California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

1020 N Ste, Room 111
(916) 319-3744
FAX: (916) 319-3745

AGENDA

Tuesday, March 23, 2021
1:30 p.m. -- State Capitol, Room 4202

Part II
Bills heard in Alphabetical Order

AB 26 (Holden) – AB 594 (McCarty)

Date of Hearing: March 23, 2021
Counsel: David Billingsley

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

AB 26 (Holden) – As Introduced December 7, 2020

As Proposed to be Amended in Committee

SUMMARY: Disqualifies 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. Requires use of force policies for law enforcement agencies to include the requirement that officers immediately report potential excessive force, and further describes the requirement to "intercede" if another officer uses excessive force. Specifically, **this bill**:

1) Specifies that policies of law enforcement agencies must require officers to immediately report potential excessive force, and to intercede when present and observing an officer using excessive force.

2) Requires policies of law enforcement agencies to, among other things, prohibit retaliation against officers that report violations of law or regulation of another officer to a supervisor, as specified, and require that an officer who fails to intercede be disciplined in the same manner as the officer who used excessive force.

3) Requires law enforcement agency policies to include procedures to prohibit an officer from training other officers for a period of at least three years from the date that an abuse of force complaint against the officer is substantiated.

4) Requires law enforcement agency policies to discipline an officer that fails to intercede when another officer commits excessive force in the same manner as the officer that used excessive force, if the officer has received training, as specified.

5) States that "excessive force" is a level of force that is not reasonably believed to be proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance.

6) Specifies that "intercede" includes, but is not limited to, physically stopping the excessive use of force, recording the excessive force and documenting efforts to intervene, efforts to deescalate the offending officer's excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer's name, unit, location, time and situation, in order to establish a duty for that officer to intervene.

7) State "retaliation" means demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resources necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty.

8) Disqualifies 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.

EXISTING LAW:

1) Requires that each law enforcement agency shall, by no later than January 1, 2021, maintain a policy that provides a minimum standard on the use of force. Each agency's policy shall include all of the following:

   a) A requirement that officers utilize de-escalation techniques, crisis intervention tactics, and other alternatives to force when feasible;

   b) A requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance;

   c) A requirement that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer;

   d) Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person;

   e) A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm;

   f) Procedures for disclosing public records, as specified;

   g) Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents;

   h) A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject;

   i) Comprehensive and specific guidelines regarding approved methods and devices available for the application of force;

j) An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased;

k) Comprehensive and specific guidelines for the application of deadly force;

l) Comprehensive and detailed requirements for prompt internal reporting and notification regarding a use of force incident, including reporting use of force incidents to the Department of Justice;

m) The role of supervisors in the review of use of force applications;

n) A requirement that officers promptly provide, if properly trained, or otherwise promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so;

o) Training standards and requirements relating to demonstrated knowledge and understanding of the law enforcement agency's use of force policy by officers, investigators, and supervisors;

p) Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical, mental, and developmental disabilities;

q) Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted;

r) Factors for evaluating and reviewing all use of force incidents;

s) Minimum training and course titles required to meet the objectives in the use of force policy; and,

t) A requirement for the regular review and updating of the policy to reflect developing practices and procedures. (Gov. Code, § 7286, subd. (b)(1)-(20).)

2) Requires the Commission on Peace Officers Standards and Training (POST) to implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force and shall also develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for use of force. The course or courses of the regular basic course for law enforcement officers and the guidelines shall include all of the following:

a) Legal standards for use of force;

b) Duty to intercede;

c) The use of objectively reasonable force;

d) Supervisory responsibilities;

e) Use of force review and analysis;

f) Guidelines for the use of deadly force;

g) State required reporting;

h) De-escalation and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence;

i) Implicit and explicit bias and cultural competency;

j) Skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues;

k) Use of force scenario training including simulations of low-frequency, high-risk situations and calls for service, shoot-or-don't-shoot situations, and real-time force option decision making;

l) Alternatives to the use of deadly force and physical force, so that de-escalation tactics and less lethal alternatives are, where reasonably feasible, part of the decision making process leading up to the consideration of deadly force;

m) Mental health and policing, including bias and stigma; and,

n) Using public service, including the rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts. (Pen. Code, § 13519.10, subd. (b)(1)-(14).)

3) 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; and,

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;

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)

4) Specifies that the following persons are disqualified from being 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).)

5) 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).)

6) 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).)

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).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In 2019, Governor Newsom signed SB 230 (Caballero) and AB 392 (Weber) requiring each law enforcement agency to provide a minimum standard on the use of force and redefine circumstances under which the use of deadly force is deemed justifiable.

   "On May 25, 2020, George Floyd was arrested for allegedly using a counterfeit bill. During the arrest, the supervising officer knelt on Floyd's neck for over eight minutes while he was handcuffed with two additional officers further restraining him. A fourth officer stood watch to ensure that the gathering crowd did not become involved.

   "During his restraint, Floyd continued to plead that he could not breathe. After nearly six minutes, Floyd became motionless. One of the officers checked his pulse and informed the supervising officer (still kneeling on Floyd's neck) that he did not feel Floyd's pulse and asked the supervising officer if Floyd should be placed on his side, to which the supervising officer replied, "no." In fact, the supervising officer kept his knee on Floyd's neck for nearly a minute after the paramedics arrived as Floyd was motionless. Floyd died at the Hennepin County Medical Center emergency room.

   "While the public was outraged by the supervising officer's disregard for Floyd's life, what was equally troubling was that the other three officers failed to stop the supervising officer, despite Minnesota's "Duty to Intervene" law.

   "Current law does not define what duty to intervene actually means. It leaves each law enforcement agency to decide as to what constitutes "intervention."

   "We are calling for responsibility and accountability. AB 26 is paramount to building public trust that has eroded between law enforcement and communities across California."

2) **Duty to Intercede When Another Officer Uses Excessive Force:** Current law specifies that every law enforcement agency have a policy that requires an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject. That requirement was established by SB 230 (Caballero), Chapter 285, Statutes of 2019.

   This bill would provide a definition of what it means to "intercede" when one officer is present and observes another officer use excessive force. This bill defines "intercede" as, including but not being limited to, "physically stopping the excessive use of force, recording the excessive force and documenting efforts to intervene, efforts to deescalate the offending officer's excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer's name, unit, location, time and

situation, in order to establish a duty for that officer to intervene."

This bill would also modify the circumstances under which an officer is required to intercede by deleting existing language which specifies that an officer must intercede when observing another officer using "force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject."

This bill would make the make the requirement to intercede when one officer observes an officer "using excessive" without any other qualifiers. Arguably this expands the circumstances under which an officer would be required to intervene, but that is not clear. Generally, one would look at the circumstances known to the person in the moment in determining whether a person acted reasonably. The bill deletes the modifier of "clearly" using excessive force. Perhaps that expands the circumstances in which an officer should intervene. Generally, one would expect a court to default to a standard of whether an officer under the circumstances to reasonably believed that his or her fellow officer was using excessive force.

3) **Consequences for Not Interceding and Failing to Report Excessive Force:** This bill would create a number of negative consequences for an officer who fails to intercede when another officer is using excessive force, or fails to report use of excessive force. In addition for any regular punishment that could be applied for failure to comply with agency policy, officer would face the following consequences under this bill:

   a) Any peace officer who has been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or death of a member of the public or to have failed to intercede in that incident are disqualified from holding office as a peace officer or being employed as a peace officer; and,

   b) A requirement that an officer be disciplined in the same manner as the officer that committed the excessive force if they fail to intervene.

4) **Final Report of the President's Task Force on 21st Century Policing (2015):** The Task Force was Co-Chaired by Charles Ramsey, Commissioner, Philadelphia Police Department and Laurie Robinson, Professor, George Mason University. The nine members of the task force included individuals from law enforcement and civil rights communities. The stated goal of the task force was ". . . to strengthen community policing and trust among law enforcement officers and the communities they served, especially in light of recent events around the county that have underscored the need for and importance of lasting collaborative relationships between local police and the public." (Final Report of the President's Task Force on 21st Century Policing (2015), p. v.) Based on based on their investigation, the Task Force provided thoughts and recommendations for law enforcement to foster a culture of transparency.

   Recommendation 2.15: The U.S. Department of Justice, through the Office of Community Oriented Policing Services, should partner with the International Association of Directors of Law Enforcement Standards and Training (IADLEST) to expand its National Decertification Index to serve as the National Register of Decertified Officers

with the goal of covering all agencies within the United States and its territories.

The National Decertification Index is an aggregation of information that allows hiring agencies to identify officers who have had their license or certification revoked for misconduct. It was designed as an answer 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." (Final Report of the President's Task Force on 21st Century Policing (2015), p. 29-30.)

California law currently provides a list of circumstances under which a person is disqualified from being an officer. Those circumstances are primarily related to the person being convicted of a felony. This bill would add to that list by disqualifying an peace officer when their employing agency makes specific findings of misconduct regarding use of excessive force or failure to intervene when excessive force is used. The practical effect of disqualification is the same as decertification. This bill would not provide a process for officers disqualified in California to be included the national decertification database and does not seek to address any other officer misconduct for which disqualification might be appropriate.

5) **Disqualification of an Individual to be a Peace Officer Based on a Disciplinary Hearing Using a Preponderance of the Evidence Standard:** This bill would disqualify 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. That disqualification would be a denial of an individual's ability to engage in their profession as a police officer and is similar in effect to the suspension of other professional licenses. It is likely that such disqualification would implicates the constitutional consideration of the officer's right to due process of law.

"The Federal Due Process Clause imposes constraints on governmental decisions that deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments." (*Mathews v. Eldridge* (1976) 424 US 319, 331.)

One factor in evaluating whether or not due process is met is evaluating the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional safeguards. *People v. Ramirez*, 25 Cal. 3d 260, 268-269. The higher the burden of proof to revoke a license, the less likely that there is an "erroneous" deprivation of the ability of an individual to pursue a profession.

The case of *Ettinger v. Bd. of Med. Quality Assurance* (1982), 135 Cal. App. 3d 853, 856, held that the appropriate evidentiary standard to revoke or suspend a doctor's license to practice medicine was by clear and convincing evidence. In reaching that holding, the court discussed the purpose revoking a doctor's license. "Since it is apparent that the underlying purpose of disciplining both attorneys and physicians is protection of the public, it would be anomalous to require a higher degree of proof in disciplinary hearings involving attorneys or real estate agents than in hearings involving physicians. Accordingly, we hold that the proper standard of proof in an administrative hearing to revoke or suspend a doctor's license should be *clear and convincing proof to a reasonable certainty* and not a mere

preponderance of the evidence."

The court went on to say, "It seems only logical to require a higher standard of proof when dealing with revocation or discipline of a professional licensee as opposed to mere termination of state employment. The former affects one's right to a specific professional employment, while the latter involves only the right to be employed by a specific employer. It is the totality of professional employment opportunity involving vested interest rights which requires the higher standard." *Id.* at 857.

The administrative disciplinary proceedings generally used by law enforcement agencies use a preponderance of the evidence standard in evaluating whether a peace officer has engaged in misconduct. Under this bill, an administrative finding (preponderance of the evidence) that the officer either used excessive force that resulted in great bodily injury or the death, or that the officer failed to intercede in that incident, would result in permanent disqualification. That raises the question of whether the peace officer disqualification criteria described in this bill are consistent with due process requirements.

6) **Prohibition on Retaliation** This bill is intended to provide an officer that intervenes in the use of excessive force or reports excessive force protection from being retaliated against by the agency that employs them, as well as fellow officers.

   The bill defines "retaliation" as a "demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resourced necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty."

   The bill prohibits retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

7) **Argument in Support**: According to the *Los Angeles Board of Supervisors*, "The County's Office of the Public Defender states that AB 26 would increase accountability of officers and law enforcement agencies, establish well-defined guidelines for officers who witness excessive force to intercede, and add disqualifications from being a peace officer to existing law. The County's Office of the Alternate Public Defender indicates that AB 26 would promote the use of de-escalation techniques, as well as help to prevent the re-hiring of officers found by their employer to have used excessive force that caused great bodily injury or death or to have failed to intercede in such incidents. The County's Office of Inspector General states that public and law enforcement agencies are best served when training is evidence-based, such as the Active Bystandership for Law Enforcement (ABLE) Project."

8) **Argument in Opposition**: According to the *California Association of Highway Patrolmen (CAHP)*, "In 2019, the CAHP was a part of a working group that negotiated issues that made comprehensive changes in the area of use of force. In that legislation, we created a mandate that an officer intercede when they feel another officer is using excessive force. The new law also requires an officer to report what they believe to be excessive force to the department. AB 26 not only addresses those issues again, but redefines excessive force. This legislation also states that if an officer fails to intercede, that they be disciplined in the same matter as the officer who used the excessive force. Oftentimes, when an officer is not the first, or even

second, person to arrive on the scene, they will observe actions being taken with a suspect without knowing what led up to the actions they are observing. For example, an officer may arrive at a scene and witness two or three officers wrestling or in a fight with a suspect on the ground. The arriving officer may not know that the suspect has a weapon, or has potentially used, or attempted to use, that weapon on the officers prior to their arrival on the scene. Without the arriving officer having full knowledge of the situation, that officer's intercedence could be dangerous to both the officers and the public.

"Finally, this bill eliminates a national standard relating to "an objectively reasonable officer" and replaces that with a level of force that is "not reasonably believed" or "reasonably perceived level of actual or threatened resistance." These terms are not defined in the legislation and, again, change the standard negotiated with the leadership of both houses a little over a year ago."

9) Related Legislation:

a) AB 931 (Villapadua), would require every law enforcement officer to complete an updated course of instruction on the duty to intercede every 2 years. AB 931 is awaiting hearing in the Assembly Public Safety Committee.

b) AB 931 is awaiting hearing in the Assembly Public Safety Committee.

c) AB 60 (Salas), would create a process to decertify police officers. AB 60 is set for hearing in the Assembly Public Safety Committee on April 6, 2021.

d) SB 2 (Bradford), would create a process to decertify police officers and expand the scope of the Bane Act. SB 2 is in the Senate Rules Committee.

e) SB 16 (Skinner), would make more incidents of police misconduct available to the public. SB 16 is set for hearing on March 23, 2021, in the Senate Judiciary Committee.

10) Prior Legislation:

a) AB 1022 (Holden), of the 2019-2020 Legislative Session, would have clarified and strengthened policies related to law enforcement officers' duty to intervene when excessive force is used. AB 1022 was held on the Senate Appropriations Suspense File.

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

c) 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.

d) SB 230 (Caballero), Chapter 285, Statutes of 2019, requires each law enforcement agency to maintain a policy that provides guidelines on the use of force, utilizing

deescalation techniques and other alternatives to force when feasible, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents, among other things.

e) 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.

f) AB 2327 (Quirk), Chapter 966, Statutes of 2018, requires a peace officer seeking employment with a law enforcement agency to give written permission for the hiring law enforcement agency to view his or her general personnel file and any separate disciplinary file. Requires each law enforcement agency to 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.

g) AB 619 (Weber), of the 2015-2016 Legislative Session, would have required law enforcement agencies to report use of force incidents to the Attorney General (AG) and would have required the AG to annually issue a report containing this information. AB 619 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Activesgv, a Project of Community Partners
American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Teachers Association
Consumer Attorneys of California
County of Los Angeles Board of Supervisors
Health Access California
Indivisible Claremont / Inland Valley
Los Angeles County Office of Education
NAACP Pasadena
Oakland Privacy
San Francisco Public Defender

Oppose

Association for Los Angeles Deputy Sheriffs
California Association of Highway Patrolmen
California Correctional Peace Officers Association (CCPOA)
California Peace Officers Association
California Police Chiefs Association
California State Sheriffs' Association
Deputy Sheriffs Association of San Diego
Los Angeles County Sheriff's Department
Los Angeles Police Protective League
Peace Officers Research Association of California (PORAC)

Riverside Sheriffs' Association
San Francisco Police Officers Association

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

AMENDMENTS TO ASSEMBLY BILL NO. 26

Amendment 1
In the title, in line 2, strike out "and to add Section 34 to the Penal Code,"

Amendment 2
On page 8, strike out lines 18 to 38, inclusive, and insert:

SEC. 3. 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.

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PROPOSED AMENDMENTS TO ASSEMBLY BILL NO. 26

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL No. 26

Introduced by Assembly Member Holden

December 7, 2020

An act to amend Sections 1029 and 7286 of the Government Code, ~~and to add Section 34 to the Penal Code,~~ relating to peace officers.

Amendment 1

LEGISLATIVE COUNSEL'S DIGEST

AB 26, as introduced, Holden. Peace officers: use of force.

(1) Existing law requires each law enforcement agency, on or before January 1, 2021, to maintain a policy that provides a minimum standard on the use of force. Existing law requires that policy, among other things, to require that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be unnecessary, and to require that officers intercede when present and observing another officer using force that is clearly beyond that which is necessary, as specified.

This bill would require those law enforcement policies to require those officers to immediately report potential excessive force, and to intercede when present and observing an officer using excessive force, as defined. The bill would additionally require those policies to, among other things, prohibit retaliation against officers that report violations of law or regulation of another officer to a supervisor, as specified, and to require that an officer who fails to intercede be disciplined in the same manner as the officer who used excessive force. By imposing additional duties on local agencies, this bill would create a state-mandated local program.

(2) Existing law disqualifies specified persons from being a peace officer, including, among others, any person convicted of a felony.

This bill would also disqualify 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.

~~(3) Existing law makes all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, principals in that crime.~~

~~This bill would make a peace officer who is present and observes another peace officer using excessive force, and fails to report the use of excessive force to a superior officer, an accessory in any crime committed by the other officer during the use of excessive force. By creating a new crime, this bill would create a state-mandated local program.~~

~~(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.~~

~~With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.~~

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

Page 2

SECTION 1. Section 1029 of the Government Code is amended to read:

Page 2

1029. (a) Except as provided in subdivision (b), (c), or (d), each of the following persons is disqualified from holding office as a peace officer or being employed as a peace officer of the state, county, city, city and county or other political subdivision, whether with or without compensation, and is disqualified from any office or employment by the state, county, city, city and county or other political subdivision, whether with or without compensation, which confers upon the holder or employee the powers and duties of a peace officer:

(1) Any person who has been convicted of a felony.

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

(3) Any person who, after January 1, 2004, 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, pursuant to subdivision (b) of Section 17 of the Penal Code, the court declares the offense to be a misdemeanor or the offense becomes a misdemeanor by operation of law.

(4) Any person who has been charged with a felony and adjudged by a superior court to be mentally incompetent under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code.

(5) Any person who has been found not guilty by reason of insanity of any felony.

(6) Any person who has been determined to be a mentally disordered sex offender pursuant to Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(7) Any person adjudged addicted or in danger of becoming addicted to narcotics, convicted, and committed to a state institution as provided in Section 3051 of the Welfare and Institutions Code.

(8) Any person who has been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or the death of a member of the public or to have failed to intercede in that incident, as required pursuant to paragraph (9) of subdivision (b) of Section 7286.

(b) (1) A plea of guilty to a felony pursuant to a deferred entry of judgment program as set forth in Sections 1000 to 1000.4,

Page 3 inclusive, of the Penal Code shall not alone disqualify a person from being a peace officer unless a judgment of guilty is entered pursuant to Section 1000.3 of the Penal Code.

(2) A person who pleads guilty or nolo contendere to, or who is found guilty by a trier of fact of, an alternate felony-misdemeanor drug possession offense and successfully completes a program of probation pursuant to Section 1210.1 of the Penal Code shall not be disqualified from being a peace officer solely on the basis of the plea or finding if the court deems the offense to be a misdemeanor or reduces the offense to a misdemeanor.

Page 4 (c) Any person who has been convicted of a felony, other than a felony punishable by death, in this state or any other state, or who has been convicted of any offense in any other state which would have been a felony, other than a felony punishable by death, if committed in this state, and who demonstrates the ability to assist persons in programs of rehabilitation may hold office and be employed as a parole officer of the Department of Corrections or the Department of the Youth Authority, or as a probation officer in a county probation department, if the person has been granted a full and unconditional pardon for the felony or offense of which the person was convicted. Notwithstanding any other provision of law, the Department of Corrections or the Department of the Youth Authority, or a county probation department, may refuse to employ that person regardless of the person's qualifications.

(d) This section does not limit or curtail the power or authority of any board of police commissioners, chief of police, sheriff, mayor, or other appointing authority to appoint, employ, or deputize any person as a peace officer in time of disaster caused by flood, fire, pestilence or similar public calamity, or to exercise any power conferred by law to summon assistance in making arrests or preventing the commission of any criminal offense.

(e) This section does not prohibit any person from holding office or being employed as a superintendent, supervisor, or employee having custodial responsibilities in an institution operated by a probation department, if at the time of the person's hire a prior conviction of a felony was known to the person's employer, and the class of office for which the person was hired was not declared by law to be a class prohibited to persons convicted of a felony, but as a result of a change in classification, as provided by law,

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the new classification would prohibit employment of a person convicted of a felony.

SEC. 2. Section 7286 of the Government Code is amended to read:

7286. (a) For the purposes of this section:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm.

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(2) "Excessive force" means a level of force that is found to have violated Section 835a of the Penal Code, the requirements on the use of force required by this section, or any other law, statute, regulation, or policy of the employing law enforcement agency.

(3) "Feasible" means reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.

(4) "Intercede" includes, but is not limited to, physically stopping the excessive use of force, recording the excessive force and documenting efforts to intervene, efforts to deescalate the offending officer's excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer's name, unit, location, time, and situation, in order to establish a duty for that officer to intervene.

(5) "Law enforcement agency" means any police department, sheriff's department, district attorney, county probation department, transit agency police department, school district police department, the police department of any campus of the University of California, the California State University, or community college, the Department of the California Highway Patrol, the Department of Fish and Wildlife, and the Department of Justice.

(6) "Retaliation" means demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resources necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty.

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(b) Each law enforcement agency shall, by no later than January 1, 2021, maintain a policy that provides a minimum standard on the use of force. Each agency's policy shall include all of the following:

(1) A requirement that officers utilize deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible.

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(2) A requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance.

(3) A requirement that officers immediately report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer.

(4) A prohibition on retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

(5) Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.

(6) A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.

(7) Procedures for disclosing public records in accordance with Section 832.7.

(8) Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents.

(9) A requirement that an officer intercede when present and observing another officer using excessive force.

(10) Comprehensive and specific guidelines regarding approved methods and devices available for the application of force.

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(11) An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased.

(12) Comprehensive and specific guidelines for the application of deadly force.

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(13) Comprehensive and detailed requirements for prompt internal reporting and notification regarding a use of force incident, including reporting use of force incidents to the Department of Justice in compliance with Section 12525.2.

(14) The role of supervisors in the review of use of force applications.

(15) A requirement that officers promptly provide, if properly trained, or otherwise promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so.

(16) Training standards and requirements relating to demonstrated knowledge and understanding of the law enforcement agency's use of force policy by officers, investigators, and supervisors.

(17) Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical, mental, and developmental disabilities.

(18) Procedures to prohibit an officer from training other officers for a period of at least three years from the date that an abuse of force complaint against the officer is substantiated.

(19) A requirement that an officer that has received all required training on the requirement to intercede and fails to act pursuant to paragraph (9) be disciplined in the same manner as the officer that committed the excessive force.

(20) Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.

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(21) Factors for evaluating and reviewing all use of force incidents.

(22) Minimum training and course titles required to meet the objectives in the use of force policy.

(23) A requirement for the regular review and updating of the policy to reflect developing practices and procedures.

(c) Each law enforcement agency shall make their use of force policy adopted pursuant to this section accessible to the public.

(d) This section does not supersede the collective bargaining procedures established pursuant to the Myers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4), the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512)

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of Division 4), or the Higher Education Employer-Employee Relations Act (Chapter 12 (commencing with Section 3560) of Division 4).

~~SEC. 3. Section 34 is added to the Penal Code, to read:~~

~~34. A peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who is present and observes another peace officer using excessive force, and fails to report the excessive use of force to a superior officer, is an accessory under Section 33 in any crime committed by the other officer during the use of excessive force.~~

~~SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~

~~However, if the Commission on State Mandates determines that this act contains other 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.~~

\+ *SEC. 3. 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.*

Amendment 2

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Date of Hearing: March 23, 2021
Counsel: Nikki Moore

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

AB 331 (Jones-Sawyer) – As Amended March 16, 2021

SUMMARY: Extends the sunset provision for the crime of organized retail theft to January 1, 2026, and also extends the existence of a taskforce established by the California Highway Patrol to analyze organized retail theft and vehicle burglary and assist local law enforcement in counties identified as having elevated property crime.

EXISTING LAW:

1) Establishes that a person who commits any of the following acts is guilty of organized retail theft, and shall be punished as specified:

   a) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value.

   b) Acts in concert with two or more persons to receive, purchase, or possess merchandise as described, knowing or believing it to have been stolen.

   c) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft.

   d) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of the acts described, or any other statute defining theft of merchandise. (Pen. Code, § 490.4, subd. (a)(1)-(4).)

2) Provides that organized retail theft is punishable as follows:

   a) If violations of paragraph (1), (2), or (3) of subdivision (a) are committed on two or more separate occasions within a 12-month period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that 12-month period exceeds nine hundred fifty dollars ($950), the offense is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.

   b) Any other violation of paragraph (1), (2), or (3) of subdivision (a) that is not described in paragraph (1) of this subdivision is punishable by imprisonment in a county jail not exceeding one year.

   c) A violation of organized retail theft by act of recruiting, coordinating, organizing, supervising, directing, managing, or financing another to commit acts of organized retail

theft is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170. (Pen. Code, § 490.4, subd. (b)(1)-(3).)

3) States that, for the purpose of determining whether the defendant acted in concert with another person or persons in any proceeding, the trier of fact may consider any competent evidence, including, but not limited to, all of the following:

   a) The defendant has previously acted in concert with another person or persons in committing acts constituting theft, or any related offense, including any conduct that occurred in counties other than the county of the current offense, if relevant to demonstrate a fact other than the defendant's disposition to commit the act;

   b) That the defendant used or possessed an artifice, instrument, container, device, or other article capable of facilitating the removal of merchandise from a retail establishment without paying the purchase price and use of the artifice, instrument, container, or device or other article is part of an organized plan to commit theft; or,

   c) The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption and the property is intended for resale. (Pen. Code, § 490.4, subd. (c).)

4) States that, in a prosecution under this section, the prosecutor shall not be required to charge any other coparticipant of the organized retail theft. (Pen. Code, § 490.4, subd. (d).)

5) Provides that, upon conviction of an offense under this section, the court shall consider ordering, as a condition of probation, that the defendant stay away from retail establishments with a reasonable nexus to the crime committed. (Pen. Code, § 490.4, subd. (e).)

6) The Department of the California Highway Patrol shall, in coordination with the Department of Justice, convene a regional property crimes task force to assist local law enforcement in counties identified by the Department of the California Highway Patrol as having elevated levels of property crime, including, but not limited to, organized retail theft and vehicle burglary. The task force shall provide local law enforcement in the identified region with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, as determined to be appropriate by the Commissioner of the California Highway Patrol in consultation with task force members. (Pen. Code, § 13899.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "In 2018, when the Legislature passed our organized retail theft bill, we crafted it in such a way that ensured sophisticated crime rings that took advantage of loopholes in state law were being targeted as opposed to theft for personal use simply because someone was hungry. Since then, while we have taken great strides in recovering millions of dollars and busting large operations through collaboration with law enforcement and the CHP task force, organized retail crime continues to be a pervasive problem according to a 2020 study by the National Retail Federation.

"At a time when businesses are already being hurt by the pandemic, it is important we maintain this effective tool. AB 331 removes the existing sunset provision for the crime of organized retail theft and continues to equip businesses and law enforcement with a vital tool needed to address this ongoing issue."

2) **Effect of Creating Crime of Organize Retail Theft**: According to the author, "Adopted in 2019, the crime of organized retail theft has been used to bust retail theft rings throughout the state. In September of this 2020, sheriffs arrested five people and recovered more than $8 million in stolen property in San Mateo. In November, the Ventura County Sheriffs arrested two men on suspicion of organized retail theft, among other crimes, and recovered nearly $10,000 in stolen goods.

"The legislation that created the crime of organized retail theft also created the California Highway Patrol (CHP) task force to collaborate with the Department of Justice to address the crime. In December of 2020, local law enforcement in cooperation with CHP officers recovered $73,000 in stolen merchandise in 'Operation Patrona' and another $212,000 in stolen and fraudulently purchased goods in 'Operation Liquidator' with both arrests taking place in Sacramento. Even as recently as February of 2021, CHP investigators arrested three people in connective with a massive retail theft operation out of Reno and recovered more than $150,000 in stolen merchandise along with $7,000 in cash."

3) **Sunset Provision and Urgency Clause**: AB 1065 (Jones-Sawyer) which established organized retail theft as a crime was initially passed in 2018, and included a sunset provision of January 1, 2021. The sunset was extended to July 1, 2021 in a budget bill last year. This bill includes an urgency clause in order to allow the bill to take effect immediately, so that this bill can be passed prior to the expiration of the sunset date. This bill will extend the sunset date for four years to January 1, 2026.

4) **Argument in Support**: According to the *California Retailers Association*, "[Organized retail crime] is defined as theft or fraudulent activity conducted with the intent to convert illegally obtained merchandise, cargo, cash, or cash equivalent into financial gain, often through subsequent online or offline sales. Organized retail crime typically involves a criminal enterprise that organizes multiple theft rings at a number of retail stores and employs a fencing operation to sell the illegally obtained goods for financial gain. According to a recent survey by the National Retail Federation (NRF), organized retail crime (ORC) is a $30 billion problem nationwide and rising. That survey also identified Los Angeles, San Francisco, and Sacramento among the top ten metropolitan areas for ORC in the country.

"ORC is also harming our communities as these networks recruit minors, homeless persons, and others to steal from retail stores. The organized retail theft statute enables law enforcement to target the leadership of these enterprises with severe criminal sanctions. For instance, in the recent breakup of a major ORC ring in the Bay Area that had recruited numerous individuals, five ringleaders were charged under §490.4. That investigation also netted nearly $10 million in assets recovered onsite and disrupted an estimated $50 million operation. Combined with effective enforcement, this law is a vital tool in combating ORC and must be extended."

5) **Related Legislation**: SB 82 (Skinner) would provide that theft of property that is valued under $950 where specified circumstances are not present to be charged as a misdemeanor.

6) **Prior Legislation**: AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, established the crime of organized retail theft, and included a sunset date of January 1, 2021.

REGISTERED SUPPORT / OPPOSITION:

Support

California Business Properties Association
California District Attorneys Association
California Peace Officers Association
California Police Chiefs Association
California Retailers Association
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Elk Grove Chamber of Commerce
Folsom Chamber of Commerce
Home Depot; the
Peace Officers Research Association of California (PORAC)
Rancho Cordova Chamber of Commerce
Roseville Area Chamber of Commerce
Ucan Chambers of Commerce
Yuba Sutter Chamber of Commerce

Opposition

None

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

Date of Hearing: March 23, 2021
Chief Counsel: Gregory Pagan

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

AB 483 (Jones-Sawyer) – As Amended March 11, 2021

SUMMARY: Grants peace officer status to security and safety officers at the California Science Center at Exposition Park, and requires that these officers complete the Commission on Peace Officer Standards and Training (POST) certified regular basic training course.

EXISTING LAW:

1) Requires that any person or persons desiring peace officer status under Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 who, on January 1, 1990, were not entitled to be designated as peace officers under that chapter shall request the Commission on Peace Officers Standards and Training (POST) to undertake a feasibility study regarding designating that person or persons as peace officers. The request and study shall be undertaken in accordance with regulations adopted by POST. POST may charge any person, with specified exceptions, requesting a study, a fee, not to exceed the actual cost of undertaking the study. (Pen. Code, § 13540, subd. (a).)

2) Provides that any study undertaken under this article shall include, but shall not be limited to, the current and proposed duties and responsibilities of persons employed in the category seeking the designation change, their field law enforcement duties and responsibilities, their supervisory and management structure, their proposed training methods and funding sources and the extent to which their current duties and responsibilities require additional peace officer powers and authority. (Pen. Code, § 13540, subd. (b).)

3) Defines "independent institutions of higher education" as those nonpublic higher education institutions that grant under graduate degrees, graduate degrees, or both, and are formed as nonprofit corporations in this state and are accredited by an agency recognized by the United States Department of Education (USDOE). (Ed. Code § 66010, subd. (b).)

4) Provides that every peace officer shall satisfactorily complete an introductory course of training prescribed by the Commission on Peace Officer Standards and Training (POST) and that after July 1, 1989 satisfactory completion of the course shall be demonstrated by passage of an appropriate examination developed or approved by POST. (Pen. Code. § 832, subd. (a).)

5) Provides that prior to the exercise of peace officer powers, every peace officer shall have satisfactorily completed the POST course. (Pen. Code, § 832, subd. (b).)

6) Provides that a person shall not have the powers of a peace officer until he or she has satisfactorily completed the POST course. (Pen. Code, § 832, subd. (c).)

7) Provides that the following are peace offices, who may carry firearms only if authorized and under terms and conditions specified by their employing agency, whose authority extends to any place in California for the purpose of performing their primary duty, or when making an arrest for a public offense where there is immediate danger to a person or property or to prevent the perpetrator's escape, as specified, or during a state of emergency, as specified:

   a) Members of the San Francisco Bay Area Rapid Transit District Police Department if their primary duty is enforcement of the law in or about property owned, operated or administered by the district or when performing a necessary duty with respect to patrons, employees and properties of the district;

   b) Harbor or port police if their primary duty is enforcement of law in or about property owned, operated or administered by harbor or port or when performing a necessary duty with respect to patrons, employees and properties of the harbor or port;

   c) Transit police officers or peace offices of a county, city, transit development board or district if the primary duty is the enforcement of the law in or abut property owned, operated or administered by the employing agency or when performing a necessary duty with respect to patrons, employees and properties of the employing agency;

   d) Persons employed as airport law enforcement officers by a city, county or district operating the airport or a joint powers agency operating the airport if their primary duty is the enforcement of the law in or about property owned, operated and administered by the employing agency or when performing a necessary duty with respect to patrons, employees and properties of the employing agency; and,

   e) Railroad police officers commissioned by the Governor if their primary duty is the enforcement of the law in or about property owned, operated or administered by the employing agency or when performing necessary duties with respect to patrons, employees and properties of the employing agency. (Penal Code Section 830.33.)

8) Provides that numerous types of publicly employed security officers are granted the powers of arrest of a peace officer although they are not peace officers. These persons may exercise the powers of arrest of a peace officer, as specified, during the course and within the scope of their employment if they successfully complete a course in the exercise of those powers, as specified, which has been certified by POST. Persons currently granted such powers are:

   a) Persons designated by a cemetery authority, as specified;

   b) Persons regularly employed as security officers for independent institutions of higher education, as specified, if the institution has concluded a Memorandum of Understanding (MOU) permitting the exercise of that authority with the sheriff or the chief of police within whose jurisdiction the institution lies;

   c) Persons regularly employed as security officers for health facilities, as specified, that are owned and operated by cities, counties, and cities and counties if the facility has concluded a MOU permitting the exercise of that authority with the sheriff or the chief of police within whose jurisdiction the facility lies;

d) Employees or classes of employees of the California Department of Forestry and Fire Protection (CDFFP) designated by the CDFFP Director, provided that the primary duty of the employee shall be the enforcement of the law, as specified;

e) Persons regularly employed as inspectors, supervisors, or security officers for transit districts, as specified, if the district has concluded a MOU permitting the exercise of that authority with, as applicable, the sheriff, the chief of police, or the Department of the California Highway Patrol within whose jurisdiction the district lies;

f) Non-peace officers regularly employed as county parole officers, as specified;

g) Persons appointed by the Executive Director of the California Science Center, as specified; and,

h) Persons regularly employed as investigators, as specified, by the Department of Transportation for the City of Los Angeles and designated by local ordinance as public officers to the extent necessary to enforce laws related to public transportation and authorized by a MOU with the chief of police permitting the exercise of that authority. (Pen. Code, § 830.7.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 2891 improves public safety at the California Science Center, in my district, by providing their security officers peace officer status, recognizing the responsibility they already have to act as the primary security personnel for the Center and honors the Memorandum of Understanding that the California Statewide Law Enforcement Association entered into with the state. Museum Security Officers at the Science Center are responsible for keeping visitors, including the 350,000 children and students, safe. It only makes sense that we honor the Memorandum of Understanding, and vest Museum Officers in my district with the title of peace officer, which they have already been living up to."

2) **POST Feasibility Study**: In 1989, SB 353 (Presley), Chapter 1165, Statutes of 1989, was introduced as a result of interim hearings of the Senate Judiciary Subcommittee on Corrections and Law Enforcement Agencies. SB 353 regrouped peace officer categories according to the nature of their jurisdiction rather than the scope of their authority. SB 353 also required a POST review of all classification requests prior to legislative consideration of granting peace officer status in the future, or where there is a request to change peace officer designation or status.

   Pursuant to SB 353, Penal Code Section 13540 provides that POST may charge a fee to the person or entity requesting a feasibility study. The study must be completed within 18 months and include a review of the proposed duties and responsibilities of the person employed in the category seeking peace officer designation. (Penal Code Sections 13541 and 13542.)

It is a general rule that one legislative body cannot limit or restrict the power of subsequent Legislatures, and the act of one Legislature does not bind its successors (see *In re Collie* (1952) 38 Cal.2d 396, 398). Thus a statute purporting to condition future legislative action on compliance with conditions in that statute may be superseded by subsequent contrary legislative action. Therefore, the present Legislature, if it so chooses, need not comply with the Penal Code Section 13540 POST feasibility study requirement.

3) **MOU Statement**:

The 2019 MOU states: "The State of California and the California Science Center agree to support legislation and any necessary SPB Board Item(s) to reclassify and/or reassign the Museum Security Officers and Supervising Museum Security Officers at the California Science Center to Law Enforcement classifications." It also states a list of peace officer protective equipment that the state will provide the museum security officer with including [1]

This bill makes a statutory change to make the security officers at the California Exposition Park peace officers, codifying and honoring the MOU statement.

4) **Prior Legislation**:

a) AB 2891 (Jones-Sawyer) of the 2020 Legislative Session was almost identical to this bill in that it made security officers at California Science Center peace officers. AB 2891 was held on the Senate Appropriations suspense file.

b) AB 2361 (Jones-Sawyer), Chapter 336, Statutes of 2016, allowed a security officer employed by an independent institution of higher learning to be deputized or appointed as a reserve deputy or reserve officer by the sheriff or chief of police of the jurisdiction in which the institution is located.

5) **Argument in Support**: According to the *California Statewide Law Enforcement Association*, "AB 483 will codify an agreement made in a 2019 Memorandum of Understanding between the CSLEA, Bargaining Unit 7, and the State of California. This simple fix is necessary to ensure the Museum Security Officers are granted full peace officer authority."

REGISTERED SUPPORT / OPPOSITION:

Support

California Statewide Law Enforcement Association.
Peace Officers' Research Association of California

Opposition

None

Analysis Prepared by: Gregory Pagan / PUB. S. / (916) 319-3744

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[1] https://cslea.com/wp-content/uploads/2020/02/mou-20190701-20230701-bu07.pdf

Date of Hearing: March 23, 2021
Counsel: Cheryl Anderson

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

AB 256 (Kalra) – As Amended March 16, 2021

SUMMARY: Makes the California Racial Justice Act of 2020 (CRJA), which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin, applicable to cases in which judgment was entered prior to January 1, 2021, and makes other technical changes. Specifically, **this bill**:

1) Deletes provisions making the CRJA applicable only prospectively to cases in which judgment had not been entered prior to January 1, 2021, and makes the CRJA applicable to all cases regardless of when judgment was entered.

2) Deletes the requirement that the court vacate the conviction and sentence and find that the conviction is legally invalid before modifying a judgment to impose an appropriate remedy where the violation of the prohibition is based on seeking or obtaining more serious charges or convictions based on race, ethnicity, or national origin.

3) Modifies the provision regarding disclosure to the defense of records relevant to a CRJA violation to apply to records that are not privileged. Upon a showing of good cause, the court may permit the prosecution to redact information prior to disclosure.

EXISTING LAW:

1) Establishes the CRJA which prohibits the state from seeking or obtaining a criminal conviction or seeking, obtaining or imposing a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

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

   b) During the trial, in a court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful, except as specified;

   c) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's

race, ethnicity, or national origin in the county where the convictions were sought or obtained;

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

e) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in the county where the sentence was imposed. (Pen. Code, § 745, subd. (a).)

2) States that a defendant may file a motion in the trial court, or if judgement has been imposed, may file a petition for writ of habeas corpus or a motion to vacate the conviction or sentence in a court of competent jurisdiction alleging a violation of the CRJA. (Pen. Code, § 745, subd. (b).)

3) States that if a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of the CRJA, the court shall hold a hearing. (Pen. Code, § 745, subd. (c).)

4) Provides that at the hearing, either party may present evidence, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent investigator. (Pen. Code, § 745, subd. (c)(1).)

5) States the defendant must prove the violation by a preponderance of the evidence. (Pen. Code, § 745, subd. (c)(2).)

6) Requires the court to make findings on the record at the conclusion of the hearing. (Pen. Code, § 745, subd. (c)(3).)

7) Provides that a defendant may file a motion requesting disclosure of all evidence relevant to a potential violation of the CRJA that is in the possession or control of the state. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact information prior to disclosure. (Pen. Code, § 745, subd. (d).)

8) States that, notwithstanding any other law, except for an initiative approved by the voters, if the court finds by a preponderance of evidence a violation of the CRJA, the court shall impose a remedy specific to the violation found from a specified list of remedies. (Pen. Code, § 745, subd. (e).)

9) Provides that before a judgment has been entered, the court may declare a mistrial if requested by the defendant, discharge the jury panel and empanel a new jury, or, in the

interests of justice, the court may dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges. (Pen. Code, § 745, subd. (e)(1).)

10) Provides that when judgement has been entered, the following remedies apply:

   a) If the court finds that the conviction was sought or obtained in violation of the CRJA, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with the CRJA;

   b) If the court finds the violation was based only on the defendant being charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins, and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred, except that the court shall not impose a sentence greater than that previously imposed; and,

   c) If the court finds that only the sentence was sought or obtained in violation of the CRJA, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence no greater than the sentence previously imposed. (Pen. Code, § 745, subd. (e)(2).)

11) Prohibits imposition of the death penalty where the court finds a violation of the CRJA. (Pen. Code, § 745, subd. (e)(3).)

12) Provides that a court is not foreclosed from imposing any other remedies available under the United States Constitution, the California Constitution, or any other law. (Pen. Code, § 745, subd. (e)(4).)

13) Specifies that these provisions apply to adjudications and dispositions in the juvenile delinquency system. (Pen. Code, § 745, subd. (f).)

14) Specifies that these provisions do not prevent the prosecution of hate crimes. (Pen. Code, § 745, subd. (g).)

15) Defines "more frequently sought or obtained" or "more frequently imposed" as statistical evidence or aggregate data that demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated and the prosecution cannot establish race-neutral reasons for the disparity. (Pen. Code, § 745, subd. (h)(1).)

16) Defines "prima facie showing" as meaning that the defendant produces facts that, if true, establish a substantial likelihood that a violation of the CRJA occurred, as specified. (Pen. Code, § 745, subd. (h)(2).)

17) Defines "racially discriminatory language" as meaning language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity or national

origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory. (Pen. Code, § 745, subd. (h)(3).)

18) Defines "state" as including the Attorney General, a district attorney, or a city prosecutor. (Pen. Code, § 745, subd. (h)(4).)

19) States that a defendant may share a race, ethnicity, or national origin with more than one group and may aggregate data among groups to demonstrate a violation of the prohibition. (Pen. Code, § 745, subd. (i).)

20) Applies the CRJA prospectively to cases in which a judgment has not been entered prior to January 1, 2021. (Pen. Code, § 745, subd. (j).)

21) States that a writ of habeas corpus may be prosecuted following a judgment entered on or after January 1, 2021, based on evidence of a violation of the CRJA. (Pen. Code, § 1473, subd. (f).)

22) Provides that a petition raising such a claim, or on the basis of new discovery provided by the state or other new evidence that could not have been previously known by the petitioner with due diligence, shall not be deemed successive. (Pen. Code, § 1473, subd. (f).)

23) States that if the petitioner already has a habeas corpus petition on file in state court, but it has not yet been decided, the petitioner may amend the existing petition with a claim that the petitioner's conviction or sentence was sought, obtained or imposed in violation of the CRJA. (Pen. Code, § 1473, subd. (f).)

24) Requires the petition to state if the petitioner requests appointment of counsel and the court to appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of the CRJA or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment. (Pen. Code, § 1473, subd. (f).)

25) Requires the court to review the petition and if the court determines that the petitioner makes a prima facie showing of entitlement to relief, the court shall issue an order to show cause why relief shall not be granted and hold an evidentiary hearing, unless the state declines to show cause. The defendant shall appear at the hearing by video unless counsel indicates that their presence in court is needed. (Pen. Code, § 1473, subd. (f).)

26) Provides that if the court determines that the petitioner has not established a prima facie showing of entitlement to relief, the court shall state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion. (Pen. Code, § 1473, subd. (f).)

27) Allows a person who is no longer in custody to vacate a conviction or sentence based on a violation of the CRJA, as specified. (Pen. Code, § 1473.7, subd. (a)(3).)

28) Allows a person who is unlawfully imprisoned or restrained of his or her liberty, under any pretense, to prosecute a writ of habeas corpus to inquire into the cause of their imprisonment or restraint. (Pen. Code, § 1473, subd. (a).)

29) States that a writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

    a) False evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to the person's incarceration;

    b) False physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person; or,

    c) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial. Defines "new evidence" as evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching. (Pen. Code, § 1473, subd. (b).)

30) Provides that any allegation that the prosecution knew or should have known of the false nature of the evidence is immaterial to the prosecution of a writ of habeas corpus based on false evidence. (Pen. Code, § 1473 subd. (c).)

31)

32) States that nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies. (Pen. Code, § 1473 subd. (d).)

33) Specifies "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances. (Pen. Code, § 1473, subd. (e)(1).)

34) Provides that a writ of habeas corpus may also be prosecuted on the basis that evidence relating to intimate partner battering and its effects, as defined, was not introduced at the trial relating to the prisoner's incarceration for a conviction of a violent felony, as defined, and was of such substance that had the substantial and competent expert evidence been introduced, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction or sentence, that the result of the proceedings would have been different. (Pen. Code, § 1473.5, subds. (a) & (b).)

35) Specifies that habeas corpus is the exclusive procedure for collateral attack on a judgment of death. (Pen. Code, § 1509, subd. (a).)

36) Creates an explicit right for a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence based on a prejudicial error damaging to the moving party's

ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere, or based on newly discovered evidence of actual innocence, as specified. (Pen. Code, § 1473.7.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "While California's leadership in passing the Racial Justice Act (AB 2542, Chapter 317, Statutes of 2020) was a major step in addressing institutionalized and implicit racial bias in our criminal courts, those with prior, racially biased convictions and sentences are barred from their right to challenge those judgements and seek justice. Controlling for conviction history and current offense, Black men convicted of a felony were still 42 percent more likely to be sentenced to prison than a white man convicted of a felony. Similarly, Latino men convicted of a felony were 32.5 percent more likely to be sent to prison. Given our state's troubled history of prosecuting and incarcerating people of color at much higher rates than the general population, it is imperative that we afford a mechanism for retroactive relief so our criminal justice system can begin to reckon with systemic racism and correct past injustices.

   "The California Racial Justice Act is a countermeasure to a widely condemned 1987 legal precedent established in the case of McCleskey v. Kemp. Known as the McCleskey decision, the U.S. Supreme Court had for too long required California criminal defendants in criminal cases to prove intentional discrimination when challenging racial bias in their legal process. AB 256 recognizes how unreasonably difficult it was for victims of racism in the criminal legal system and provides an effective framework for addressing past racial bias in our criminal courts. This will ensure everyone is afforded an equal opportunity to pursue justice.

   "Calls for racial justice and the fight against COVID-19 has only exposed how pervasive racially biased judgements were to people of color, and we have an opportunity to root out any miscarriage of justice and apply appropriate convictions and sentences with what we know today. Additionally, providing a mechanism for retroactive relief will allow the state to realize significant court and correctional savings."

2) **The California Racial Justice Act:** In its landmark *McCleskey* decision, the United States Supreme Court rejected the defendant's claim that the Georgia capital punishment statute violates the equal protection clause of the 14 Amendment. The defendant argued "that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 291-292.) In rejecting the claim, the Court concluded the defendant had failed to demonstrate that the statute was enacted for or that decisionmakers in defendant's case acted with a discriminatory purpose. (*Id.* at pp. 297-299.)

   The Court acknowledged that biased decision making may affect sentencing. (*McCleskey v. Kemp*, *supra,* 481 U.S. at p. 309.) However, the Court suggested that the legislature, not the judiciary, was the proper branch to engineer remedies to these systemic problems. (*Id.* at p. 319.)

In response, the Legislature passed AB 2542 (Kalra), Statutes of 2020, the California Racial Justice Act. This Act allows racial bias to be shown by, among other things, statistical evidence that convictions for an offense were more frequently sought or obtained against people who share the defendant's race, ethnicity or national origin than for defendants of other races, ethnicities or national origin in the county where the convictions were sought or obtained; or longer or more severe sentences were imposed on persons based on their race, ethnicity or national origin or based on the victim's race, ethnicity or national origin. Racial bias may also be shown by evidence that a judge or attorney, among other listed persons associated with the defendant's case, exhibited bias towards the defendant, or, in court and during the trial proceedings, used racially discriminatory language or otherwise exhibited bias or animus, based on the defendant's race, ethnicity or national origin. The Act does not require the discrimination to have been purposeful or to have had a prejudicial impact on the defendant's case.

The CRJA applies only to judgments of conviction occurring on or before January 1, 2021. This bill would make the Act applicable to all cases regardless of when the judgment was entered.

3) **Racial Inequity in California's Criminal Justice System**: The California Committee on the Revision of the Penal Code has published its first annual report and concluded: "The current system has deep racial inequity at its core. New data published for the first time in this report reveals that racial disparities may be even worse than many imagined. Data obtained by the Committee for this report confirms people of color are disproportionately punished under state laws — from traffic infractions to serious and violent felonies." (http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf at p. 6 [as of March 13, 2021].)

   The committee further concluded: "Despite [recent] reforms, and California's sustained decrease in crime rates, people of color — Black men in particular — and people with mental health issues continue to be incarcerated disproportionately.... There is no reason California cannot maintain historically low crime rates while correcting glaring racial inequities in our criminal justice system." (http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf at p. 10.)

4) **Writ of Habeas Corpus Generally**: Habeas corpus, also known as "the Great Writ", is a process guaranteed by both the federal and state constitutions to obtain prompt judicial relief from illegal restraint. The functions of the writ is set forth in Penal Code section 1473, subdivision (a): "Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Penal Code section 1473, subdivision (d) specifies that "nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted."

   A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: false evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to his incarceration; or false physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person. (Pen. Code, § 1473, subd.

(b)(1) & (2).) Any allegation that the prosecution knew or should have known of the false nature of the evidence is immaterial to the prosecution of a writ of habeas corpus based on false evidence. (Pen. Code, § 1473, subd. (c).)

A habeas corpus claim of false testimony requires proof that false evidence was introduced against petitioner at his or her trial and that such evidence was material or probative on the issue of his or her guilt. (*In re Bell* (2007) 42 Cal.4th 630, 637.) False evidence introduced at trial against a defendant is substantially material or probative if there is a reasonable probability that, had the false evidence not been introduced, the result would have been different. (*In re Roberts* (2003) 29 Cal.4th 726, 741-742.) A reasonable probability that the result would have been different if false evidence had not been introduced against defendant is a chance great enough, under the totality of circumstances, to undermine the court's confidence in the outcome. (*Id.* at p. 742.)

A writ of habeas corpus may also be prosecuted based on newly discovered evidence. The new evidence must be "credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (Pen. Code, §1473, subd. (b)(3).)

The Legislature has also codified the right to prosecute a petition for writ of habeas corpus when evidence of intimate partner battering was not presented at trial. (Pen. Code, § 1473.5.) Again, the evidence must be of such substance that had it been presented there is a "reasonable probability, sufficient to undermine confidence in the judgment of conviction or sentence, that the result of the proceedings would have been different." (Pen. Code, § 1473.5, subd. (a).)

The CRJA provides that for judgments of conviction occurring on or after January 1, 2021, a writ of habeas corpus may be prosecuted where the state violates the Act by seeking or obtaining a criminal conviction or sentence on the basis of race, ethnicity, or national origin. Unlike habeas provisions generally, the Act's habeas provision does not expressly require a showing that the bias was prejudicial to the criminal proceedings. If the petitioner is successful in their habeas claim, the court must vacate the conviction and sentence, find that it is legally invalid, and order new proceedings that are consistent with the Act's prohibitions against racial bias.

This bill would authorize a petition to be filed for cases in which a judgment was entered prior to January 1, 2021.

5) **Motion to Vacate**: Penal Code section 1473.7, subdivision (a), provides, "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. . . . [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice."

The CRJA provides that for judgments of conviction occurring on or after January 1, 2021, a motion to vacate may be prosecuted where the state violates the Act by seeking or obtaining

a criminal conviction or sentence on the basis of race, ethnicity, or national origin. Unlike motions to vacate based on immigration consequences and newly discovered evidence, the Act's motion to vacate provision requires no showing of prejudicial error or actual innocence.

This bill would authorize a motion to be filed for cases in which a judgment was entered prior to January 1, 2021.

6) **Lack of Prejudice Standard**: Generally, an error of California law is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) This emanates from Article VI, section 13 of the California Constitution:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Because the CRJA lacks a prejudicial error standard, the Act may result in litigation on whether such a standard is required under section 13 of Article VI of the California Constitution.

While section 13 of Article VI of the California Constitution does not apply to state habeas proceedings (*In re Clark* (1993) 5 Cal.4th 750, 795), the California Supreme court has nonetheless applied a similar standard to habeas petitions grounded on some violations of fundamental constitutional rights. (See *In re Richards* (2016) 63 Cal.4th 291, 312-313 [habeas corpus petition based on false evidence]; *In re Clark*, *supra*, 5 Cal.4th at p. 795, citing *In re Martin* (1987) 44 Cal.3d 1, 50-51 [habeas corpus petition based on prosecutorial witness intimidation in violation of a criminal defendant's right to present a defense]; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [habeas corpus petition based on claim of ineffective assistance of counsel in violation of the constitutional right to counsel].)

7) **Proposition 7**: Proposition 7 was approved by the voters in 1978 and does not permit legislative amendment without voter approval. (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 278.) The initiative changed the law in two primary respects. First, it increased the punishment for the crime of murder in both the first and the second degree. And, it strengthened the death penalty by expanding the special circumstances under which a person convicted of first degree murder may be put to death. (*Ibid.*)

Because the CRJA prohibits the death penalty where there has been a violation of the Act's prohibitions against racial bias, there may be litigation regarding Proposition 7.

8) **Finality of Judgment**: California Constitution Article I., § 28 (a)(6), provides that "[v]ictims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences

of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end."

The California Supreme Court has recognized "society's legitimate interest in the finality of its criminal judgments." (*In re Reno* (2012) 55 Cal.4th 428, 451.) "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.' [Citation.] And when a habeas petitioner succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' [citation], prejudice the government and diminish the chances of a reliable criminal adjudication. ...'" (Quoting *McCleskey v. Zant* (1991) 499 U.S. 467, 491 [113 L. Ed. 2d 517, 111 S. Ct. 1454].)" (*In re Reno, supra*, 55 Cal.4th at p. 451.)

This bill makes the CRJA fully retroactive, applying it to all cases regardless of the date of the judgment of conviction.

9) **Practical Considerations**: Several areas of the CRJA could be clarified, as the meaning is unclear.[1] For example, the CRJA can be violated if a "juror" in the case exhibits bias. The Act can also be violated if during the defendant's trial, in court and during the proceedings, a "juror" uses racially discriminatory language. (Pen. Code, § 745, subd. (a)(1) & (2).) The term juror is not further defined. Does either type of violation include alternate and/or prospective jurors?

The CRJA can be violated where a defendant is charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are "similarly situated." (Pen. Code, § 745, subd. (a)(3).) What does the phrase "similarly situated" mean?

To establish a violation based on more serious charges or convictions, the evidence must also establish that the prosecution "more frequently sought or obtained" convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in a county where the convictions were sought or obtained? (Pen. Code, § 745, subd. (a)(3).) The CRJA does not state what the convictions must be more frequently sought or obtained than.

Under the CRJA, "more frequently sought or obtained" means "that statistical evidence or aggregate data demonstrate a significant difference is seeking or obtaining convictions ... comparing individuals who have committed similar offense and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." (Pen. Code, § 745, subd. (h)(1).) The Act does not further define "significant difference."

The CRJA can also be violated based on longer or more severe sentences being "more frequently imposed" based on race, ethnicity, or national origin than those imposed on

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[1] See generally, Couzens, *Assembly Bill 2542: "California Racial Justice Act of 2020"* (Jan. 2021), raising many of these points.

"similarly situated" individuals. (Pen. Code, § 745, subd. (a)(4)(A) & (B).) Again, "similarly situated" is not further defined.

Under the CRJA, "more frequently imposed" means "that statistical evidence or aggregate data demonstrate a significant difference is seeking or obtaining convictions … comparing individuals who have committed similar offense and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." (Pen. Code, § 745, subd. (h)(1).) Again, the Act does not further define "significant difference." Nor is there a stated timeframe of comparison.

The CRJA does not state who is to hear a motion in the trial court based on a violation of the Act. (Pen. Code, § 745, subd. (a).) What if the allegation of bias is against the judge hearing the case? Does this judge also hear the motion raising their alleged bias? Though this would raise ethical issues, the Act provides no direction on this.

The CRJA specifies no remedy/sanction for a violation of its discovery provision. (Pen. Code, § 745, subd. (d).)

The CRJA does not state that the discharge of the jury panel, as a remedy for a specified violation, requires a defendant's consent. (Pen. Code, § 745, subd. (e)(1)(B).) "Consent is implied under some circumstances, as, for instance, where a defendant moves in arrest of judgment, asks to have the judgment vacated or seeks a new trial." (*People v. Kelly* (1933) 132 Cal.App.118, 122.) Is the defendant's consent an implied requirement of the Act? Failure to obtain consent implicates double jeopardy principles. (U.S. Const., 5th Amend.; Cal. Const., art I, § 15.)

Where the CRJA requires the court to vacate the judgment and conviction and order "new proceedings consistent with subdivision (a)," what does this mean? (Pen. Code, § 745, subd. (e)(2)(A).) Subdivision (a) lists the various CRJA prohibitions – i.e., lists the possible ways the CRJA can be violated. Is this in reference to when the new criminal proceedings should begin – i.e., from the point at which one of these prohibitions of the CRJA was violated?

What is meant by the phrase "the ability to rectify the violation by modifying the judgment?" (Pen. Code, § 745, subd. (e)(2)(A).) Does it mean the court must have the legal authority or jurisdiction, which it may be lacking under other provisions of law, to correct the violation? Or does it mean the court must modify the judgment only if one of the available remedies is suitable to effect a remedy? The Act does not provide guidance on what a court is to do if, under either definition, it doesn't have the ability to correct the violation.

Does the remedy depend on when the violation occurred or when the court imposes the remedy? (Pen. Code, § 745, subd. (e)(1) & (2).)

On resentencing, based on only a sentence having been sought, obtained, or imposed, in violation of the CRJA, can the court impose the same sentence? (Pen. Code, § 745, subd. (e)(2)(B).)

What point of reference is used to determine what constitutes racially discriminatory language, especially in light of the fact that this bill would make the CRJA fully retroactive? (Pen. Code, § 745, subd. (a)(2).)

Is the test for "bias" on the basis of race, ethnicity or national origin objective or subjective? (Pen. Code, § 745, subd. (a)(1).)

10) **Argument in Support**: According to the Ella Baker Center for Human Rights, a co-sponsor of this bill: "With the Racial Justice Act, California took a profound step forward in addressing institutionalized and implicit racial bias in our criminal courts by empowering defendants to object to charges, convictions, or punishment if they can show that anyone involved in their case — a judge, attorney, officer, expert witness or juror — demonstrated bias during the process, or if they can show statistical evidence of demographic inequities in charges, convictions, or sentences for the same crime. However, this legislation was made prospective; to excluded those who had been harmed prior to January 1, 2021 by the racial bias and discrimination that has long permeated our criminal legal system.

"Based in Oakland, the Ella Baker Center for Human Rights works to advance racial and economic justice to ensure dignity and opportunity for people with low income and people of color. Last year's cry for racial justice in the wake of the state-sanctioned killings of Black Americans, Breonna Taylor, and George Floyd made obvious the need to address racism across America and the globe. We hope California's Legislature continues to respond to the urgent calls for healing our institutions, and the necessary rooting-out of racism from our systems of justice.

"California took a bold step to address our nation's legacy of anti-Black, anti-brown, and foreign-based bias in enacting the original Racial Justice Act. However, amendments relegating it to apply prospectively only – to only apply to future Californians – leave the many currently within the court system without the civil rights protections provided in the RJA. Those with prior, racially biased convictions and sentences deserve equal justice under the law and should not serve time imprisoned because of race and the biases of others.

"Additionally, providing a mechanism for retroactive relief will allow the state to realize significant court and correctional savings from correcting the missteps of the past. For these reasons, the Ella Baker Center for Human Rights supports the Racial Justice Act for All, Assembly Bill 256 (Kalra), to allow the Racial Justice Act apply to previous cases... to ensure that everyone is afforded an opportunity to pursue more equal justice. We urge the legislature to pass this important bill…."

11) **Argument in Opposition**: According to the California District Attorneys Association: "First, while AB 2542 purported to create laws designed to eliminate discrimination in the criminal justice system (an unquestionably important goal shared by CDAA), it did so in a way that created a great risk of depriving society and victims of every race, ethnicity, and national origin of justice notwithstanding indisputable and overwhelming evidence of an offender's guilt. That risk remains because under the laws enacted by AB 2542 (i.e., Penal Code section 745), a case can be reversed even if there was no showing that the defendant was deprived of a fair trial. For example, if there is a mass shooting and a law enforcement officer involved in the case (who merely took an undisputed videotaped statement from a witness) or an expert (who testified to undisputed conclusions) turns out to be biased against the defendant, there will have to be a reversal regardless of whether 50 people observed the defendant doing the shooting, the bias was revealed to the jury, the law enforcement officer

did not even testify, and all the people murdered belonged to the same racial and ethnic group as the defendant.
"Second, Penal Code section 745 is riddled with ambiguous language and unanswered questions that have yet to be resolved by any appellate court. For example, the bill would overturn a conviction if a 'defendant was charged or convicted of a *more serious* offense than defendants of other races, ethnicities, or national origins who commit *similar* offenses and are *similarly situated*, and the evidence establishes that the prosecution more *frequently sought* or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin . . .' Other than 'frequently sought' none of the terms highlighted are defined and even the term 'frequently sought' is given a vague definition.

"The definition of more 'frequently sought or obtained' or more 'frequently imposed' means statistical data demonstrates a 'significant' difference in the comparative groups. But no definition of 'significant' is provided? Is a 5%, 10%, or 50%, or 80% differential significant? The statute leaves it entirely up to the individual judge to decide without any guidance.

"In addition, it is yet unknown how to assess the relevant time period for comparison purposes. If there is a disproportion based on statistics going back 25 years but no disproportion going back 10 years, which is the relevant statistic?

"What qualifies as an ethnicity or national origin? What if there are no statistics kept on the percentage of individuals committing each kind of crime who are of Armenian, Guatemalan, Swedish, or other national origin? Or of sub-groups of broadly defined ethnic or racial categories? Two defendants charged with the same crime can be of same ethnicity but of different national origin or race or be of the same race but of different ethnicity or national origin. What is the relevant group for comparison? Is there a violation if the defendant belongs to an ethnic group for which convictions are disproportionately over-sought but a racial group for which convictions are disproportionately under-sought? The law allows for aggregation of statistics if the defendant belongs to more than one class but since aggregation can both distort and cancel out any actual disproportionate effect, how can such an aggregate statistic have any meaning?

"AB 256 would dramatically expand the scope of AB 2542 *without seeing how any of these issues created by AB 2542 have been resolved.*

"Third, the current law imposes heavy costs on local counties without any reimbursement. Setting aside the costs of appeals, delays and interruptions of trials, and the costs of evidentiary hearings that necessarily will involve untold witnesses and expert testimony on both sides, the costs of having to review thousands of files is astronomical. To illustrate: Let's say a defendant brings a simple motion challenging a prosecution on grounds defendant is allegedly charged with a "more serious" offense (i.e., assault with a deadly weapon or great bodily injury) than similarly situated defendants from different groups based on "similar" conduct. The number of files relevant to such a motion in Santa Clara County would be close to 1,500 files - each would have to be identified, located, reviewed, and redacted (to comply with state constitutional requirements and protect privileges) just to provide relevant discovery. Even if each file could be identified, located, reviewed, and redacted in an hour's total time, that would require a prosecutor working approximately 8

months (at a cost of over $100,000) to handle a single discovery request. And that assumes that the only files used for comparison are from a single year. AB 256 would, based on a relatively low threshold showing, require pulling, reviewing, and redacting files potentially going back 100 years since the bill sets out no time frames or limits on the relevant comparison groups.

"These cost concerns prompted this Legislature to limit the scope of AB 2542 so that it did not apply retroactively. *AB 256 overturns this critical limitation.* Since every defendant belongs to at least two or more racial, ethnic, or national origin groups, practically every single conviction that has ever occurred in California can now be re-opened and potentially reversed. The defendant can mandate lengthy and costly evidentiary hearings involving the testimony of attorneys, law enforcement officers, jurors, experts, or other members of the criminal justice system without even having to show that a claimed violation of section 745 is more likely than not. Indeed, such hearings can be mandated based simply on defendant showing more than mere possibility that a violation has occurred.

"And the difficulties in trying to defend against the allegation and the ramifications of dismissal are compounded because relevant statistics are more likely to be absent, relevant witnesses (i.e., judges, attorneys, prosecutors, officers, etc.,) may be dead or unavailable. Retrying the cases after years or decades will often be impossible.

"We do not oppose the change in language proposed by AB 256 to section 745(d) clarifying that privileged materials are not discoverable. (And would support the bill if that were the only change proposed.) But this change is only one of the dozens of other problems arising from the current structure of section 745, none of which AB 256 corrects (and which we do not detail in the interests of brevity).

"We strongly urge a reconsideration of this attempt to vastly expand the scope of section 745 and dramatically increase the costs that would be imposed by applying section 745 retroactively without even being able to assess the impact of section 745 as it currently exists. And, once again, we respectfully offer to sit down with you and other proponents of both AB 2542 and AB 256 to identify existing issues and propose possible solutions that would help serve justice and further the goal of eliminating discrimination in a more effective and fair manner."

12) **Related Legislation**: ACA 2 (Levine) would amend the California Constitution and prohibit the death penalty from being imposed as a punishment for any violation of law. ACA 2 has been referred to this committee.

13) **Prior Legislation**:

a) AB 2542 (Kalra), Chapter 317, Statutes of 2020, created the CRJA which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin, applicable to all cases regardless of the date of conviction.

b) AB 3070 (Weber), Chapter 318, Statutes of 2020, prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, and other specified characteristics, and outlines a court procedure for objecting to, evaluating, and resolving improper bias in peremptory challenges.

c) AB 1798 (Levine), of the 2019-2020 Legislative Session, would have prohibited a person from being executed pursuant to a judgment that was either sought or obtained on the basis of race – i.e., where race was a significant factor in the decision to either seek or impose the death penalty. AB 1798 was held in the Assembly Committee on Appropriations.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union (Co-Sponsor)
American Friends Service Committee (Co-Sponsor)
California United for a Responsible Budget (CURB) (Co-Sponsor)
Coalition for Humane Immigrant Rights (CHIRLA) (Co-Sponsor)
Ella Baker Center for Human Rights (Co-Sponsor)
Initiate Justice (Co-Sponsor)
League of Women Voters of California (Co-Sponsor)
Silicon Valley De-bug (Co-Sponsor)
8th Amendment Project
A New Path
Afro Upris
Alliance for Boys and Men of Color
Alliance San Diego
Amnesty Interntational USA Group 30 San Francisco
Anti-defamation League
Asian Law Alliance
Asian Solidarity Collective
Bend the Arc: Jewish Action
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Immigrant Policy Center
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for the Innocent
California Latinas for Reproductive Justice
California League of United Latin American Citizens
California Public Defenders Association
California State Council of Service Employees International Union (seiu California)
California Teachers Association
Californians for Safety and Justice
Clergy and Laity United for Economic Justice
Coalition for Justice and Accountability
Communities United for Restorative Youth Justice
Community Advocates for Just and Moral Governance
Community Bridge Housing Corp
Community Legal Services in East Palo Alto
Consumer Attorneys of California

Courage California
Dignity and Power Now
Drug Policy Alliance
Empowering Pacific Islander Communities
Equal Justice USA
Fair Chance Project
Families United to End Lwop - Fuel
Felony Murder Elimination Project
Friends Committee on Legislation of California
Human Impact Partners
Immigrant Legal Resource Center
Indivisible Marin
Kern County Participatory Defense
LA Voice
La.voice/pico
Legal Aid at Work
Legal Services for Prisoners with Children
Long Beach Immigrant Rights Coalition
Los Angeles Urban League
National Association of Social Workers, California Chapter
National Center for Lesbian Rights
National Center for Youth Law
National Institute for Criminal Justice Reform
Nextgen California
Oakland Privacy
Pillars of the Community
Project Rebound Consortium
Racial Justice Allies of Sonoma County
Re:store Justice
Resilience Orange County
San Francisco Public Defender
San Jose State University Human Rights Institute
San Jose/silicon Valley Branch of The NAACP
San Mateo County Participatory Defense
Santa Barbara Women's Political Committee
Secure Justice
Showing Up for Racial Justice - Bay Area
Showing Up for Racial Justice - Marin
Showing Up for Racial Justice - San Diego
Showing Up for Racial Justice - San Francisco
Showing Up for Racial Justice North County
Smart Justice of California
Southeast Asia Resource Action Center
Team Justice
The American Constitution Society Chapter for Santa Clara University School of Law
The W. Haywood Burns Institute
The Women's Foundation of California
Think Dignity
Time for Change Foundation

UC Berkeley's Underground Scholars Initiative
Udw/afscme Local 3930
Unchained Scholars USC Student Caucus
Uncommon Law
Unitarian Universalist Justice Ministry of California (formerly Unitarian Universalist Legislative Ministry of California)
Voices for Progress
We the People - San Diego
White People 4 Black Lives
Young Women's Freedom Center
Youth Hype
Ywca Berkeley/Oakland

Opposition

California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: March 23, 2021
Counsel: Matthew Fleming

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

AB 18 (Lackey) – As Introduced December 7, 2020

SUMMARY: Requires a law enforcement agency to submit sexual assault forensic evidence that was received prior to January 1, 2016 to a crime lab, and requires crime labs to process that kit and upload DNA profiles to the Combined DNA Index System (CODIS). Specifically, **this bill**:

1) Requires law enforcement agencies to submit sexual assault forensic evidence that was received prior to January 1, 2016 to a crime lab on or before January 31, 2022.

2) Requires crime labs to process sexual assault forensic evidence kits that was received by a law enforcement agency prior to January 1, 2016 on or before January 31, 2023.

3) Specifies that if a sexual assault kit would not be eligible for uploading qualifying DNA profiles into COIDS, pursuant to state and federal regulations, the crime lab is not required to process the evidence kit.

4) Specifies that if a victim of crime from whom a sexual assault evidence kit was collected prior to January 1, 2016, notifies the law enforcement agency or the crime lab that the victim does not want the kit tested, the crime lab is not required to test the kit.

EXISTING LAW:

1) Provides that in order to ensure that sexual assault forensic evidence is analyzed within the two-year timeframe required and to ensure the longest possible statute of limitations for sex offenses the following shall occur:

   a) A law enforcement agency in whose jurisdiction a specified sex offense occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:

      i) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence; and,

      ii) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim.

   b) The crime lab shall do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016:

i) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence; or,

ii) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence, for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab should upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified. (Pen. Code, § 680, subds. (b)(7)(A) and (B).)

2) Specifies that crime labs do not need to test all items of forensic evidence obtained in a sexual assault forensic evidence examination. (Pen. Code, § 680, subd. (b)(7)(C).)

3) Specifies that a DNA profile need not be uploaded into CODIS if it does not meet the federal guidelines. (Pen. Code, § 680, subd. (b)(7)(D).)

4) Defines "rapid turnaround DNA program" as a program for training of sexual assault team personnel in the selection of a representative samples of forensic evidence from the victim to be the best evidence based on the medical evaluation and patient history, the collection and preservation of that evidence, and the transfer of the evidence directly from the medical facility to the crime lab, which is adopted pursuant to a written agreement between the law enforcement agency, the crime lab, and the medical facility where the sexual assault team is based. (Pen. Code, § 680, subd. (c)(2)(5).)

5) Establishes the Sexual Assault Victims' DNA Bill of Rights which provides victims of sexual assault with the following rights:

a) The right to be informed whether or not a DNA profile of the assailant was obtained from the testing of the rape kit evidence or other crime scene evidence from their case;

b) The right to be informed whether or not the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence has been entered into the Department of Justice (DOJ) Data Bank of case evidence; and,

c) The right to be informed whether or not there is a match between the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence and a DNA profile contained in the DOJ Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation. (Pen. Code § 680 (c)(2).)

6) Provides that upon the request of a sexual assault victim, the law enforcement agency investigation of a specified sex offense shall inform the victim of the status of the DNA testing of the rape kit evidence or other crime scene evidence form the victim's case. (Penal Code § 680 (c)(1).)

7) Requires the following persons to provide buccal swab samples (DNA), right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological

samples, as required by law, for law enforcement identification analysis:

a) Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated for committing any felony offense in juvenile court;

b) Any adult person who is arrested for or charged with any of the following felony offenses:

   i) Any felony offense specified or attempt to commit any felony offense that imposes upon a person the duty to register in California as a sex offender;

   ii) Murder or voluntary manslaughter or any attempt to commit murder or voluntary manslaughter;

   iii) Any adult person arrested or charged with any felony offense; and,

c) Any person, including any juvenile, who is required to register in California as a sex offender or arsonist because of the commission of, or the attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense. (Pen. Code § 296, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: "It's completely unacceptable that professionals entrusted with potentially pivotal and sacred evidence have failed to follow through. The rape kit backlog illustrates that we are not committed to helping victims of rape. The backlog has allowed countless predators to go free and continue their attacks. This bill will ensure California delivers justice to victims of sexual assault and goes after these criminals with every tool available."

2) **Sexual Assault Evidence Kits and the Combined DNA Index System (CODIS)**: After a possible sexual assault has occurred, victims of the crime may choose to be seen by a medical professional, who then conducts an examination to collect any possible biological evidence left by the perpetrator. To collect forensic evidence, many jurisdictions provide what is called a "sexual assault evidence kit" (SAE kit). SAE kits often contain a range of scientific instruments designed to collect forensic evidence such as swabs, test tubes, microscopic slides, and evidence collection envelopes for hairs and fibers. The composition of sexual assault kits vary depending on jurisdiction. For example, according to a report from 2011, the police and sheriff's department in Los Angeles use identically arranged sexual assault kits, however, the rest of California does not. (NIJ, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, May 2011, at page 2, available at: https://www.ncjrs.gov/pdffiles1/nij/233279.pdf, [as of Mar. 13, 2020].)

   Analyzing forensic evidence from SAE kits assists in linking the perpetrator to the sexual assault. Generally, once a hospital or clinic has conducted a sexual assault kit examination, it

transfers the kit to a local law enforcement agency. From there, the law enforcement agency may send the kit to a forensic laboratory. Evidence collected from a kit can be analyzed by crime laboratories and could provide the DNA profile of the offender. Once law enforcement authorities have that genetic profile, they could then upload the information onto CODIS.

Created by the FBI in 1990, CODIS is a national database that stores the genetic profiles of sexual assault offenders onto a software program. By exchanging, testing, and comparing genetic profiles through CODIS, law enforcement agencies can discover the name of an unknown suspect who was in the system or link together cases that still have an unknown offender. The efficacy of CODIS depends on the volume of genetic profiles that law enforcement agencies submit. (FBI website, Combined DNA Index System (CODIS), available at: https://www.fbi.gov/services/laboratory/biometric-analysis/codis,[as of June 6, 2019].) At present, more than 190 public law enforcement laboratories use CODIS. (*Id.*)

3) **Untested Sexual Assault Evidence Kits**: There are a number of reasons why law enforcement authorities may not submit a SAE kit to a crime lab. For example, the identity of the suspect may never have been at issue. Often times, whether or not the victim consented to the sexual activity is the most important issue in the case, not the identity of the suspect. In other cases, charges may be dropped for a variety for reasons, or a guilty plea may be entered rendering further investigation moot. (NIJ, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Case*s, May 2011, at page 3, available at: https://www.ncjrs.gov/pdffiles1/nij/233279.pdf, [as of May 11, 2020].)

Despite a variety of reasons why law enforcement may not have a kit tested, a 2014 report by the California State Auditor found that law enforcement rarely documents reasons for not analyzing sexual assault evidence kits. (State Auditor, Sexual Assault Evidence Kits, Oct. 2014, at page 17, available at: https://www.bsa.ca.gov/pdfs/reports/2014-109.pdf, [as of May 11, 2020].) Specifically, the report found that "[i]n 45 cases . . . reviewed in which investigators at the three agencies we visited did not request a kit analysis, the investigators rarely documented their decisions. As a result, we often could not determine with certainty why investigators decided that kit analysis was not needed." (*Id.* at 23.)

Upon a more in-depth review of the individual cases, the report found that analysis of the kits would not have been likely to further the investigation of those cases. The "decisions not to request sexual assault evidence kit analysis in the individual cases we reviewed appeared reasonable because kit analysis would be unlikely to further the investigation of those cases. We reviewed specific cases at each agency in which investigators did not request analysis. Our review included 15 cases from each of the three agencies we visited with offenses that occurred from 2011 through 2013, for a total of 45 cases. In those cases, we did not identify any negative effects on the investigations as a result of decisions not to request analysis. We based our conclusions on the circumstances present in the individual cases we reviewed, as documented in the files for the 45 cases and as discussed with the investigative supervisors." (*Id.*)

Although the audit found the explanations for not submitting the sexual assault kits to be reasonable, testing those kits may have identified offenders who had committed another crime for which they were never previously identified. The National Institute of Justice funded Detroit, Michigan and Houston, Texas to test their unsubmitted sexual assault kits.

The results revealed that testing unsubmitted kits can lead to convicting hundreds to thousands of serial offenders; such testing identified over 400 serial rapists in Detroit alone. (NIJ, National Sexual Assault Kit Initiative (SAKI): FY 2017 Competitive Grant Announcement, Dec. 20, 2016, available at: https://www.bja.gov/funding/SAKI17.pdf [as of May 11, 2020].)

It is important to note that just because a kit goes untested does not necessarily mean that the suspect's DNA profile was never uploaded to CODIS in order to potentially link the suspect to other crimes. If a suspect is convicted, or even arrested for, certain qualifying offenses, a DNA sample is collected pursuant to Penal Code section 296 and the DNA profile uploaded to the Arrestee Index or the Convicted Offender Index in CODIS. A conviction for any felony will require the collection of a DNA profile for both adults and juveniles. And an arrest or charge against an adult for any felony or any offense that would result in requiring the person to register as a sex offender, if convicted, would similarly result in the collection of a DNA profile under Penal Code Section 296. Such profiles are then regularly searched against the already-existing profiles in CODIS.

4) **Mandatory Testing of Sexual Assault Evidence Kits Collected in 2016 or Later**: In 2019, the Legislature passed SB 22 (Leyva) Chapter 588, Statutes of 2019. That bill required law enforcement agencies to submit sexual assault forensic evidence to a crime lab and required crime labs to either process the evidence for DNA profiles and upload them to CODIS. SB 22 applied to all sexual assault evidence that was received on or after January 1, 2016. Prior to the passage of SB 22, California law encouraged, but did not require any agency to send a sexual assault kit to a crime lab. This bill would require sexual assault evidence kits that were received prior to January 1, 2016 are also sent to a crime lab and tested.

5) **Audit on Untested Sexual Assault Evidence Kits:** AB 3118 (Chiu), Chapter 950, Statutes of 2018, required each law enforcement agency, crime lab, medical facility, or other facility in possession of sexual assault kits to conduct an audit of all the kits in their possession and report specified information about them to the DOJ. In turn, the DOJ was required to compile the information and submit a report to the Legislature. The information to be audited includes the date when the kits were collected, whether they were tested by a crime lab, whether the information from the test was uploaded to CODIS, etc. DOJ published its report in July, 2020, and is available on the Attorney General's public website (Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, DOJ, July 2020, available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/ag-rpt-audit-usasfe-kits-2020.pdf [as of Feb. 19, 2021].)

According to the DOJ, a mere 149 law enforcement agencies were responsive to the audit mandated by AB 3118. (*Id.* at p. 9.) At the time of the DOJ report, the Commission on Peace Officers Standards and Training (POST) website listed 690 law enforcement agencies in California. (POST website, https://post.ca.gov/le-agencies; *Id.* at 3.) Not every law enforcement agency handles SAE kits, and by the terms of AB 3118, any agency that does not handle SAE kits was not required to respond to the audit. It is therefore possible that the 541 law enforcement agencies which did not respond to the audit do not handle SAE kits, but it may also be the case that at least some agencies who do handle SAE kits were not responsive to the AB 3118 audit.

The law enforcement agencies that did respond to DOJ reported that there were 13,929 untested sexual assault kits in California. (*Id.* at 9) Approximately one third of those kits (4,834) were reportedly not tested because the survivor/victim chose not to pursue prosecution and therefore there was little incentive to process the evidence. (*Ibid.*). SAE kits that were collected in cases where the victim/survivor chose not to pursue prosecution were specifically exempted from AB 3118. Therefore, there is no further information available as to why the kits were not tested. Most of the remaining, untested kits were cases in which the survivor/victim had desired prosecution; those accounted for 5,679 untested kits. The final 3,416 untested kits were cases where the preference for prosecution of the survivor/victim was unknown or unascertainable. (*Id.* at 10).

In regards to the 9,095 untested kits where the survivor/victim either desired prosecution or the preference of the person was unknown, the reporting law enforcement agencies provided a variety of explanations for why the kits were not tested. (*Ibid.*). The three most common reasons were: 1) the case was determined to be unactionable by the prosecution, 2) testing the kit was determined to be unnecessary because the case already adjudicated, and 3) the reason for not testing the kit was simply unknown. (*Ibid.*). The last "unknown" category accounted for 2,659 kits, and was further explained as follows:

> "Law enforcement agencies and crime laboratories were unable to determine the reasons why 575 kits [] had not been tested, usually because the records had been sealed or purged, were incomplete, or could not be located. Agencies listed 'other' with no further explanation, or provided another explanation that did not fit within the categories above, for 605 kits []. No reason was given for 1,149 [] of the reported untested sexual assault evidence kits." (*Id.* at 11)

Additional reasons for untested kits were 1) there was an active investigation or prosecution, 2) the kit was determined to be unlikely to yield a probative DNA profile, 3) the kit was part of a "courtesy report" taken by one law enforcement agency for the benefit of another and is being held until the law enforcement agency with jurisdiction takes action, and 4) it was determined that no crime was committed or there was a crime other than sexual assault that was committed. (*Id.* at 11 – 12.) The report also contains a breakdown of where and when SAE kits were collected. Of particular relevance to this proposal is the finding that 10,232 untested SAE kits were collected prior to 2016. (*Id.* at 23).

There are ongoing efforts to compile information on untested kits and test them. AB 280 (Low) Chapter 698, Statutes of 2017 established a voluntary contribution fund for the purpose of processing untested SAE kits. In addition, budget bills in 2018 and 2019 allocated millions of dollars in order to compile information on untested SAE kits. All of these funding sources are administered as grants by the DOJ (*See Id.* at 13).

6) **Arguments in Support**: According to *Crime Victims United*: "We have all heard the saying "that justice delayed is justice denied." For victims of sexual assault who have been waiting to have their rape kits tested no truer words are spoken. While SB 813 (Leyva – 2016) and SB 22 (2019) fortified avenues for victims to have rape kits tested the reality is there is still a backlog. According to the Department of Justice 2020 report there remains 13,929 kits that have not been tested through the State of California This is simply a nightmare for those victims. If this continues there is a real possibility that the DNA will degrade and not only the victims associated with those kits be denied justice prematurely, but serious and violent

rapists will be on our streets to victimize again."

7) **Argument in Opposition**: According to the *California Public Defenders Association*: "If enacted, AB 18 would require crime laboratories analyze all sexual assault kits received prior to January 1, 2016, no later than January 31, 2024, regardless of whether the DNA is necessary to a prosecution, regardless of whether the suspect has already pled guilty and regardless of whether there are items of evidence from other types of cases, the results of which are necessary for a successful prosecution, that will not be tested because the lab's resources will be devoted to testing of sexual assault evidence. The bill requires the sexual assault evidence be analyzed and the profiles be uploaded to CODIS regardless of whether the crime has been solved and the suspect convicted. This bill, if passed, will be an expensive unfunded mandate, the cost of which will need to be reimbursed by the state at a time when the state's financial situation is of tremendous concern.

   "How crime laboratories allocate limited resources should not be micromanaged by the state legislature. While the testing of DNA evidence from sexual assault cases is important, it is not more important than DNA testing on items of evidence collected in the investigation of other types of violent crime such as homicides, kidnapping or assaults. Moreover, this bill would require evidence from a sexual assault case be tested by January 31, 2024, regardless of whether conducting such testing would prevent the laboratory from testing evidence from other types of cases when the results of the DNA testing are required for prosecution. In other words, this bill might actually put prosecutions in jeopardy because of the time constraints it imposes on crime labs. Meeting the time limits imposed by this bill could also put on hold DNA testing that might tend to exonerate someone being held in custody for a crime he did not commit."

8) **Prior Legislation**:

   a) AB 2481 (Lackey), of the 2019 – 2020 Legislative Session, was identical to this bill. AB 2481 was held in the Assembly Appropriations suspense file.

   b) SB 22 (Leyva), Chapter 588, Statutes of 2019, required law enforcement agencies to either submit sexual assault forensic evidence to a crime lab or ensure that a rapid turnaround DNA program is in place, and required crime labs to either process the evidence for DNA profiles and upload them into the Combined DNA Index System (CODIS) or transmit the evidence to another crime lab for processing and uploading.

   c) AB 3118 (Chiu), Chapter 950, Statutes of 2018, required each law enforcement agency, crime lab, medical facility, or any other facility that possesses sexual assault evidence kits to conduct an audit of all kits in their possession and report the findings to the DOJ, who is then required to submit a report to the Legislature.

   d) AB 41 (Chiu), Chapter 694, Statutes of 2017, required all local law enforcement agencies investigating a case involving sexual assault to input specified information relating to the administration of a sexual assault kit into the DOJ's SAFE-T database within 120 days of collection. It also required public laboratories to input an explanation onto SAFE-T if they had not completed DNA testing of a sexual assault kit within 120 days of acquiring

the kit.

e) AB 1312 (Gonzalez Fletcher), Chapter 692, Statutes of 2017, required law enforcement and medical professionals to provide victims of sexual assault with written notification of their rights. Provides additional rights to sexual assault victims, and mandates law enforcement and crime labs to complete tasks related to rape kit evidence.

f) AB 280 (Low), Chapter 698, Statutes of 2017, established the Rape Kit Back Log Voluntary Tax Contribution Fund and allowed taxpayers to contribute their own funds to the Fund through a designation on the state personal income tax return.

g) AB 1848 (Chiu), of the 2015-2016 Legislative Session, would have required local law enforcement agencies to conduct an audit of sexual assault kits collected during a period of time, as specified by the DOJ, and to submit data regarding the total number of kits, the amount of kits submitted for DNA testing, the amount not submitted and other information, as specified. AB 1848 was held in the Senate Appropriations Committee.

h) AB 2499 (Maienschein), Chapter 884, Statutes of 2016, required the DOJ to, in consultation with law enforcement agencies and crime victims groups, establish a process giving location and other information to victims of sexual assault upon inquiry.

i) SB 1079 (Glazer), of the 2015-2016 Legislative Session, would have required the DOJ to maintain a restricted access repository for tracking DNA database hits that local law enforcement agencies could use to share investigative information. SB 1079 was held in the Senate Appropriations Committee.

j) AB 1517 (Skinner), Chapter 874, Statutes of 2014, provided preferred timelines that law enforcement agencies and crime labs should follow when dealing with sexual assault forensic evidence.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
Crime Victims United of California
Leda Health
National Association of Social Workers, California Chapter
Work Equity Action Fund

1 private individual

Oppose

California Public Defenders Association (CPDA)

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

Date of Hearing: March 23, 2021
Counsel: Cheryl Anderson

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

AB 395 (Lackey) – As Introduced February 3, 2021

SUMMARY: Creates a new and separate crime of forcibly entering a vehicle with the intent to commit a theft inside. Specifically, **this bill**:

1) Creates a new crime of forcibly entering a vehicle with the intent to commit theft.

2) Punishes this offense either as a misdemeanor with incarceration not to exceed one year in the county jail, or as a felony with imprisonment in the county jail for 16 months, or two, or three years under criminal justice realignment.

3) Defines "forcible entry" as entry accomplished through either of the following means:

   a) Force that damages the exterior of the vehicle, including, but not limited to, breaking a window, cutting a convertible top, punching a lock, or prying open a door; or

   b) Use of a tool or device that manipulates the locking mechanism, including, without limitation, a slim jim or other lockout tool, a shaved key, jiggler key, or lock pick, or an electronic device such as a signal extender.

4) Prohibits a person from being convicted both under this provision and the existing auto burglary statute.

EXISTING LAW:

1) States that any person who enters any house, room, apartment,…shop, warehouse, store,… outhouse or other building, tent, vessel, … *vehicle …when the doors are locked*, aircraft … or mine … with the intent to commit grand or petit larceny or any other felony is guilty or burglary. (Pen. Code, § 459 [emphasis added].)

2) States that burglary of an inhabited dwelling is first degree burglary, and that all other kinds of burglary are of the second degree. (Pen. Code, § 460.)

3) Provides that the punishment for first degree burglary is imprisonment in the state prison for two, four, or six years. (Pen. Code, § 461, subd. (a).)

4) Provides that the punishment for second degree burglary is either confinement of up to one year in the county jail, or confinement in the county jail for 16 months, two, or three years pursuant to criminal justice realignment. (Pen. Code, §§ 18, subd. (a), 461, subd. (b), 1170,

subd. (h).)

5) Provides that no person shall willfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner. (Veh. Code, § 10852.)

6) Provides that the punishment for vehicle tampering is confinement of up to six months in the county jail, a fine not to exceed $1,000, or both. (Veh. Code, §§ 42002, 40000.9.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Vehicle burglaries or 'smash-and-grabs' have increased since more drivers are not using or checking their vehicles for longer periods of time due to the pandemic, according to the Automobile Club of Southern California. In addition, the latest statistics from the California Department of Justice's dataset show that vehicle burglaries have been on the rise.

   "Existing law requires proof beyond a reasonable doubt that vehicle's doors were locked in order for the crime to be considered felony burglary. Even with evidence of forced entry (e.g. smashed window), the vehicle's owner still has to prove in court that their vehicle was locked. This process becomes burdensome for victims who have their vehicles broken into while visiting other cities.

   "It takes merely seconds to break into a vehicle and steal valuable items but its effect on the victim lasts much longer. This bill signifies that Californians have had enough with letting offenders walk away without punishment and it is time for the state to hold offenders accountable for the distress they cause for victims."

2) **Elements Required for Auto Burglary Prosecutions**: In order to convict a person under the current auto burglary statute, Penal Code section 459, the prosecutor must prove that (1) the defendant entered a locked vehicle, and (2) when the defendant entered the locked vehicle they intended to commit theft (or any other felony). (See CALCRIM No. 1700, see also *People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–1461.)

   The common law element of "breaking" has never been an essential element of statutory burglary in California. The only exception is auto burglary, which requires that the doors of a vehicle be locked. In fact, that is the key element of auto burglary. While locked doors is an element, forced entry or use of burglary tools is not. (*In re James B.* (2003) 109 Cal.App.4th 862, 868.)

   The element of "locked doors" has been interpreted to mean that the defendant must unlawfully alter the vehicle's locked state in some manner. (*In re James B.*, supra, 109 Cal.App.4th at p. 868.) On one end of the spectrum this could be accomplished by unlocking the vehicle without consent of the owner. At the opposite end, auto burglary could be committed by smashing a window. (*Ibid.*)

   Some prosecutors argue that, particularly in cases where a victim is unavailable, such as with

tourists who cannot return to court, while there may be concrete evidence of a break in, it may prove difficult to establish that a vehicle was locked. And yet, convictions have been upheld based on circumstantial evidence to prove the requisite element of locking. For example, in *People v. Rivera* (2003) 109 Cal.App.4th 1241, the court upheld a conviction where there was evidence of forced entry even though there was no evidence that the doors were locked or sealed. Circumstantial evidence that the car's doors were locked was based on the car's windows being broken. (*Id.* at pp. 1244-1245.)

This bill seeks to create a new and separate crime of unlawful entry of a vehicle, the elements of which are forcible entry into the car, and the intent to steal property inside. In doing so, it would present an alternate theory of liability for the prosecutor to present. This bill would eliminate the prosecutor's duty to establish that a vehicle is locked, and instead require the prosecutor to prove forcible entry.

3) **Dual Convictions**: While this bill creates a new crime of unlawful entry of a vehicle with intent to steal, it does not repeal the current auto burglary statute, Penal Code section 459. Having two statutes involving similar conduct presents the possibility of double convictions for a single entry into a car. For example, when there is evidence that a person breaks into a locked car in a forcible manner, (i.e. smashing a window), if this bill is enacted, the prosecutor really has established the elements for both crimes. Convictions for two crimes for a singular act raises fairness concerns.

   The concern is best illustrated with the crimes of theft and receiving stolen property. Common law principles prohibit dual convictions for both stealing and receiving the same property. This rule is based on the notion that a person who has stolen property cannot buy or receive that property from himself. (*People v. Ceja* (2010) 49 Cal.4th 1, 4-5, citing *People v. Allen* (1999) 21 Cal.4th 846, 850.) The Legislature codified this rule in 1992. (*People v. Ceja, supra*, 49 Cal.4th at p. 3.) Penal Code section 496 was amended to state, "No person may be convicted pursuant to this section and of the theft of the same property." (Pen. Code, §496, subd. (a).)

   Similarly to the language contained in the receiving stolen property statute, this bill specifies that a person cannot be convicted of both this new crime and of auto burglary based on the act of breaking into a single car. A prosecutor will have discretion to charge a defendant with both crimes and will be able to present alternative theories of liability; however, the defendant may only be convicted of one crime or the other.

4) **Immigration Consequences**: A conviction of the new crime created by this bill poses potential immigration consequences for noncitizen defendants. A theft offense is an aggravated felony for immigration purposes if a one-year sentence is imposed. (8 USC § 1101(a)(43)(G) & (U).) Thus, if a term of one-year or more is imposed for this new offense, it will be a theft-related "aggravated felony" for immigration purposes. This triggers a host of immigration consequences, including deportability. (8 USC § 1227(a)(2)(A)(iii).) By contrast, a Ninth Circuit case has held that auto burglary under Penal Code section 459 is not a theft-related aggravated felony because it is an indivisible statute which can be violated by entering the locked vehicle with the intent to commit theft *or any felony*. (*Rendon v. Holder* (9th Cir. 2014) 764 F.3d 1077, 1084.)

The new theft offense created by this bill is also a crime of moral turpitude for immigration purposes which can pose consequences for noncitizen defendants. (*United States v. Esparza-Ponce* (9th Cir. 1999) 193 F.3d 1133, 1136 [theft is a crime of moral turpitude for immigration purposes].) Among other possible consequences, a crime of moral turpitude can render a noncitizen inadmissible (8 USC § 1182(a)(2)(A)(i)(I)) or deportable (8 USC § 1227(a)(2)(A)(i) & (ii)).

5) **Argument in Support**: According to the Los Angeles County Sheriff's Department: "California's current auto burglary statute requires proof that the vehicle was locked in order to establish the crime of auto burglary. Proving a vehicle was locked at the time of the break-in requires victims to appear in court and testify that their vehicle was in fact locked after they exited. This is highly problematic for cases that involve the tourist population. This makes prosecuting a case extremely difficult as the prosecution cannot produce a victim to testify their vehicle was locked at the time."

6) **Argument in Opposition**: According to the Immigrant Legal Resource Center: "We oppose the creation of the new offense of forced entry of a vehicle with "intent to commit theft," under AB 395, for two reasons.

"First, as we discussed when a version of this bill was introduced last year (AB 1921), this offense would have a *particularly harmful effect on noncitizens*. However, if the bill were amended to prohibit entry with 'intent to commit theft **or any felony**,' it is likely that it would prevent that particularly severe harm.

"Second, even if the amendment is added, we still would urge the Legislature not to create this new offense on the grounds that it is entirely redundant: it punishes conduct that is already covered by comparable existing criminal statutes that provide the same exposure, such as vandalism or theft. California need not create an unnecessary new offense at this historic moment, when it is striving reduce mass incarceration and overcriminalization. We will discuss each of these points.

"Immigration consequences and effect of an amendment. "Regarding the immigration effect, if AB 395 as written becomes law, convictions under the new statute will result in the deportation of noncitizen defendants in California and the accompanying destruction of California families. This threat also can make it more difficult for prosecutors to plea bargain in these types of cases. *See e.g. Jae Lee v. United States*, 137 S.Ct. 1958, 1961 (2017) (appellant said he would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial).

"As we explained last year, an offense with the elements of an unpermitted entry into a vehicle with *intent to commit theft* has at least two serious immigration consequences. It is a 'crime involving moral turpitude' for immigration consequences. Conviction can make a noncitizen deportable or inadmissible, and cause other penalties, depending on the circumstances.[1] Worse, if a year or more sentence is imposed on this new offense, it would

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[1] "See INA §§ 212(a)(2)(A)(i), 237(a)(2)(A) (inadmissible, deportable based on one or more convictions of a crime involving moral turpitude)."

be an aggravated felony as 'attempted theft.' Aggravated felonies carry some of the worst possible immigration consequences.[2]

"However, if the statute were amended to prohibit such an entry with 'intent to commit theft *or any felony*,' and if that phrase was interpreted the same way as it is in Penal Code § 459, the California burglary statute, then it is likely that these severe immigration penalties would not apply.

"Statute is unnecessary. Amending the statute to add 'or any felony' would address the specific immigration problem. However, we still argue that the statute should not create a new crime when that is not needed, and the crime is more serving to create publicity or please a public that may not understand how the law currently works.

"We recognize the motivation to address car break-ins. We understand that the California commercial burglary statute requires proof that the vehicle was locked, and that in some cases this proof is not available, so that the person will not be specifically convicted of burglary.

"The new offense would be an alternative felony/misdemeanor ('wobbler') offense that has a potential felony sentence of 16 months, two years, or three years (a '16/2/3' wobbler). The conduct it prohibits already is covered by offenses, including 16/2/3 felonies that have almost no immigration consequences. In particular, damaging a locked or unlocked car by breaking the window, slashing a convertible top, or other means, is punishable under California law as vandalism, Penal Code § 594(a). Vandalism is punished as a 16/2/3 felony if the damage is at least $400, and otherwise as a one-year misdemeanor.

"Along with vandalism, the person can be charged with stealing objects from the car, which is punishable as grand theft, Penal Code § 487, a 16/2/3 wobbler, or petty theft, Penal Code § 490, a misdemeanor. A defendant can be convicted of and sentenced for both vandalism and theft for the same incident. For less serious offenses, in many counties taking objects from a locked or unlocked car or otherwise tampering with the car is routinely prosecuted as vehicle tampering, Vehicle Code § 10852, a misdemeanor.

"For these reasons, the Immigrant Legal Resource Center strongly opposes these bills. At a time when the state is trying to reduce criminal and immigration penalties rather than increase them, we urge you to not create a bill that punishes behavior already covered by current laws, and that especially harms California's large non-citizen population and the many U.S. citizens who are part of their families...."

7) **Related Legislation**:

a) AB 308 (Chen) provides that the Board of State and Community Corrections (BSCC) shall administer grants to law enforcement agencies that participate in regional vehicle burglary and theft reduction joint task forces. AB 308 is set to be heard in this committee on March 23, 2021.

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[2] "See INA § 101(a)(43)(G), (U) (attempt to commit theft is an aggravated felony if a year or more is imposed)."

b) SB 82 (Skinner) requires theft of property that is valued under $950 and where specified circumstances are not present to be charged as a misdemeanor. SB 82 was re-referred to the Senate Committee on Appropriations on March 17, 2021.

8) **Prior Legislation**:

a) AB 1921 (Diep), of the 2019-2020 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. AB 1921 was not heard in this committee.

b) SB 23 (Wiener), of the 2019-2020 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. SB 23 was held in the Assembly Appropriations Committee.

c) SB 916 (Wiener), of the 2017-2018 Legislative Session, also would have created a new crime of unlawful entry of a vehicle. SB 916 was held in the Senate Appropriations Committee.

d) AB 476 (Kukykendall), of the 1997-1998 Legislative Session, would have expanded the crime of burglary to include entry into a vehicle, regardless of if the doors are locked, to commit a felony or theft. AB 476 failed passage in this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Police Chiefs Association
California Travel Association (CALTIA)
Los Angeles County Sheriff's Department
National Insurance Crime Bureau
Southwest California Legislative Council

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association
Ella Baker Center for Human Rights
Immigrant Legal Resource Center
San Francisco Public Defender

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: March 23, 2021
Chief Counsel: Gregory Pagan

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

AB 547 (McCarty) – As Amended March 17, 2021

SUMMARY: Provides that a county probation department shall, upon request, notify a victim of domestic violence or stalking, of the perpetrators current address when the perpetrator is placed on, or being released on probation.

1) Provides that a county probation department shall notify a victim of domestic violence or stalking, of the perpetrators current address, or proposed address, after conviction, is placed on or being released on probation, after conviction, under the supervision of the adult probation department.

2) Provides that the above notification requirement shall only apply if the victim has requested notification and has provided the probation department with a current address at which they may be notified.

3) Requires the district attorney to advise the above victims of their right to request and receive notification, as specified.

EXISTING LAW:

1) Provides that whenever a person confined in the state prison for a conviction of a violent felony, the California Department of Corrections (CDC) or the Board of Parole Hearings (BPH) shall notify the local law enforcement agencies that have jurisdiction over the community in which the person was convicted and that have jurisdiction over the community in which the person is scheduled to be released. (Pen. Code § 3058.6.)

2) Requires the CDC or the BPT, within 45 days of the scheduled release of a person convicted of a violent felony, to notify the sheriff, chief of police, or both, and the district attorney in the jurisdiction where the person is scheduled to be paroled. (Pen. Code § 3058.6, subd. (a).)

3) Provides that the sheriff or the chief of police when notified as to the pending release of a violent felon may notify an appropriate person of a pending release. (Pen. Code § 3058.7, subd. (a).)

4) Requires the CDC to send a notice to a victim or witness who has requested notification that a person convicted of a violent felony is scheduled to be released. (Pen. Code § 3058.8, subd. (a).)

5) Provides that the CDC shall notify local law enforcement of the fact that a paroled inmate is going to be released in its jurisdiction. (Pen. Code § 3003, subd. (e)(1).)

6) Provides that upon conviction of a violent felony, the district attorney, probation officer, or victim- witness coordinator shall notify the victim as to his or her right to be sent notice of the defendant's release from custody. (Pen Code § 679.03, subd. (a)(1).

7) Provides that if a victim or witness so requests, the CDC shall not return an inmate released on parole who committed a violent felony to a location within 35 miles of the actual residence of a victim or witness. (Pen. Code § 3003, subd. (f).

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Nearly one in every three people in California have experience domestic violence at some point in their lifetime. For many, the story does not end when their abuser is arrested. More than half of the women who survive domestic violence live in fear for their safety. Tragically, these fears are often well-founded. As many as half of female victims of domestic violence report experiencing further incidents of violence or stalking by their abuser within one year.

   California must do more to protect victims of domestic violence. This bill will ensure that victims have the right to be notified of the probation address of their abuser and if necessary take further action to protect themselves from further abuse.

2) **Background**: According to materials supplied by the author, "Currently, victims of domestic violence can request to be notified of the parole location of a felony domestic violence offender, but not the probation location of a domestic violence offender. Domestic violence can be traumatizing for victims. After experiencing domestic violence, survey data shows that most female survivors report feeling fearful and unsafe, and 62.6% of female survivors experience symptoms of PTSD. Sadly, this fear is often justified, rates of re-victimization by the same offender ranging from ~20% (based on criminal justice reporting data) to as high as 50% (from surveys of victims). Abusers may choose to live near their victims to perpetuate violence or stalking. Data shows that the severity of the initial crime of domestic violence, the specific charge (misdemeanor or felony), and the outcome (probation or parole) are not predictors of the likelihood that an offender will re-abuse their victim. Surveys of victims reveal that those who ended their relationship with their abuser were twice as likely to report being re-victimized.

   "Victims of domestic violence should have the right to access any information that may pertain to their safety. Knowing the probation address of their abuser will equip survivors with information that may help them assess their risk, and if necessary take further action to protect themselves from further abuse."

3) **Argument in Support**: According to *Work Equity*, "AB 547 would help protect victims of domestic violence and prevent further abuse by expanding notification rights for victims of domestic violence to include notification of their perpetrators proposed address when

released on probation. By notifying the domestic violence of their perpetrator's location, this bill gives victims important information that may impact their safety and risk of continued violence, harassment, or stalking by their abuser.

REGISTERED SUPPORT / OPPOSITION:

Support

Work Equity

Opposition

None

Analysis Prepared by: Gregory Pagan / PUB. S. / (916) 319-3744

Date of Hearing: March 23, 2021
Counsel: David Billingsley

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

AB 594 (McCarty) – As Amended March 16, 2021

SUMMARY: Requires deadly use of force incidents other than those required to be investigated by the Attorney General, to be criminally investigated by an entity other than the law enforcement agency that employs the peace officer that was involved in a deadly use of force incident. Specifically, **this bill:**

1) States that except for shootings resulting in the death of an unarmed civilian (intended to be investigated by Attorney General), a law enforcement agency shall cause a criminal investigation of all deadly use of force incidents to be conducted by either of the following means:

    a) By an outside agency, including a police department, sheriff's department, or district attorney's office, with which the employing agency has a memorandum of understanding or similar agreement to conduct deadly use of force investigations, or which has primary jurisdiction to investigate the incident; or,

    b) By a multidisciplinary and multiagency task force composed of representatives from various law enforcement agencies within the county or region with which the employing agency has a memorandum of understanding or similar agreement to conduct deadly use of force investigations.

2) Specifies that under no circumstances shall the employing agency have primary responsibility in conducting the criminal investigation described above.

3) States that this bill does not limit the authority of an agency to conduct an administrative or disciplinary investigation of any deadly use of force incident separately from the criminal investigation.

4) Requires each law enforcement agency to, by no later than January 1, 2023, adopt a written policy or amend its existing written policy regarding the criminal investigation of officer-involved deadly use of force incidents, to be consistent with the provisions of this bill.

5) Requires the policy be available to the public on the agency's internet website.

6) Defines the following terms:

    a) "Criminal investigation" means "an investigation that is conducted to determine if a violation of state law was committed by a peace officer involved in a deadly use of force incident."

b) "Law enforcement agency" means "any police department, sheriff's department, or agency of the state or any political subdivision thereof that employs peace officers."

c) "Deadly use of force incident" means "any use of force by an officer that results in death."

EXISTING LAW:

1) Requires a state prosecutor to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian. The Attorney General is the state prosecutor unless otherwise specified or named. (Gov. Code, § 12525.3, subd. (b)(1).)

2) Specifies that the state prosecutor is authorized to do all of the following:

   a) Investigate and gather facts in an incident involving a shooting by a peace officer that results in the death of an unarmed civilian; and,

   b) For all investigations conducted, prepare and submit a written report. The written report shall include, at a minimum, the following information:

      i) A statement of the facts;

      ii) A detailed analysis and conclusion for each investigatory issue; and,

      iii) Recommendations to modify the policies and practices of the law enforcement agency, as applicable.

   c) If criminal charges against the involved officer are found to be warranted, initiate and prosecute a criminal action against the officer. (Gov. Code, § 12525.3, subd. (b)(2)((A)-(C).)

3) Requires the state prosecutor post and maintain on a public internet website each written report prepared by the state prosecutor pursuant to this subdivision, appropriately redacting any information in the report that is required by law to be kept confidential. (Gov. Code, § 12525.3, subd. (b)(3).)

4) Specifies that commencing on July 1, 2023, the Attorney General shall operate a Police Practices Division within the Department of Justice to, upon request of a local law enforcement agency, review the use of deadly force policies of that law enforcement agency. (Gov. Code, § 12525.3, subd. (c)(1).)

5) States that the Police Practices Division shall make specific and customized recommendations to any law enforcement agency that requests a review, based on those policies identified as recommended best practices. (Gov. Code, § 12525.3, subd. (c)(1).)

6) Provides that when the Attorney General deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction.

In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process. (Gov. Code, § 12550.)

7) Allows each department or agency that employs custodial officers, to establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so established shall comply with the provisions of this section and with other provisions, as specified. (Pen. Code, § 832.5, subd. (a)(2).)

8) 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).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "I first called for this legislation in 2015 with AB 86. Last year we passed AB 1506 requiring unarmed officer-involved shooting investigations be referred automatically to the CA Attorney General. AB 594 expands that law by requiring deadly use-of-force investigations be referred to a multi-agency task force. Almost 800 people have been shot and killed by police in California since 2015, and less than five independent investigations. Enough is enough – It is time for accountability and transparency on this issue."

2) **AB 1506 (McCarty), Independent Investigations of Shootings by Peace Officers.** AB 1506 (McCarty), Chapter 326, Statutes of 2020, specified that a state prosecutor shall conduct an investigation of any officer-involved shooting that resulted in the death of an unarmed civilian, as specified. AB 1506 also directs the Attorney General, beginning July 1, 2023, to operate a Police Practices Division within the Department of Justice (DOJ), to, upon request of a local law enforcement agency, review the use of deadly force policies of that law enforcement agency. Implementation of AB 1506 is subject to appropriation by the Legislature.

   This bill would cover criminal investigations of some types of officer use of force that were not addressed by AB 1506. This bill would address use of force investigations where the use of force by the officer results in death (except by shooting). This bill would require those use of force investigations to be conducted by an outside agency or by a multiagency task force.

3) **Connecticut and Wisconsin Laws Require Independent Investigations When There is Use of Deadly Force by a Police Officer:** In 2012, Connecticut passed a statute governing the procedure for the investigation of the use of deadly force by a police officer. The statute provided for the appointment of an individual to conduct the investigation, other than prosecutorial official from the judicial district where the incident occurred. Upon the conclusion of the investigation of the incident, a report must be filed that contains the following: (1) The circumstances of the incident, (2) a determination of whether the use of deadly physical force by the peace officer was appropriate, and (3) any future action to the taken by the Division of Criminal Justice as a result of the incident. (CT Gen Stat § 51-277 (2012).)

   AB 409 in Wisconsin was signed into law by Gov. Walker in April 2014. That law requires

that an investigation must be performed by an independent review panel when a police officer is involved in the death of a civilian. The panel must consist of two individuals from outside of the police agency involved. In addition, the family of the victim must be informed of their legal rights.

4) **Final Report of the President's Task Force on 21st Century Policing (2015):** The Task Force was Co-Chaired by Charles Ramsey, Commissioner, Philadelphia Police Department and Laurie Robinson, Professor, George Mason University. The nine members of the task force included individuals from law enforcement and civil rights communities. The stated goal of the task force was ". . . to strengthen community policing and trust among law enforcement officers and the communities they served, especially in light of recent events around the county that have underscored the need for and importance of lasting collaborative relationships between local police and the public." (Final Report of the President's Task Force on 21st Century Policing (2015), p. v.) Based on based on their investigation, the Task Force provided thoughts and recommendations on a variety of issues related to police practices.

   One of the areas explored by the Task Force was oversight. The Task Force developed the following actions items (among others) in connection with cases that involved police use of force resulting in a death, or police shootings resulting in death or injury:

   2.2.2 Action Item: These policies should also mandate external and independent criminal investigation in cases of police use of force resulting in death, officer-involved shooting resulting in injury or death, or in-custody deaths.

   One way this can be accomplished is by the creation of multi-agency force investigation task forces comprising state and local investigators. Other ways to structure this investigative process include referring to neighboring jurisdictions or to the next higher levels of government (many small departments may already have state agencies handle investigations), but in order to restore and maintain trust, this independence is crucial.

   In written testimony to the task force, James Palmer of the Wisconsin Professional Police Association offered an example in that state's statutes requiring that agency written policies "require an investigation that is conducted by at least two investigators . . . neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer – involved death." Furthermore, in order to establish and maintain internal legitimacy and procedural justice, these investigations should be performed by law enforcement agencies with adequate training, knowledge, and experience investigating police use of force. (Interim Report of the President's Task Force on 21st Century Policing (2015), p. 21.)

   2.2.3 Action Item: The task force encourages policies that mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury of death, or in- custody deaths.

   Strong systems and policies that encourage use of an independent prosecutor for reviewing police uses of force and for prosecution in cases of inappropriate deadly force and in-custody death will demonstrate the transparency to the public that can lead to mutual trust between community and law enforcement. (Interim Report of the President's Task Force on 21st

Century Policing (2015, p. 22.)

2.2.5 Action Item: Policies on use of force should clearly state what types of information will be released, when, and in what situation, to maintain transparency.

This should also include procedures on the release of a summary statement regarding the circumstances of the incident by the department as soon as possible and within 24 hours. The intent of this directive should be to share as much information as possible without compromising the integrity of the investigation or anyone's rights. (Interim Report of the President's Task Force on 21st Century Policing (2015, p. 22.)

5) **Argument in Support**: According to the *California Public Defenders Association*, "Under current law, when a police officer kills or seriously injures another person, the determination as to whether the officer acted unlawfully is generally made by the officer's own department, necessarily consisting of the officer's friends, colleagues, or co-workers. While some police agencies take these use of force investigations seriously, and reach their conclusions without bias or favoritism, others do not. In either case, public confidence in the outcome is soured by the understandable perception that a police agency is less likely to find that one of its own members engaged in serious misconduct.

"AB 594 addresses this issue by requiring an agency other than the officer's own department to investigate the use of force when the officer kills, seriously injures, or shoots another person, subject to some limitations. The bill also allows each police agency to designate a separate agency or collection of agencies to conduct these use of force investigations, if none of the investigating agencies are the agency to which the officer belongs."

6) **Argument in Opposition**: According to the *Peace Officers' Research Association of California*, "PORAC understands your efforts to improve the public's trust in law enforcement agency investigations. However, we believe each agency has a system in place that ensures professionalism and accuracy in the investigatory process. For example, nearly every law enforcement agency in San Bernardino County has an agreement with the Sheriff's Department to do their investigations dealing with officer-involved shootings. San Bernardino Sheriff's Department has a robust internal affairs investigatory program. However, in addition to the investigation of outside agency's shooting incidents, San Bernardino Sheriff's Department continues to investigate their own officer-involved shootings, as well. This measure would no longer allow that to continue."

7) **Related Legislation**:

   a) 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 set for hearing in the Assembly Public Safety Committee on March 23, 2021.

   b) AB 60 (Salas), would create a process to decertify police officers. AB 60 is set pending hearing in the Assembly Public Safety Committee.

8) **Prior Legislation:**

a) AB 1506 (McCarty), Chapter 326, Statutes of 2020, provided that a state prosecutor shall conduct an investigation of any officer-involved shooting that resulted in the death of an unarmed civilian, as specified.

b) AB 1024 (Kiley), Chapter 204, Statutes of 2017, requires a court to disclose a grand jury indictment proceeding, as specified, if the grand jury decides not to return an indictment in a grand jury inquiry into an offense that involves a shooting or use of excessive force by a peace officer, as defined, that led to the death of a person being detained or arrested by the peace officer.

c) AB 2917 (McCarty), of the 2019-2020 Legislative Session, would have required the Attorney General, commencing on July 1, 2023, to create a program within the Department of Justice (DOJ), to review the policies on the use of deadly force of any law enforcement agency, as specified, that requests a review, and to make recommendations. AB 2917 was never heard in the Assembly Public Safety Committee.

d) AB 284 (McCarty), of the 2017-2018 Legislative Session, would have, contingent upon the appropriation of funding by the Legislature, required the DOJ to conduct a study of all or a sample of peace officer-involved shootings resulting in death or serious injury that occurred in California between January 1, 2015, and December 31, 2016.

e) AB 86 (McCarty), of the 2015-2016 Legislative Session, would have required the Attorney General to appoint a special prosecutor to direct an independent investigation if a peace officer, in the performance of his or her duties, uses deadly physical force upon another person and that person dies as a result of the use of that deadly physical force. AB 86 was held on the Assembly Appropriations Suspense File.

f) SB 227 (Mitchell), Chapter 175, Statutes of 2015, would prohibit a grand jury from inquiring into an offense or misconduct that involves a shooting or use of excessive force by a peace officer, as specified, that led to the death of a person being detained or arrested by the peace officer. SB 227 was held unconstitutional by the Third Appellate District Court of Appeal.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)
Consumer Attorneys of California
San Francisco Public Defender

Oppose

California Association of Highway Patrolmen
California Attorneys for Criminal Justice
California State Sheriffs' Association
Peace Officers Research Association of California (PORAC)

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744