SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 256	**Hearing Date:**	June 29, 2021
Author:	Kalra		
Version:	May 24, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal procedure: discrimination***

HISTORY

Source: American Civil Liberties Union California Action
American Friends Service Committee
Ella Baker Center for Human Rights
California Coalition for Women Prisoners
Californians United for a Responsible Budget
Coalition for Humane Immigrant Rights (CHIRLA)
Initiate Justice
League of Women Voters of California
NextGen
Silicon Valley De-Bug

Prior Legislation: AB 2542 (Kalra), Ch. 317, Stats. 2020

Support: A New Path; Afro-Upris; All of Us or None Riverside; Alliance San Diego; American Constitution Society Chapter for Santa Clara University School of Law; American Friends Service Committee; Amnesty International USA: Anti-Defamation League; API Equality – LA; Asian American Advancing Justice – California; Asian Law Alliance; Asian Prisoner Support Committee; Asian Solidarity Collective; Bay Rising; Bend the Arc: Jewish Action; Black Women for Wellness Action Project; California Attorneys for Criminal Justice; California Federal of Teachers AFL-CIO; California Immigrant Policy Center; California Innocence Coalition; California League of United Latin American Citizens; California Nurses Association; California Public Defenders Association; California State Council of Service Employees International Union (SEIU California); California Teachers Association; Californians for Safety and Justice; Center on Juvenile and Criminal Justice; Change Begins with Me Indivisible Group; Clergy and Laity United for Economic Justice; Coalition for Justice and Accountability; Community Advocates for Just and Moral Governance; Community Agency for Resources Advocacy & Services; Community Legal Services in East Palo Alto; Communities United for Restorative Youth Justice (CURYJ); Consumer Attorneys of California; Courage California; Cure California; Death Penalty Focus; Del Cerro for Black Lives Matter; Democratic Club of Vista; Democratic Party of the San Fernando Valley; Democrats of Rossmoor; Dignity and Power Now; Disability Rights California; Drug Policy Alliance; Ella Baker Center for Human Rights; Empowering Pacific Islander Communities; Equal Rights Advocates; Equal Justice USA; F.U.E.L. – Families

United to End LWOP; Felony Murder Elimination Project; Friends Committee on Legislation of California; Hillcrest Indivisible; Human Impact Partners; Immigrant Legal Resource Center; Indivisible Marin; Initiate Justice; Kern County Participatory Defense; LA Coalition for Excellent Public Schools; LA Voice; Law Enforcement Action Partnership; Legal Services for Prisoners with Children; League of Women's Voters of California; Los Angeles Urban League; Mission Impact Philanthropy; Naral Pro-Choice California; National Association of Social Workers, California Chapter; National Center for Lesbian Rights; National Center for Youth Law; National Institute for Criminal Justice Reform; No Justice Under Capitalism; Oakland Privacy; Partnership for the Advancement of New Americans; Pillars of the Community; Project Rebound Consortium; Racial Justice Allies of Sonoma County; Resilience Orange County; Reuniting Families Contra Costa; Root & Rebound; Rubicon Programs; San Bernardino Free Them All; San Diegans for Justice; San Diego Progressive Democratic Club; San Jose State University Human Rights Institute; San Francisco Public Defender; San Mateo County Participatory Defense; Santa Barbara Women's Political Committee; SD QTPOC Collectivo; Secure Justice; Showing Up for Racial Justice (SURJ) Bay Area; SURJ San Diego; SURJ San Francisco; SURJ San Jose; SURJ Marin; SURJ North County San Diego; Silicon Valley De-bug; Smart Justice California; Secure Justice; Social Workers for Equity & Leadership; Southeast Asia Resource Action Center; Starting Over, Inc.; Team Justice; Transformative In-Prison Workgroup; Unitarian Universalist Justice Ministry of California; W. Haywood Burns Institute; Think Dignity; TIDES Advocacy; Time for Change Foundation; UC Berkeley's Underground Scholars Initiative; UDW/AFSCME Local 3930; Uncommon Law; United Food and Commercial Workers – Western States Council; Uprise Theater; Voice for Progress; We the People – San Diego; White People 4 Black Lives; YWCA Berkeley/Oakland; Young Women's Freedom Center; Youth Hype; 8th Amendment Project

Opposition: California District Attorneys Association; California State Sheriffs' Association; California Police Chiefs Association; Crime Victims United

Assembly Floor Vote: 45 - 21

PURPOSE

The purpose of this bill is the make 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, apply retroactively and to make other clarifying changes.

Existing law 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. (Pen. Code, § 745.)

Existing law provides that a violation of the CRJA is established if the defendant proves, by a preponderance of the evidence, 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 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;

- 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;

- 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,

- 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).)

Existing law states that a defendant may file a motion in the trial court, of 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).)

This bill states that if the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings.

Existing law 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 trial court shall hold a hearing. (Pen. Code, § 745, subd. (c).)

Existing law provides that at the hearing, evidence may be presented by either party, including but not limited to, statistical evidence aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. (Pen. Code, § 745, subd. (c)(1).)

Existing law states that the defendant shall have the burden of proving a violation of the CRJA by a preponderance of the evidence and at the conclusion of the hearing, the court shall make findings on the record. (Pen. Code, § 745, subd. (c)(2) & (3).)

Existing law authorizes a defendant to file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of the CRJA in the possession or control of the state. A motion under this section shall describe the type of records or information the defendant seeks and 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).)

Existing law states that notwithstanding any other law, except for an initiative approved by the voters, if the court finds, by a preponderance of the evidence, a violation of the CRJA, the court shall impose a remedy specific to the violation found from the following list:

- Declare a mistrial, if requested by the defendant;
- Discharge the jury panel and empanel a new jury;
- Dismiss enhancements, special circumstances, special allegations, or reduce one or more charges if the court determines that it would be in the interest of justice. (Pen. Code, § 745, subd. (e).)

Existing law states that when a judgment has been entered, if the court finds that a 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's provisions. (Pen. Code, § 745, subd. (e)(2)(A).

Existing law provides that if the court finds that the only violation of the CRJA is based on the defendant being 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 court has the ability to rectify the violation by modifying the judgement to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed. (Pen. Code, § 745, subd. (e)(2)(A).)

This bill deletes the above provision.

Existing law states that when a judgement has been entered, if the court finds that only the sentence was sought, obtained or imposed in violation of the CRJA, the court shall vacate the sentence, find that it is legally invalid and impose a new sentencing, but shall not impose a sentence greater than that previously imposed. (Pen. Code, § 745, subd. (e)(2)(B).)

Existing law prohibits the imposition of the death penalty on a defendant when the court finds that there has been a violation of the CRJA. (Pen. Code, § 745, subd. (e)(3).)

Existing law clarifies that the remedies available under the CRJA do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

Existing law states that the CRJA applies to adjudications and dispositions in the juvenile delinquency system and that its provisions do not prevent the prosecution of hate crimes. (Pen. Code, § 745, subd. (f) & (g).)

Existing law provides the following definitions for purposes of the CRJA:

- "More frequently sought or obtained" or "more frequently imposed" means that statistical evidence or aggregate date 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.

- "Prima facie showing" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of the CRJA has occurred. "Substantial likelihood" requires more than a mere possibility, but less than a standard of more likely than not.

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

- "State" includes the Attorney General, a district attorney, or a city prosecutor. (Pen. Code, § 745, subd. (h).)

This bill states that "juror" means a prospective or sworn juror, including alternate jurors.

Existing law states that when a defendant shares a race, ethnicity, or national origin with more than one group, the defendant may aggregate data among groups to demonstrate a violation of the CRJA. (Pen. Code, § 745, subd. (i).)

Existing law states that the CRJA applies only prospectively in cases in which judgement has not been entered prior to January 1, 2021. (Pen. Code, § 745, subd. (j).)

This bill provides that the CRJA shall also apply retroactively as follows:

- Beginning January 2, 2022, in cases in which judgment was entered prior to January 1, 2021, if the petitioner is sentenced to death or currently serving a sentence in state prison or in a county jail for a jail-eligible felony, or committed to the Division of Juvenile Justice for a juvenile disposition, or if a motion to vacate is filed because of actual or potential immigration consequences;

- Beginning January 1, 2023, in cases in which judgment was entered for a felony conviction or juvenile disposition after January 1, 2013; and,

- Beginning January 1, 2025, in cases in which judgment was entered for a felony conviction or juvenile disposition regardless of the date of judgement.

Existing law allows a person who is unlawfully imprisoned or restrained of his or her liberty to prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint. (Pen. Code, § 1473, subd. (a).)

This bill makes conforming changes to existing law on habeas corpus relief based on a violation of the CRJA.

This bill contains the following legislative findings and declarations:

- It is the intent of the Legislature to apply the California Racial Justice Act of 2020 retroactively, to ensure equal access to justice for all; and,
- It is the intent of the Legislature that, except as described in subdivision (a), all other amendments made by this act are to clarify existing law.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> 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.
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> 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.
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> 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. AB 256 includes a just phase-in for persons with judgements rendered prior to January 1, 2021 to use court remedies to challenge a racial bias in their case. Additionally, providing a mechanism for retroactive relief will allow the state to realize significant correctional savings.

2. *McClesky v. Kemp*

In *McClesky v. Kemp*, (1987) 481 U.S. 279, the defendant, a black man, was sentenced to death for the murder of a white police officer during the course of a robbery. The defendant filed a habeas petition challenging his sentence on the grounds that the death penalty is administered in a discriminatory manner in Georgia in violation of the equal protection clause and cruel and unusual punishment clause under the 14th and 8th Amendments to the U.S Constitution. In support of his claim, the defendant proffered a statistical study indicating that, even after taking into account nonracial variables, defendants who were charged with killing whites 4.3 times more likely to receive the death penalty in Georgia as opposed to killing blacks, and in general black defendants were 1.1 times more likely to receive a death sentence than other defendants. The District Court denied his petition and the Court of Appeals affirmed the District Court. Both courts assumed the validity of the study.

The U.S. Supreme Court granted certiori and in reviewing the case, the Court also assumed the validity of the study which conducted an extensive examination of over 2,000 murder cases that occurred in Georgia during the 1970s. The study indicated that black defendants who kill white victims have the greatest likelihood of receiving the death penalty. (*McClesky v. Kemp*, *supra*, 481 U.S. at p. 287.)

The defendant claimed that the Georgia capital punishment statute violates the equal protection clause of the 14th Amendment because a defendant's race and the race of the victim has an impact on the likelihood of being sentenced to death, as evidenced by the study. The Court began its analysis with the principal that a defendant who alleges an equal protection violation has the burden of proving purposeful discrimination that had a discriminatory effect on the defendant. (*Ibid*.) While statistical evidence had been accepted by the Court to prove an equal protection violation in the selection of the jury venire in a particular district, the Court reasoned that the nature of the capital sentencing decision is fundamentally different than venire-selection.

> Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. . . . . Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection. . . . In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.(*Id*. at p. 294.)

The Court thus held that the study is insufficient to support an inference that any of the decisionmakers in defendant's case acted with discriminatory purpose to establish a violation of the equal protection clause. The defendant's argument that the study proves that the State as whole acted with discriminatory purpose by adopting a criminal punishment statute despite its allegedly discriminatory application also failed because there was no evidence that the statute was enacted to further a racially discriminatory purpose. (*Id*. at p. 298.)

The defendant's claim that Georgia's capital sentencing system violates the Eighth Amendment was also rejected by the Court. The Court found that the defendant's sentence was not disproportionate to other death sentences imposed in the state and the fact that the capital sentencing statute gives jurors discretion does not make the application of the law arbitrary and capricious because focused discretion is fundamental in the criminal justice system. (*Id*. at p. 311-312.)

Proponents for the CRJA argued that the ruling in *McClesky* requiring proof of intentional or purposeful discrimination established a legal standard nearly impossible to meet. Instead, the CRJA 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. The CRJA does not require the discrimination to have been purposeful or to have had prejudicial impact on the defendant's case.

The CRJA allows a violation to be based on bias by judicial officers, including a defense attorney, allows defendants to file a motion for relevant records, and specifies remedies when a violation is proven, including vacating a conviction, resentencing or ordering new proceedings, and prohibiting the imposition of the death penalty.

3. Retroactivity of the CRJA

As originally introduced, the CRJA applied both prospectively and retroactively regardless of sentencing date. However, as the bill moved through the Legislative process, the bill was amended to apply prospectively only in order to address concerns related to costs and the potential impact on the judicial system. According to background information provided by the author, since the CRJA went into effect at the beginning of this year, only a few motions have been filed. This may be due to the newness of the law and the time it takes to request and review discovery in order to establish a violation of the law.

This bill applies the CRJA retroactively but does so through a phased-in process for people sentenced prior to 2021 as follows:

- Beginning January 1, 2022, the CRJA applies retroactively to cases in which judgment was entered prior to January 1, 2021, if the petitioner is sentenced to death, or is currently serving a state prison sentence or a felony sentence in the county jail under realignment, or where a motion to vacate is filed because of actual or potential immigration consequences, as specified;

- Beginning January 1, 2023, the CRJA applies retroactively to cases in which judgment was entered for a felony conviction or juvenile disposition after January 1, 2013; and,

- Beginning January 1, 2025, the CRJA applies retroactively to cases in which judgment was entered for a felony conviction or juvenile disposition regardless of the date of judgment.

4. Argument in Support

According to Smart Justice California:

> 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 the 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 prospective; it 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.
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> If prohibiting racism in our courts and providing a person a means to remedy racial bias in their case is the right thing to do, it is the right thing to do for everyone. Those with prior, racially biased convictions and sentences deserve equal justice under the law and have waited. Providing a mechanism for retroactive relief will allow the state to realize significant court and correctional savings.

5. Argument in Opposition

According to Crime Victims United:

> First and foremost, Crime Victims United strongly supports laws that eliminate discrimination in the criminal justice system. The risk remains because of the laws enacted by AB 2542 (i.e., Penal Code section 745). Pursuant to Penal code section 745 a case can be reversed even if there was no showing that the defendant was deprived of a fair trial.
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> Secondly, Penal Code section 745 is full of ambiguous language and numerous unanswered questions that have yet to be resolved by the higher courts. For example, Penal Code section 745 speaks to "frequently sought" or obtained convictions of more serious offenses. However, the definition of "frequently sought" is vague while other terms such as "similarly situated" are not even defined. There is no guidance about what qualifies as ethnicity or national origin. There are no answers to what defines relevant groups for comparison. Thus, a judicial officer is left with no guidance on how to apply this law.
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> Lastly, the current law impose heavy costs on local counties without reimbursement. Not only are there costs to vet the files, but the appeals, delays, interruptions of trial, and expert testimony would lead to astronomical costs that the counties cannot bear. It should be noted that this Legislature last year recognized the high cost of retroactivity, thus eliminating it from AB 2542. AB 256 seeks to overturn this limitation on how far back the retroactivity can go, thus potentially cases from any number of years can be scrutinized.

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