

## CONCURRENCE IN SENATE AMENDMENTS

AB 256 (Kalra, et al.)

As Amended August 24, 2022

Majority vote

**SUMMARY**

Original Committee of Reference: PUB. S.

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, among other things.

**Senate Amendments**

Current Committee Recommendation: Concur

- 1) Amend the timeline for retroactive application of the CRJA, to apply as follows:
  - a) Commencing January 1, 2023, to all cases in which the petitioner is sentenced to death or to cases in which there are actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgement or disposition became final.
  - b) Commencing January 1, 2024, to all cases in which, the petitioner is currently serving a sentence in state prison or in a county jail for a realigned felony offense, or is committed to the Division of Juvenile Justice for a juvenile disposition, regardless of when the judgment or disposition became final.
  - c) Commencing January 1, 2025, to all cases in which judgement became final for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice on or after January 1, 2015.
  - d) Commencing January 1, 2026, to all cases in which judgement was for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice, regardless of when the judgement or disposition became final.
- 2) Clarify that out-of-court statements that "the court finds trustworthy and reliable," statistical evidence, and aggregate data are admissible for the limited purpose of proving a violation.
- 3) Provide that whether more serious charges or longer or more severe sentences were "more frequently sought or obtained" or "more frequently imposed" is based on the totality of the evidence, which may include statistical evidence, aggregate data, or nonstatistical evidence.
- 4) Provide that the defendant does not need to prove intentional discrimination.
- 5) Provide that motions made at trial must be made as soon as practicable upon the defendant learning of the alleged violation and that untimely motions may be waived in the discretion of the court.
- 6) Modify the provision regarding disclosure to the defense of records relevant to a CRJA violation to apply to privileged records unless a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order.

- 7) State that the CRJA applies to adjudications to transfer a juvenile case to adult court.
- 8) Clarify that if after judgment has been entered, the court finds that the only violation was based on the defendant having been charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins, the court may modify the judgment to a lesser included or lesser related offense. On resentencing, the court shall not impose a new sentence greater than that previously imposed.
- 9) Provide that for petitions that are filed in cases for which judgment was entered before January 1, 2021, and that are based on the actions or statements of a judge, attorney, law enforcement officer involved in the case, expert witness, or juror, the petitioner shall be entitled to relief unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.
- 10) Clarify that when a defendant files a habeas corpus petition based on the CRJA, and the court issues an order to show cause and holds an evidentiary hearing, the defendant may appear remotely, and the court may conduct the hearing through the use of remote technology.
- 11) Make other technical and clarifying changes.
- 12) Double joint this bill with SB 467 (Wiener) of the current legislative session to avoid chaptering out issues.

## COMMENTS

### *Finality of Judgment*

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.)" (*In re Reno, supra*, 55 Cal.4th at p. 451.)

This bill would make the CRJA fully retroactive, applying it to all cases regardless of the date of finality of the judgment of conviction. It would, however, apply the retroactivity in phases, as specified.

*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.

While California Constitution Article VI, Section 13, 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].)

This bill would provide a standard of prejudice where a petition is based on retroactive application of the CRJA, and where the violation of the CRJA is based on either of the following: [1] a judge, attorney, law enforcement officer, expert witness, or juror exhibited bias based on race, ethnicity, or national origin; or [2] during the trial, one of the foregoing used racially discriminatory language. In particular, the bill would provide that the petitioner is entitled to retroactive relief, as specified, unless the state proves beyond a reasonable doubt that the error did not contribute to the verdict. This is the more stringent standard of prejudice generally applied to federal constitutional errors pursuant to *Chapman v. California* (1967) 386 U.S. 18:

The *Chapman* standard of review requires the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Reversal is required if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

(*People v. Bridgeford* (2015) 241 Cal.App.4th 887, 904, citations and quotations omitted.)

The bill is silent as to what standard of prejudice applies to violations of the CRJA prospectively. The United States Supreme Court has recognized that certain federal constitutional errors are not amenable to harmless error analysis. These errors represent "structural defects in the constitution of the trial mechanism." (*In re Christopher* (2022) 12 Cal.5th 1063, 1074, citations and quotations omitted.) "[U]nder the California constitutional harmless-error provision some errors similarly are not susceptible to the 'ordinary' or 'generally applicable' harmless-error analysis ... and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case." (*Ibid.*) These are known as structural errors. These errors are per se prejudicial in light of the "difficulty of assessing the effect of the error." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4.) It's an open question whether some or all prospective violations constitute structural error.

### **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."

### **Arguments in Support**

According to the *Ella Baker Center for Human Rights*, a co-sponsor of this bill, "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."

### **Arguments in Opposition**

According to the *California District Attorneys Association*, "AB 256 does not require a showing of *any* actual prejudice or harm arising from a violation of section 745 to reverse a conviction for cases occurring after January 1, 2021. For example, if there is a mass shooting and it later comes to light that a law enforcement officer involved in the case (who merely took an undisputed videotaped statement from a witness) exhibited bias against the defendant during the arrest, there will have to be a reversal regardless of how many people observed the defendant doing the shooting, the law enforcement officer did not even testify, and all the people murdered belonged to the same racial and ethnic group as the defendant."

## **FISCAL COMMENTS**

According to the Senate Appropriations Committee:

- 1) Courts: Judicial Council estimates increased workload costs between the following ranges resulting from this bill: \$1.4 million to \$2 million in the first year, \$1.1 million to \$1.7 million in the second year, and \$900,000 to \$1.4 million for the third and fourth years each. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations. The 2022-23 budget includes an ongoing annual allocation of \$151.5 million and a one-time allocation of \$10.3 million backfill from the General Fund in order to address declining revenue to the Trial Court Trust Fund.

- 2) Department of Justice (DOJ): The DOJ reports estimated costs of \$509,000 in 2022-23 (3.0 personnel years (PY)), \$2.1 million in 2023-24 (8.0 PY), \$2 million in 2024-25 (8.0 PY), \$1.3 million in 2025-26 and 2026-27 (5.0 PY) (General Fund). Actual costs would depend on the number of petitions that would be filed and appealed.
- 3) Transporting habeas petitioners: Unknown, potentially-significant workload costs in the thousands of dollars to the Department of Corrections and Rehabilitation (CDCR) to supervise and transport individuals in state custody to attend hearings related to this measure. Actual costs would depend on the number of incarcerated persons who file a petition and make a prima facie showing that they are entitled to relief and for whom remote/video appearances at the proceedings are not exercised. (General Fund)
- 4) Incarceration savings: Unknown potentially savings annually in reduced state incarceration costs for individuals whom the courts resentence to a shorter term of imprisonment and/or release from state facilities resulting from the successful prosecution of a writ of habeas corpus. The estimated per capita cost to detain a person in a state prison for 2022-23 is \$111,446 annually, with an annual marginal rate per person of over \$13,000. Actual savings would depend on the number of individuals who are resentenced and who avoid incarceration in state prison because of this measure. Aside from marginal cost savings per individual, however,

CDCR would experience an institutional cost savings only if the number of persons incarcerated decreased to a level that would effectuate the closing of a prison yard or wing (General Fund).

## VOTES

### ASM PUBLIC SAFETY: 6-2-0

**YES:** Jones-Sawyer, Bauer-Kahan, Lee, Quirk, Santiago, Wicks

**NO:** Lackey, Seyarto

### ASM APPROPRIATIONS: 12-4-0

**YES:** Lorena Gonzalez, Calderon, Carrillo, Chau, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas

**NO:** Bigelow, Megan Dahle, Davies, Fong

### ASSEMBLY FLOOR: 45-21-13

**YES:** Bauer-Kahan, Bennett, Berman, Bloom, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Daly, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Holden, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, McCarty, Medina, Mullin, Nazarian, O'Donnell, Quirk, Quirk-Silva, Reyes, Luz Rivas, Robert Rivas, Blanca Rubio, Santiago, Stone, Ting, Ward, Akilah Weber, Wicks, Wood, Rendon

**NO:** Bigelow, Chen, Choi, Cunningham, Megan Dahle, Davies, Flora, Fong, Gallagher, Gray, Kiley, Lackey, Mathis, Nguyen, Patterson, Petrie-Norris, Seyarto, Smith, Valladares, Voepel, Waldron

**ABS, ABST OR NV:** Aguiar-Curry, Arambula, Boerner Horvath, Cooley, Cooper, Frazier, Irwin, Mayes, Muratsuchi, Ramos, Rodriguez, Salas, Villapudua

### SENATE FLOOR: 30-10-0

**YES:** Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

**NO:** Bates, Borgeas, Dahle, Grove, Hurtado, Jones, Melendez, Nielsen, Ochoa Bogh, Wilk

**ASM PUBLIC SAFETY: 5-2-0**

**YES:** Jones-Sawyer, Mia Bonta, Bryan, Quirk, Santiago

**NO:** Lackey, Seyarto

**UPDATED**

VERSION: August 24, 2022

CONSULTANT: Cheryl Anderson / PUB. S. / (916) 319-3744

FN: 0004552