debt unenforceable. SB 144 was not heard in the Assembly Public Safety by request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

San Francisco Public Defender (Sponsor)
ACLU California Action (Co-Sponsor)
All Rise Alameda
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Bay Area Legal Aid
Bay Area Regional Health Inequities Initiative
Black Leadership Council
Building the Base Face to Face
California Attorneys for Criminal Justice
California Public Defenders Association
California Public Defenders Association (CPDA)
Center for Responsible Lending
Center on Juvenile and Criminal Justice
Change Begins With Me
Cloverdale Indivisible
Community Legal Services in East Palo Alto
Contra Costa Moveon
Defending Our Future: Indivisible in Ca
East Bay Community Law Center
East Valley Indivisibles
El Cerrito Progressives
Ella Baker Center for Human Right
Ella Baker Center for Human Rights
Homeboy Industries
Housing California
Indivisible 36
Indivisible 41
Indivisible Auburn CA
Indivisible Beach Cities
Indivisible CA 37

Indivisible CA Statestrong
Indivisible Ca-25 Simi Valley Porter Ranch
Indivisible Ca-3
Indivisible Ca-39
Indivisible Ca-7
Indivisible Ca29
Indivisible Ca: Statestrong
Indivisible Claremont / Inland Valley
Indivisible Colusa County
Indivisible East Bay
Indivisible Elmwood
Indivisible Euclid
Indivisible Lorin
Indivisible Los Angeles
Indivisible Marin
Indivisible Media City Burbank
Indivisible Normal Heights
Indivisible North Oakland Resistance
Indivisible North San Diego County
Indivisible Northridge
Indivisible Oc 46
Indivisible Oc 48
Indivisible Petaluma
Indivisible Sacramento
Indivisible San Bernardino
Indivisible San Jose
Indivisible San Pedro
Indivisible Santa Barbara
Indivisible Sausalito
Indivisible Sebastopol
Indivisible Sf
Indivisible Sonoma County
Indivisible South Bay LA
Indivisible Stanislaus
Indivisible Suffragists
Indivisible Ventura
Indivisible Windsor
Indivisible Yolo
Indivisible: San Diego Central
Indivisibles-sherman Oaks
Insight Center for Community Economic Development
Lawyers' Committee for Civil Rights - San Francisco
Legal Services for Prisoners With Children
Legal Services of Northern California
Livermore Indivisible
Los Angeles Conservation Corps
Los Angeles County District Attorney's Office
Mill Valley Community Action Network
Mountain Progressives

Multi-faith Action Coalition
National Association of Social Workers, California Chapter
Neighborhood Legal Services of Los Angeles County
Nothing Rhymes With Orange
Orchard City Indivisible
Orinda Progressive Action Alliance
Policylink
Prosecutors Alliance California
Public Counsel
Root & Rebound
San Diego Indivisible Downtown
San Francisco Bay Area Planning and Urban Research Association (SPUR)
San Francisco Financial Justice Project
Santa Cruz Indivisible
Sfv Indivisible
Tehama Indivisible
Together We Will/indivisible - Los Gatos
Underground Grit
Underground Scholars Initiative At the University of California, Irvine
Underground Scholars Initiative, University of California Davis
University of California, Irvine School of Law Consumer Law Clinic
Vallejo-benicia Indivisible
Venice Resistance
Yalla Indivisible
Youth Justice Coalition

Oppose

California District Attorneys Association
California Narcotic Officers' Association
Peace Officers Research Association of California (PORAC)

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Date of Hearing: July 13, 2021
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 483 (Allen) – As Amended July 7, 2021

As Proposed to be Amended in Committee

SUMMARY: Applies the repeal of sentence enhancements for prior prison or county jail felony terms and for prior convictions of specified crimes related to controlled substances retroactively. Specifically, **this bill**:

1) States that any sentence enhancement imposed prior to January 1, 2018, for a specified prior drug conviction, except if the enhancement was imposed for a prior conviction of using a minor in the commission of offenses involving specified controlled substance, is legally invalid.

2) States that any enhancement imposed prior to January 1, 2020, for a prior separate prison or county jail felony term, except if the enhancement was for a prior conviction of a sexually violent offense, as specified, is legally invalid.

3) Requires the Secretary of the Department of Corrections and Rehabilitation (CDCR) and the county correctional administrator of each county to identify those persons in their custody currently serving a term that includes one of the repealed enhancements and to provide the name of each person, along with the person's date of birth and relevant case number or docket number, to the sentencing court that imposed the enhancement. This information shall be provided as follows:

   a) By March 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the repealed enhancement. For purposes of this deadline, CDCR shall consider all other enhancements to have been served first; and,

   b) By July 1, 2022, for all other individuals.

4) Provides that upon receiving the information, the court shall review the judgment and verify that the current judgement includes one of the repealed enhancements and the court shall recall the sentence and resentence the defendant. The review and resentencing shall be completed as follows:

   a) By July 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the repealed enhancement; and,

   b) By December 31, 2023, for all other individuals.

5) Creates a presumption that resentencing shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety.

6) Requires the court to apply the Rules of Court on resentencing and any other changes in the law that reduce sentences so as to promote uniformity of sentencing.

7) Allows the court to consider post-conviction factors at resentencing.

8) Provides that, unless the court originally imposed the upper term, the court may not impose a sentence in excess of the middle term unless circumstances in aggravation have been stipulated by the defendant or found true by the trier of fact.

9) Requires the court to appoint counsel for resentencing.

10) Allows waiver of the resentencing hearing upon agreement of the parties.

11) Provides that if a resentencing hearing is not waived, the defendant may appear at the hearing remotely, if the defendant agrees.

12) States Legislative intent that any changes to a sentence as a result of these provisions is not a basis for a prosecutor or court to rescind a plea agreement.

EXISTING LAW:

1) Provides for an enhancement of punishment of one year for each prior prison or county jail term served by the defendant for a sexually-violent felony, as specified. (Pen. Code, § 667.5, subd. (b).) *Prior law*, in effect until January 1, 2020, required a sentencing court to impose an additional one-year term of imprisonment for each prior prison or county jail felony term served by the defendant for a non-violent felony. (Former Pen. Code, § 667.5, subd. (b), repealed Jan. 1, 2020.)

2) Provides for an enhancement of punishment of three years for a prior felony conviction related to the use of a minor in the commission of specified offenses involving controlled substances. (Health & Saf. Code, § 11370.2.) *Prior law*, in effect until January 1, 2018, required a sentencing court to impose on a defendant convicted of specified crimes related to controlled substances, an additional three-year term for each prior conviction of specified crimes related to controlled substances. (Former Health & Saf. Code, § 11370.2, repealed Jan. 1, 2018.)

3) Allows the court at the time of sentencing to strike or dismiss an enhancement in the interest of justice. (Pen. Code, § 1385.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "In 2017 and 2019, the Legislature and Governor repealed ineffective sentence enhancements (laws called RISE Acts) that added

three years of incarceration for each prior drug offense (SB 180, Mitchell) and one year for each prior prison or felony jail term (SB 136, Wiener). However, the reforms applied only prospectively to cases filed after these important bills became law. People in California jails and prisons who were convicted prior to the RISE Acts are still burdened by mandatory enhancements.

"A robust body of research finds that long prison and jail sentences have no positive impact on public safety, but are demonstrably injurious to families and communities-particularly Black, Latino, and Native Americans in the United States and in California. Recent studies by the U.S. Sentencing Commission have further found that retroactive application of sentence reductions in the federal system has no measurable impact on recidivism rates. An analysis of the prison populations in Maryland, Michigan, and Florida came to similar conclusions.

"In light of this research, and following the guidance of a wide array of stakeholders, the California Committee on Revision of the Penal Code unanimously recommended the retroactive elimination of California's one- and three- year enhancements. SB 483 applies the law equally by retroactively applying California's elimination of ineffective three-year and one-year sentence enhancements."

2) **Legislative Changes to Penal Code Section 667.5, subdivision (b)** and **Health and Safety Code section 11370.2**: Prior to January 1, 2020, section 667.5, subdivision (b) required trial courts to impose a one-year sentence enhancement for each true finding on an allegation the defendant had served a separate prior prison or county jail term for a felony and had not remained free of custody for at least five years. But effective January 1, 2020, SB 136 (Wiener), Chapter 590, Statutes of 2019, amended section 667.5, subdivision (b) to limit the prior prison term enhancement to only prior prison terms for sexually violent offenses, as defined in Welfare and Institutions Code section 6600, subdivision (b).

   Former Health and Safety Code section 11370.2, provided for a mandatory three-year enhancement for each prior felony conviction of certain enumerated offenses related to controlled substances. But effective January 1, 2018, SB 180 (Mitchell) Chapter 677, Statutes of 2017, narrowed the list of prior offenses that qualify a defendant for an enhancement under this provision. Now the enhancement only applies to prior convictions that involved using a minor to commit drug-related crimes.

   Absent some indication to the contrary in a bill, courts presume the Legislature intended changes to apply prospectively. (See Pen. Code, § 3.) However, if the change in the law reduces the punishment for a crime, the changes will apply retroactively to those cases that are not yet final on appeal. (See e.g. *People v. Brown* (2012) 54 Cal.4th 314, 323–324.) "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1046.)

   This bill would apply the former legislative changes to the prior prison term enhancement and to the prior drug conviction enhancement retroactively.

   CDCR has informed this committee that as of December 31, 2020, there were 10,133 individuals serving a sentence for a prior prison term enhancement imposed before December

31, 2019[1]. Of these individuals, 7,072 were individuals with a determinate sentence, and 3,061 individuals had an indeterminate sentence. CDCR has informed this committee that as of December 31, 2020, there were 209 individuals serving a sentence for a prior drug conviction enhancement imposed before December 31, 2017[2]. Of these individuals, 178 persons were serving a determinate sentence, and 31 individuals were serving an indeterminate sentence.

While individuals serving a determinate term for these enhancements could be released from prison if the rest of the sentence has been served, those individuals serving an indeterminate term would still be required to have a parole suitability hearing before the Board of Parole Hearings.

The above figures do not include individuals who are serving determinate sentences with these enhancements but are incarcerated in county jail pursuant to Realignment.

3) **Effect on Guilty Pleas**: This bill states legislative intent that its provision for retroactive application and resentencing applies to guilty plea cases. This would include those in which there may have been a negotiated disposition.

When the parties reach a plea agreement in the context of existing law, a claim that seeks to avoid a term of the agreement is an attack on the plea itself. However, "the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." (*Doe v. Harris* (2013) 57 Cal.4th 64, 71.) "That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them," (*Id.* at p. 66) "It follows … that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement" (*Id.* at p. 73; see also *Harris v. Superior Court* (2016) 1 Cal.5th 984, 990–992 [The electorate may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement. The electorate did so when it enacted Proposition 47."])

4) **Argument in Support**: According to the *Drug Policy Alliance*, the sponsor of this bill, "In 2017 and 2019, the Legislature repealed sentence enhancements that added three years of incarceration for each prior drug offense (SB 180 Mitchell) and one year for each prior prison or felony jail term (SB 136 Wiener). However, these reforms apply only to cases filed after these bills became law. Those who were convicted prior to their enactment continue to be separated from their families and communities. SB 483 would ensure the retroactive repeal of these sentence enhancements, ensuring that no one is serving time based on rulings that California has already deemed unfair and ineffective.

"Sentencing enhancements have not made our communities safer. Instead, they put significant financial burdens on taxpayers and families statewide—each additional year in prison costs over $112,600 per person. Retroactively eliminating sentence enhancements would decrease spending currently crippling state and local budgets, and allow for the

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[1] This is the final date before the change to Penal Code section 667,5, subdivision (b) took effect.
[2] This is the final date before the changes to Health and Safety Code section 11370.2 took effect.

meaningful reinvestment in desperately needed community services and,programs....

"The retroactive RISE Act is another step forward in sustaining legislative momentum to eliminate unjust sentence enhancements and end wasteful incarceration spending in favor of community reinvestment."

5) **Argument in Opposition**: According to the *California Narcotic Officers Association,* "Senate Bill 483 would undermine the ability to hold career drug traffickers accountable. Career drug dealers are the equivalent of someone who makes a career of poisoning the community with life threatening substances. We believe that the current sentencing structure is appropriate and do not see any rational basis for lessening accountability for this class of criminals."

6) **Related Legislation**:

   a) AB 1540 (Ting), would require the court to provide counsel for the defendant when there is a recommendation from the California Department of Corrections and Rehabilitation, the Board of Parole Hearings, or the district attorney, to recall an inmate's sentence and resentence that inmate to a lesser sentence. AB 1540 is pending in the Senate Public Safety Committee.

   b) AB 1245 (Cooley), would allow a defendant who has served at least 15 years in the state prison to file a petition for recall and resentencing. The hearing for AB 1245 was postponed by the Assembly Appropriations Committee.

   c) AB 1509 (Lee), would repeal several firearm enhancements, reduces the penalty for using a firearm in the commission of specified crimes from 10 year, 20 years, or 25-years-to-life to one, two, or three years, and authorizes recall and resentencing for a person serving a term for these enhancements. AB 1509 was held in the Assembly Appropriations Committee.

   d) SB 81 (Skinner), would create a presumption that it is in the furtherance of justice to dismiss an enhancement upon the courts finding that one of specified circumstances is true. SB 81 is pending in the Assembly Appropriations Committee.

7) **Prior Legislation**:

   a) SB 136 (Wiener), Chapter 590, Statutes of 2019, limits the one-year sentence enhancement for prison or county jail felony priors by permitting imposition of the enhancement for a defendant sentenced to a new felony offense only if the defendant has a prior conviction for a sexually violent offense, as specified.

   b) SB 1392 (Mitchell), of the 2017-2018 Legislative Session, would have repealed the one-year sentence enhancement for each prior prison or county jail felony term that applies to a defendant sentenced on a new felony. SB 1392 failed passage on the Senate Floor.

   c) SB 180 (Mitchell), Chapter 677, Statutes of 2017, limited the three-year enhancement for a prior conviction related to the sale or possession for sale of specified controlled substance to convictions for the manufacture of a controlled substance, or using or

employing a minor in the commission of specified controlled substance offenses.

d) SB 966 (Mitchell), of the 2015-2016 Legislative Session, would have eliminated the three-year enhancement upon conviction for the sale or possession for sale of specified controlled substances with a prior conviction related to the same. SB 966 failed passage in this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Drug Policy Alliance (Sponsor)
Californians United for A Responsible Budget (Co-Sponsor)
Ella Baker Center for Human Rights (Co-Sponsor)
A New Path
ACLU California Action
All of Us or None Riverside
Asian Americans Advancing Justice - California
Asian Prisoner Support Committee
Asian Solidarity Collective
Bend the Arc: Jewish Action
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Public Defenders Association
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Californians United for A Responsible Budget (CURB)
Center for Living and Learning
Change Begins With Me Indivisible Group
Children's Defense Fund - CA
Courage California
Del Cerro for Black Lives Matter
Democratic Club of Vista
Democratic Woman's Club of San Diego County
Dignity and Power Now
Fair Chance Project
Faith in Action East Bay
Friends Committee on Legislation of California
Govern for California
Harm Reduction Coalition
Hillcrest Indivisible
Human Impact Partners
Immigrant Legal Resource Center
Initiate Justice
John Burton Advocates for Youth
Justice LA

Kehilla Community Synagogue
Legal Services for Prisoners With Children
Los Angeles County District Attorney's Office
Mission Impact Philanthropy
Multi-faith Action Coalition
National Institute for Criminal Justice Reform
Partnership for The Advancement of New Americans
Pillars of The Community
Prevention At the Intersections
Prison Law Office
Prison Policy Initiative
Prosecutors Alliance California
Racial Justice Coalition of San Diego
Re:store Justice
Riseup
Root & Rebound
Rubicon Programs
San Bernardino Free Them All
San Diego Progressive Democratic Club
San Francisco Peninsula People Power
San Francisco Public Defender
Sd-qtpoc Colectivo
Secure Justice
Showing Up for Racial Justice (SURJ) Bay Area
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice California
Social Workers for Equity & Leadership
Starting Over INC.
Surj Contra Costa County CA
Surj Marin - Showing Up for Racial Justice
Team Justice
The W. Haywood Burns Institute
Think Dignity
Uncommon Law
United Food and Commercial Workers, Western States Council
Uprise Theatre
We the People - San Diego
Women's Foundation California
Ywca Berkeley/oakland

Opposition

California Narcotic Officers' Association

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Amended Mock-up for 2021-2022 SB-483 (Allen (S))

Mock-up based on Version Number 97 - Amended Senate 5/20/21
Submitted by: Sandy Uribe, Assembly Public Safety Committee

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares that in order to ensure equal justice and address systemic racial bias in sentencing, it is the intent of the Legislature to retroactively apply Senate Bill 180 of the 2017–18 Regular Session and Senate Bill 136 of the 2019–20 Regular Session to all persons currently serving a term of incarceration in jail or prison for these repealed sentence enhancements. **It is the intent of the Legislature that any changes to a sentence as a result of the act that added this section shall not be a basis for a prosecutor or court to rescind a plea agreement.**

SEC. 2. Section 1171 is added to the Penal Code, to read:

1171. (a) Any sentence enhancement that was imposed prior to January 1, 2018, pursuant to Section 11370.2 of the Health and Safety Code, except for any enhancement imposed for a prior conviction of violating or conspiring to violate Section 11380 of the Health and Safety Code, is legally invalid.

(b) The Secretary of the Department of Corrections and Rehabilitation and the county correctional administrator of each county shall identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a) and shall provide the name of each person, along with the person's date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement. This information shall be provided as follows:

(1) By March 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the enhancement. **For purposes of this paragraph, all other enhancements will be considered to have been served first.**

(2) By July 1, 2022, for all other individuals.

(c) Upon receiving the information described in subdivision (b), the court shall review the judgment and verify that the current judgment includes a sentence enhancement described in

subdivision (a). If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall ~~administratively amend the abstract of judgment to delete that enhancement~~ **recall the sentence and resentence the defendant**. The review and ~~amendment~~ resentencing shall be completed as follows:

(1) By July 1, 2022, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement.

(2) By December 31, 2023, for all other individuals.

(d) Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed.

(e) The parties may waive a resentencing hearing. If the hearing is not waived, the resentencing hearing may be conducted by two-way electronic audiovideo communication between the defendant and the courtroom, if the defendant agrees.

SEC. 3. Section 1171.1 is added to the Penal Code, to read:

1171.1. (a) Any sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code, is legally invalid.

(b) The Secretary of the Department of Corrections and Rehabilitation and the county correctional administrator of each county shall identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a) and shall provide the name of each person, along with the person's date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement. This information shall be provided as follows:

(1) By March 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the enhancement. **For purposes of this paragraph, all other enhancements will be considered to have been served first.**

(2) By July 1, 2022, for all other individuals.

(c) Upon receiving the information described in subdivision (b), the court shall review the judgment and verify that the current judgment includes a sentencing enhancement described in subdivision (a). If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall ~~administratively amend the abstract of judgment to delete that enhancement~~ **recall the sentence and resentence the defendant**. The review and ~~amendment~~ **resentencing** shall be completed as follows:

(1) By July 1, 2022, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement.

(2) By December 31, 2023, for all other individuals.

(d) Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed.

(e) The parties may waive a resentencing hearing. If the hearing is not waived, the resentencing hearing may be conducted by two-way electronic audiovideo communication between the defendant and the courtroom, if the defendant agrees.

SEC. 4. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Date of Hearing: July 13, 2021
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 248 (Bates) – As Amended March 23, 2021

SUMMARY: Requires the Department of Corrections and Rehabilitation (CDCR) to refer a person directly to the Department of State Hospitals (DSH) for an evaluation as to whether the person still meets the criteria as a sexually violent predator (SVP) if the person is in CDCR for an offense committed while the person was previously serving an indeterminate term in DSH as an SVP. Specifically, **this bill**:

1) Modifies the procedures for the SVP evaluations of individuals in the custody of CDCR for a new offense committed while they were serving an indeterminate term in a state hospital as an SVP as follows:

   a) For persons in the custody of CDCR for the commission of a new offense committed while serving in a state hospital as an SVP, CDCR shall at least 6-months prior to the individual's scheduled release date, refer the person directly to the DSH for a full SVP evaluation;

   b) If the inmate was received by CDCR with less than 9-months of their sentence to serve, or if the inmate's release date is modified by a judicial or administrative action, CDCR may refer the person for evaluation at a date that is less than 6-months prior to the inmate's scheduled release;

   c) If both evaluators concur that the person has a diagnosed mental disorder so that the person is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of State Hospitals shall forward a request for a court order, no less than 20-calendar-days prior to the person's scheduled release date, authorizing a transfer of the individual from the CDCR to the DSH to continue serving the remainder of the individual's original indeterminate commitment as a sexually violent predator if the original petition has not been dismissed; and

   d) If the petition has previously been dismissed, the Director of State Hospitals shall forward a request for a new petition to be filed for commitment, as specified, no less than 20-calendar days prior to the scheduled release date of the person.

EXISTING LAW:

1) Provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a SVP after the person has served his or her prison commitment. (Welf. & Inst. Code, § 6600, et seq.)

2) **Defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against at least one victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."** (Welf. & Inst. Code, **§ 6600, subd. (a)(1).)**

3) Permits a person committed as a SVP to be held for an indeterminate term upon commitment. (Welf. & Inst. Code, § 6604.1.)

4) Requires that a person found to have been a SVP and committed to DSH have a current examination on his or her mental condition made at least yearly. The report shall include consideration of conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and also what conditions can be imposed to adequately protect the community. (Welf. & Inst. Code, § 6604.9.)

5) Allows a SVP to seek conditional release with the authorization of the Director of DSH when DSH determines that the person's condition has so changed that he or she no longer meets the SVP criteria, or when conditional release is in the person's best interest and conditions to adequately protect the public can be imposed. (Welf. & Inst. Code, § 6607.)

6) Allows a person committed as a SVP to petition for conditional release or an unconditional discharge any time after one year of commitment, notwithstanding the lack of recommendation or concurrence by the Director of DSH. (Welf. & Inst. Code, § 6608, subd. (a).)

7) States that if the court deems the petition for conditional release not frivolous, the court shall give notice to the attorney for the county of commitment, the attorney for the committed person, and the Director of State Hospitals of its intention to set a conditional release hearing. (Welf. & Inst. Code, § 6608, subd. (b)(1).)

8) Specifies that for a conditional release hearing where the county of domicile has not yet been determined, if one or more counties, other than the county of commitment, may be the county of domicile, the court shall set a hearing to determine the county of domicile. (Welf. & Inst. Code, § 6608, subd. (b)(3).)

9) Specifies that after determining the county where the SVP would be released, the court shall set a date for a conditional release hearing and shall give notice of the hearing at least 30 court days before the hearing. (Welf. & Inst. Code, § 6608, subd. (b)(4).)

10) Provides that the court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. (Welf. & Inst. Code, § 6608, subd. (e).)

11) Provides that the attorney designated the county of commitment shall represent the state and have the committed person evaluated by experts chosen by the state and that the committed person shall have the right to the appointment of experts, if he or she so requests. (Welf. & Inst. Code, § 6608, subd. (e).)

12) Requires the court to order the committed person placed with an appropriate forensic conditional release program operated by the state for one year if the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community. (Welf. & Inst. Code, § 6608, subd. (e).)

13) Provides that if the court denies the petition to place the person in an appropriate forensic conditional release program, the person may not file a new application until one year has elapsed from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h)

14) Requires a person who is conditionally released to the community to be placed in the county of the domicile of the person prior to the person's incarceration, unless both of the following conditions are satisfied:

   a) The court finds that extraordinary circumstances require placement outside the county of domicile; and

   b) The designated county of placement was given prior notice and an opportunity to comment on the proposed placement of the committed person in the county, according to specified procedures. (Welf. & Inst. Code, § 6608.5, subd. (a)(1)-(2).)

15) Defines "extraordinary circumstances" as "circumstances that would inordinately limit DSH's ability to effect conditional release of the person in the county of domicile in accordance with specified laws." (Welf. & Inst. Code, § 6608.5, subd. (c).)

16) States that the county of domicile shall designate a county agency or program that will provide assistance and consultation in the process of locating and securing housing within the county for persons committed as sexually violent predators who are about to be conditionally released. (Welf. & Inst. Code, § 6608.5, subd. (d).)

17) Specifies that in recommending a specific placement for community outpatient treatment, DSH or its designee shall consider all of the following:

   a) The concerns and proximity of the victim or the victim's next of kin; and

   b) The age and profile of the victim or victims in the sexually violent offenses committed by the person subject to placement. For purposes of this subdivision, the "profile" of a victim includes, but is not limited to, gender, physical appearance, economic background, profession, and other social or personal characteristics. (Welf. & Inst. Code, § 6608.5, subd. (e)(1)-(2).)

18) States that if the court determines that placement of a person in the county of his or her domicile is not appropriate, the court shall consider the following circumstances in designating his or her placement in a county for conditional release:

   a) If and how long the person has previously resided or been employed in the county; and

b) If the person has next of kin in the county. (Welf. & Inst. Code, § 6608.5, subd. (g)(1)-(2).)

19) Specifies that when DSH makes a recommendation to the court for community outpatient treatment for any person committed as a SVP, or possibilities of community placement exist, DSH must notify the sheriff or chief of police, or both, the district attorney, or the county's designated counsel, that have jurisdiction over the following locations:

a) The community in which the person may be released for community outpatient treatment;

b) The community in which the person maintained his or her last legal residence; and,

c) The county that filed for the person's civil commitment. (Welf. and Inst. Code, 6609.1, subd. (a)(1)(A)-(C).)

20) Requires notice be given at least 30 days prior to DSH's submission of its recommendation to the court in those cases in which DSH recommended community outpatient treatment, or in which DSH is recommending or proposing a placement location, or in the case of a petition or placement proposal by someone other than DSH, within 48 hours after becoming aware of the petition or placement proposal. (Welf. and Inst. Code, 6609.1, subd. (a)(4).)

21) Requires the notice include all of the following information concerning each person committed as a SVP who is proposed or is petitioning to receive outpatient care in a conditional release program in that city or county:

a) The name, proposed placement address, date of commitment, county from which committed, proposed date of placement in the conditional release program, fingerprints, and a photograph;

b) The date, place, and time of the court hearing at which the location of placement is to be considered and a proof of service attesting to the notice's mailing in accordance with this subdivision; and,

c) A list of agencies that are being provided this notice and the addresses to which the notices are being sent. (Welf. and Inst. Code, 6609.1, subd. (a)(5)(A)-(C).)

22) Specifies that agencies receiving the notice may provide written comment to the DSH and the court regarding the impending release, placement, location, and conditions of release. All community agency comments shall be combined and consolidated. (Welf. and Inst. Code, 6609.1, subd. (b).)

23) Requires that the agencies' comments and DSH's statements be considered by the court which shall, based on those comments and statements, approve, modify, or reject the DSH's recommendation or proposal regarding the community or specific address to which the person is scheduled to be released or the conditions that shall apply to the release if the court finds that the department's recommendation or proposal is not appropriate. (Welf. and Inst. Code, 6609.1, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "When the Sexually Violent Predator Act changed from SVP's serving two-year commitments in a state hospital to indeterminate commitments, the laws governing screening of inmates did not change. As a result, current law permits SVPs who are committed to a state hospital as an SVP for an indeterminate term who later receive a new prison commitment to be re-screened by CDCR as an SVP after serving their new prison term.

   "This loop hole creates an incentive for a SVP to get a 'second bite at the apple' to relitigate their original SVP commitment by purposely committing a new felony in a state hospital while serving their original SVP commitment.

   "An individual committed to a state hospital as an SVP for an indeterminate term should not be rewarded for committing a new felony while in the state hospital with a new opportunity to re-litigate their original SVP commitment in a new petition after completing a new prison sentence.

   "This bill simply closes a loophole in the Sexually Violent Predator Act, something that was accidentally overlooked when the Sexually Violent Predator Act was changed from two-year terms to indeterminate terms."

2) **SVP Law Generally**: The Sexually Violent Predator Act (SVPA) establishes an extended civil commitment scheme for sex offenders who are about to be released from prison, but are referred to the DSH for treatment in a state hospital, because they have suffered from a mental illness which causes them to be a danger to the safety of others.

   DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. Under existing law, a person may be deemed a SVP if they have been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. If two licensed psychiatrists or psychologists concur in the diagnosis, the case is referred to the county district attorney who may file a petition for civil commitment.

   Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause is found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove (1) a person who has been convicted of a sexually violent offense against at least one victim and (2) who has a diagnosed mental disorder that (3) makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." If the prosecutor meets this burden, the person then can be civilly committed to a DSH facility for treatment.

   DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. (Welf. & Inst. Code, § 6604.9.) In addition, DSH has an obligation to seek judicial review any time

it believes a person committed as a SVP no longer meets the criteria, not just annually. (Welf. & Inst. Code, § 6607.) A person committed as a SVP may be held for an indeterminate term upon commitment or until it is shown that the defendant no longer poses a danger to others.

3) **Obtaining Release From Commitment**: A person committed as a SVP may petition the court for conditional release or unconditional discharge after one year of commitment. (Welf. & Inst. Code, § 6608, subd. (a).) The petition can be filed with, or without, the concurrence of the Director of State Hospitals. The Director's concurrence or lack thereof makes a difference in the process used.

A SVP can, with the concurrence of the Director of State Hospitals, petition for unconditional discharge if the patient "no longer meets the definition of a SVP," or for conditional release. (Welf. & Inst. Code, § 6604.9, subd. (d).) If an evaluator determines that the person no longer qualifies as a SVP or that conditional release is in the person's best interest and conditions can be imposed to adequately protect the community, but the Director of State Hospitals disagrees with the recommendation, the Director must nevertheless authorize the petition. (*People v. Landau* (2011) 199 Cal.App.4th 31, 37-39.) When the petition is filed with the concurrence of the DSH, the court shall order a show cause hearing. (Welf. & Inst. Code, § 6604.9, subd. (f).) If probable cause is found, the patient thereafter has a right to a jury trial and is entitled to relief unless the district attorney proves "beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent behavior if discharged." (Welf. & Inst. Code, § 6605.)

A committed person may also petition for conditional release or unconditional discharge notwithstanding the lack of recommendation or concurrence by the Director of State Hospitals. (Welf. & Inst. Code, § 6608, subd. (a).) Upon receipt of this type of petition, the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (Welf. & Inst. Code, § 6608, subd. (a).) If the petition is not found to be frivolous, the court is required to hold a hearing. (*People v. Smith* (2013) 216 Cal.App.4th 947.)

Once the court sets the hearing on the petition, then the petitioner is entitled to both the assistance of counsel, and the appointment of an expert. (*People v. McKee*, *supra*, 47 Cal.4th 1172, 1193.) At the hearing, the person petitioning for release has the burden of proof by a preponderance of the evidence. (Welf. & Inst. Code, § 6608, subd. (i); *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1503.) If the petition is denied, the SVP may not file a subsequent petition until one year from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h).)

4) **SVPs Returned to Prison for Commission of a New Crime While in the State Hospital:** Originally, a SVP commitment was for two years. In 2006, the SVP law was amended to create an indeterminate commitment, until it is shown the defendant no longer poses a danger to others.

When the SVP law changed from two-year commitments to indeterminate commitments, the laws governing screening of CDCR inmates as potential SVPs did not change. Existing law does not differentiate the screening process between a person in the custody of CDCR that

has not been screened as an SVP and one that has already been determined to be a SVP and returned to CDCR custody for a crime committed while held in a state hospital as an SVP. As a result, a person who is committed to the state hospital as a SVP for an indeterminate term, who later receives a new prison commitment, would need to be re-screened by CDCR as an SVP after serving their new prison commitment. This bill would instead refer such an inmate directly to DSH for a full evaluation as to whether the person still meets the SVP criteria, prior to the person's release from CDCR.

5) **Argument in Support:** According to the *Office of the District Attorney, San Diego County*, "SB 248 will amend Welfare & Institutions Code section 6601 to address the sexually violent predator who has already been committed to the state hospital under the SVPA but committed a new felony offense while committed to the state hospital to receive sex offender treatment. Under existing law, Section 6601 would permit such a sexually violent predator to re-litigate a commitment as a sexually violent predator after completion of a new prison commitment rather than returning the individual to the state hospital to continue receiving sex offender treatment in the state hospital under the previous indeterminate commitment under the SVPA. This loophole rewards individuals who commit a new felony with the opportunity to re-litigate an indeterminate commitment under the SVPA. SB 248 seeks to avoid this absurd result. The absurd result of re-litigating an SVP commitment was not contemplated when the SVPA was originally enacted because the SVPA only permitted two-year commitments at that time. When the SVPA only permitted two-year commitments, new petitions had to be filed and litigated every two years for every committee. Proposition 83 did away with the re-commitments every two years for every SVP committee. However, now the only SVP committees permitted to re-litigate their SVP commitment are those convicted of a new felony. SB 248 seeks to correct this problem."

6) **Related Legislation:** AB 821 (Cooper), would place the burden of showing extraordinary circumstances on DSH by clear and convincing evidence when a court considers whether to place a person no longer found to be a SVP in a county other than their county of residence. AB 821 is a 2 year bill in the Assembly Public Safety Committee.

7) **Prior Legislation**:

   a) SB 1023 (Bates), of the 2019-2020 Legislative Session, would have required that proceedings for the civil commitment of a sexually violent predator be in open court, on the record, unless the court makes specified findings. SB 1023 was never heard in the Senate Public Safety Committee.

   b) AB 255 (Gallagher), Chapter 39, Statutes of 2017, specified that courts must consider the connections to the community when designating the placement of a SVP in a county for conditional release.

   c) AB 262 (Lackey), of the 2015-16 Legislative Session, would have placed additional residency restrictions on SVP's conditionally released for community outpatient treatment by requiring that an SVP shall only reside in a dwelling or abode within 10 miles of a permanent physical police or sheriff station that has jurisdiction over the location and has 24 hour a day peace officer staffing on duty and available to respond to call for service. AB 262 failed passage in this committee.

d) AB 1607 (Fox), Chapter 877, Statutes of 2014, requires the court, prior to an SVP conditional release hearing, to notify both the county of commitment and the county of domicile, if the county of domicile is different than the county of commitment, and allows the county of domicile to represent the state at the conditional release hearing.

e) AB 1768 (Achadjian), of the 2013-14 Legislative Session, would have prohibited a person designated as an SVP from being conditionally released as a transient or being released in housing consisting of a recreational vehicle or other vehicle. AB 1768 was pulled by the author and was not heard in Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County District Attorney's Office (Sponsor)
California Association of Code Enforcement Officers
California District Attorneys Association
California Law Enforcement Association of Records Supervisors (CLEARS)
Peace Officers Research Association of California (PORAC)

Oppose

None

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Date of Hearing: July 13, 2021
Counsel: Nikki Moore

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 504 (Becker) – As Amended July 8, 2021

SUMMARY: Requires the Secretary of State (SOS) and California Department of Corrections and Rehabilitation (CDCR) to share identifying information for persons imprisoned for the conviction of a felony and persons on parole or otherwise released from imprisonment for purposes of determining voter eligibility. Specifically, **this bill**:

1) Provides that if a person who is ineligible to vote receives a notice of eligibility and subsequently becomes registered or preregistered to vote, and votes or attempts to vote in an election held after the effective date of the person's registration or preregistration, that person shall be presumed to have acted with official authorization and shall not be guilty of fraudulently voting or attempting to vote, unless that person willfully votes or attempts to vote knowing that the person is not entitled to vote.

2) Defines the following terms for the purpose of this bill:

   a) "Conviction" excludes a juvenile adjudication consistent with existing law.

   b) "Imprisoned" to mean currently serving a state or federal prison sentence pursuant to existing law.

   c) "Parole" to mean a term of supervision by CDCR consistent with existing law.

   d) "Statewide voter database" to mean the statewide voter registration database developed in compliance with the requirements of the federal Help America Vote Act of 2002.

3) Repeals provisions of law that require the clerk of the superior court of each county to periodically furnish the SOS and county elections official with certain information regarding persons who have been committed to state prison for a felony conviction, as specified.

4) Requires CDCR to provide to the SOS, on a weekly basis and in a format prescribed by the SOS, certain identification information for all of the following persons:

   a) Persons imprisoned for the conviction of a felony and under the jurisdiction of CDCR. Requires, to the extent available, identification information provided by CDCR regarding these persons to include the date on which each person's term of imprisonment began.

   b) Persons on parole or persons released from imprisonment for the conviction of a felony and no longer under the jurisdiction of CDCR. Requires, to the extent available, identification information provided by CDCR regarding these persons to include the dates on which each person's parole began and on which the person was discharged from

the jurisdiction of CDCR.

5) Requires CDCR to provide the SOS with the personal identification information, including all of the following, for the persons listed above: all known first names; all known last names; all known middle names; all known name suffixes; last known address; date of birth; last four digits of the person's social security number, if available; driver's license or state-issued identification number, if available.

6) Requires the SOS, upon receipt of the information described above, to do all the following:

   a) Identify any registration record in the statewide voter database that contains personal identifying information that, for each of the unique identifiers described above, as available, matches information pertaining to a person imprisoned for the conviction of a felony and under the jurisdiction of CDCR or on parole, as specified above.

   b) For any matched records described in subdivision (a), provide to county elections officials within three days of receipt of the information from CDCR the information pertaining to a person imprisoned for the conviction of a felony and under the jurisdiction of CDCR or a person on parole or released from imprisonment for the conviction of a felony and no longer under the jurisdiction of CDCR, and the corresponding unique identifier or identifiers used in the statewide voter database.

7) Requires the county elections official, upon receipt of information from the SOS, to do all of the following:

   a) Cancel the affidavit of registration of any person imprisoned for the conviction of a felony and under the jurisdiction of CDCR whose registration information matches the unique identifier or identifiers used in the statewide voter database provided by the SOS to the county; and,

   b) Using the form prepared by the SOS pursuant to the provisions of this bill, notify a person on parole or released from imprisonment for the conviction of a felony and no longer under the jurisdiction of CDCR, and whose last known address is within the county based on the unique identifier or identifiers used in the statewide voter database provided by the SOS to the county, that the person's voting rights are restored and advise the person that if the person is otherwise entitled to register to vote, the person may register to vote. Requires the county elections official to provide the person with information regarding the procedure for registering to vote.

8) Requires the SOS to prepare a form to be used by county elections officials to provide the notice that the person may register to vote.

9) Provides that a county or county elections official is not liable for taking or failing to take the actions to cancel an affidavit of registration or notify a person of their restored right to vote when the county or county elections official have received erroneous information from the SOS or CDCR.

10) Requires a county elections official to make conditional voter registration (CVR) available to military and overseas voters and voters with disabilities via a certified remote accessible vote by mail (RAVBM) system.

11) Specifies that military and overseas voters may complete a conditional voter registration and cast a provisional ballot, or nonprovisional ballot during the 14 days immediately preceding an election or on election day pursuant to this article.

12) Makes technical and conforming changes.

EXISTING LAW:

1) States that the Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or serving a state or federal prison term for the conviction of a felony. (Cal. Const., Article II, § 4.)

2) Requires that a person be a U.S. citizen, California resident, not in prison for conviction of a felony, and at least 18 years of age at the time of the next election to be entitled to register to vote in this state. (Elec. Code, § 2101, subd. (a).)

3) Requires CDCR and each county probation department to:

   a) Establish and maintain on the department's Internet Web site a hyperlink to the Internet Web site at which information provided by the Secretary of State regarding voting rights for persons with a criminal history may be found; and (Elec. Code, §§ 2105.5, subd. (a)(1) & (b)(1).)

   b) Post, in each parole office where parolees are seen, a notice that contains the Internet Web site address at which information provided by the Secretary of State regarding voting rights for persons with a criminal history may be found. (Elec. Code, §§ 2105.5, subd. (a)(2) & (b)(2).)

4) Requires the facility administrator of a local detention facility to develop written policies and procedures whereby the county registrar of voters allows qualified voters to vote in local, state, and federal elections, pursuant to election codes. (Cal. Code Regs., Title 15, § 1071.)

5) Requires CDCR to provide each person on parole under its jurisdiction, upon that person's request made at any time during the parole, information provided by the SOS regarding voting rights for persons with a criminal history. (Elec. Code, § 2105.6 subd. (a).)

6) Encourages each county probation department to notify persons that a printed version of information regarding voting rights for persons with a criminal history who are under CDCR's supervision is available upon request, and requires they provide it if requested. (Elec. Code, § 2105.6, subds. (b) & (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 504 improves two critical election processes by 1) ensuring justice involved folks are granted the right to register to vote after serving their time with more accurate voter rolls, and 2) grants both UOCAVA/military and disabled voters to 'Conditionally' or 'Same Day' register just as you and I currently can."

2) **Bolstering Voter Rights for Incarcerated and Formerly Incarcerated Persons**: In California, a person cannot vote if they are serving a state or federal prison term for a felony. This prohibition is located in the state Constitution and the Elections Code. (*See* Calif. Const. Art. II, Sec. 4, which states: "[the] Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned for the conviction of a felony." *See also*, Elec. Code, § 2101, which implements Art. II, Sec. 4: "[a] person entitled to register to vote shall be a United States citizen, a resident of California, not imprisoned for the conviction of a felony, and at least 18 years of age at the time of the next election.")

   The Elections Code requires county and state elections officials to cancel a voter's registration if the person has lost the right to vote due to a felony conviction. Current practice is for the clerk of each superior court to provide information about a felony conviction to the Secretary of State and county election officials so that the election offices can properly remove persons from the voter roles as required by law.

   This bill would change the process, removing the superior courts' role, and instead requiring CDCR to provide to the SOS the names and specified information about persons who are disallowed from voting on a weekly basis. The SOS is then responsible for notifying county elections officials that the voter's registration should be canceled.

   This bill would also require CDCR to notify SOS of persons who are regaining their eligibility to vote because the person is on parole or probation for conviction of a felony. This bill specifies that CDCR, to the extent possible, should share the dates that a person's parole begins and ends. This notification is meant to better ensure that a person who has regained the right to vote is aware of that right. However, because person on parole has regained the right to vote, the date parole ends is not necessarily relevant to share.

3) **Justice-Involved Voters:** Article II, Section 4 of the California Constitution states that "[the] Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or serving a state or federal prison term for the conviction of a felony." Elections Code section 2101 implements Article II, Section 4 of the California Constitution and provides that "[a] person entitled to register to vote shall be a United States citizen, a resident of California, not imprisoned for the conviction of a felony, and at least 18 years of age at the time of the next election." In order to maintain an updated and current voter file, elections officials are required to cancel the voter registrations of individuals who are imprisoned for the conviction of a felony. However, a person who is on parole or probation is permitted to register to vote and vote.

   Over the years, various bills have been signed into law to educate individuals with a criminal history about their voting rights. AB 149 (Weber), Chapter 580, Statutes of 2013, required a county probation department to either establish a hyperlink on its website to the SOS's voting

rights guide for persons with a criminal history or to post a notice that contains the SOS's website where the voting rights guide can be found. In 2014, two bills were enacted to further this effort. AB 2243 (Weber), Chapter 899, Statutes of 2014, required CDCR to establish and maintain on its website a link to the SOS voting rights guide for incarcerated individuals or post in each parole office a notice with the website address of the SOS voting rights guide for incarcerated individuals. SB 1063 (Block), Chapter 624, Statutes of 2014, required state and local juvenile detention facilities to identify individuals housed in those facilities who are eligible to register to vote and provide assistance in completing affidavits of registration and returning the completed voter registration cards.

AB 1344 (Weber), Chapter 796, Statutes of 2017, required CDCR and county probation departments to provide specified voting rights information to persons under their jurisdiction upon request. Finally, in 2020, ACA 6 (McCarty), Resolution Chapter 24, Statutes of 2020, proposed to amend the state Constitution to allow individuals who are on parole for the conviction of a felony to vote if they otherwise meet all other eligibility requirements. This measure appeared on the ballot for the November 2020 statewide election as Proposition 17 and was approved by the voters.

4) **History of California's Disenfranchisement Laws**: According to a recent KQED report on the history of California's voting rights: "With little controversy, California's constitutional delegates approved Article II, Section 5 of the state's constitution in 1849, which stated that "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector." … In California, application of the law varied. Most courts through the early 20th century equated an 'infamous crime' with a felony. But the legislature confused matters by specifying the loss of voting rights for embezzlement or misappropriation of public funds. As a result, interpretation was largely left to county clerks and election officials." (Guy Marzorati, *Proposition 17 and the History of Voting Rights for Formerly Incarcerated Californians*, KQED, Oct. 12, 2020, available at https://www.kqed.org/news/11841345/proposition-17-and-the-history-of-voting-rights-for-formerly-incarcerated-californians.)

The sweeping exclusion of all persons with a felonious history was reexamined in the 1960s and 70s. In 1966, the California Supreme Court ruled in *Otsuka v. Hite*, that the petitioner's crime was not "infamous" and that he should be restored his right to vote. Justice Stanley Mosk opened the case saying:

> This case presents the difficult question whether bona fide conscientious objectors who pleaded guilty more than 20 years ago to a violation of the federal Selective Service Act can constitutionally be treated as persons convicted of an "infamous crime" and hence rendered ineligible to vote by article II, section 1, of the California Constitution. After reviewing the history and purpose of this ground of voter disqualification we have concluded that to preserve its constitutionality it must be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process.

The wake of the *Otsuka* case left the counties to determine locally which formerly incarcerated persons were entitled to restored voting rights. By 1973, the United States Supreme Court ruled in the case *Richardson v. Ramirez* that the constitution does not guarantee a right to vote, overturning the California Supreme Court's holding that it violated

the Equal Protection Clause to bar "ex-felons" whose sentences and paroles had expired from voting.

The Legislature responded by placing Proposition 10 on the ballot in 1974, establishing that a person is disqualified from voting until the completion of their parole term.

This recently changed again when the Legislature approved ACA 6 (McCarty), Chapter 24, Statutes of 2020, which eliminated the disenfranchisement of a person because they were on parole for the conviction of a felony. Proposition 17 was approved by the voters with over 58 percent of voters affirming. The Legislature also passed AB 646 (McCarty), Chapter 320, Statutes of 2020, to conform statutory law to ACA 6, and to authorize a person on parole for the conviction of a felony to register to vote and to vote.

California still prohibits a person incarcerated for a federal or state prison conviction from voting. In the District of Columbia, Maine, and Vermont, a person never loses their right to vote, even while incarcerated.

5) **Argument in Support**: According to the *American Civil Liberties Union California Action* and *League of Women Voters of California*, "[SB 504 would] improve the accuracy of conviction data that is reported to elections officials and increase access to democracy for people who have finished their prison sentences.

"Our organizations have a long history of working to protect and expand voting rights for people impacted by the criminal legal system, including by successfully restoring voting rights to Californians coming home from prison by passing Proposition 17 on the November 2020 ballot. Although in recent years states like California have rolled back the felony disenfranchisement laws on their books, voters impacted by the criminal legal system still often experience de facto disenfranchisement. This is because widespread confusion about the voting rights of people with convictions often leads eligible individuals to mistakenly believe that they are prohibited from participating in their own democracy and because outdated government systems sometimes incorrectly flag eligible voters with convictions for removal from voter rolls, further compounding confusion about who is actually eligible to vote. Since structural discrimination still leads to the overrepresentation of Black and Brown people in our criminal legal system, de facto disenfranchisement acts as another form of voter suppression that unfairly robs communities of color of their political power.

"In order to combat *de facto disenfranchisement*, it's essential that we improve California's systems for reporting and tracking of prison commitments for voter registration purposes and improve the information that elections officials provide to voters with convictions. Current state law requires the clerk of each superior court to report prison commitments to the local elections office monthly and requires elections officials to cancel the registrations of individuals who are currently imprisoned for the conviction of a felony. Unfortunately, our organizations and our partners have observed that county elections officials sometimes receive and rely on over-inclusive lists from superior courts and cancel the registrations of eligible voters who have not been sentenced to state prison. These erroneous cancellations have resulted in the disenfranchisement of thousands of eligible California voters and have spawned legal action in some counties.

"SB 504 would help resolve these problems by changing how conviction data is reported and used and by requiring county elections officials to provide notice to eligible individuals when their voting rights are restored after the completion of their prison term. By making the California Department of Corrections (CDCR), instead of the county courts, responsible for sending relevant conviction data to elections officials, SB 504 will reduce the possibility that these reports will contain the names of people who were not sentenced to prison and, therefore, are still eligible to vote. This is because CDCR only has data about people in prison or on parole, whereas county courts have data about anyone charged or convicted with any kind of crime in that court."

6) **Prior Legislation**:

a) ACA 6 (McCarty), Chapter 24, Statutes of 2020, proposed to the voters an amendment to the California Constitution to allow individuals who are on parole for conviction of a felony to vote if they otherwise meet all other eligibility requirements. This measure appeared as Proposition 17 at the statewide general election held on November 3, 2020 where the measure was approved by voters. AB 646 (McCarty), Chapter 320, Statutes of 2020, contained the implementing legislation for ACA 6.

b) AB 1344 (Weber), Chapter 796, Statutes of 2017, required CDCR and county probation departments to post in the office and online voting rights information. Additionally, this bill required CDCR and county probation departments to provide voting rights information and affidavits of registration to persons under their jurisdiction upon request.

c) AB 301 (Wagner), of the 2013-14 Legislative Session, would have required court clerks to report the name, address and birth date of people disqualified from jury duty to county elections officials, and require automatic termination of the person's voter registration. AB 301 failed passage in the Assembly Judiciary Committee.

d) SB 1063 (Block), Chapter 624, Statutes of 2014, required specified state and local juvenile detention facilities to identify eligible individuals housed in those facilities to register to vote and provide assistance in completing affidavits of registration and returning the completed voter registration cards, as specified.

e) AB 2243 (Weber), Chapter 899, Statutes of 2014, required the CDCR to make specified information relating to voting rights of incarcerated persons available to the public, and parolees under their jurisdiction.

f) AB 149 (Weber), Chapter 580, Statutes of 2013, required a county probation department to either establish a hyperlink on its internet website to the SOS's voting rights guide for persons with a criminal history or to post a notice that contains that the SOS's internet website address where the voting rights guide can be found.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union California Action

California Federation of Teachers AFL-CIO
California Public Defenders Association
California State Association of Counties
Disability Rights California
League of Women Voters of California
Microsoft Corporation

Opposition

None

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Date of Hearing: July 13, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 775 (Becker) – As Amended July 6, 2021

SUMMARY: Clarifies that persons who were prosecuted under a theory of felony murder, the natural and probable consequences doctrine, or any theory in which malice was imputed to them based solely on their participation in a crime, and who were convicted of attempted murder or manslaughter, may apply for the same resentencing relief as persons who were convicted of murder under those same theories. Specifically, **this bill**:

1) Clarifies that the petition process through which qualifying defendants can have their convictions of felony murder or murder under the natural and probable consequences doctrine vacated and be resentenced, when specified conditions are satisfied, also applies to:

   a) Murder convictions under any theory in which malice is imputed to the defendant based solely on their participation in a crime;

   b) Attempted murder convictions under the natural and probable consequences doctrine; and,

   c) Manslaughter convictions.

d) Clarifies that upon receiving a petition in which the required information is set forth or readily ascertainable, the court shall appoint counsel if the petitioner has requested counsel.

e) Provides that a single prima facie hearing on a petition is to be held after briefing has been submitted.

f) Requires a court that declines to issue an order to show cause to provide a statement fully setting forth its reasons for declining to do so.

g) Specifies that when the court issues and order to show cause and holds a hearing to determine whether the petitioner is entitled to relief, the rules of evidence apply at that hearing.

h) Clarifies that at the hearing, the burden is on the prosecution to prove beyond a reasonable doubt that the petitioner is guilty of murder or attempted murder under the current law.

i) Clarifies that a finding that there is substantial evidence to support a conviction of murder, attempted murder, or manslaughter is insufficient to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing.

j) States that a person convicted of murder, attempted murder, or manslaughter, whose conviction is not final, may challenge the validity of that conviction on direct appeal rather

than via the petition.

k) Reduces the time a judge may place a resentenced petitioner on parole following completion of their sentence from three years to two years.

EXISTING LAW:

1) Defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

2) Defines malice for this purpose as either express or implied and defines those terms. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen. Code, § 188, subd. (a).)

3) Provides that for conviction of murder generally, a participant in a crime must have the mental state described as malice, unless specified criteria are met. (Pen. Code, § 188, subd. (a)(3).)

4) States that malice shall not be imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).)

5) Provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188, subd. (b).)

6) Defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189, subd. (a).)

7) States that a participant in one of the specified felonies is liable for first degree murder only if one of the following is proven:

   a) The person was the actual killer;

   b) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or,

   c) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified. (Pen. Code, § 189, subd. (e).)

8) Allows a defendant to be convicted of first degree murder if the victim is a peace officer who was killed in the course of duty, where the defendant was a participant in one of the specified felonies and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of duty, regardless of the defendant's state of mind.

(Pen. Code, § 189, subd. (f).)

9) Prescribes the penalty for first degree murder as death, imprisonment in the state prison for life without the possibility of parole (LWOP), or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190, subd. (a).)

10) Provides that when a prosecutor charges a special circumstance enhancement and it is found true, a person found guilty of first degree murder who is not the actual killer, acted with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one of specified felonies which resulted in death shall be punished by death or LWOP. (Pen. Code, § 190.2, subd. (d).)

11) Provides a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or second degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or second degree murder. (Pen. Code, § 1170.95.)

12) Provides that an attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. (Pen. Code, § 21a.)

13) Defines manslaughter as the unlawful killing of a human being without malice. (Pen. Code, § 192.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "When the Legislature passed Senate Bill 1437 (Skinner) in 2018, it changed California's long-held and unjust Felony Murder law that was overly punitive to those who did not kill or intend to kill. It allowed a pathway for people who took plea deals to lesser charges, such as manslaughter to apply for resentencing. It was a landmark piece of legislative that transformed our criminal justice system to be one that lives up to our ideals of fairness, justice, and equity. However, what has occurred since SB 1437 is that some courts incorrectly reasoned that it only applied to murder and not attempted murder. These courts have barred people from applying for re-sentencing, which has led to an absurd and unfair situation where people are eligible for resentencing if the victim died, but are ineligible if the victim did not die. This means the least culpable people are still serving decades in prison even though they should be eligible for relief.

   "SB 775 builds on SB 1437, by clarifying existing law to include voluntary manslaughter and attempted murder convictions as eligible for relief under SB 1437. This simple reform would assist hundreds of incarcerated people that the appellate courts deemed to have been excluded by the technical language of SB 1437, and the thousands of similar people who did not file petitions yet because of the court rulings."

2) **Background: Murder and the Enactment of SB 1437**: Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Malice may be express or implied. (Pen. Code, § 188, subd. (a).) "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature" – i.e., intent to kill. (Pen. Code, § 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188, subd. (a)(2).)

   There are legal theories under which a person can be convicted of murder even if they do not personally kill anyone and/or even if they do not intend to kill anyone. SB 1437 (Skinner), Chapter 1015, Statutes of 2018, changed the law by limiting the legal bases for convicting someone of the crime of murder. In particular, it limited the scope of vicarious liability (accomplice liability) for the crime of murder by changing the mens rea (mental state) requirement for that offense. SB 1437 provided that, except in limited circumstances, in order to be convicted of murder, a principal in a crime had to act with malice aforethought. SB 1437 precluded malice from being imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).) This is sometimes referred to as the "no imputation rule" for murder.

   a) **Felony Murder**: Prior to the enactment of SB 1437, any person involved in the commission of a specified felony (such as rape, murder, or robbery) that resulted in death was liable for first degree murder under the felony murder rule, regardless of their specific intent or conduct. (See *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275-276.) SB 1437 amended the felony murder statute so that the felony murder rule only applies if the defendant: 1) was the actual killer; 2) harbored the intent to kill and assisted the actual killer in committing first degree murder; or 3) was a major participant in the underlying felony and acted with reckless indifference to human life. (*Id.* at p. 276; Pen. Code, § 189, subd. (e).) However, this limitation does not apply to the killing of a police officer where the defendant knew or reasonably should have known the victim was a peace officer engaged in the performance of their duties. (Pen. Code, § 189, subd. (f).)

      SB 1437 also appears to have eliminated California's second degree felony murder law. (See Couzens, *Accomplice Liability for Murder: SB 1437* (June 2020) at pp. 20-21.) Second degree felony murder "imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life. [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1182.) Again, under SB 1437, malice cannot be imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3); see *In re White* (2019) 34 Cal.App.5th 933, 937, fn. 2 [under Sen. Bill No. 1437 (2017–2018 Reg. Sess.) "the second degree felony-murder rule in California is eliminated"]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1142, fn. 3 [Sen. Bill No. 1437 "brings into question the ongoing viability of second degree felony murder in California"].)

   b) **Natural and Probable Consequences**: Prior to SB 1437, under the natural and probable consequences doctrine, an aider and abettor was guilty not only of the intended crime (target offense), but also for any other offense (nontarget offense) that was a natural and probable consequence of the crime aided and abetted. (*People v. Chiu* (2014) 59 Cal.4th 155, 158.) Liability for murder attached if the defendant aided and abetted a target

offense of which murder was the natural and probable consequence – i.e., murder was a reasonably foreseeable consequence of the crime aided and abetted. (*Id.* at pp. 161, 164-165.) It was irrelevant whether the aider and abettor had the intent to kill. (*Id.* at p. 164.)

The natural and probable consequences doctrine did not apply to first degree murder (*People v. Chiu, supra*, 59 Cal.4th at pp. 166-167); an aider and abettor could not be guilty of first degree murder unless they personally deliberated, premeditated, and intended to kill. (*Id.* at p. 166.) However, it did apply to second degree murder. (*Id.* at pp. 165-166.)

SB 1437 eliminated the natural and probable consequences rule as applied to murder. (*People v. Gentile* (2020) 10 Cal.5th 830, 843.)

3) **Retroactive Application of SB 1437 through the Petition Process**: SB 1437 made these changes to the felony murder rule and the natural and probable consequences doctrine retroactive by allowing a defendant who was convicted of murder before its passage to petition to vacate their murder conviction and be resentenced if their criminal conduct did not meet these newly-established criteria. (Pen. Code, § 1170.95.) Specifically, a person convicted of first or second degree murder may petition a trial court for resentencing "when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code, § 1170.95, subd. (a).)

4) **SB 1437 and Attempted Murder**: Courts are of differing views on the question of whether SB 1437 abrogated vicarious liability for attempted murder, in addition to murder. In engaging in statutory interpretation to determine the Legislature's intent, and noting the omission of any reference to attempted murder in SB 1437, some court have held that the abrogation of vicarious liability by SB 1437 does not apply to attempted murder. The issue is under review before the California Supreme Court. (See e.g. *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, rev. gr. Nov. 13, 2019, S258175 [does not apply]; *People v. Sanchez* (2020) 46 Cal.App.5th 637, 642-644, rev. gr. June 10, 2020, S261768 [does apply]; *People v. Larios* (2019) 42 Cal.App.5th 956, 964-968, rev. gr. Feb. 26, 2020, S259983 [does apply].)

A separate question is, assuming SB 1437 abrogated vicarious liability for attempted murder, does an attempted murder conviction fall within the ambit of the petition process under Penal Code section 1170.95, which provides retroactive relief. While appellate courts have held that it does not, the California Supreme Court has also granted review in these cases. (See e.g. *People v. Larios* (2019) 42 Cal.App.5th 956, 964-968, rev. gr. Feb. 26, 2020, S259983 [does not]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1015-1016, rev. gr. Mar. 11, 2020, S259948 [does not].)

In concluding that SB 1437 did not abrogate vicarious liability for attempted murder, the court in *Lopez, supra*, 38 Cal.App.5th at page 1104, noted:

> [T]here is nothing ambiguous in the language of Senate Bill 1437, which, in addition to the omission of any reference to attempted murder, expressly identifies its purpose as the need "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life."
>
> [Citation.] Had the Legislature meant to bar convictions for attempted murder under the natural and probable consequences doctrine, it could easily have done so.

The court reasoned the Legislature's intent to exclude attempted murder from the ambit of SB 1437 reform was underscored by the language of the petition process, which does not reference attempted murder. (*Lopez, supra*, 38 Cal.App.5th at pp. 1104-1105.)

On the other hand, the court in *Larios, supra*, 42 Cal.App.5th at p. 968, held that SB 1437's abrogation of the natural and probable consequences doctrine necessarily applies to attempted murder.

> As noted by our state Supreme Court, "where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy [than the principal offender]." (*People v. Lee*[(2003)] 31 Cal.4th [613,] 624.) Our interpretation of Senate Bill 1437 comports with its stated goal of ensuring a defendant's culpability is premised upon his or her own actions and subjective mens rea. (Stats. 2018, ch. 1015, § 1, subds. (d), (g).)

(*Larios, supra*, 42 Cal.App.5th at p. 968.) The court nonetheless concluded the petition process for retroactive relief does not apply in light of the unambiguous language of the statute which does not reference persons convicted of attempted murder. (*Id.* at pp. 968-970.)

This bill would clarify that the petition process under Penal Code section 1170.95, providing retroactive SB 1437 relief, applies to attempted murder convictions under the natural and probable consequences doctrine. By implication, this would appear to clarify that SB 1437's abrogation of vicarious liability for murder applies to attempted murder.

5) **SB 1437 and Manslaughter**: Manslaughter is an unlawful killing without malice. It is a lesser offense to murder. (*People v. Rios* (2000) 23 Cal.4th450, 453, 464.) Sudden quarrel, heat of passion, or unreasonable self-defense can negate the malice element of murder. (*Id.* at pp. 460-461.)

A question has also been raised regarding SB 1437's application to manslaughter convictions. The court in *People v. Flores* (2020) 44 Cal.App.5th 985, concluded it does not apply. There the applicant had been convicted of manslaughter pursuant to a plea agreement. (*Id.* at p. 990.) Citing subdivision (a)(2) of Penal Code section 1170.95, the applicant contended that she had accepted a plea offer in lieu of a trial at which she could have been convicted of first or second degree murder under the now erroneous theories of vicarious

liability. (*Flores, supra*, at p. 994.) The court rejected her argument, holding that "[h]ad the Legislature intended to make section 1170.95 available to defendants convicted of manslaughter, it easily could have done so" and that the "absence of any reference to manslaughter implies the omission was intentional." (*Flores, supra*, at p. 993.) The applicant was found to be statutorily ineligible for relief under the petition process because manslaughter is not listed in Penal Code section 1170.95, subdivision (a). (*Flores, supra*, at pp. 990, 993, 997.)

People v. Cervantes (2020) 44 Cal.App.5th 884, also concluded that a manslaughter conviction did not qualify the applicant for resentencing under section 1170.95. The court held that the "decision not to include manslaughter in section 1170.95 falls within the Legislature's 'line-drawing' authority as a rational choice that is not constitutionally prohibited" (*Cervantes, supra,* at p. 888), rejecting, an equal protection challenge to section 1170.95.

This bill would clarify that the petition process for retroactive relief applies to manslaughter convictions by plea or jury trial. Specifically, this bill would provide for relief only if "[t]he petitioner could not presently be convicted of murder or attempted murder *because* of changes to Section 188 or 189 made effective January 1, 2019." (Emphasis added.) In other words, for resentencing to be granted, it would have to be established that the petitioner could not have been convicted of murder or attempted murder under the law as it reads after January 1, 2019. Changes made by SB 1437 to Penal Code sections 188 and 189 regard the liability of certain accomplices under first degree felony murder, the application of the natural and probable consequences doctrine, and, likely, conviction of second degree felony murder. Therefore, relief would be granted if the only way to have convicted the petitioner was through first degree felony murder, the natural and probable consequences doctrine, or, likely, second degree felony murder as they existed prior to January 1, 2019. (See Couzens, *supra*, at pp. 28-29.) Or, as this bill would clarify in a catchall provision, relief would be granted if the only way to have convicted the petitioner was under any other theory in which malice was imputed to them based solely on their participation in a crime. Changes made by SB 1437 to Penal Code section 188 prohibit imputing malice to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).)

Because generally neither felony murder nor the natural and probable consequences doctrine are theories on which one can commit voluntary manslaughter (*People v. Turner* (2020) 45 Cal.App.5th 428, 439-440), the bill appears largely inapplicable to voluntary manslaughter convictions by jury trial. However, a petitioner may have pled guilty or no contest to voluntary manslaughter in order to forego the risk of being convicted of murder or attempted murder under one of these subsequently abrogated theories of liability. (*Ibid.*)

6) **Appointment of Counsel**: The California Supreme Court is also considering the issue of when the right to appointed counsel arises under the petition process of Penal Code section 1170.95, as enacted by SB 1437. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, rev. gr. Mar. 18, 2020, S260598; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326, rev. gr. Mar. 18, 2020, S260493.) A petition for relief under Penal Code section 1170.95 must include: "(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1).) If any of the information is missing "and cannot be readily

ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (Pen. Code, § 1170.95, subd. (b)(2).) Subdivision (c) provides:

> The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. *If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.* The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(Emphasis added.)

This has been interpreted as "a two-step process" for the court to determine if it should issue an order to show cause. (*People v. Verdugo, supra*, 44 Cal.App.5th at p. 327.) First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (*Id.* at p. 332.) If the petitioner has made this initial prima facie showing, and has requested that counsel be appointed, the petitioner is then entitled to appointed counsel. (*Id.* at pp. 332-333; *People v. Lewis*, *supra*, 43 Cal.App.5th at p. 1140 ["trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls within the provisions' of the statute."].) The court then reviews the petition a second time. If, in light of the parties' briefing, it concludes the petitioner has made a prima facie showing that they are entitled to relief, it must issue an order to show cause. (*Verdugo, supra,* 44 Cal.App.5th at p. 328.)

This view allows a court to summarily deny a petition during the first step without appointing counsel or holding a hearing. (*Verdugo, supra*, 44 Cal.App.5th at pp. 332-333; *People v. Lewis, supra,* 43 Cal.App.5th at p. 1140.)[1]

This bill would clarify that the right to counsel attaches when the court receives the petition, if the petition includes the required information or where missing information can readily be ascertained by the court, and if the petitioner has requested counsel. Following briefing, the court would then determine whether a prima facie case for relief has been made.

7) **Appropriate Standard of Proof at a Hearing after an Order to Show Cause Issues on a Petition**: Penal Code section 1170.95 provides in pertinent part: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of [section 1170.95]. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (Pen.

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[1] Review has also been granted on the question of whether the court can consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief. (*People v. Lewis*, *supra*, 43 Cal.App.5th 1128; *People v. Verdugo*, *supra*, 44 Cal.App.5th 320, 326.)

Code, § 1170.95, subd. (c).) "Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner . . . ." (*Id.*, subd. (d)(1).) "At the hearing . . . , the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. . . . The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Id.*, subd. (d)(3).) The primary requirement for eligibility for resentencing under Penal Code section 1170.95 is that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code, § 1170.95, subd. (a)(3).)

The appellate courts are divided as to the appropriate standard of proof at a hearing conducted after the issuance of an order to show cause. (*People v. Mary H.* (2016) 5 Cal.App.5th 246, 255 ["'The function of a standard of proof ... is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."' [Citation.]"].)

In *People v. Duke* (2020) 55 Cal.App.5th 113, 123, review granted January 13, 2021, S265309, the court concluded, "To carry its burden, the prosecution must . . . prove beyond a reasonable doubt that the defendant could still have been convicted of murder under the new law—in other words, that a reasonable jury could find the defendant guilty of murder with the requisite mental state for that degree of murder. This is essentially identical to the standard of substantial evidence...."

On the other hand, in *People v. Lopez* (2020) 56 Cal.App.5th 936, 949, review granted February 10, 2021, S265974, the court stated, "[W]e construe the statute as requiring the prosecutor to prove beyond a reasonable doubt each element of first or second degree murder under current law . . . ." The court explained:

> As noted, the substantial evidence standard is one applied by an appellate court on appeal of a judgment of conviction. It is not a standard of proof to be employed by a fact finder. The substantial evidence standard is a deferential one under which the court of appeal "'presume[s] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 104 [206 Cal.Rptr.3d 83].) As such, the "standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S. Ct. 2781], fn. omitted, superseded in part on other grounds by 28 U.S.C. § 2254(d).) By contrast, the section 1170.95 ineligibility inquiry is made by the trial court. And, in making that inquiry, the trial court may be confronted with new evidence (§ 1170.95, subd. (d)(3)) and frequently will be asked to find newly relevant facts not previously admitted or found by a trier of fact (i.e., whether the petitioner acted with malice or was a major participant in an underlying felony and acted with reckless indifference to

> human life) (§§ 188, subd. (a)(3), 189, subd. (e)(3)). Given these circumstances, the rationale underlying the application of the deferential substantial evidence standard is not implicated.

(*People v. Lopez, supra*, 56 Cal.App.5th at pp. 950-951.)

This bill would clarify that the substantial evidence standard is not the applicable standard in determining whether a petitioner is ineligible for resentencing. The bill would expressly state that a finding of substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing. The bill would also clarify that the prosecution's burden at the hearing is to prove beyond a reasonable doubt that the petitioner is guilty of murder or attempted murder based on the new law.

8) **Application of the Rules of Evidence at the Eligibility Hearing**: At the evidentiary hearing on eligibility for relief following the issuance of an order to show cause, the parties may rely on the record of conviction or offer new or additional evidence to meet their respective burdens. (Pen. Code, § 1170.95, subdivision (d)(3).) The "record of conviction" consists of "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the accusatory pleadings, appellate court opinions, preliminary hearing and trial transcripts, a change of plea form, a reporter's transcript of the defendant's change of plea, and the abstract of judgment. (22A Ca. Jur. Criminal Law: Posttrial Proceedings § 306.)

This bill would specify that the rules of evidence apply at the hearing on eligibility. It is not entirely clear whether this means a statement in the record of conviction that is offered to prove the truth of the matter stated would have to fall within an exception to the hearsay rule in order to be admissible at the hearing. This raises a concern that parties would be required to recall witnesses from the trial to testify again at the Evidence Code section 1170.95 evidentiary hearing, even where there is a prior transcript of the trial testimony as part of the record of conviction; this may not be possible in older cases in which witnesses are no longer available.

Importantly, a criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and California Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, there is an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant and was subject to cross-examination. This exception is codified in the Evidence Code, which provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] … [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) An absent witness is not unavailable in the constitutional sense unless the prosecution has made a good faith effort to obtain their presence at the trial. (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Similarly, under the Evidence Code, a witness is unavailable when they are absent from the hearing and the proponent of their statement has been unable to procure their attendance by the court's

process despite having exercised reasonable diligence. (Evid. Code, § 240, subd. (a)(5).) There are additional reasons a court could find a witness unavailable, including if the witness is deceased or unable to attend due to physical or mental illness or infirmity, or absent and the court is unable to compel their presence, or if the witness would suffer physical or mental trauma from being required to testify, as established by a doctor/psychiatrist/psychologist. (Evid. Code, § 240, subds. (a)(3), (a)(4) & (c).)

Thus, it would appear that assuming the prosecution must prove witness unavailability in order to use prior testimony from the record of conviction, they would be able to make this showing in a number of circumstances. That being said, the author should consider clarifying this point.

9) **Raising SB 1437 on Direct Appeal**: In *Gentile*, the California Supreme Court found that the petition process set forth in Penal Code section 1170.95 is the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments. (*People v. Gentile, supra*, 10 Cal.5th at pp. 851–859.) Generally, the rule is that a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

This bill would provide that where a conviction is not final, it may be challenged on SB 1437 grounds on direct appeal from that conviction.

10) **Argument in Support**: According to the *California Public Defenders Association*, a sponsor of this bill, "For decades, under California's felony murder rule and another old doctrine known as the "natural and probable consequences doctrine," all people who committed a crime – even a misdemeanor –could be charged with murder if one participant caused the death of another. Thus, people who never killed anyone, did not aid and abet the murder, and never even intended for a death to occur could be charged with murder and get a life sentence in prison. Then in 2018, the Legislature passed SB 1437 (Skinner, 2018) which changed this archaic and unjust law. SB 1437 also allowed people who were eligible for relief under the new law to go back to court to ask to be resentenced. The passage of SB 1437 meant that people could no longer be prosecuted for murder solely because a death occurred. SB 1437 also allowed eligible people who took plea deals to apply for resentencing. Many of these pleas were to manslaughter or other charges less than murder because the District Attorney had already determined they were not culpable for murder.

"Although SB 1437 changed California's long-held and unjust homicide laws that were overly punitive to those who did not kill or intend to kill, some appellate courts have reasoned, incorrectly, that SB 1437 applies only to murder and not to attempted murder. These courts have also barred people from applying for re-sentencing. This has led to an absurd and unfair situation where people are eligible for resentencing if the victim died but are ineligible if the victim did not die. Furthermore, although SB 1437 allowed a pathway for people who took pleas deals to lesser charges, such as manslaughter, to apply for resentencing. However, the bill did not explicitly include these people for resentencing. As a result, this has led to a situation where the least culpable people are still serving decades in prison even though they should be eligible for relief.

"SB 775 clarifies existing law to include voluntary manslaughter and attempted murder convictions as eligible for relief under SB 1437. This simple reform would assist hundreds of

incarcerated people who have been deemed by the appellate courts to be excluded by the technical language of SB 1437, and the thousands of similar people who did not file petitions yet because of the court rulings. For these reasons, CPDA is proud to sponsor SB 775."

11) **Argument in Opposition**: According to the *California District Attorneys Association*, "The purpose of SB 1437 was to reduce lengthy sentences that were not commensurate with the culpability of the individual. The language of SB 1437 regarding the new requirements for imposing first degree *felony murder* liability is adopted from Penal Code Section 190.2, which in turn, derives from United States Supreme Court cases imposing limitations on punishing non-killers in felony murder cases through an Eighth Amendment analysis. The Court premised its arguments in those cases on the idea that punishing someone by death (or life without the possibility of parole) could be unconstitutionally disproportionate to the offense. The punishment for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." The punishment for second degree murder is a state prison term of 15 years to life.

"The sentences imposed for the crimes of voluntary manslaughter and attempted murder are significantly shorter than the sentences imposed for murder. The punishment for voluntary manslaughter is imprisonment for 3, 6, or 11 years. The punishment for attempted murder is imprisonment for 5, 7, or 9 years. If a jury finds a premeditation allegation to be true (which demonstrates an intent to kill and falls outside of both SB 1437 and this bill), then the punishment is life with the possibility of parole after 7 years.

"No state or federal court case has ever held that the sentences imposed for voluntary manslaughter, attempted murder, or premeditated attempted murder are "not commensurate with the culpability of the individual." Moreover, nothing in SB 1437 indicated that the sentences for the crimes of voluntary manslaughter or attempted murder were not commensurate with an individual's culpability for the crime.

"In addition to the substantive objections of this bill, there are similar logistical issues in this bill as the ones in SB 1437 that are still the subject of timely and costly litigation. The application of this bill to convictions that resulted from negotiated pleas that contain no admissible record of conviction for an evidentiary hearing is problematic.

"Additionally, the effect of a number of the procedural provisions of the bill would be to allow everyone convicted of voluntary manslaughter or attempted murder to successfully petition to have a resentencing hearing regardless of the underlying theory advanced by the prosecution. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner's ineligibility for a resentencing, this bill will effectively authorize the release of those who attempted to kill and those who played major roles in the killing of others.

"We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately, this bill falls short and creates some potentially disastrous and costly problems that render this bill unworkable."

12) **Related Legislation**: SB 300 (Cortese), of the 2020-2021 Legislative Session, would repeal the provision of law requiring punishment by death or imprisonment for LWOP for a person convicted of murder in the first degree who is not the actual killer, but acted with reckless

indifference for human life as a major participant in specified dangerous felonies. SB 300 is pending consideration on the Senate Floor.

13) **Prior Legislation**:

a) SB 1437 (Skinner), Chapter 1015, Statutes of 2018, limited liability for individuals based on a theory of first or second degree felony murder, and allowed individuals previously sentenced on a theory of felony murder to petition for resentencing if they meet specified qualifications.

b) AB 3104 (Cooper), of the 2017-2018 Legislative Session, would have limited the sentence for specified first degree murder convictions where the person is not the actual killer, but participated in specified felonies, to 25 years to life. Would specify that a person who is not the actual killer and who does not act with reckless indifference to human life and is not a major participant in the crime, but who is an accomplice in a specified felony that results in the death of a person, is guilty of second degree murder, punishable by 15 years to life. AB 3104 died on the Assembly Inactive File.

c) SB 878 (Hayden), of the 1999-2000 Legislative Session, would have required the court in a case involving felony murder with a defendant who did not physically or directly commit the murder, whether imposition of a sentence of first degree murder is proportionate to the offense committed and to the defendant's culpability in committing that offense by considering specified criteria and to state its reasons on the record. SB 878 failed passage on the Senate Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA) (Sponsor)
California Attorneys for Criminal Justice (Co-Sponsor)
ACLU California Action
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Catholic Conference
Californians for Safety and Justice
Californians United for a Responsible Budget (CURB)
Drug Policy Alliance
Ella Baker Center for Human Rights
Fresno Barrios Unidos
Friends Committee on Legislation of California
Initiate Justice
Legal Services for Prisoners With Children
National Association of Social Workers, California Chapter
Re:store Justice
San Francisco Public Defender
Smart Justice California
We the People - San Diego
Young Women's Freedom Center

Opposition

California District Attorneys Association
Los Angeles Professional Peace Officers Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego District Attorneys Association

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