
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 256 **Hearing Date:** June 23, 2015
Author: Jones-Sawyer
Version: June 16, 2015
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Falsifying Evidence*

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: AB 1993 (Romero), Chapter 620, Statutes of 2000

Support: American Civil Liberties Union; American Friends Service Committee; California District Attorneys Association; California Police Chiefs Association, Inc.; California Public Defenders Association; Ella Baker Center for Human Rights; Los Angeles County District Attorney's Office

Opposition: None known

Assembly Floor Vote: 79 - 0

PURPOSE

The purpose of this bill is to expand the prohibition against knowingly, willfully, and intentionally tampering with evidence to include digital images and video recordings.

Existing law provides that every peace officer who files any report with the agency which employs him or her regarding the commission of any crime or any investigation of any crime, if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. (Penal Code §118.1.)

Existing law provides that every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor (Penal Code §135.)

This bill additionally specifies that the prohibition on destroying or concealing evidence applies to a digital image or a video recording owned by another and applies also if it was erased with the intent to prevent it or its content from being produced.

Existing law provides that every person who reports to any peace officer, or district attorney, that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor. (Penal Code §148.5 (a).)

Existing law makes it a misdemeanor for a person to knowingly, willfully, and intentionally alter, modify, plant, place, manufacture, conceal, or move any physical matter, with specific intent that the action will result in a person being charged with a crime, or with the specific intent that the physical matter be will be wrongfully produced as genuine or true upon any trial, proceeding or inquiry. (Penal Code, §141(a).)

This bill specifies that the prohibition against a peace officer knowingly, willfully and intentionally tampering with physical evidence to charge someone with a crime or to produce as true evidence at trial includes tampering with a digital image or video recording.

Existing law makes it a felony for a peace officer to knowingly, willfully, and intentionally alter, modify, plant, place, manufacture, conceal, or move any physical matter, with specific intent that the action will result in a person being charged with a crime, or with the specific intent that the physical matter be will be wrongfully produced as genuine or true upon any trial, proceeding or inquiry. (Penal Code §141(b).)

This bill additionally makes it a felony for a peace officer to knowingly, willfully, intentionally and wrongfully tamper with a digital image, or video recording with the specific intent that the physical matter, digital image or video recording will be concealed or destroyed or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the

“durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14)). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

In 2000, Assembly Bill 1993(Romero) was signed into law making it a felony for a peace officer to knowingly alter, place, or move physical matter with the specific intent to wrongfully charge another person for a crime. This Romero bill was inspired by the Los Angeles Police Department Rampart scandal.

However, with technological advancements, this law has not been updated to accommodate these developments. Personal mobile phones and other electronic devices now allow individuals to capture images and videos. This recording capability has provided the public an opportunity to monitor instances of police misconduct.

Throughout the state, there have been several instances of police misconduct documented by civilians on their personal mobile devices. In many instances, peace officers have temporarily confiscated person’s mobile devices as possible evidence, only to return the mobile devices with material digital images and/or videos deleted or destroyed.

For example, in May 2013, police in Bakersfield temporarily confiscated the mobile devices of two witnesses who recorded police beating a 33-year-old father of four. The victim of the police beating subsequently died. The police returned the devices with the video of the incident deleted.

Increasingly, as the public captures questionable police practices on video, it is critical that we send a message that altering or deleting these videos will not be tolerated. AB 256 ensures the law will not be misinterpreted by specifically clarifying that “any physical matter” includes digital images and video recordings.

2. Updating the Law to Include Video Recordings

Existing law prohibits any individual from willfully destroying or concealing, knowing it will be evidence in a case, with the intent of keeping it from being produced in that case. It is generally a misdemeanor but is a felony if a peace officer knowingly, willfully and intentionally alters, modifies, plants, places, manufacturers conceals or moves and physical matter with the intent that the action will result in a person being charged with a crime or that he evidence will be represented as original in a trial. This bill updates these sections to include a digital image or video recording

Several U.S. Courts of Appeals have specifically recognized a First Amendment right to record the police and/or other public officials in a public place. (See *Glik v. Cunniffe* (1st Cir. 2011) 655 F.3d 78, 85 ("[A] citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."); *ACLU of Illinois v. Alvarez* (7th Cir. 2012) 679 F.3d 583, 595 ["The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."]; *Fordyce v. City of Seattle* (9th Cir. 1995) 55 F.3d 436, 438 (assuming a First Amendment right to record the police); and *Smith v. City of Cumming* (11th Cir. 2000) 212 F.3d 1332, 1333 ["The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."].)

In California there is no law preventing a civilian from openly recording a police officer carrying out his or her duties in a public place. However, a person does not have the right to interfere with the police when recording. If an individual does interfere with an officer doing his or her work, that person may be charged with obstruction of justice. In this day and age where many cell phones have cameras and video recording capabilities, recording an interaction between police and a member of the public is becoming more and more common. There have been reported incidents of police officers either trying to arrest individuals or destroy photographs or recordings when the officers realize they are being recorded. This bill would subject an officer to felony prosecution for tampering with or confiscating such photographs or video recordings.

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