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## SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair

2021 - 2022 Regular Session

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### AB 256 (Kalra) - Criminal procedure: discrimination

**Version:** May 24, 2021

**Urgency:** No

**Hearing Date:** July 15, 2021

**Policy Vote:** PUB. S. 4 - 1

**Mandate:** No

**Consultant:** Shaun Naidu

**Bill Summary:** AB 256 would, among other things, apply retroactively, as specified, the prohibition on the state from seeking or obtaining a conviction or sentence based on race, ethnicity, or national origin.

#### Fiscal Impact:

- 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. For illustrative purposes, the Budget Act of 2021 allocates \$118.3 million from the General Fund for insufficient revenue for trial court operations. (General Fund\*)
- Department of Justice (DOJ): The department reports the following appellate litigation workload cost ranges (and new personnel requirements) associated with AB 256: \$2.768 million (and 29.0 PY) to \$9.911 million (and 96.0 PY) in FY 2021-2022, \$12.230 million (and 67.0 PY) to \$41.215 million (and 203.0 PY) in FY 2022-2023 and 2023-2024, \$4.764 million (and 29.0 PY) to \$17,102 million (and 96.0 PY) in FY 2024-2025, and \$588,000 (and 3.0 PY) to \$5.302 million (and 33.0 PY) in FY 2025-2026. The increased workload to DOJ would depend on the number of petitions that would be filed and appealed. (General Fund)
- 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)
- 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 FY 2020-2021 per capita cost to detain a person in a state prison is \$112,691 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)

\*Trial Court Trust Fund

**Background:** Last year, the Legislature passed the California Racial Justice Act of 2020 (CRJA). The act prohibits the state from seeking or obtaining a criminal conviction or imposing a sentence based on race, ethnicity, or national origin. The defendant may establish a violation of this prohibition upon proving any of the following:

- 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.
- During the defendant's trial, in 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 discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This provision does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially-neutral and unbiased physical description of the suspect.
- The defendant was charged with 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.
- 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.
- 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.

The act includes various procedural mechanisms to facilitate its use and applies only prospectively in cases in which judgment has not been entered prior to January 1, 2021.

Existing law allows a person who is unlawfully imprisoned or restrained of their liberty to prosecute a writ of habeas corpus to inquire into the cause of their imprisonment or

restraint. 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 the person's incarceration.
- 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.
- 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. "New evidence" means 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.
- If a criminal conviction or sentence was sought, obtained, or imposed in violation of the CRJA if judgment was entered on or after January 1, 2021.

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. Habeas corpus is the exclusive procedure for collateral attack on a judgment of death.

Additionally, existing law creates an explicit right for a person who is 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.

The prosecution is required to disclose to the defense exculpatory evidence in the prosecution's possession or known to be in the possession of investigating agencies. The trial court has broad authority to dismiss a case in the interests of justice, except as specified.

Parties in a criminal case are allowed an unlimited number of challenges to prospective jurors for cause, and challenges for cause may be based on general disqualification, implied bias, or actual bias. "Implied bias" occurs when there is the existence of a state of mind in the juror evincing enmity against, or bias towards, either party. "Actual bias" is defined as the state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

Separate from challenges for cause, each party may strike a prospective juror through the use of a peremptory challenge for which no reason needs be given. Parties can make only a limited number of peremptory challenges for each case.

**Proposed Law:** This bill would apply the CRJA retroactively in phases. Specifically, it would allow a person who alleges that their conviction or sentence is based on race, ethnicity, or national origin to petition for a writ of habeas corpus, as follows:

- Starting January 1, 2022, in cases in which judgment was entered prior to January 1, 2021, if any of the following apply:
  - The petitioner is sentenced to death.
  - The petitioner is currently serving a sentence in state prison or in a county jail pursuant to the 2011 Realignment Legislation.
  - The petitioner is committed to the Division of Juvenile Justice for a juvenile disposition.
  - If the motion to vacate is filed by a person who is no longer in custody, as specified, because of actual or potential immigration consequences related to the conviction or sentence.
- Beginning January 1, 2023, in cases in which judgment was entered for a felony conviction or juvenile disposition after January 1, 2013.
- Beginning January 1, 2025, in cases in which judgment was entered for a felony conviction or juvenile disposition regardless of the date of judgment.

AB 256 would make a number of other changes to the CRJA, including defining “juror” to mean a prospective juror, including alternate jurors, and requiring the disqualification of a judge from any further proceedings under the act if a motion under the CRJA is made in the trial court that is based in whole or in part on conduct or statements by that judge.

**Related Legislation:** AB 1798 (Levine, 2019-2020 Reg. Sess.) would have prohibited a person from being executed pursuant to a judgment that was either sought or obtained on the basis of race if the court makes a finding that race was a significant factor in seeking or imposing the death penalty. AB 1798 was held on the Suspense File of the Assembly Committee on Appropriations.

AB 2542 (Kalra, Ch. 317, Stats. 2020) prohibited the state from seeking or upholding a conviction or sentence that is discriminatory based on race, ethnicity, or national origin for cases in which judgement has not been entered prior to January 1, 2021. Prior versions of AB 2542 applied both prospectively and retroactively, regardless of the sentencing date. This Committee adopted amendments to strike the retroactivity of the measure.

**Staff Comments:** Based on the phases in AB 256 to petition the court for cases that were final before 2021, the current prison population, court statistical information, and petition trends related to Propositions 47 (2014) and 64 (2016), Judicial Council estimates the following number of habeas petitions filed as a result of this measure: approximately 5,000 in the first year, 4,000 in the second year, and 3,000 in the third and fourth years each. Feedback from the courts for AB 2542 (the precursor to this bill) indicates a general estimate of between three minutes and 15 minutes would be spent to review each petition to determine if it meets the “prima facie” standard for an additional review hearings. For 5,000 petitions that would equal roughly \$251,000 to \$1.255 million. Based on that same feedback, it is estimated that it takes between 30 minutes and 90 minutes for the additional review hearing for each petition that makes a

prima facie showing that a violation of the CRJA occurred. It is unknown how many petitions would make a prima facie showing.

Additionally, AB 256 likely would produce additional costs to CDCR to transport incarcerated individuals to and from court for hearings for habeas corpus petitions. There are many factors that affect the costs of out-of-institution transportation, including each person's escape risk and in-custody behavior, the distance from the facility where the person is detained to the courthouse, and the pace at which a court moves through its docket. Presuming that two correctional officers with regular hourly wages would transport one person with a total travel and court time of four hours, which is a conservative assumption, this bill would cost the department almost \$300 per hearing. If the court and travel time were extended, department costs would rise commensurately. If CDCR is able to transport multiple inmates to a courthouse at one time, the per-incarcerated person costs would be lowered in turn.

Relatedly, AB 256 could result in the immediate or later release of a number of people currently incarcerated in state prison. If this measure results in the release from state prison of 10 individuals, it would result in a marginal rate cost savings of roughly \$130,000 annually. If this measure results in a large enough number of people released from prison to effectuate the closing of a yard or wing of a prison, incarceration cost savings to the state could reach in the millions of dollars annually.

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