



CaliforniaCivilLiberties.org

California Civil Liberties Advocacy
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Wednesday, May 18, 2016

Assembly Appropriations Committee
Attn: Pedro Reyes, Chief Consultant
State Capitol
Room 2114
Sacramento, California 95814

RE: Assembly Bill 1940 (Cooper)

Dear Mr. Reyes,

The California Civil Liberties Advocacy (CCLA) strongly **OPPOSES** AB 1940.

While the CCLA understands that the Appropriations Committee's primary task is to review a bill's fiscal impact on the state and local governments, stakeholders frequently bring policy arguments before the members. Since the committee analysis includes policy arguments both from supporters and the opposition, and since this bill does not appear to have a significant fiscal impact, the CCLA wishes to express their strong opposition before this moves forward. **Furthermore, neither the CCLA, nor any other stakeholders, were afforded the opportunity to adequately review or comment on the amendments that the Public Safety Committee stipulated for this bill's passage.**

Our argument is quite simple, really — in criminal investigations, civilian witnesses are generally not allowed to review similar video footage and other types of evidence before making a statement or offering testimony in court or when deposed. Why then should a law enforcement officer be allotted this unique privilege when under review for misconduct? Granted, AB 1940 was amended in an attempt to address this privilege when it involves incidents of use of force. It is lamentable that the day this bill was heard in Public Safety, committee Chair Jones-Sawyer stated that he felt the amendments addressed the concerns of the opposition. Because they do NOT address our concerns.

Unfortunately, the recent amendments fall immensely short due to the aforementioned reason: civilian witnesses are barred from reviewing evidence—to say nothing of criminal defendants—even if it is in the presence of law enforcement. There appears to be no public check provided in this bill to ensure that the investigator or supervisor will be free of bias when overseeing the officer who is reviewing their own body camera footage. Additionally, what

*"Indifference to personal liberty is but the precursor of the state's hostility to it."
— Justice Kennedy, U.S. Supreme Court*

mechanism allows the supervisor to peer into the thoughts of an officer to ensure that they are not adapting their statements to what they just saw in the footage? To further confound this issue, the text in the recent amendment states that

“an officer may have a legal representative present during the review of the recordings without the independently assigned investigator or supervisor present, before the peace officer makes a report, is ordered to give an internal affairs statement, or before any criminal or civil proceeding.”

The officer may have their own “legal representative” present during the review? If the officer hires a defense attorney in anticipation of charges being filed, and that attorney may review the footage before those charges are even filed, this necessarily circumvents due process and constitutes a violation of equal protection. When a law enforcement officer is under investigation for allegations of misconduct or criminal wrongdoing, they should not be afforded any more privileges than an ordinary defendant, in order to be consistent with Constitutional safeguards. Let us be clear — if there is an inquiry as to whether or not excessive force was involved in an incident, then this means it is likely an individual’s civil rights were violated.

The CCLA is not against law enforcement and certainly not “pro criminal.” In fact, the CCLA is the only civil liberties organization to publicly support several Fourth Amendment bills alongside law enforcement groups in this and recent legislative sessions. But we also concede that police officers make mistakes. They are human and therefore not infallible. Some police officers commit criminal acts and abuse their position, such as former Sacramento police officer Gary Dale, who was convicted of raping a stroke-disabled woman in her 70’s. (Smith, *Life Sentence for ex-Sacramento cop in rape case* (Nov. 10, 2015) Sacramento Bee.) Or former police officer Sergio Alvarez, who was sentenced to 205 years in prison for sexually assaulting eight women in West Sacramento — kidnapping five of them and either raping or forcing them to perform oral sex while on duty. (Irvine, *AP: Officer sex cases plagued by lax supervision, policies* (Nov. 2, 2015) Associated Press.) Indeed, just because someone wears a badge and swears to serve and protect their communities, that does not mean that such persons are beyond reproach or that they are completely honest all of the time. And it would be stating the obvious to recount all of the recent incidents that have been filmed of police use of force that led to criminal charges in the past few years. One very egregious California case that springs to mind is that of a homeless man suffering from schizophrenia. His name was Kelly Thomas and he was effectively beaten to death by six officers from the Fullerton Police Department. (Goldenstein, *\$4.9-million settlement in death of mentally ill homeless man Kelly Thomas* (Nov. 23, 2015) L.A. Times.) The medical report stated that “Thomas suffered broken bones in his face, choked on his own blood and was repeatedly shocked with two stun guns.” (Taxin & Risling, *AP: CA police officer charged with murder* (Sept. 21, 2011) Associated Press.) Orange County District Attorney Tony Rackauckas stated that the cause of death was “ ‘mechanical compression of the thorax’ from being pinned down with the body weight of one of the officers on top of him . . . [t]he compression led to his inability to breathe, which caused him to lose consciousness, enter a coma and die.” (Ng, *2 Police Officers Charged in Homeless Man’s Death*

(Sept. 21, 2011) ABC News.) The incident was captured by a cell phone video camera, but these are just the type of incidents that the public expects body cameras to capture and discourage.

Commenting on whether or not police officers should be afforded the opportunity here in question, the Harvard Law Review stated that such “asymmetric access to the footage is therefore problematic as it allows officers to adapt their testimony in order to bolster their credibility while civilian witnesses cannot do the same.” (*Developments in the Law: Considering Police Body Cameras* (2015) 128 Harv. L. Rev. 1794, 1808.) Prosecutors and defense attorneys alike routinely take depositions for comparison to witness statements or video evidence with the very purpose of impeaching the testimony of eye-witnesses or defendants. This has proved a very effective tool for deciphering whether or not a witness or defendant’s testimony is accurate and credible. But if such witnesses—especially defendants—were given the opportunity to review video footage that tended to incriminate them, would they not utilize this opportunity to adapt their testimony in an attempt to mitigate or provide a seemingly rational explanation for their actions? It is established that police officers are imperfect humans. They are capable of both negligent and culpable acts. If they are facing criminal prosecution for manslaughter or murder charges, would they not do the same? Furthermore, will this policy not nullify the trust that comes with the transparency expected from law enforcement body cameras? With utmost respect for the members, the committee should know the answers to these questions.

If the bill were amended so that law enforcement officers could not review their footage when an investigation is pending or when there are allegations regarding misconduct, this would be a great compromise. We understand law enforcement’s concern that defense attorneys will utilize it far too often to impeach an officer’s testimony on something as simple as confusing the shade or color of a shirt. Therefore, restricting a law enforcement’s access only when there are allegations or when an investigation is initiated would provide a more balanced approach to this policy.

For all of the aforementioned reasons, the CCLA strongly **OPPOSES** AB 1940.

Respectfully,


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