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CALIFORNIA'S POLICE DECERTIFICATION BILL WOULD STRIP PROBATION OFFICERS OF CIVIL IMMUNITY

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On Governor Gavin Newsom's desk is Senate Bill 2, the California Legislature's latest attack on peace officers. While the bill is focused on establishing a decertification procedure for officers who are regulated by POST, the bill also seeks to take many statutory immunity protections away from all peace officers in the state, including probation officers. The governor has until October 10, 2021, to sign or veto the bill.

California's civil rights statute, the Tom Bane Civil Rights Act, authorizes lawsuits against peace officers who are alleged to have interfered with civil rights through "threat, intimidation, or coercion". Statutory immunity in California protects officers from liability under the Bane Act unless the conduct is intentional or malicious.

SB 2, authored by Sen. Bradford (D-Gardena) and Senate Speaker Pro Tem Toni Atkins (D-San Diego), removes specific state immunity protections for peace officers and public agencies when sued in state court for alleged civil rights violations. The lawsuit-friendly bill provides that "[t]he state immunity provisions provided in **sections 821.6, 844.6 and 845.6 of the Government Code shall not apply** to any cause of action brought against any peace officer or custodial officer, or directly against a public entity that employs a peace officer or custodial officer":

- Government Code section 821.6 protects public employees from liability for injury caused by instituting or prosecuting a judicial or administrative proceeding, even if the employee acts maliciously and without probable cause. The statute was drafted to protect against liability for malicious prosecution, but the courts **treat section 821.6 as conferring immunity** on prosecutors, coroners, non-sworn employees and peace officers for alleged negligent and intentional acts in the course of an investigation or criminal prosecution.

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With SB 2, **those protections would go away** for probation peace officers, likely opening the door to more state-court litigation against individual officers over claims involving lost evidence, the conduct of probation searches, allegedly false detentions and arrests, injuries in the course of a detention or arrest, including officer-involved shootings, and other actions taken in the course and scope of the job. Since probation officers no longer would have immunity under section 821.6, the entities they work for also would lose the immunity granted them under Government Code section 815.2, which "piggybacks" on section 821.6 by protecting public entities from liability for an employee's actions when the employee is immune from liability.

- Government Code section 844.6 states a public entity, e.g., a probation department, is not liable for injuries to prisoners, defined as anyone housed in a prison, jail or correctional facility (e.g., a juvenile hall). Individual public employees currently may be held civilly liable for such injuries when caused by the employee's negligence or wrongful conduct. The **effect of SB 2** here is to **help plaintiffs reach the "deep pockets"** of the public entity when suing over injuries to prisoners by making the entity itself liable.

- Government Code section 845.6 protects both public entities and public employees from liability for injuries caused by the failure to furnish or obtain medical care for a prisoner. Liability for employee and employer exists under current law only when the employee knows or should know a prisoner needs immediate medical care and fails to provide it – often a claim in suicides in custody. **SB 2 removes this protection**, thereby making *any* failure to obtain medical care for a prisoner a basis for liability.

What's Left of Qualified Immunity in California?

Qualified immunity is a federal court-created doctrine that, in the words of the U.S. Supreme Court, protects peace officers and other government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known". It is a defense that a federal, state or local public official may raise to a federal lawsuit accusing the official of violating a plaintiff's rights in the course of duty. In practice, a successful qualified immunity defense means a Section 1983 lawsuit alleging a peace officer violated a person's civil rights under color of authority cannot proceed against that officer as an individual defendant so long as he or she did not violate a "clearly established" right.

Qualified immunity in *federal* civil rights cases, known as "Section 1983 claims", **is not disturbed by SB 2**. The federal qualified immunity defense – no liability if no violation

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of a "clearly established" right -- remains in place unless and until the U.S. Supreme Court decides to modify or eliminate the doctrine it created in 1982. Justice Clarence Thomas repeatedly has criticized qualified immunity but the Court has yet to reform it.

Unlike many of the statutes enacted in other states last year following the George Floyd killing, **SB 2 does not try to remove all immunity** from peace officers. Last year, for example, Colorado became the first state to ban qualified immunity entirely as a defense to state constitutional claims against law enforcement. Colorado even makes officers personally liable for up to $25,000 of a judgment against them.

But by removing peace officers from the protections of Government Code section 821.6, **SB 2 reduces state immunity defenses** for peace officers to situations covered by other statutes that may apply depending on the circumstances of a specific case. Immunity from state court lawsuits likely will not be available to probation peace officers in most situations.

Indemnification Requirements Broadened by SB 2

"Indemnification" in litigation against public entities is a legal concept requiring the employer to take on the liability of the employee. SB 2 **preserves current provisions on indemnification** of employees and former employees of public entities, meaning a county still can be required to pay a judgment levied by a court or jury against a probation eace officer in a civil rights lawsuit. The same statutes still allow **peace officers to sue public entities** to recover the costs of defending a suit.

SB 2 removes a statutory barrier to lawsuits against public agencies by extending agency liability in cases of injury to prisoners.

SB 2 Likely to Increase State Civil Rights Litigation

One effect of the changes to qualified immunity under SB 2 is likely to be an increase in state-court litigation of the type brought by the Prison Law Office against California probation departments. Stripped of immunity from errors in providing medical care, conducting investigations and maintaining prisoner safety, probation departments and probation officers will have few if any statutory defenses to liability in actions brought in state courts. Violations of civil rights usually are pursued as Section 1983 claims in federal court, but SB 2 makes it more likely those claims will be litigated instead in state courts since the peace officer defendants will not have immunity in many situations.

Another provision of SB 2 adds to the list of peace officer personnel records to be disclosed to the public **any sustained finding of unreasonable or excessive force**, including sustained findings of a failure to intervene in unreasonable or excessive force by another officer. These provisions will go into effect if the Governor signs SB 16 before SB 2.

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Should Probation Officers Protect Personal Assets?

If enacted into law, SB 2 would increase the risk of personal liability for actions covered by the Government Code sections it eliminates. Under current law, County governments have no obligation to pay punitive damages levied against an individual officer in a civil rights case, although most have a practice of doing so. Since the bill does not eliminate indemnification or remove the right to recover from the employer the officer's attorney fees and costs related to a judgment, individual officers' assets probably are at no greater risk of forfeiture or attachment to satisfy a judgment than under current law.

Homestead provisions that protect a residence from a civil judgment, living trusts that assign assets upon death or incapacity, negligence riders on personal and homeowners' insurance policies, and other **steps to protect assets are wise for armed officers** even without the dark cloud of SB 2 and similar measures looming over the profession.

Changes to POST Do Not (Yet) Affect Probation Officers

SB 2 creates a Peace Officer Standards Accountability Division within the Commission on Peace Officer Standards and Training (POST) to govern a slew of certification and decertification requirements to be imposed on police officers and sheriff's deputies. These changes do not affect probation peace officers because probation officers are governed by the Board of State and Community Corrections, Standards and Training for Corrections, rather than by POST.

However, a Legislature already responsible for reducing probation terms to two years and proposing to reduce juvenile terms to six months, as well as threatening funding for juvenile services and encouraging the premature release of felons into the community, may not rest with the changes that would be wrought by SB 2. The governor's signature on SB 2 will signal a beginning, not an end, to new assaults on peace officer duties and liabilities in the tarnished Golden State.