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**Assembly
California Legislature**



**ASSEMBLY COMMITTEE ON
PUBLIC SAFETY**
BILL QUIRK, CHAIR
ASSEMBLYMEMBER, TWENTIETH DISTRICT

CHIEF COUNSEL
GREGORY PAGAN

COUNSEL
GABRIEL CASWELL
STELLA Y. CHOE
SHAUN NAIDU
SANDY URIBE

AGENDA

9:00 a.m. – April 28, 2015
State Capitol, Room 126

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
1.	AB 8 (Gatto)	Mr. Pagan	Emergency services: hit-and-run incidents.
2.	AB 86 (McCarty)	Mr. Billingsley	Peace officers: Department of Justice: independent investigation.
3.	AB 443 (Alejo)	Mr. Caswell	Forfeiture.
4.	AB 733 (Chavez)	Mr. Caswell	Crimes: prostitution.
5.	AB 835 (Gipson)	Mr. Billingsley	Vehicular manslaughter: statute of limitation.
6.	AB 849 (Bonilla)	Mr. Pagan	Unlawfully causing a fire: explosion.
7.	AB 913 (Santiago)	Ms. Uribe	Student safety.
8.	AB 1003 (Nazarian)	Mr. Pagan	Mental health: Sexually violent predators.
9.	AB 1006 (Levine)	Mr. Billingsley	Prisoners: mental health treatment.
10.	AB 1051 (Maienschein)	Ms. Choe	Human trafficking.

11.	AB 1104 (Rodriguez)	Ms. Choe	Search warrants.
12.	AB 1118 (Bonta)	Mr. Caswell	Police officer standards and training; procedural justice.
13.	AB 1140 (Bonta)	Ms. Uribe	Crime victim compensation.
14.	AB 1154 (Gray)	Ms. Uribe	The California Public Records Act: applications for licenses and licenses to carry firearms.
15.	AB 1213 (Wagner)	Mr. Billingsley	Offender Global Positioning System Database.
16.	AB 1237 (Brown)	Mr. Billingsley	State hospitals: placement evaluations.
17.	AB 1241 (Calderon)	Ms. Uribe	Crimes: audiovisual work: recording.
18.	AB 1276 (Santiago)	Ms. Choe	PULLED BY AUTHOR.
19.	AB 1310 (Gatto)	Mr. Billingsley	Disorderly conduct: unlawful distribution of image.
20.	AB 1491 (O'Donnell)	Mr. Caswell	Prostitution.

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
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MOTION TO GRANT RECONSIDERATION ONLY

21.	AB 534 (Linder)	Mr. Pagan	Driver's licenses: suspension of driving privileges.
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Individuals who, because of a disability, need special assistance to attend or participate in an Assembly committee hearing or in connection with other Assembly services, may request assistance at the Assembly Rules Committee, Room 3016, or by calling 319-2800. Requests should be made 48 hours in advance whenever possible.

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Date of Hearing: April 28, 2015
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 8 (Gatto) – As Introduced December 1, 2014

SUMMARY: Authorizes a law enforcement agency to issue a "Yellow Alert" if a person has been killed or has suffered serious bodily injury due to a hit-and-run incident, and the law enforcement agency has specified information regarding the suspect or the suspect's vehicle. Specifically, **this bill:**

- 1) Provide that if a hit-and-run incident is reported to a law enforcement agency and that agency determines that specified requirements are met, the agency may request the California Highway Patrol (CHP) to activate a Yellow Alert. If the CHP concurs that the specified requirements are met, it shall activate a Yellow Alert in the geographic area requested by the investigating agency.
- 2) Define a "Yellow Alert" to mean a notification system activated by the CHP, at the request of a local law enforcement agency, designed to issue and coordinate alerts with respect to a hit-and-run incident resulting in death or serious bodily injury to a person.
- 3) Authorizes a law enforcement agency to request that a Yellow Alert be activated if the agency determines the following conditions are met in regard to the investigation of the hit-and-run incident:
 - a) A person has been killed or has suffered serious bodily injury due to a hit-and-run incident;
 - b) The investigating law enforcement agency has additional information concerning the suspect or the suspect's vehicle, including, but not limited to, any of the following:
 - i) The complete license plate number of the suspect's vehicle;
 - ii) A partial license plate number and the make, model, and color of the suspect's vehicle; or,
 - iii) The identity of the suspect.
 - c) Public dissemination of available information could either help avert further harm or accelerate the apprehension of the suspect.
- 4) State that radio, television, and cable and satellite systems are encouraged, but are not required, to cooperate with disseminating the information contained in a Yellow Alert.
- 5) Require the CHP, upon activation of a Yellow Alert, to assist the investigating law enforcement agency by issuing the Yellow Alert via a local digital sign.

EXISTING LAW:

- 1) States that if an abduction has been reported to a law enforcement agency and the agency determines that a child 17 years of age or younger, or an individual with a proven mental or physical disability, has been abducted and is in imminent danger of serious bodily injury or death and there is information available that, if disseminated to the general public, could assist in the safe recovery of the victim, the agency, through a person authorized to activate the Emergency Alert System (EAS), shall request the activation of the EAS within the appropriate local area. (Gov. Code, § 8594, subd. (a).)
- 2) Provides that California Highway Patrol (CHP) in consultation with the Department of Justice, as well as a representative from the California State Sheriffs' Association, the California Police Chiefs' Association and the California Police Officers' Association shall develop policies and procedures providing instructions specifying how law enforcement agencies, broadcasters participating in the EAS, and where appropriate, other supplemental warning systems, shall proceed after qualifying abduction has been reported to a law enforcement agency. (Gov. Code, § 8594, subd. (b).)
- 3) Defines a "Blue Alert" as a quick response system designed to issue and coordinate alerts following an attack upon a law enforcement officer, as specified. (Gov. Code, § 8594.5, subd. (a).)
- 4) Provides that in addition to the circumstances described under existing law relating to "Amber Alerts", upon the request of an authorized person at a law enforcement agency that is investigating an offense, the CHP shall activate the EAS and issue a blue alert if all of the following conditions are met:
 - a) A law enforcement officer has been killed, suffers serious bodily injury, or is assaulted with a deadly weapon, and the suspect has fled the scene of the offense;
 - b) A law enforcement agency investigating the offense has determined that the suspect poses an imminent threat to the public or other law enforcement personnel;
 - c) A detailed description of the suspect's vehicle or license plate is available for broadcast;
 - d) Public dissemination of available information may help avert further harm or accelerate apprehension of the suspect; and,
 - e) The CHP has been designated to use the federally authorized EAS for the issuance of blue alerts. (Gov. Code, § 8594.5, subd. (b).)

- 5) Provides that the "Blue Alert" system incorporates a variety of notification resources and developing technologies that may be tailored to the circumstances and geography of the underlying attack. The blue alert system shall utilize the state-controlled Emergency Digital Information System, (EDIS) local digital signs, focused text, or other technologies, as appropriate, in addition to the federal EAS, if authorized and under conditions permitted by the federal government. (Gov. Code, § 8594.5, subd. (c).)
- 6) Defines a "Silver Alert" as a notification system, that can be activated as specified, and is designed to issue and coordinate alerts with respect to a person 65 years of age or older who is reported missing. (Gov. Code, § 8594.10, subd. (a).)
- 7) Provides that if a person is reported missing to a law enforcement agency, and that agency determines that specified requirements are met, The agency may request the CHP to activate a "Silver Alert". If the CHP concurs that the specified requirements are met, it shall activate a "Silver Alert" within the geographical area requested by the investigating law enforcement agency. (Gov. Code, § 8594.10, subd. (c).)
- 8) States that a law enforcement agency may request a "Silver Alert" be activated if that agency determines that all of the following conditions are met in regard to the investigation of the missing person:
 - a) The missing person is 65 years of age or older.
 - b) The investigating law enforcement agency has utilized all available local resources.
 - c) The law enforcement agency determines that that the person has gone missing under unexplained or suspicious circumstances.
 - d) The law enforcement agency believes that the person is in danger because of age, health, mental or physical disability, environment or weather conditions, that the person is in the company of a potentially dangerous person, or there are other factors indicating that the person may be in peril.
 - e) There is information available that, if disseminated to the public, could assist in the safe recovery of the missing person. (Gov. Code, § 8594.10, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "These are crimes which, by their nature, occur at a high rate of speed and with clear means for fleeing the scene. The public is almost always needed to catch those who leave fellow citizens dying on the side of the road, and AB 47 will allow us to do so promptly, before the perpetrator can get away and cover up the evidence.

"Nationwide, less than half of all hit-and-run offenders are apprehended. In Los Angeles, the arrest rate for fatal hit-and-runs is only 20%. Denver, Colorado created a similar alert system in 2012, which it called the "Medina Alert," named for Jose Medina, the victim of a deadly

hit-and-run in 2011. Of the seventeen cases that have prompted Medina Alerts in Denver, thirteen have been solved, an incredible 76% success rate. On March 25, Colorado's Governor signed legislation expanding the Medina Alert statewide.

"Accidents happen, but if you don't stop, it becomes a crime. This is a sensible bill that will use extant public-information systems to make our streets safer."

- 2) **Background:** The National Highway Traffic Safety Administration reports that the number of hit-and-run accidents is increasing nationally. According to the AAA Foundation for Traffic Safety, one in five of all pedestrian fatalities involve hit-and-run accidents and 60% of hit-and-run fatalities have pedestrian victims. Additionally, USA Today writes that in 2013 an estimated 20,000 hit-and-run incidents occur each year in the City of Los Angeles alone and 4,000 of these incidents involved injuries or death.

To address this problem, the author has introduced this bill, which is modeled after legislation in Colorado ("Medina Alert") that has been instrumental in locating hit-and-run suspects. Specifically, this bill would create a "Yellow Alert" notification system, similar to California's successful "Amber Alert" system, that would authorize CHP to activate digital highway signage (as well as other electronic messaging systems) when there is information available to locate hit-and-run suspects. The "Yellow Alert" notification system would provide the public with information about the hit-and-run suspect and/or the suspect's vehicle and request that the public be on the lookout and report information to law enforcement.

There are a number of similar alert systems already in use in California. The first alert system developed in California was "Amber Alert", established by AB 415, (Runner) Chapter 517, Statutes of 2002, that authorized law enforcement agencies to use the digital messaging on overhead roadway signs to assist in recovery efforts for child abduction cases. Following on the success of the "Amber Alert" program, the "Blue Alert" and the "Silver Alert" notification systems were developed. The "Blue Alert" system, established by SB 839 (Runner), Chapter 311, Statutes of 2010, provides for public notification when a law enforcement officer has been attacked and the "Silver Alert" notification system, established by SB 1047 (Alquist), Chapter 651, Statutes of 2012, provides for public notification when a person age 65 years or older is missing. The "Silver Alert" system was recently broadened with the passage of SB 1127 (Torres) Chapter 440, Statutes of 2014, to include missing persons who are developmentally disabled or cognitively impaired.

Supporters of the bill include local jurisdictions as well as a number bicycle and pedestrian groups. Bicycle and pedestrian groups, note that using California's network of changeable message signs to locate hit-and-run suspects would provide a simple yet effective way to solve, and possibly deter, this type of crime. Also writing in support of the bill, Eric Garcetti, Mayor of the City of Los Angeles, notes that the "Medina Alert" system in Colorado has led to the arrest of 76 percent of hit-and-run fugitives and that this bill would help local law enforcement achieve similar results and give hope to families and victims of hit-and-run accidents.

Commenting on AB 47 (Gatto, 2014) last year, the Department of Finance noted that creating a "Yellow Alert" notification system would be duplicative of current "Be On the Look Out" and "APBnet" systems already in use. Specifically, these systems enable officers to quickly create photo bulletins and distribute them to any number of targeted recipients including law

enforcement agencies and individuals in specific communities (city, county, state). Systems such as APBnet are widely available to law enforcement and have been in use since 1995. APBnet allows photo bulletins (with photos and information about suspects, stolen property, etc.) to be sent across multiple jurisdictions and to communities to help solve crimes and arrest suspected criminals.

- 3) **Governor's Veto Message:** AB 47 (Gatto) of the 2014 Legislative Session was identical to this bill and was vetoed by the Governor. The Governor, in his veto message stated, "I am returning Assembly Bill AB 47 without my signature."

"This bill would establish a 'Yellow Alert' notification system, which could be activated in response to a hit-and-run incident."

"I have just signed SB 1127, to add developmentally disabled persons to the missing persons alert system. This expansion should be tested before adding more categories of individuals that could overload the system."

4) **Prior Legislation:**

- a) SB 1127 (Torres), Chapter 440, Statutes of 2014, authorized a law enforcement agency to request the CHP to activate a "Silver Alert" when a developmentally disabled or cognitively impaired person is reported missing, and specified conditions are met.
- b) AB 535 (Quirk), Chapter 328, Statutes of 2013, provided that for the activation of the EAS where law enforcement receives a report that an abduction has occurred. An abductor may include a custodial parent or guardian where the abducted child is in imminent danger of serious bodily injury or death.
- c) SB 1047 (Alquist), Chapter 651, Statutes of 2012, authorized a law enforcement agency to request CHP to activate a "Silver Alert" if a person 65 years of age or older is missing.
- d) SB 839 (Runner), Chapter 311, Statutes of 2010, required the CHP, at the request of an authorized person at a law enforcement agency, to activate the EAS and issue a "Blue Alert", as defined, if a law enforcement officer has been killed, suffers serious bodily injury, or is assaulted with a deadly weapon, the suspect has fled the scene of the offense, and other specified conditions are met.
- e) SB 38 (Alquist), of the 2009-2010 Legislative Session, would have authorized a law enforcement agency to request the CHP to activate the EAS and issue a "Silver Alert" if a person 65 years of age or older is missing. SB 38 was held on the Assembly Appropriations Committee's Suspense File.
- f) AB 415 (Runner), Chapter 517, Statutes of 2002, required law enforcement to activate the EAS and issue an "Amber Alert" to assist recovery efforts in child abduction cases by disseminating Information to the general public.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of Orange County Deputy Sheriffs
Los Angeles County Bicycle Coalition
San Diego County Bicycle Coalition
California Walks
ABATE of California
California Bicycle Coalition
Inland Empire Biking Alliance
People Power of Santa Cruz County
Sacramento Area Bicycle Advocates
Safe Routes to School National Partnership
Coalition for Sustainable Transportation
Silicon Valley Bicycle Coalition
Marin County Bicycle Coalition
Eric Garcetti, Mayor of the City of Los Angeles
Walk & Bike Mendocino

Opposition

None

Analysis Prepared by: Gregory Pagan / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 86 (McCarty) – As Amended April 23, 2015

SUMMARY: Requires the Department of Justice to commence an independent investigation, if a peace officer uses deadly force in the performance of his or her duties that results in the death of an individual. Specifically, **this bill:**

- 1) Specifies that a peace officer, in the performance of his or her duties, uses deadly physical force upon another person and that person dies as a result of the use of that deadly physical force, the Attorney General shall appoint a special prosecutor to direct the investigation concerning the use of deadly physical force by that peace officer.
- 2) Pursuant to this investigation, the special prosecutor shall have the sole power to determine whether criminal charges should be filed.
- 3) If the special prosecutor chooses to file charges, the special prosecutor will file those charges in the superior court of the county in which the incident took place.
- 4) The special prosecutor is responsible for prosecuting any criminal charges that are file I connection with this section.
- 5) Any support the special prosecutor needs to pursue prosecution of the criminal charges filed under this section, will be provided by the Attorney General's Office.

EXISTING LAW:

- 1) Specifies that subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. (Cal. Const., Art. 5, § 13.)
- 2) States that it shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. (Cal. Const., Art. 5, § 13.)
- 3) Provides that the Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law , in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their perspective jurisdictions as to the Attorney General may seem advisable. (Cal. Const., Art. 5, § 13.)
- 4) States that whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violation of law of which the superior court shall have jurisdiction, and in such cases the

Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office. (Cal. Const., Art. 5, § 13.)

- 5) Specifies that the Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge. (Gov. Code, § 12550.)
- 6) Provides that when the Attorney General deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process. State that if a district attorney is disqualified to conduct any criminal prosecution within the county, the Attorney General may employ special counsel to conduct the prosecution. The attorney's fee in such case is a legal charge against the state. (Gov. Code, § 12550.)
- 7) States that if a district attorney is disqualified to conduct any criminal prosecution within the county, the Attorney General may employ special counsel to conduct the prosecution. The attorney's fee in such case is a legal charge against the State. (Gov. Code, § 12553.)
- 8) States that when requested to do so by the grand jury of any county, the Attorney General may employ special counsel and special investigators, whose duty it shall be to investigate and present the evidence in such investigation to such grand jury. (Pen. Code, § 936.)
- 9) Provides that when a grand jury request special counsel, services of such special counsel and special investigators shall be a county charge of such county. (Pen. Code, § 936.)
- 10) Specifies that the district attorney is the public prosecutor, except as otherwise provided by law. (Gov. Code, § 25600.)
- 11) States that a public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses. (Gov. Code, § 25600.)
- 12) Requires each department or agency in this state that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public. (Pen. Code, § 832.5, subd. (a)(1).)
- 13) Allows each department or agency that employs custodial officers, to establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so established shall comply with the provisions of this section and with other provisions as specified. (Pen. Code, § 832.5, subd. (a)(2).)
- 14) Requires complaints and any reports or findings relating to these complaints be retained for a period of at least five years. All complaints retained may be maintained either in the peace or

custodial officer's general personnel file or in a separate file designated by the department or agency as provided by department or agency policy, in accordance with all applicable requirements of law. However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints, as specified, shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law. (Pen. Code, § 832.5, subd. (b).)

- 15) Prohibits complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, from being maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the California Public Records Act (Pen. Code, § 832.5, subd. (c).)
- 16) Allows a department or agency that employs peace or custodial officers to release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative. (Pen. Code, § 832.7, subd. (d).)
- 17) Requires the department or agency to provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition. (Pen. Code, § 832.7, subd. (e)(1).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "There is a growing appetite, both at the national and local level, to create a better and more transparent system regarding police shootings that is fair to police, families, and the community in order to restore public trust.

"There is skepticism in the current process where local DA's investigate cops they work most closely with. To foster better transparency in the process, a common sense reform would be to have an independent review process by the Department of Justice to investigate police shootings where a civilian death occurs.

"California needs to have this important conversation to restore public trust and show that we are a leader on this issue."

- 2) **AB 409 in Wisconsin was signed into law by Gov. Walker in April 2014.** That law requires that an investigation must be performed by an independent review panel when a

police officer is involved in the death of a civilian. The panel must consist of two individuals from outside of the police agency involved. In addition, the family of the victim must be informed of their legal rights.

- 3) **Connecticut Law Requires Independent Investigation Into Use of Deadly Force by a Police Officer:** In 2012, Connecticut passed a statute governing the procedure for the investigation of the use of deadly force by a police officer. The statute provided for the appointment of an individual to conduct the investigation, other than prosecutorial official from the judicial district where the incident occurred. Upon the conclusion of the investigation of the incident, a report must be filed that contains the following: (1) The circumstances of the incident, (2) a determination of whether the use of deadly physical force by the peace officer was appropriate, and (3) any future action to be taken by the Division of Criminal Justice as a result of the incident. (CT Gen Stat § 51-277 (2012).)
- 4) **Interim Report of the President's Task Force on 21st Century Policing (2013):** The Task Force was Co-Chaired by Charles Ramsey, Commissioner, Philadelphia Police Department and Laurie Robinson, Professor, George Mason University. The nine members of the task force included individuals from law enforcement and civil rights communities. The stated goal of the task force was “. . . to strengthen community policing and trust among law enforcement officers and the communities they served, especially in light of recent events around the country that have underscored the need for and importance of lasting collaborative relationships between local police and the public.” (Interim Report of the President's Task Force on 21st Century Policing (2015), p. v.) Based on based on their investigation, the Task Force provided thoughts and recommendations on a variety of issues that involved with community policing.

One of the areas of police practices explored by the Task Force was oversight. The Task Force developed the following actions items (among others) in connection with cases that involved police use of force resulting in a death, or police shootings resulting in death or injury:

2.2.2 Action Item: These policies should also mandate external and independent criminal investigation in cases of police use of force resulting in death, officer-involved shooting resulting in injury or death, or in-custody deaths.

One way this can be accomplished is by the creation of multi-agency force investigation task forces comprising state and local investigators. Other ways to structure this investigative process include referring to neighboring jurisdictions or to the next higher levels of government (many small departments may already have state agencies handle investigations), but in order to restore and maintain trust, this independence is crucial.

In written testimony to the task force, James Palmer of the Wisconsin Professional Police Association offered an example in that state's statutes requiring that agency written policies “require an investigation that is conducted by at least two investigators . . . neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer – involved death.” Furthermore, in order to establish and maintain internal legitimacy and procedural justice, these investigations should be performed by law enforcement agencies with adequate training, knowledge, and experience investigating police use of force. (Interim Report of the President's Task Force on 21st Century Policing (2015),

p. 21.)

2.2.3 Action Item: The task force encourages policies that mandate the use of external and independent prosecutors in cases of police use of force resulting in death, officer-involved shootings resulting in injury of death, or in-custody deaths.

Strong systems and policies that encourage use of an independent prosecutor for reviewing police uses of force and for prosecution in cases of inappropriate deadly force and in-custody death will demonstrate the transparency to the public that can lead to mutual trust between community and law enforcement. (Interim Report of the President's Task Force on 21st Century Policing (2015, p. 22.)

2.2.5 Action Item: Polices on use of force should clearly state what types of information will be released, when, and in what situation, to maintain transparency.

This should also include procedures on the release of a summary statement regarding the circumstances of the incident by the department as soon as possible and within 24 hours. The intent of this directive should be to share as much information as possible without compromising the integrity of the investigation or anyone's rights. (Interim Report of the President's Task Force on 21st Century Policing (2015, p. 22.)

- 5) **Argument in Support:** According to the *California State Conference of the National Association for the advancement of Colored People*, "Police brutality has had a long history in California leading many civil rights organizations and advocates to raise issues concerning police misconduct. Following the high-profiled deaths of Michael Brown and Eric Garner, civil rights advocates have campaigned for greater oversight of the investigation process following deaths involving law enforcement. Independent review panels of law enforcement agencies help uncover broken policies, outdated procedures, outmoded technology, and operating norms that puts officers at odds with the community they are meant to serve and protect.

"Currently, three-fourths of the largest cities in the United States have established some form of law enforcement review panel which represents a de facto public finding that additional oversight is a suitable response to the problem of law enforcement misconduct. It is important to California and to all citizens to have transparency and accountability in all police and public safety policies. AB 86 is good public policy in that it would build public trust by establishing an independent review process in cases involving peace officer shooting and other use of force resulting in death."

- 6) **Argument in Opposition:** According to *The Peace Officers Research Association of California*, "AB 86 would require the Attorney General to commence an independent investigation by the Department of Justice if a peace officer uses deadly force upon another person and that person dies as a result. The finding of such an investigation, and recommendation whether or not to prosecute would then be forwarded to the Attorney General and District Attorney of the county where the incident occurred.

"District Attorneys are elected by their counties to handle these types of investigations. District Attorneys have made decisions for years, and have overseen difficult cases that have been scrutinized heavily by the media and public. The concern that there would be a conflict

of interest between a District Attorney and officers they may work with is unfounded. District Attorneys routinely prosecute peace officers when they believe there is sufficient evidence to prove a crime beyond a reasonable doubt. It is a District Attorney's ethical duty to ensure the fair administration of justice, without regard to who is being investigated.

"AB 86 is unnecessary because we believe the Attorney General already has the authority to investigate and prosecute any case in which he or she believes criminal conduct has occurred."

- 7) **Related Legislation:** SB-227 (Mitchell) would prohibit a grand jury from inquiring into an offense or misconduct that involves a shooting or use of excessive force by a peace officer, as specified, that led to the death of a person being detained or arrested by the peace officer. SB 227 is pending a vote on the Senate floor.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California
California State Conference of the National Association for the Advancement of Colored People
Friends Committee on Legislation
Legal Services for Prisoners with Children
National Association of Social Workers

Opposition

Association of Los Angeles Deputy Sheriffs
Association of Deputy District Attorneys
California Association of Highway Patrolmen
California College and University Police Chiefs Association
California Correctional Supervisors Organization
California District Attorneys Association
California Narcotic Officers Association
California Peace Officers' Association
California Police Chiefs Association
California Statewide Law Enforcement Association
Los Angeles Police Protective League
Office of the District Attorney, Alameda County
Eva Patterson, Equal Justice Society/Co-Chair CCRC
Peace Officers Research Association of California
Riverside Sheriffs Association

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 443 (Alejo) – As Amended April 21, 2015
As Proposed to be Amended in Committee

SUMMARY: Permits prosecutors to seize assets and property of individuals associated with transnational criminal organizations up to 60 days prior to the filing of criminal charges pursuant to criminal profiteering forfeiture proceedings. Specifically, **this bill:**

- 1) Provides that the prosecuting agency may, prior to the commencement of a criminal proceeding, file a petition of forfeiture with the superior court of the county in which the defendant will be charged with a criminal offense, which shall allege that the defendant has engaged in a pattern of criminal profiteering activity, including the acts or threats chargeable as crimes and the property forfeitable, provided the court determines that:
 - a) The value of the assets to be seized exceeds \$100,000.
 - b) There is a substantial probability that the prosecuting agency will file a criminal complaint or seek a grand jury indictment against the defendant.
 - c) There is a substantial probability that the prosecuting agency will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture.
 - d) The need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.
 - e) There is a substantial probability that the assets subject to forfeiture represent direct or indirect proceeds of criminal activity committed for the benefit of, at the direction of, or in association with, a transnational criminal organization, as defined.
- 2) Defines, for purposes of criminal profiteering forfeiture, a “transnational criminal organization” as “any ongoing organization, association, or group, having leaders, associates, operations, or activities in more than one country, with one of its primary activities being the commission of one or more specified criminal profiteering related acts.”
- 3) States that if a forfeiture petition is filed prior to the filing of the complaint in a criminal action, the motion and any injunctive order shall be dismissed by operation of law unless a criminal complaint or grand jury indictment is filed within 60 days of the grant of the motion. If a forfeiture petition is dismissed pursuant to this subdivision, the motion shall not be refiled, except upon the filing of a criminal complaint.

- 4) Provides that if a forfeiture petition is filed prior to the filing of the complaint in a criminal action, a person claiming an interest in the property or proceeds may move for the return of the property on the grounds that there is not probable cause to believe the property is forfeitable and is not automatically subject to court order of forfeiture or destruction by another provision of this chapter. The motion may be made prior to, during, or subsequent to the filing of criminal charges or a grand jury indictment. If the prosecuting agency does not establish a substantial probability that the property is subject to forfeiture, the court shall order the seized property released to the person it determines is entitled thereto.

EXISTING LAW:

- 1) Establishes the "California Control Profits of Organized Crime Act." (Pen. Code, § 186.)
- 2) Declares that the Legislature finds and declares that an effective means of punishing and deterring criminal activities of organized crime is through the forfeiture of profits acquired and accumulated as a result of such criminal activities. It is the intent of the Legislature that the "California Control of Profits of Organized Crime Act" be used by prosecutors to punish and deter only such activities. (Pen. Code, § 186.1).
- 3) Defines "criminal profiteering activity" as any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following offenses: arson, bribery, child pornography or exploitation, felonious assault, embezzlement, extortion, forgery, gambling, kidnapping, mayhem, murder, pimping and pandering, receiving stolen property, robbery, solicitation of crimes, grand theft, trafficking in controlled substances, violation of the laws governing corporate securities, specified crimes involving obscenity, presentation of a false or fraudulent claim, false or fraudulent activities, schemes, or artifices, money laundering, offenses relating to the counterfeit of a registered mark, offenses relating to the unauthorized access to computers, computer systems, and computer data, conspiracy to commit any of the crimes listed above, offenses committed on behalf of a criminal street gang, offenses related to fraud or theft against the state's beverage container recycling program, human trafficking, any crime in which the perpetrator induces, encourages, or persuades a person under 18 years of age to engage in a commercial sex act, any crime in which the perpetrator, through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act, theft of personal identifying information, offenses involving the theft of a motor vehicle, abduction or procurement by fraudulent inducement for prostitution. (Pen. Code, § 186.2(a).)
- 4) Defines "pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements: (Pen. Code, § 186.2(b)(1).)
 - a) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics;
 - b) Are not isolated events; and/or
 - c) Were committed as a criminal activity of organized crime.

- 5) Defines "organized crime" as a crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods and services such as narcotics, prostitution, loan-sharking, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, fraud against the beverage container recycling program, or systematically encumbering the assets of a business for the purpose of defrauding creditors. "Organized crime" also means crime committed by a criminal street gang, as defined. "Organized crime" also means false or fraudulent activities, schemes, or artifices, as defined, and the theft of personal identifying information, as defined. (Pen. Code, § 186.2(d).)
- 6) States that the following assets of any person who is convicted a specified underlying offense and of engaging in a pattern of criminal profiteering activity are subject to forfeiture (Pen. Code, § 186.3):
 - a) Any property interest whether tangible or intangible, acquired through a pattern of criminal profiteering activity; and
 - b) All proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.
- 7) States that, notwithstanding that no response or claim has been filed, in all cases where property is forfeited, as specified, and, if necessary, sold by the Department of General Services (DGS) or local governmental entity, the money forfeited or the proceeds of sale shall be distributed by the state or local governmental entity as follows (Pen. Code, § 186.8):
 - a) To the bona fide or innocent purchaser, conditional sales vendor, or holder of a valid lien, mortgage, or security interest, if any, up to the amount of his or her interest in the property or proceeds, when the court declaring the forfeiture orders a distribution to that person. The court shall endeavor to discover all those lien holders and protect their interests and may, at its discretion, order the proceeds placed in escrow for up to an additional 60 days to ensure that all valid claims are received and processed;
 - b) To DGS or local governmental entity for all expenditures made or incurred by it in connection with the sale of the property, including expenditures for any necessary repairs, storage, or transportation of any property seized, as specified; and
 - c) To the State's General Fund or local governmental entity, whichever prosecutes.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 443 seeks to empower a prosecuting agency's ability to effectively dismantle criminal organizations by targeting the proceeds of criminal activity while respecting the due process rights of suspects, arrestees, and criminal defendants.

"Specifically, AB 443 provides a prosecuting agency with the ability to freeze criminal assets before the commencement of a criminal proceeding. Waiting until the filing of a criminal proceeding to bring a petition for asset forfeiture brings the risk of providing an early notification to the criminal organization under investigation. Criminal organizations benefit from the early warning system by transferring or removing their assets from the jurisdiction of the court. While the criminal proceeding may affect an individual in the criminal organization, the criminal operations of these gangs can proceed as their funds remain available.

"Although this tool allows for a forfeiture petition to be filed before the filing of a criminal complaint, the bill includes several safeguards to protect the due process rights of criminal suspects, arrestees, and defendants. The bill strikes an appropriate line between these constitutional rights and the need for protecting the public from organized crime. Many of these organizations are operating in cities throughout the state.

"In addition, AB 443 aims to punish and deter the trafficking in firearms and endangered species by adding these crimes to the definition of "criminal profiteering activity," making the profits of these crimes subject to forfeiture."

2) **The Proposed Amendments:** This bill includes a number of amendments that were negotiated between the author, the bill sponsor, and committee staff, in consultation with some of the opposition to the bill. The arguments in support and in opposition were submitted prior to the proposed amendments. The amendments do not remove opposition, but they were made in an attempt to address some of their concerns and limit the applicability of the proposed legislation. The amendments fall into the following categories:

a) **Transnational Criminal Organizations:** The original bill applied the seize and freeze provisions to all criminal profiteering forfeiture proceedings. However, the background provided by the sponsor indicated that the purpose of the bill was to seize the assets of transnational gangs. The bill, as introduced did not limit the applicability of the seizure provisions to transnational gangs.

The bill as proposed to be amended today defines transnational criminal organizations for purposes of criminal forfeiture as: "any ongoing organization, association, or group, having leaders, associates, operations, or activities in more than one country, with one of its primary activities being the commission of one or more specified criminal profiteering related acts." The proposed amendments additionally add an additional element to the proposed seizure language that require prosecutors show "a substantial probability that the assets subject to forfeiture represent direct or indirect proceeds of criminal activity committed for the benefit of, at the direction of, or in association with, a transnational criminal organization." The bill, as proposed to be amended, therefore limits the applicability of the seizure to transnational criminal organizations, as defined.

b) **Threshold Amount:** The threshold amount triggering the seize and freeze provisions is \$100,000. Forfeiture covers anything from liquid (or cash) assets, to vehicles, to real estate. The author's office originally set a minimum of \$10,000 and the amendments

have raised the minimum to \$100,000.

- c) **Motion for Return of Seized Property:** As discussed in the "Due Process" section below, there are a number of constitutional concerns when the government seeks to deprive a person of their property. Namely, people have a right to be heard. A more thorough analysis of this concept is included in the following section. However, the amendments seek to improve upon these concerns. As introduced, the bill did not provide for an opportunity for a person with an interest in the property to be heard on the issue of whether the property should or should not be seized until the civil forfeiture proceeding ran its course. This would be after the conclusion of the criminal case.

The bill, as amended, provides an opportunity for an interest holder to make a motion to the court for return of their property and argue that the prosecution has failed to meet the requirements set forth in the seizure provisions.

- 3) **Due Process: Seize and Freeze:** This bill seeks to add a provision to the criminal profiteering section which will allow prosecutors to seize assets up to 60 days prior to filing a criminal action if the following criteria are shown to a judge by a prosecutor:
- a) The value of the assets to be seized exceeds \$100,000.
 - b) There is a substantial probability that the prosecuting agency will file a criminal complaint or seek a grand jury indictment against the defendant.
 - c) There is a substantial probability that the prosecuting agency will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture.
 - d) The need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.
 - e) There is a substantial probability that the assets subject to forfeiture represent direct or indirect proceeds of criminal activity committed for the benefit of, at the direction of, or in association with, a transnational criminal organization, as defined.

The showing is made by a prosecutor in an ex parte proceeding. Thus the person whose property is being seized is not present at the proceeding and is not able to refute any allegations made by the prosecution prior to the seizing of the assets. The bill, as drafted and as proposed to be amended, does not provide a person with an opportunity to be heard prior to the seizure of their property. A person's property may not be confiscated by the state without "some kind of notice and opportunity to be heard." *Fuentes v. Shevin* (1972) 407 U.S. 67, 79-80. "We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing." *Beaudreau v. Superior Court* (1975) 14 Cal.3d. 448, 458). The bill's sponsor argues that the ex parte nature of the proceeding is necessary to prevent the property owner from hiding or moving assets. Opponents argue that prosecutors can first seize the property without sufficient evidence to bring criminal charges against a

prospective defendant and will allow for seizure of an innocent owner's property without due process.

The proposed amendments to the bill do provide for an opportunity for a person claiming interest in the property to make a motion for return of the property during the 60 day period prior to the filing of criminal charges. While this does not provide for a hearing prior to the seizure of the property, it does provide a remedy that was not present in the original bill which allows an interest holder in the seized property to move for return of the property on the basis of the prosecution not meeting their burden in the ex parte proceeding.

- 4) **Substantial Probability:** The bill does provide that the prosecution must allege to a magistrate that there is a "substantial probability" that the agency will file a criminal complaint or seek a criminal grand jury indictment. Additionally, the prosecutor must allege that there is a "substantial probability" that the prosecuting agency will prevail on the issue of forfeiture.

According to the sponsor, the standard of substantial probability is intended to be at least as demanding as probable cause. California courts have found the term to be synonymous with "strong probability" or "strong likelihood." (*Walbrook Ins. Co. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460-1461.) In the search warrant context, the term is also synonymous with "probable cause." (See *Fenwick & W. v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278-1279 ["Probable cause must attach to each place to be searched. Thus, an affidavit for a search warrant must contain facts demonstrating a substantial probability that evidence of a crime will be located in a particular place."]; *People v. Garcia* (2003) 111 Cal.App.4th 715, 721 [same].) "Substantial probability" also appears several times in the U.S. Code, including in the asset forfeiture context (21 U.S.C. § 853(e)(1)(B)(i)). Courts addressing the use of the term in federal statutes have uniformly held that substantial probability actually affords defendants greater protection than the probable cause standard. (See *United States v. Gotti* (2d Cir. 1986) 794 F.2d 773, 777 ["Congress was aware that the 'probable cause' standard is less demanding than a requirement of 'substantial probability'"]; *United States v. Wong* (D. Haw. 2012) 2012 WL 5464178, at *3 [same].)

- 5) **Interim Property Value:** The bill would allow for seizure of property for up to 60 days prior to the filing of criminal proceedings against the property owner or asset holder. The bill does provide however that the property may not be forfeited if the agency fails to file criminal charges within the prescribed 60-day window allotted. However, the bill does not address compensation to the property owner for the interim value of the property. For instance, if a business owner must shut down his or her business, there is no provision for that owner to receive remuneration for their economic losses during that period. In fact, such a seizure could result in the loss of a business completely.
- 6) **Criminal Profiteering Asset Forfeiture Generally:** Criminal profiteering asset forfeiture is a criminal proceeding held in conjunction with the trial of the underlying criminal offense. Often, the same jury who heard the criminal charges also determines whether the defendant's assets were the ill-gotten gains of criminal profiteering. As a practical matter, the prosecution must assemble its evidence for the forfeiture matter simultaneously with the evidence of the crime.

Under Penal Code Section 186.2, asset forfeiture for is allowed upon conviction of more than

thirty crimes under specified circumstances.

"Criminal profiteering activity means any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime [under various criminal statutes]. Those crimes include: arson; bribery, child pornography or exploitation, which may be prosecuted as a felony; felonious assault, embezzlement; extortion, forgery, gambling, kidnapping, mayhem, murder, pimping and pandering, receiving stolen property, robbery, solicitation of crimes, grand theft, trafficking in controlled substances, violation of the laws governing corporate securities, crimes related to possession and distribution of obscene or harmful matter, presentation of a false or fraudulent claim, false or fraudulent activities, schemes, or artifices, money laundering, offenses relating to the counterfeit of a registered mark, offenses relating to the unauthorized access to computers, computer systems, and computer data, conspiracy to commit any of the crimes listed above, felony gang activity, as specified, any offenses related to fraud or theft against the state's beverage container recycling program, including, but not limited to, those offenses specified in this subdivision and those criminal offenses specified in the California Beverage Container Recycling and Litter Reduction Act, human trafficking, any crime in which the perpetrator induces, encourages or persuades a person under 18 years of age to engage in a commercial sex act, any crime in which the perpetrator, through force, fear, or coercion, deceit violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act, theft of personal identifying information, motor vehicle theft, and abduction or procurement by fraudulent inducement for prostitution". (Pen. Code, § 186.2(a)(1) to (33).)

- 7) **Criminal Profiteering Proceeds:** Under existing law, forfeited assets are distributed as follows:
- a) To the bona fide or innocent purchaser, conditional sales vendor, or holder of a valid lien, mortgage, or security interest, if any, up to the amount of his or her interest in the property or proceeds, when the court declaring the forfeiture orders a distribution to that person. The court shall endeavor to discover all those lien holders and protect their interests and may, at its discretion, order the proceeds placed in escrow for up to an additional 60 days to ensure that all valid claims are received and processed.
 - b) To the Department of General Services or local governmental entity for all expenditures made or incurred by it in connection with the sale of the property, including expenditures for any necessary repairs, storage, or transportation of any property seized, as specified.
 - c) To the State's General Fund or local governmental entity, whichever prosecutes.

Under existing law, the forfeited proceeds of criminal profiteering are placed in the county general fund with no directions for use. There is an exception for forfeiture in child pornography cases. In such cases, the money is deposited in the county or State Children's Trust Fund for child abuse and neglect prevention and intervention. (Pen. Code, § 186.8 and Welf. and Inst. Code, § 18966 and 18969.) In California drug asset forfeiture, law enforcement receives 65% of forfeiture proceeds. (Health and Safety Code Sections 11469 *et seq.*) Of this amount, 15% must be placed in a special county or city fund used "to combat drug abuse and divert gang activity." Under federal forfeiture law allowing "adoption" of state seizures of drug proceeds, the agency seizing that property

may receive as much as 80% of these proceeds. This money must be used according to guidelines set by the United States Department of Justice and require that the money be used largely for law enforcement.

- 8) **Elements of the Offense:** Proceeds can be forfeited if the proceeds were gained through a pattern of criminal activity and were gained through involvement in organized crime.
- a) **Pattern of Criminal Activity:** "Pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering (listed above), that meet the following requirements
- i) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics;
 - ii) Are not isolated events; and/or
 - iii) Were committed as a criminal activity of organized crime.
- b) **Organized Crime:** "Organized crime" means crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods and services such as narcotics, prostitution, loan-sharking, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, fraud against the beverage container recycling program, or systematically encumbering the assets of a business for the purpose of defrauding creditors. "Organized crime" also means crime committed by a criminal street gang. "Organized crime" also means false or fraudulent activities, schemes, or artifices, and the theft of personal identifying information.
- 9) **Argument in Support:** According to the *The Attorney General*, "AB 443 has been carefully crafted to preserve due process rights. Moreover, existing law has protections that would apply to any changes made by AB 443. These include:
- the burden to prove that the assets are subject to forfeiture and tied to criminal activity lies on the state
 - the state must prove their tie by the legal standard "beyond a reasonable doubt"
 - any proceeds from the forfeiture of assets or monies does not go back to the seizing entity.

"The first two provisions ensure one of the cornerstones of our legal system: innocent until proven guilty. Laws that permit the seizure of assets prior to a conviction receive criticism by placing the burden of proof on the defendant. States that place the burden of proof on the owner create a barrier to due process and force innocent owners to navigate the legal system. California law protects innocent owners by placing the burden on the government entity. Moreover, the standard of proof required increases the burden. As reported by the Institute for Justice, 'beyond a reasonable doubt' is the hardest standard under which it is hardest to forfeit assets. Not only does the government have the responsibility to prove the assets are subject to forfeiture but it must also do so by meeting the highest standards of a courtroom.

"Finally, California law does not create an incentive for law enforcement to seize assets. Currently, California's order of distribution statute mandates any money forfeited or proceeds from a sale to be distributed accordingly:

1. To any innocent purchasers, conditional sales vendor, or holder of a valid lien, mortgage, or security interest
2. To the Department of General Services or local governmental entity for all expenses related to the sales
3. To the General Fund of the State or the general fund of a local governmental entity

"There are also provisions that allow for the funds to go into a County's Children's Trust Fund, the California Beverage Container Recycling Fund, and to the Victim-Witness Assistance Fund for certain crimes for which the assets were forfeited. State and local law enforcement are not on the order of distribution. They do not receive any budget increases as a result of any proceeds from seized assets.

"In California, the intent of asset forfeiture is not to fund local enforcement agencies. In California, assets are seized to reduce the profitability of criminal enterprises, remove the assets required to fund these criminal activities, and protect public safety throughout the state.

"While California law currently ensures these protections, AB 443 also implements further provisions to safeguard due process. Foremost, the bill merely establishes a process by which a prosecuting agency can petition to freeze assets for an individual suspected of engaging in a pattern of criminal profiteering activity. The power to approve a petition for the preservation of assets will remain with the courts. Given this provision, no law enforcement or prosecuting agency will have the ability to freeze or seize assets without the approval of the petition. This will protect many assets from seizure. For example, an individual pulled over for a traffic stop, found in the possession of a large sum of money, may not have his or her assets frozen. The law enforcement officer will not have the approval of a court as no petition was sought beforehand nor does a traffic stop count as 'engaged in a pattern of criminal profiteering'.

"In deciding whether or not to approve a petition to freeze assets, the court cannot grant approval unless certain conditions are met. As mentioned earlier, the court must find that the value of the assets to be seized exceeds \$10,000. In a review of the recently terminated Federal Equitable Sharing Program, which was a means for states to seize assets without charges or a conviction, the Washington Post found that half of the seizures were below \$8,800. AB 443 casts a much narrower net by setting the floor at \$10,000. This provision ensures that law enforcement agencies target larger operations.

"Second, the court must find a substantial probability that the prosecuting agency will file a criminal complaint and that there is a substantial probability that the prosecuting agency will prevail on the issue of forfeiture. When a prosecuting agency petitions the court for asset preservation before filing for a criminal proceeding, they will still need to convince the courts that the assets are tied to criminal activity. Without securing substantial probability on these two fronts, the courts may deny the petition. Finally, in the case where a prosecuting agency may be granted permission but does not file for a criminal proceeding, the order to freeze the assets will be dismissed within 60 days from when it was granted. Nor could a

prosecuting agency return to the court and petition to freeze the same assets unless accompanied by a new criminal complaint.

"With these protections, the people of California can feel confident that their rights are protected. As the chief law enforcement officer in the state, the Attorney General is deeply committed to protecting the rights of Californians. AB 443 protects and ensures due process while also enabling law enforcement agencies to dismantle transnational organizations. These criminal organizations threaten the safety of our neighborhoods and place Californians in danger. We are proud to sponsor AB 443 as part of the efforts to rid these international criminal organizations from California's streets."

- 10) **Argument in Opposition:** According to *California Attorneys for Criminal Justice*, "This bill allows a prosecuting agency to file a petition of forfeiture prior to the commencement of the underlying criminal proceeding if there is a 'substantial probability' that the prosecuting agency will file a criminal complaint and there is a 'substantial probability' the prosecuting agency will prevail on the issue of forfeiture.

"As written, the agency anticipating the commencement of criminal proceedings can seize first without sufficient evidence to bring charges. This will cause the forfeiture of an innocent owner's valuable property without provision of any concomitant avenue of Due Process. The implied hearing rights suggested in context of pre-complaint seizure would be a plenary action in the superior court. In other words, an action that the aggrieved property owner would have to both initiate and pay for, or suffer forfeiture. The provision in AB 443 dismissing the motion by 'operation of law' does absolutely nothing to restore the interim value of property that has been seized. The interim harm could be significant to someone who is not charged with a crime, especially if all his or her assets are seized for the two-month period.

"The statutory provision for pre-charging /post-seizure hearing inherent in AB 443 fails to meet constitutional requirements. A person's property may not be confiscated by the state without 'some kind of notice and opportunity to be heard.' *Fuentes v. Shevin* (1972) 407 U.S. 67, 79-80. . "We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing.'*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 313. CACJ believes that the proposed governmental 'need' for private property in AB 443 can never outweigh the need of the true owner not to be deprived of property without due process of law.

"Such hearings are virtually always required before the taking. *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 308. Postponement of notice and provision of a due process hearing until after the initial taking has occurred is generally disfavored. *Id.* Even if criminal charges are ultimately filed, due to the time sensitive value of various instruments and property, the delays inherent in AB 443 would probably cause many seizing agencies to become belatedly liable to the person whose property was seized. *Hunt v. United States Dep't of Justice* (5th Cir. Tex. 1993) 2 F.3d 96.

"AB 443 contains a self-executing clause which vests inappropriate authority in the hands of prosecutors. This bill requires showing that it is 'substantially probable' that charges will be filed since this pre-hearing is attended only by the prosecutor, the prosecutor would simply be able to make an assertion and that assertion is to be taken as fact. The defense is not present to cross-examine the prosecutor to assure the veracity of the statement. The burden is met simply because the prosecutor says so.

"Affected property owners would be caught in an inevitable and unconstitutional 'Catch-22'. On the one hand between seeking immediate redress, or, requiring the Court to delay discovery (which, due to the civil nature of a pre-complaint seizure, the seizing agency would then have an obligation to provide) until disposition of the criminal matter. *Pacers, Inc. v. Superior Court* (1984) 162 Cal. App. 3d 686, 690. Given the ever increasing statutes of criminal limitations in this state, such cases could take decades to resolve. Viewed in this context, the mischief of a pre-complaint 'criminal' seizure statute becomes plainly apparent not only in the cost to individuals, but to the already heavily burdened superior courts of this state.

"The state can have no legitimate interest in the seizure of the property of others, until such time as there occurs a nexus and sufficient evidence to support the filing of a criminal charge against the owner that will then allow the accused person to litigate the matter in a single action, thus saving scarce judicial resources and preserving the accused's established rights to due process of law."

11) Related Legislation:

- a) AB 160 (Dababneh), adds piracy, insurance fraud, and tax fraud to the list of crimes for which a prosecutor can seek criminal profiteering forfeiture. Additionally, amends the organized crime element of criminal profiteering to provide additional examples of matter which constitute criminal profiteering. AB 160 is awaiting a hearing in the Assembly Appropriations Committee.
- b) SB 298 (Block), adds money laundering for criminal profiteering to the crimes for which a wiretap may be sought. SB 298 is awaiting a hearing in the Senate Appropriations Committee.

12) Prior Legislation:

- a) AB 1791 (Galgiani), of the 2011-2012 Legislative Session, would have included within the definition of "criminal profiteering activity" the sale of tangible personal property or other secondhand goods, including, but not limited to, gold and other precious metals, excluding "coin dealers" as defined, without a license. AB 1791 failed passage in the Assembly Public Safety Committee.
- b) AB 17 (Swanson), Chapter 211, Statutes of 2009, included abduction or procurement by fraudulent inducement for prostitution within the definition of criminal profiteering activity.

- c) AB 924 (Emerson), Chapter 111, Statutes of 2007, included vehicle theft within the definition of criminal profiteering activity.
- d) AB 988 (Bogh), Chapter 53, Statutes of 2005, included identity theft within the definition of criminal profiteering activity.
- e) AB 22 (Lieber), Chapter 240, Statutes of 2005, included human trafficking within the definition of criminal profiteering activity.
- f) SB 968 (Bowen), Chapter 125, Statutes of 2003, included Beverage Act fraud within the definition of criminal profiteering activity.
- g) SB 1520 (Schiff), Chapter 994, Statutes of 2000, requires that secondhand dealers make reports electronically to local law enforcement, of pawned property, and requires DOJ, in consultation with law enforcement agencies, to develop clear descriptive categories of personal property that a secondhand dealer must report to local law enforcement agencies.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorney General's Office (sponsor)
Alameda County District Attorney's Office
California Police Chiefs Association
California Statewide Law Enforcement Association
Gonzalez Police Department
Law Center to Prevent Gun Violence
Monterey County District Attorney's Office
Peace Officers Research Association of California
Santa Clara District Attorney's Office
Soledad Police Department

Opposition

American Civil Liberties Union
California Attorneys for Criminal Justice
California Public Defenders Association
Gun Owners of California

Analysis Prepared by: Gabriel Caswell / PUB. S. / (916) 319-3744

Amendments Mock-up for 2015-2016 AB-443 (Alejo (A))

*****Amendments are in BOLD*****

Mock-up based on Version Number 99 - Introduced 2/23/15
Submitted by: Staff Name, Office Name

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 186.2 of the Penal Code is amended to read:

186.2. For purposes of this chapter, the following definitions apply:

(a) "Criminal profiteering activity" means any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections:

- (1) Arson, as defined in Section 451.
- (2) Bribery, as defined in Sections 67, 67.5, and 68.
- (3) Child pornography or exploitation, as defined in subdivision (b) of Section 311.2, or Section 311.3 or 311.4, which may be prosecuted as a felony.
- (4) Felonious assault, as defined in Section 245.
- (5) Embezzlement, as defined in Sections 424 and 503.
- (6) Extortion, as defined in Section 518.
- (7) Forgery, as defined in Section 470.
- (8) Gambling, as defined in Sections 337a to 337f, inclusive, and Section 337i, except the activities of a person who participates solely as an individual bettor.
- (9) Kidnapping, as defined in Section 207.
- (10) Mayhem, as defined in Section 203.

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- (11) Murder, as defined in Section 187.
- (12) Pimping and pandering, as defined in Section 266.
- (13) Receiving stolen property, as defined in Section 496.
- (14) Robbery, as defined in Section 211.
- (15) Solicitation of crimes, as defined in Section 653f.
- (16) Grand theft, as defined in Section 487 or subdivision (a) of Section 487a.
- (17) Trafficking in controlled substances, as defined in Sections 11351, 11352, and 11353 of the Health and Safety Code.
- (18) Violation of the laws governing corporate securities, as defined in Section 25541 of the Corporations Code.
- (19) Any of the offenses contained in Chapter 7.5 (commencing with Section 311) of Title 9, relating to obscene matter, or in Chapter 7.6 (commencing with Section 313) of Title 9, relating to harmful matter that may be prosecuted as a felony.
- (20) Presentation of a false or fraudulent claim, as defined in Section 550.
- (21) False or fraudulent activities, schemes, or artifices, as described in Section 14107 of the Welfare and Institutions Code.
- (22) Money laundering, as defined in Section 186.10.
- (23) Offenses relating to the counterfeit of a registered mark, as specified in Section 350.
- (24) Offenses relating to the unauthorized access to computers, computer systems, and computer data, as specified in Section 502.
- (25) Conspiracy to commit any of the crimes listed above, as defined in Section 182.
- (26) Subdivision (a) of Section 186.22, or a felony subject to enhancement as specified in subdivision (b) of Section 186.22.
- (27) Any offenses related to fraud or theft against the state's beverage container recycling program, including, but not limited to, those offenses specified in this subdivision and those criminal offenses specified in the California Beverage Container Recycling and Litter Reduction Act, commencing at Section 14500 of the Public Resources Code.
- (28) Human trafficking, as defined in Section 236.1.

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(29) Any crime in which the perpetrator induces, encourages, or persuades a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

(30) Any crime in which the perpetrator, through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

(31) Theft of personal identifying information, as defined in Section 530.5.

(32) Offenses involving the theft of a motor vehicle, as specified in Section 10851 of the Vehicle Code.

(33) Abduction or procurement by fraudulent inducement for prostitution, as defined in Section 266a.

~~(34) Trafficking in firearms or other deadly weapons.~~

~~(35) Trafficking in endangered species, as defined by Section 2062 of the Fish and Game Code or the federal Endangered Species Act of 1973.~~

(b) (1) "Pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements:

(A) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics.

(B) Are not isolated events.

(C) Were committed as a criminal activity of organized crime.

(2) Acts that would constitute a "pattern of criminal profiteering activity" may not be used by a prosecuting agency to seek the remedies provided by this chapter unless the underlying offense occurred after the effective date of this chapter and the prior act occurred within 10 years, excluding any period of imprisonment, of the commission of the underlying offense. A prior act may not be used by a prosecuting agency to seek remedies provided by this chapter if a prosecution for that act resulted in an acquittal.

(c) "Prosecuting agency" means the Attorney General or the district attorney of any county.

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(d) "Organized crime" means crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods and services such as narcotics, weapons, prostitution, loan-sharking, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, fraud against the beverage container recycling program, or systematically encumbering the assets of a business for the purpose of defrauding creditors. "Organized crime" also means crime committed by a criminal street gang, as defined in subdivision (f) of Section 186.22. "Organized crime" also means false or fraudulent activities, schemes, or artifices, as described in Section 14107 of the Welfare and Institutions Code, and the theft of personal identifying information, as defined in Section 530.5.

(e) "Underlying offense" means an offense enumerated in subdivision (a) for which the defendant is being prosecuted.

(f) As used in this chapter, "transnational criminal organization" means any ongoing organization, association, or group, having leaders, associates, operations, or activities in more than one country, with one of its primary activities being the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of Section 186.22, subdivision (e).

SEC. 2. Section 186.4 of the Penal Code is amended to read:

186.4. (a) (1) The prosecuting agency shall, in conjunction with the criminal proceeding, file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense, which shall allege that the defendant has engaged in a pattern of criminal profiteering activity, including the acts or threats chargeable as crimes and the property forfeitable pursuant to Section 186.3. ~~The~~

(2) The prosecuting agency may, prior to the commencement of a criminal proceeding, file a petition of forfeiture with the superior court of the county in which the defendant will be charged with a criminal offense, which shall allege that the defendant has engaged in a pattern of criminal profiteering activity, including the acts or threats chargeable as crimes and the property forfeitable pursuant to Section 186.3, provided the court determines that:

(A) The value of the assets to be seized exceeds ~~\$10,000.~~ 100,000.

(B) There is a substantial probability that the prosecuting agency will file a criminal complaint or seek a grand jury indictment against the defendant.

(C) There is a substantial probability that the prosecuting agency will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture.

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(D) The need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(E) There is a substantial probability that the assets subject to forfeiture represent direct or indirect proceeds of criminal activity committed for the benefit of, at the direction of, or in association with, a transnational criminal organization, as defined in Section 186.2, subdivision (f).

(b) The prosecuting agency shall make service of process of a notice regarding that petition upon every individual who may have a property interest in the alleged proceeds, which notice shall state that any interested party may file a verified claim with the superior court stating the amount of their claimed interest and an affirmation or denial of the prosecuting agency's allegation. If the notices cannot be given by registered mail or personal delivery, the notices shall be published for at least three successive weeks in a newspaper of general circulation in the county where the property is located. If the property alleged to be subject to forfeiture is real property, the prosecuting agency shall, at the time of filing the petition of forfeiture, record a lis pendens in each county in which the real property is situated which specifically identifies the real property alleged to be subject to forfeiture. The judgment of forfeiture shall not affect the interest in real property of any third party which was acquired prior to the recording of the lis pendens.

(c)(1) If a forfeiture petition is filed pursuant to Section 186.4, subdivision (a)(2), prior to the filing of the complaint in a criminal action, a person claiming an interest in the property or proceeds may move for the return of the property on the grounds that there is not probable cause to believe the property is forfeitable pursuant to Section 186.3 and is not automatically subject to court order of forfeiture or destruction by another provision of this chapter. The motion may be made prior to, during, or subsequent to the filing of criminal charges or a grand jury indictment. If the prosecuting agency does not establish probable cause substantial probability that the property is subject to forfeiture, the court shall order the seized property released to the person it determines is entitled thereto.

(2) If a claimant's motion filed pursuant to paragraph (1) is granted, the people may, within 15 days, file a petition for a writ of mandate or prohibition seeking appellate review of the ruling.

(e) (d) If a forfeiture petition is filed pursuant to Section 186.4, subdivision (a)(2), prior to the filing of the complaint in a criminal action, the motion and any injunctive order shall be dismissed if a criminal complaint or grand jury indictment is not filed within 60 days of the grant of the motion. If a forfeiture petition is dismissed pursuant to this subdivision, the motion shall not be refiled, except upon the filing of a criminal complaint.

(e) (e) All notices shall set forth the time within which a claim of interest in the property seized is required to be filed pursuant to Section 186.5.

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Date of Hearing: April 28, 2015
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 733 (Chávez) – As Amended March 26, 2015

SUMMARY: Requires sex offender registration, placement on the Megan's Law Website, and mandates a minimum \$10,000 (\$ 41,070) fine for solicitation of a minor. Specifically, **this bill:**

- 1) Creates a mandatory fine of \$10,000 for solicitation of a minor.
- 2) Requires that a person convicted of solicitation of a minor make restitution to the minor that includes the cost of mental health counseling for the minor.
- 3) Requires a person who is convicted of soliciting a minor to register as a sex offender:
 - a) Specifies that these offenders, who are granted probation, shall participate in a sex offender management program as a condition of probation.
 - b) Requires specified postings about the offender on the Megan's Law Website. Permits an offender to petition for removal from the Megan's Law Website if the person has satisfied all conditions of probation or suspension of imposition of his or her sentence and has not been convicted of any other offense requiring registration as a sex offender in a 5-year period following satisfaction of those conditions.

EXISTING LAW:

- 1) Requires persons convicted of specified sex offenses to register for life, or reregister if the person has been previously registered, upon release from incarceration, placement, commitment, or release on probation. States that the registration shall consist of all of the following (Pen. Code, § 290.015, subd. (a).):
 - a) A statement signed in writing by the person, giving information as shall be required by DOJ and giving the name and address of the person's employer, and the address of the person's place of employment, if different from the employer's main address;
 - b) Fingerprints and a current photograph taken by the registering official;
 - c) The license plate number of any vehicle owned by, regularly driven by or registered in the name of the registrant;
 - d) Notice to the person that he or she may have a duty to register in any other state where he or she may relocate; and,

- e) Copies of adequate proof of residence, such as a California driver's license or identification card, recent rent or utility receipt or any other information that the registering official believes is reliable.
- 2) States every person who is required to register, as specified, who is living as a transient shall be required to register for the rest of his or her life as follows:
- a) He or she shall register, or reregister if the person has previously registered, within five working days from release from incarceration, placement or commitment, or release on probation, pursuant to Penal Code Section 290(b), except that if the person previously registered as a transient less than 30 days from the date of his or her release from incarceration, he or she does not need to reregister as a transient until his or her next required 30-day update of registration. If a transient is not physically present in any one jurisdiction for five consecutive working days, he or she shall register in the jurisdiction in which he or she is physically present on the fifth working day following release, as specified. Beginning on or before the 30th day following initial registration upon release, a transient shall reregister no less than once every 30 days thereafter. A transient shall register with the chief of police of the city in which he or she is physically present within that 30-day period, or the sheriff of the county if he or she is physically present in an unincorporated area or city that has no police department, and additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is physically present upon the campus or in any of its facilities. A transient shall reregister no less than once every 30 days regardless of the length of time he or she has been physically present in the particular jurisdiction in which he or she reregisters. If a transient fails to reregister within any 30-day period, he or she may be prosecuted in any jurisdiction in which he or she is physically present.
 - b) A transient who moves to a residence shall have five working days within which to register at that address, in accordance with Penal Code Section 290(b). A person registered at a residence address in accordance with that provision who becomes transient shall have five working days within which to reregister as a transient in accordance with existing law.
 - c) Beginning on his or her first birthday following registration, a transient shall register annually, within five working days of his or her birthday, to update his or her registration with the entities described in existing law. A transient shall register in whichever jurisdiction he or she is physically present on that date. At the 30-day updates and the annual update, a transient shall provide current information as required on the DOJ annual update form, including the information.
 - d) A transient shall, upon registration and re-registration, provide current information as required on the DOJ registration forms, and shall also list the places where he or she sleeps, eats, works, frequents, and engages in leisure activities. If a transient changes or adds to the places listed on the form during the 30-day period, he or she does not need to report the new place or places until the next required re-registration. (Pen. Code, § 290.011, subs. (a) to (d).)
- 3) Provides that willful violation of any part of the registration requirements constitutes a misdemeanor if the offense requiring registration was a misdemeanor, and constitutes a

- felony of the offense requiring registration was a felony or if the person has a prior conviction of failing to register. (Pen. Code, § 290.018, subs. (a)&(b).)
- 4) Provides that within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the DOJ. (Pen. Code § 290.015, subd. (b).)
 - 5) States that a misdemeanor failure to register shall be punishable by imprisonment in a county jail not exceeding one year, and a felony failure to register shall be punishable in the state prison for 16 months, two or three years. (Pen. Code, § 290.018, subs. (a)&(b).)
 - 6) Provides that the DOJ shall make available information concerning persons who are required to register as a sex offender to the public via an internet website. The DOJ shall update the website on an ongoing basis. Victim information shall be excluded from the website. (Pen. Code § 290.46.) The information provided on the website is dependent upon what offenses the person has been convicted of, but generally includes identifying information and a photograph of the registrant.
 - 7) Generally prevents the use of the information on the website from being used in relation to the following areas: (Pen. Code, § 290.46, subd. (1)(2).)
 - a) Health insurance;
 - b) Insurance;
 - c) Loans;
 - d) Credit;
 - e) Employment;
 - f) Education, scholarships, or fellowships;
 - g) Housing or accommodations; and
 - h) Benefits, privileges, or services provided by any business establishment.
 - 8) Provides that any person who solicits, agrees to engage in, or engages in an act of prostitution is guilty of a misdemeanor. The crime does not occur unless the person specifically intends to engage in an act of prostitution and some act is done in furtherance of agreed upon act. Prostitution includes any lewd act between persons for money or other consideration. (Pen. Code, § 647, subd. (b).)
 - 9) Provides that if the defendant agreed to engage in an act of prostitution, the person soliciting the act of prostitution need not specifically intend to engage in an act or prostitution. (Pen. Code § 647, subd. (b).)
 - 10) Provides that where any person is convicted of a second prostitution offense, the person shall serve a sentence of at least 45 days, no part of which can be suspended or reduced by the

- court regardless of whether or not the court grants probation. (Pen. Code § 647, subd. (k).)
- 11) Provides that where any person is convicted for a third prostitution offense, the person shall serve a sentence of at least 90 days, no part of which can be suspended or reduced by the court regardless of whether or not the court grants probation. (Pen. Code § 647, subd. (k).)
 - 12) Defines “unlawful sexual intercourse” as an act of sexual intercourse accomplished with a person under the age of 18 years, when no other aggravating elements – such as force or duress – are present. (Pen. Code § 261.5, subd. (a).)
 - 13) Provides the following penalties for unlawful sexual intercourse:
 - a) Where the defendant is not more than three years older or three years younger than the minor, the offense is a misdemeanor;
 - b) Where the defendant is more than three years older than the minor, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up to \$10,000; or,
 - c) Where the defendant is at least 21 years of age and the minor is under the age of 16, the offense is an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up to \$10,000. (Pen. Code § 261.5, subd (b)-(d).)
 - 14) Provides that in the absence of aggravating elements each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor is punishable as follows:
 - a) Where the defendant is over 21 and the minor under 16 years of age, the offense is a felony, with a prison term of 16 months, two years or three years.
 - b) In other cases sodomy with a minor is a wobbler, with a felony prison term of 16 months, two years or three years. (Pen. Code §§ 286, subd. (b), 288a, subd. (b), 289, subd. (h).)
 - 15) Provides that where each crime of sodomy, oral copulation or penetration with a foreign or unknown object with a minor who is under 14 and the perpetrator is more than 10 years older than the minor, the offense is a felony, punishable by a prison term of 3, 6 or 8 years. (Pen. Code §§ 286, subd. (c)(1), 288a, subd. (c)(1), 289, subd. (j).)
 - 16) Provides that any person who engages in lewd conduct – any sexually motivated touching or a defined sex act – with a child under the age of 14 is guilty of a felony, punishable by a prison term of 3, 6 or 8 years. Where the offense involves force or coercion, the prison term is 5, 8 or 10 years. (Pen. Code § 288, subd. (b).)
 - 17) Provides that where any person who engages in lewd conduct with a child who is 14 or 15 years old, and the person is at least 10 years older than the child, the person is guilty of an alternate felony-misdemeanor, punishable by a jail term of up to one year, a fine of up to \$1,000, or both, or by a prison term of 16 months, two years or three years and a fine of up

\$10,000. (Pen. Code § 288, subd. (c)(1).)

- 18) Includes numerous crimes concerning sexual exploitation of minors for commercial purposes. These crimes include:
- a) Pimping: Deriving income from the earnings of a prostitute, deriving income from a place of prostitution, or receiving compensation for soliciting a prostitute. Where the victim is a minor under the age of 16, the crime is punishable by a prison term of three, six or eight years. (Pen. Code § 266h, subs. (a)-(b);
 - b) Pandering: Procuring another for prostitution, inducing another to become a prostitute, procuring another person to be placed in a house of prostitution, persuading a person to remain in a house of prostitution, procuring another for prostitution by fraud, duress or abuse of authority, and commercial exchange for procurement. (Pen. Code § 266i, subd. (a).);
 - c) Procurement: Transporting or providing a child under 16 to another person for purposes of any lewd or lascivious act. The crime is punishable by a prison term of three, six, or eight years, and by a fine not to exceed \$15,000. (Pen. Code § 266j.)
 - d) Taking a minor from her or his parents or guardian for purposes of prostitution. This is a felony punishable by a prison term of 16 months, two years, or three years and a fine of up to \$2,000. (Pen. Code § 267.); and,
- 19) Provides that where a person is convicted of pimping or pandering involving a minor the court may order the defendant to pay an additional fine of up to \$5,000. In setting the fine, the court shall consider the seriousness and circumstances of the offense, the illicit gain realized by the defendant and the harm suffered by the victim. The proceeds of this fine shall be deposited in the Victim-Witness Assistance Fund and made available to fund programs for prevention of child sexual abuse and treatment of victims. (Pen. Code § 266k, subd. (a).)
- 20) Provides that where a defendant is convicted of taking a minor under the age 16 from his or her parents to provide to others for prostitution (Pen. Code § 267) or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (Pen. Code § 266j), the court may impose an additional fine of up to \$20,000. (Pen. Code § 266k, subd. (b).)
- 21) Provides that where a defendant is convicted under the Penal Code of taking a minor (under the age of 18) from his or her parents for purposes of prostitution (Pen. Code § 267), or transporting or providing a child under the age of 16 for purposes of any lewd or lascivious act (266j), the court, if it decides to impose a specified additional fine, the fine must be no less than \$5,000, but no more than \$20,000. (Pen. Code § 266k, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "it is horrifying to know that California is notorious for trafficking children for sex. We must work harder to increase punishments for those who commit such heinous acts and this preventive measure will address just that."
- 2) **Heavy Penalties and Registration Requirements Already Exist for Persons who Engage in Sexual Acts with Minors:** Under current law, existing penalties which are almost too numerous to count exist for crimes involving various sexual acts with minors. From lewd and lascivious acts with a child to statutory rape, any individual who is an adult that engages in sexual contact with a minor is punished under California law. The penalties for these offenses almost universally include long prison sentences, and require sex registration. This bill would add the crime of misdemeanor solicitation for prostitution to the list of offenses which would require sex registration and inclusion on the Megan's Law Website.
- 3) **California's Sex Offender Management Board's Background:** On September 20, 2006, Governor Arnold Schwarzenegger signed Assembly Bill 1015, which created the California Sex Offender Management Board. AB 1015 had been introduced by Assembly Members Judy Chu and Todd Spitzer and passed the California Legislature with nearly unanimous bipartisan support.

Because California is the most populated state in the Union and has had lifetime registration for its convicted sex offenders since 1947, California has more registered sex offenders than any other state with about 88,000 identified sex offenders (per DOJ, August 2007).

Currently, the California Department of Corrections and Rehabilitation (CDCR) supervises about 10,000 of those 88,000 sex offenders, of which about 3,200 have been designated as "high-risk sex offenders". (CDCR Housing Summit, March 2007). Additionally, there are about 22,500 adult sex offenders serving time in one of 32 state prisons operated by CDCR (California Sex Offender Management Task Force Report, July 2007).

While it is commonly believed that most sexual assaults are committed by strangers, the research suggests that the overwhelming majority of sex offenders victimize people known to them; approximately 90% of child victims know their offenders, as do 80% of adult victims [per Kilpatrick, D.G., Edmunds, C.N., & Seymour, A.K. Rape in America: A Report to the Nation (1992). Arlington, VA: National Victim Center.]

- 4) **Sex Offender Registration and the Megan's Law Website:** According to a 2014 report by the California Sex Offender Management Board¹, the intent of registration was to assist law enforcement in tracking and monitoring sex offenders since they were viewed as the group most likely to commit another sex offense. It was thought that having their names and addresses known to law enforcement and with the expansion of community notification also available to the public would dissuade them from committing a new offense, enable members of the public to exercise caution around them, enable law enforcement to monitor them and, if necessary, solve new sex offense cases more readily. Although research suggests that use of a registry may help law enforcement solve sex crimes against children involving strangers

¹ <http://www.cce.csus.edu/portal/admin/handouts/Tiering%20Background%20Paper%20FINAL%20FINAL%204-2-14.pdf>

more quickly, United States DOJ statistics tell us that most crimes against children (about 93%) are committed not by a stranger but by a person known to the child and his or her family, usually an acquaintance or family member.

Since 1947, earlier by far than any other state, California has required “universal lifetime” registration for persons convicted of most sex crimes. (Pen. Code, § 290.) Though every other state has instituted some form of registration since then, California is among only four states which require lifetime registration for every convicted sex offender, no matter the nature of the crime or the level of risk for reoffending. Almost all other states use some version of a “tiering” or “level” system which: 1. recognizes that not all sex offenders are the same, 2. provides meaningful distinctions between different types of offenders and 3. requires registration at varying levels and for various periods of time. There are nearly 100,000 registrants today in California, a number accumulated over the past 66 years since the Registry was created in 1947. In 2004 California began to provide pictures and other identifying information on the Megan’s Law website for about 80% of registrants. (www.meganslaw.ca.gov)

There are about 98,000 registered sex offenders on California’s registry. About 76,000 live in California communities and the other 22,000 are currently in custody. Of these offenders, 80% are posted on the state’s Megan’s Law web site with their full address or ZIP Code and other information, depending upon the offense they committed. About 20% are not posted or are excluded from posting on the web site by law, again depending on the conviction offense. Posting on the web site does not take into account years in the community without reoffending, the offender’s risk level for committing a new sexual or violent crime, or successful completion of treatment. About one-third of registered offenders are considered “moderate to high risk” while the remaining two-thirds are “moderate to low risk” or “low risk.” Local police departments and sheriff’s offices are charged with managing the registration process. Registered sex offenders must re-register annually on their birthdays as well as every time they have a change of address. Transient sex offenders re-register every 30 days and sexually violent predators every 90 days. Registration information collected by law enforcement is sent to the California Department of Justice (DOJ) and stored in the California Sex and Arson Registry. If an offender’s information is posted online and he fails to register or re-register on time, he will be shown as “in violation” on the Megan’s Law web site. When proof is provided by local law enforcement to DOJ of a registrant’s death, he or she is removed from the registry. Every ten years since the Registry was first established has been marked by a dramatic increase in the number of registrants.

As noted above, the original goal of registration was to assist law enforcement in tracking and monitoring sex offenders. Over time, registration was expanded to include community notification and also began to encompass a wider variety of crimes and behaviors. Due to these changes, research has focused on exploring the changes in sex 4 CASOMB “Tiering Background Paper” offender registration laws and this has resulted in a constantly growing body of research that has altered the perspective on sex offender registration. This research has made it clear that:

- The sexual recidivism rate of identified sex offenders is lower than the recidivism rate of individuals who have committed any other type of crime except for murder.

- Not all sex offenders are at equal risk to reoffend. Low risk offenders reoffend at low rates, high risk offenders at much higher rates.
- It is possible to use well-researched actuarial risk assessment instruments to assign offenders to groups according to risk level. (i.e. Low, Medium, High.)
- Risk of a new sex offense drops each year the offender remains offense-free in the community. Eventually, for many offenders, the risk becomes so low as to be meaningless and the identification of these individuals through a registry becomes unhelpful due to the sheer numbers on the registry. Research has identified differing time frames of decreased risk for the various categories of offenders (i.e. low, medium, high).
- Research on both general and sexual offenders has consistently indicated that focusing on higher risk offenders delivers the greatest return on efforts to reduce reoffending.
- Completing a properly designed and delivered specialized sex offender treatment program delivered within the context of effective supervision reduces recidivism risk even further. In California, all registered sex offenders on parole or probation are now required by state law to enter and complete such a program.

This bill would add more low-risk sex offenders to the registry, making the monitoring of the existing high-risk sex offenders even more difficult than it already is.

- 5) **The Current Sex Offender Registration System and Megan's Law Website has Become too Unwieldy to be Effective for Law Enforcement:** Again, according to California's Sex Offender Management Board, there are a number of problems with the current system as a result of adding too many low-risk sex offenders. California's system of lifetime registration for all convicted sex offenders has created a registry that is very large and that includes many individuals who do not necessarily pose a risk to the community. The consequences of these realities are that the registry has, in some ways, become counterproductive to improving public safety. When everyone is viewed as posing a significant risk, the ability for law enforcement and the community to differentiate between who is truly high risk and more likely to reoffend becomes impossible. There needs to be a way for all persons to distinguish between sex offenders who require increased monitoring, attention and resources and those who are unlikely to reoffend.

There are many unintended consequences and indirect costs associated with sex offender registration.

- Innocent families and children of offenders (including victims of intra-familial sexual abuse) also bear the consequences of lifetime registration since they can often be identified by the public. Adverse consequences also arise for employers, landlords, neighbors and others.
- There has been a proliferation of residence restrictions and exclusion zones for registered sex offenders in many jurisdictions in California. Violation of these can

lead to criminal charges. The obstacles posed by registration status prevent many individuals from obtaining housing or employment and becoming functioning, contributing, tax-paying members of society.

- There is reason to believe that registration policies, especially lifetime registration, keep some victims, particularly family members of the offender, from disclosing the abuse because they wish to avoid the stigma that will impact their family and their own lives for a very long time.
 - The presence nearby of one or more registered sex offenders can drive down property values in a neighborhood and make houses difficult to sell. If the current registration system was effective in the ways intended, these might be considered part of the price to pay for the greater good. But, since the current registry does not attain its intended purposes, many of these unintended consequences are without justification.
- 6) **Minimum Mandatory Fines Remove Judicial Discretion and are Subject to Penalties and Assessments:** Judges are in the best position to determine the appropriate sentence in a particular case. The judge presiding over a particular case is an independent arbiter of the facts and circumstances presented. The Legislature should pause before removing this discretion from judges, and tie their hands in particular matters. For this reason, minimum mandatory fines have been generally disfavored as a form of punishment.

Setting the penalty, or range of penalties, for a crime is an inherently legislative function. The Legislature does have the power to require a minimum term or other specific sentence. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) Sentencing, however, is solely a judicial power. (*People v. Tenorio* (1970) 3 Cal.3d 89, 90-93; *People v. Superior Court (Fellman)* (1976) 59 Cal.App.3d 270, 275.) California law effectively directs judges to impose an individualized sentence that fits the crime and the defendant's background, attitude, and record. (Cal. Rules of Court, rules 4.401-4.425.) This bill limits judicial discretion and requires a minimum fine of \$10,000 to be imposed in each case, regardless of the facts of the case and the defendant's record.

Also, there are penalty assessments and fees assessed on the base fine for a crime. Assuming a defendant was fined \$10,000 for engaging in prostitution as the minimum fine, the following penalty assessments would be imposed pursuant to the Penal Code and the California Government Code:

Base Fine:	\$ 10,000
Penal Code 1464 assessment:	\$ 10,000 (\$10 for every \$10)
Penal Code 1465.7 surcharge:	2,000 (20% surcharge)
Penal Code 1465.8 assessment:	40 (\$40 fee per offense)
Government Code 70372 assessment:	5,000 (\$5 for every \$10)
Government Code 70373 assessment:	30 (\$30 for felony or misd.)
Government Code 76000 assessment:	7,000 (\$7 for every \$10)
Government Code 76000.5 assessment:	2,000 (\$2 for every \$10)
Government Code 76104.6 assessment:	1,000 (\$1 for every \$10)

Government Code 76104.7 assessment: 4,000 (\$4 for every \$10)

Total Additional Fine with Assessments: \$ 41,070

- 7) **Graduated Sanctions Already Exist for Recidivist Johns:** For a first offense conviction of prostitution the defendant faces up to 180 days in jail. If a defendant has one prior conviction of prostitution he or she must receive a county jail sentence of not less than 45 days. If the defendant has two or more prior convictions, the minimum sentence is 90 days in the county jail.
- 8) **Prostitution and Human Trafficking, Though Related, are not Always the Same Thing:** A growing number of policy discussions are equating prostitution offenses with human trafficking offenses. There is no doubt that the crimes are related, however, they are not the same crime. A number of proposals seek to treat all prostitution offenses more severely because of the grave threat and nature of human trafficking. Human trafficking is a very serious crime, involving forced servitude, with very serious penalties. Most prostitution offenses between a person who is soliciting a prostitute and the prostitute themselves are misdemeanor crimes, which are unrelated to human trafficking. Additionally, pimps and panderers generally are treated more severely by the law, with much more serious consequences than the prostitute or the "john." Unlike the crimes of pimping and pandering, human trafficking is a crime that generally involves some form of force or coercion.

California has existing strict laws for the treatment of pimps and panderers, as well as human traffickers. However, those crimes are not the same and should not be treated the same. Furthermore, not every person who solicits a prostitute is engaged in the crime of human trafficking. In fact, the vast majority are not purchasing a commercial sex act with a person who is being forced to engage in the activity through the auspices of human trafficking. Categorizing all "johns" as human traffickers, or all pimps and panderers as human traffickers, is unproductive in setting criminal justice policy. Blurring the lines between the less severe crimes related to prostitution, and the more severe crimes related to human trafficking, weakens the severity of human trafficking offenses. For instance, this committee has approved bills to add human trafficking to the list of serious felonies. However, if we continue to expand the definition of human trafficking to include more minor prostitution-related offenses the committee would have to re-evaluate in the future whether it would still consider human trafficking a serious felony.

According to the Polaris Project, "Human trafficking is a form of modern-day slavery where people profit from the control and exploitation of others. As defined under U.S. federal law, victims of human trafficking include children involved in the sex trade, adults age 18 or over who are coerced or deceived into commercial sex acts, and anyone forced into different forms of 'labor or services,' such as domestic workers held in a home, or farm-workers forced to labor against their will. The factors that each of these situations have in common are elements of force, fraud, or coercion that are used to control people." (<<http://www.polarisproject.org/human-trafficking/overview>>.)

Pimping under California law means receiving compensation from the solicitation of a known prostitute. (Pen. Code, § 266h.) Whereas pandering means procuring another person for the purpose of prostitution by intentionally encouraging or persuading that person to become or continue being a prostitute. (Pen. Code, § 266i.) Oftentimes, pimps use mental,

emotional, and physical abuse to keep their prostitutes generating money. Consequently, there has been a paradigm shift where pimping and pandering is now viewed as possible human trafficking.

This new approach has been criticized by some because it blurs the line between human trafficking and prostitution. Sex workers say it discounts their ability to willingly work in the sex industry. (See *Nevada Movement Draws the Line on Human Trafficking* by Tom Ragan, Las Vegas Review Journal, May 26, 2013, < <http://www.reviewjournal.com/news/las-vegas/nevada-movement-draws-line-human-trafficking>>.)

- a) **Prostitution Generally:** The basic crime of prostitution is a misdemeanor offense. (Pen. Code § 647(b).) Prostitution can be generally defined as "soliciting or agreeing to engage in a lewd act between persons for money or other consideration." Lewd acts include touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification of either person.

To implicate a person for prostitution themselves, the prosecutor must prove that the defendant "solicited" or "agreed" to "engage" in prostitution. A person agrees to engage in prostitution when the person accepts an offer to commit prostitution with specific intent to accept the offer, whether or not the offerer has the same intent.

For the crime of "soliciting a prostitute" the prosecutors must prove that the defendant requested that another person engage in an act of prostitution, and that the defendant intended to engage in an act of prostitution with the other person, and the other person received the communication containing the request. The defendant must do something more than just agree to engage in prostitution. The defendant must do some act in furtherance of the agreement to be convicted. Words alone may be sufficient to prove the act in furtherance of the agreement to commit prostitution

Violation of Pen. Code § 647(b) is a misdemeanor. For a first offense conviction of prostitution the defendant faces up to 180 days in jail. If a defendant has one prior conviction of prostitution he or she must receive a county jail sentence of not less than 45 days. If the defendant has two or more prior convictions, the minimum sentence is 90 days in the county jail.

In addition to the punishment described above, if the defendant is conviction of prostitution, he or she faces fines, probation, possible professional licensing restrictions or revocations, possible immigration consequences, possible asset forfeiture, and possible driving license restrictions.

Closely associated crimes to prostitution include: abduction of a minor for prostitution (Pen. Code 267); seduction for prostitution (Pen. Code 266); keeping a house of prostitution (Pen. Code 315); leasing a house for prostitution (Pen. Code 318); sending a minor to a house of prostitution (Pen. Code 273e); taking a person against that person's will for prostitution (Pen. Code 266a); compelling a person to live in an illicit relationship (Pen. Code 266b); placing or leaving one's wife in a house of prostitution (Pen. Code 266g); loitering for prostitution (Pen. Code 653.22 subd. (a)); pimping (Pen. Code 266h); or, pandering (Pen. Code 266i). Most of these crimes are punished much

more severely than the underlying prostitution offense, particularly the crimes of pimping, pandering, and procurement.

- b) **Human Trafficking Generally:** Human trafficking involves the recruitment, transportation or sale of people for forced labor. Through violence, threats and coercion, victims are forced to work in, among other things, the sex trade, domestic labor, factories, hotels and agriculture. According to the January 2005 United States Department of State's Human Smuggling and Trafficking Center report, "Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking", there is an estimated 600,000 to 800,000 men, women and children trafficked across international borders each year. Of these, approximately 80% are women and girls and up to 50% are minors. A recent report by the Human Rights Center at the University of California, Berkeley cited 57 cases of forced labor in California between 1998 and 2003, with over 500 victims. The report, "Freedom Denied", notes most of the victims in California were from Thailand, Mexico, and Russia and had been forced to work as prostitutes, domestic slaves, farm laborers or sweatshop employees. [University of California, Berkeley Human Rights Center, "Freedom Denied: Forced Labor in California" (February, 2005).] According to the author:

"While the clandestine nature of human trafficking makes it enormously difficult to accurately track how many people are affected, the United States government estimates that about 17,000 to 20,000 women, men and children are trafficked into the United States each year, meaning there may be as many as 100,000 to 200,000 people in the United States working as modern slaves in homes, sweatshops, brothels, agricultural fields, construction projects and restaurants."

In 2012, Californians voted to pass Proposition 35, which modified many provisions of California's already tough human trafficking laws. The proposition increased criminal penalties for human trafficking, including prison sentences up to 15-years-to-life and fines up to \$1,500,000. Additionally, the proposition specified that the fines collected are to be used for victim services and law enforcement. Proposition 35 requires persons convicted of trafficking to register as sex offenders. Proposition 35 prohibits evidence that victim engaged in sexual conduct from being used against victims in court proceedings. Additionally, the proposition lowered the evidential requirements for showing of force in cases of minors.

- i) **Trafficking Victims Protection Act of 2000 (22 USC Sections 7101 *et seq.*):** In October 2000, the Trafficking Victims Protection Act of 2000 (TVPA) was enacted and is comprehensive, addressing the various ways of combating trafficking, including prevention, protection and prosecution. The prevention measures include the authorization of educational and public awareness programs. Protection and assistance for victims of trafficking include making housing, educational, health-care, job training and other federally funded social service programs available to assist victims in rebuilding their lives. Finally, the TVPA provides law enforcement with tools to strengthen the prosecution and punishment of traffickers, making human trafficking a federal crime.
- ii) **Recent Update to Human Trafficking Laws:** In 2012, Californians voted to pass Proposition 35, which modified many provisions of California's already tough human

trafficking laws. Specifically, Proposition 35 increased criminal penalties for human trafficking offenses, including prison sentences up to 15-years-to-life and fines up to \$1.5 million. The proposition specified that the fines collected are to be used for victim services and law enforcement. In criminal trials, the proposition prohibits the use of evidence that a person was involved in criminal sexual conduct (such as prostitution) to prosecute that person for that crime if the conduct was a result of being a victim of human trafficking, and makes evidence of sexual conduct by a victim of human trafficking inadmissible for the purposes of attacking the victim's credibility or character in court. The proposition lowered the evidentiary requirements for showing of force in cases of minors.

Proposition 35 also requires persons convicted of human trafficking to register as sex offenders and expanded registration requirements by requiring registered sex offenders to provide the names of their internet providers and identifiers, such as e-mail addresses, user names, and screen names, to local police or sheriff's departments. After passage of Proposition 35, plaintiffs American Civil Liberties Union and Electronic Frontier Foundation filed a law suit claiming that these provisions unconstitutionally restricts the First Amendment rights of registered sex offenders in the states. A United States District Court judge granted a preliminary injunction prohibiting the implementation or enforcement of Proposition 35's provisions that require registered sex offenders to provide certain information concerning their Internet use to law enforcement. [*Doe v. Harris* (N.D. Cal., Jan. 11, 2013, No. C12-5713) 2013 LEXIS 5428.]

iii) **California Attorney General's Report on Human Trafficking:** The California Attorney General's Human Trafficking in California 2012 report stated that human trafficking investigations and prosecutions have become more comprehensive and organized. There are nine human trafficking task forces in California, composed of local, state and federal law enforcement and prosecutors.

Data on human trafficking has improved, although the data still does not reflect the actual extent and range of human trafficking. Data from 2010 through 2012 collected by the California task forces are set out in the following chart:

California Human Trafficking Task Forces Data 2010-2012

Investigations	2,552
Victims Identified	1,277
Arrests Made	1,798

Trafficking by Category

Sex Trafficking	56%
Labor Trafficking	23%

Unclassified or Insufficient Information	21%
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9) **Known or Should Have Known:** For all of the provisions of this legislation which are tying additional registration requirements, and punishments for solicitation of a minor, the author has included language which is not in the underlying offense. The defendant must either know that the person is a minor at the time they solicit the minor for prostitution, or they "should know" that the person they are soliciting is a minor. The bill would cover persons who are targeting minors on purpose, but the provisions leave room for people who do not know that they are soliciting a minor with the "should have known" provision.

10) **Argument in Support:** None submitted

11) **Argument in Opposition:** According to *The American Civil Liberties Union*, "AB 733 seeks to equate the crime of soliciting a minor to engage in prostitution with the crime of actually having sex with a minor. The lifetime registration and other penalties contemplated by this bill for the crime of solicitation are excessive and inappropriate.

"AB 733 would make four changes to sentencing laws for individuals convicted of soliciting a prostitute, in violation of Penal Code section 647(b), in cases where the convicted person knew or should have known that the person solicited was a minor. Specifically, AB 733 would: (1) establish a mandatory \$10,000 fine; (2) require lifetime registration as a sex offender; (3) require that a convicted person's information be posted online; and (4) require participation in a sex offender management program as a condition of probation.

"Effectively, AB 733 seeks to equate the crime of soliciting a minor to engage in prostitution with the crime of actually having sex with a minor. This is inappropriate. There is a wide gap between those crimes in terms of the harm caused and the likely risk posed by the person convicted. This is especially true given that the crime of soliciting a minor applies to someone who did not know that the person solicited was a minor but 'should have known.' A person who solicits an individual that he or she 'should have known' is a minor may well stop the encounter upon learning that the individual solicited is in fact a minor. Simply put, individuals who *actually* engage in sex with a minor should face higher penalties than those who do not.

"AB 733 will also make it more difficult to effectively manage true sex offenders. California already requires a vast number of people to register as sex offenders for life, imposing residency and other restrictions. California's Sex Offender Management Board (CASOMB) has strongly criticized the vast scope of the current registration system:

"Under the current system, many local registering agencies are challenged just keeping up with registration paperwork. It takes an hour or more to process each registrant, the majority of whom are low risk offenders. As a result, law enforcement cannot monitor higher risk offenders more intensively in the community due to the sheer numbers now in the registry. Some of the consequences of lengthy and unnecessary registration requirements actually destabilize the lives of registrants and those – such as families – whose lives are often substantially impacted. Such consequences are thought to raise levels of known risk factors while providing no discernible benefit in terms of community safety.

"CASOMB has become convinced that California policy makers need to rethink the registration laws and the time has come, after nearly 70 years of use, to make some major changes in the state's registration system.²

"Moreover, AB 733 is unnecessary. Courts already have the discretion to order anyone who commits any offense to register as a sex offender under Penal Code section 290.006. Courts also have the discretion to order participation in a sex offender treatment program as a condition of probation, where appropriate. And courts have the power to impose a \$10,000 fine and order appropriate restitution. For these reasons, we respectfully oppose AB 733."

12) **Related Legislation:** AB 201 (Brough), would eliminate the state preemption which prohibits a local agency from enacting local ordinances that restrict a sex offender from residing or being present in specific locations, and authorize local agencies to enact ordinances that are more restrictive than state law. AB 201 is awaiting a hearing in the Assembly Local Government Committee and has been double referred to this Committee.

1) **Prior Legislation:**

- a) AB 90 (Swanson), Statutes of 2011, Ch. 457, included, within the definition of criminal profiteering activity, any crime in which the perpetrator induces, encourages, or persuades, or causes through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, a person under 18 years of age to engage in a commercial sex act, and specifies that the proceeds shall be deposited in a Victim-Witness Fund, as specified.
- b) AB 17 (Swanson), Statutes of 2010, Ch. 211, added abduction or procurement for prostitution to the criminal profiteering asset forfeiture law; provided that the court may impose a fine of up to \$20,000, in addition to any other fines and penalties, where the defendant has been convicted of abduction of a minor for purposes of prostitution or procurement of a minor under the age of 16 for lewd conduct; and provided that 50 percent of the additional fine shall be deposited in the Victim-Witness Assistance Fund for purposes of grants to community-based organizations that serve minor victims of human trafficking.
- c) AB 22 (Lieber), Chapter 240, Statutes of 2005, created the California Trafficking Victims Protection Act, which established civil and criminal penalties for human trafficking and allowed for forfeiture of assets derived from human trafficking. In addition, the Act required law enforcement agencies to provide Law Enforcement Agency Endorsement to trafficking victims, providing trafficking victims with protection from deportation and created the Human Trafficking Task Force.

REGISTERED SUPPORT / OPPOSITION:

² California's Sex Offender Management Board Year End Report 2014 (February 2015), at pp. 12-13; available at http://www.cce.csus.edu/portal/admin/handouts/CASOMB_End_of_Year_Report_to_Legislature_2014.pdf.

Support

None

Opposition

American Civil Liberties Union
Legal Services for Prisoners with Children

Analysis Prepared by: Gabriel Caswell / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 835 (Gipson) – As Amended April 14, 2015

SUMMARY: Provides that, in addition to filing a criminal complaint within the existing statute of limitations, if a person flees the scene of an accident that results in a vehicular manslaughter, as specified, a criminal complaint may be filed within one year after the person is initially identified by law enforcement as a suspect in the commission of the offense.

EXISTING LAW:

- 1) States that vehicular manslaughter is the unlawful killing of a human being without malice while driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. (Pen. Code, § 192, subd. (c)(1).)
- 2) States that violation of vehicular manslaughter is punishable by either imprisonment in the county jail for not more than one year or by imprisonment in the state prison for two, four or six years. (Pen. Code, § 193, subd. (c), par. (1).)
- 3) States that vehicular manslaughter also is the unlawful killing of a human being without malice while (i) driving a vehicle in the commission of an unlawful act, not amounting to a felony, but without gross negligence or (ii) driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence. [Penal Code section 192, subd. (c), par. (2).] States that violation of this offense is punishable by imprisonment in the county jail for not more than one year. (Pen. Code, § 193, subd. (c), par. (2).)
- 4) Requires that prosecution for an offense punishable by imprisonment in the state prison or county jail pursuant to realignment be commenced within three years after commission of the offense, except as specified. (Pen. Code, § 801.)
- 5) Requires that prosecution for a misdemeanor offense be commenced within one year after commission of the offense, except as specified. (Pen. Code, § 802, subd. (a).)
- 6) Allows a criminal complaint to be filed within the standard period, or one year after the person is initially identified by law enforcement as a suspect in the commission of the offense, whichever is later, but in no case later than six years after the commission of the offense, if a person flees the scene of an accident that caused death or permanent, serious injury (Pen. Code, § 803, subd. (j).)
- 7) States that the driver of a vehicle involved in an accident resulting in injury to a person, other than himself or herself, or in the death of a person shall immediately stop the vehicle at the

scene of the accident and provide assistance and information. (Veh. Code, § 20001, subd. (a).)

- 8) Specifies that if the results in death or permanent, serious injury, a person who violates subdivision shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or by both that imprisonment and fine. However, the court, in the interests of justice and for reasons stated in the record, may reduce or eliminate the minimum imprisonment. (Veh. Code, § 20001, subd. (b)(2).)
- 9) States that a person who flees the scene of the crime after committing a violation of vehicular manslaughter while intoxicated of, or gross vehicular manslaughter upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision or an allegation made pursuant to this subdivision. (Veh. Code, § 20001, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "“Currently, the statute of limitation provides an incentive for vehicular homicide suspects to flee the scene of serious traffic accidents in order to avoid identification and possible prosecution. Our laws should not encourage flight, and discourage rendering aid.

”Assembly Bill (AB) 835 will ensure those who commit vehicular homicide and flee the scene of the incident are held accountable for their crime by tolling the statute of limitations until the suspect is identified by law enforcement.”

- 2) **Statute of Limitations:** Criminal statutes of limitations are laws that limit the time during which a prosecution can be commenced. A prosecution is initiated by filing an indictment or information, filing a complaint, arraigning a defendant charged with a felony, or issuing an arrest or bench warrant. (Pen. Code, § 804.) If prosecution is not commenced within the applicable period of limitation, it is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time before or after judgment. *People v. McGee* (1934) 1 Cal.2d 611, 613. The defense may be waived only under limited circumstances for the benefit of the defendant. *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 370.

Statutes of limitations have been in operation for over 350 years and are deeply rooted in the American legal system. "There are several rationales underlying statutes of limitations. First, they ensure that prosecutions are based upon reasonably fresh evidence. The idea is that over time, memories fade, witnesses die or leave the area, and physical evidence becomes more difficult to obtain, identify, or preserve. In short, the possibility of erroneous conviction is minimized when prosecution is prompt. Second, statutes of limitations encourage law

enforcement officials to investigate suspected criminal activity in a timely fashion. In addition, it is thought that (statutes of limitations) may reduce the possibility of blackmail based on threats to disclose information to prosecutors or law enforcement officials. Another rationale is that as time goes by, the likelihood increases that an offender has reformed, making punishment less necessary. In addition, society's retributive impulse may lessen over time, making punishment less desirable. Finally, there is the thought that statutes of limitations provide an overall sense of security and stability to human affairs." (Lauren Kerns, *Incorporating Tolling Provisions into Sex Crimes Statutes of Limitations*, 13 Temp. Pol. & Civ. Rts. L. Rev. 325, 327 (2003) (internal quotations and citations omitted).)

In considering revisions to California's statutes of limitations, the California Law Revision Commission identified five factors to be considered by the Legislature in drafting a limitations statute: "(a) The *staleness* factor. A person accused of crime should be protected from having to face charges based on possibly unreliable evidence and from losing access to the evidentiary means to defend. (b) The *repose* factor. This reflects society's lack of a desire to prosecute for crimes committed in the distant past. (c) The *motivation* factor. This aspect of the statute imposes a priority among crimes for investigation and prosecution. (d) The *seriousness* factor. The statute of limitations is a grant of amnesty to a defendant; the more serious the crime, the less willing society is to grant that amnesty. (e) The *concealment* factor. Detection of certain concealed crimes may be quite difficult and may require long investigations to identify and prosecute the perpetrators." (1 Witkin Cal. Crim. Law Defenses Section 234 (3rd ed. 2010), citing 17 Cal. Law Rev. Com. Reports, pp.308-311.)

- 3) **The Proposed Legislation has Similar Language to the Existing Statute of Limitations for the Crime of Hit and Run with Injury or Death, but it Does Not Include Any Cap on Time:** This bill would allow the statute of limitations to be extended for crimes of vehicular manslaughter where the suspect left the scene of the accident. The statute of limitations for vehicular manslaughter is one year (misdemeanor vehicular manslaughter), or three years (felony vehicular manslaughter). This bill would allow the statute of limitations to be extended indefinitely beyond those time periods, if a suspect has not been identified. If a suspect is identified at any point in the future, a criminal complaint can be filed within one year of identification of the suspect. Under existing law, the statute of limitation for a hit and run with injury or death, includes a provision which extends the statute of limitations to allow the filing of a complaint within one year of identification of a suspect. However, there is a six year cap, beyond which charges cannot be filed. (Pen. Code, § 803(j).) The proposed legislation mirrors the language extending the statute of limitations in hit and run with injury or death, but does not include any cap.
- 4) **Argument in Support:** According to *The Los Angeles County Professional Peace Officers Association*, "This bill would authorize a criminal complaint to be brought against a person who flees the scene of an accident for violation of specified vehicular manslaughter crimes to be filed either one or 3 years after the commission of the offense.

"The additional time would aid law enforcement officers in their investigations of these specified crimes, and seeks to ensure justice is served and closure provided for the families of the victims."
- 5) **Argument in Opposition:** According to *The American Civil Liberties Union of California*, "AB 835 would effectively eliminate the statute of limitations for charges under Penal Code

section 192(c)(1) or (2) in cases where a person flees the scene of an accident. The bill would permit the prosecution to pursue charges within one year of identifying a suspect, without any outer-limit on when charges may be filed. Practically speaking, this is effectively the same as no statute of limitations, as the prosecution may pursue charges decades after the events at issue. In contrast, Penal Code section 803(j) currently provides that, in cases where a person flees the scene of an accident causing death, the prosecution may file charges within one year of identifying a suspect “but in no case later than six years after the commission of the offense.”

“Creating two different statutes of limitations for these offenses will create confusion. A prosecutor may choose to charge the more severe offense of Penal Code section 192(c) for the specific purpose of evading the six year statute of limitations provided for the offense of fleeing the scene of an accident causing death. People charged with this more severe crime more than six years after the events may raise legitimate due process and equal protection concerns.”

“Moreover, statutes of limitations promote one of the core principles of our justice system: that crimes are solved and brought to trial quickly, to ensure that a person accused of a crime faces reliable evidence and has a fair opportunity to mount a defense. The United States Supreme Court stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) People should not face criminal charges based on evidence that may be unreliable or after they have lost access to evidence to defend against the charge. With time memory fades, witnesses become unavailable, and physical evidence becomes unobtainable or contaminated.

Offenses that charged under Penal Code section 192(c) are particularly likely to raise these concerns. These offenses do not require intent but, rather, a finding of gross negligence. Determining whether the accused person committed an act with gross negligence requires a careful assessment of all of the circumstances of the accident and many of the circumstances leading up to the accident. A person facing charges of gross vehicular manslaughter decades after the event will have lost the ability to identify and interview key witnesses and to collect physical evidence that may be relevant to his or her defense.”

“For these reasons, we oppose AB 835 unless amended to provide an outer-limit of six years for filing these charges.”

6) **Prior Legislation:**

- a) AB 184 (Gatto), Chapter 765, Statutes of 2013, provides that, notwithstanding any other limitation of time specified, if a person flees the scene of an accident that has caused death or permanent, serious injury, charges may be brought either one or 3 years after the completion of the offense, as specified, or one year after the person is initially identified as a suspect in the commission of the offense, whichever is later, but in no case later than 6 years after the commission of the offense.
- b) AB 2484 (Davis), of the 2011-2012 Legislative Session, would have provided that notwithstanding any other limitation of time, as specified, if a person flees the scene of an accident, a criminal complaint for the crimes described above may be filed either one or 3 years after the commission of the offense, as specified, or one year after the person is

initially identified by law enforcement as a suspect in the commission of that offense, whichever is later. The bill was never heard in the Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Highway Patrolmen
California District Attorneys Association
Crime Victims United
Fraternal Order of Police California State Lodge
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association

Opposition

American Civil Liberties Union of California
California Attorneys for Criminal Justice
Legal Services for Prisoners with Children

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 849 (Bonilla) – As Introduced February 26, 2015
As Proposed to be Amended in Committee

SUMMARY: Makes it a felony for any person to extract tetrahydrocannabinol (THC) or any other cannabinoids, by means of solvent extraction, from marijuana and cause an explosion resulting in great bodily injury, or damage to structures, property, or forest land. Specifically, **this bill:**

- 1) Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in great bodily injury shall be punished by imprisonment in a county jail for two, four, or six years, or by imprisonment in a county jail for a term not exceeding one year, by a fine not to exceed \$10, 000, or both a fine and imprisonment.
- 2) Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to an inhabited structure or inhabited property shall be punished by imprisonment in a county jail for two, three, or four years, or by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed \$10,000, or by both a fine and imprisonment.
- 3) Provides that any person who extracts, or attempts to extract THC or any other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to forest land shall be punished by imprisonment in a county jail for 16 months, two, or three years, be punished by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed \$10,000, or by both a fine and imprisonment.
- 4) Any person who extracts, or attempts to extract THC or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to property is guilty of a misdemeanor punishable by imprisonment in a county jail for a term not to exceed six months, by a fine not to exceed \$1,000, or by both a fine and imprisonment. For purposes of this paragraph unlawfully causing an explosion that damages property does not include an explosion that damages his or her own personal property unless there is injury to another person or to another person's structure, forest land, or property.

EXISTING LAW:

- 1) Provides that a person is guilty of unlawfully causing a fire when he or she recklessly sets fire to or causes to be burned any structure, forestland, or property.
 - a) Unlawfully causing a fire that causes great bodily injury is a felony, punishable by imprisonment in the state prison for two, four, or six years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
 - b) Unlawfully causing a fire that causes an inhabited structure or property to burn is a felony, punishable by imprisonment in the state prison for two, three, or four years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
 - c) Unlawfully causing a fire of a structure or forestland is a felony punishable by imprisonment in the state prison for 16 months, 2, or 3 years, or by imprisonment in the county jail not to exceed one year, or by a fine, or by both imprisonment and a fine.
 - d) Unlawfully causing a fire of property is a misdemeanor. (Pen. Code, § 452.)
- 2) Provides that any person convicted of reckless fire setting shall be punished by a one, two, or three year enhancement for each of the following circumstances found to be true:
 - a) The defendant was previously convicted of felony arson;
 - b) A peace officer, firefighter, or other emergency personnel suffered great bodily injury;
 - c) The defendant proximately caused great bodily injury to more than one victim in a single incident; or,
 - d) The defendants proximately caused multiple structures to burn. (Pen. Code, § 452.1.)
- 3) States that the following terms have the following meanings:
 - a) "Structure" means any building, or commercial or public tent, bridge, tunnel, or power plant;
 - b) "Forest land" means any brush covered land, cut over land, forest, grasslands, or woods;
 - c) "Property" means real property or personal property, other than a structure or forest land;
 - d) "Inhabited" means being used for dwelling purposes whether occupied or not. "Inhabited structure" and "inhabited property" do not include real property on which an inhabited structure or an inhabited property is located;
 - e) "Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law,

- f) "Recklessly" means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto. (Pen. Code, § 450.)
- 4) Provides that any person, firm, or corporation who, except as specified, within this state, possesses any destructive device, other than fixed ammunition of a caliber greater than .60 caliber is guilty of a public offense. A person, firm, or corporation convicted of this offense shall be punished imprisonment in the county jail for a term not to exceed one year, or in the state prison, or by a fine not to exceed \$10,000, or by both. (Pen. Code, § 18710.)
- 5) States that any person who recklessly or maliciously has in possession any destructive device or any explosive in any of the following places is guilty of a felony punishable by imprisonment in a county jail for two, four, or six years:
- a) On a public street or highway;
 - b) In or near any theater, hall, school, college, church, hotel, or other public building,
 - c) In or near any private habitation;
 - d) In, on, or near any aircraft, railway passenger train, car, cable road, cable car, or vessel engaged in carrying passengers for hire; and,
 - e) In, on, or near any other public place ordinarily passed by human beings. (Pen Code, § 18715.)
- 6) Provides that any person that possesses any substance, material, or combination of substances or materials with the intent any destructive device or any explosive without first obtaining a valid permit that destructive device or explosive, is guilty of a felony punishable by imprisonment in a county jail for two, three, or four years. (Pen Code, § 18720.)
- 7) States that every person that does any of the following is guilty of a felony punishable by imprisonment in a county jail for two, four, or six years:
- a) Carries any destructive device or any explosive on any vessel, aircraft, car, or other vehicle that transports passengers for hire;
 - b) While on board any vessel, aircraft, car, or other vehicle that transports passengers for hire places or carries any destructive device or explosive in any hand baggage, roll, or other container; and;
 - c) Places any destructive device or any explosive in any baggage that is alter checked with any common carrier. (Pen Code, § 18720.)

- 8) States except as provided, any person, firm or corporation who, within this state, sells, offers for sale, or knowingly transports any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, is guilty of a felony punishable by imprisonment in a county jail for two, three, or four years. (Pen. Code, § 18730.)
- 9) Provides that every person that possess, explodes, or ignites, or attempts to possess, explode, or ignite any destructive device or any explosive with the intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy any property is guilty of a felony punishable by imprisonment in a county jail for three, five, or seven years. (Pen. Code, § 18740.)
- 10) Provides that every person that explodes, or ignites, or attempts to explode, or ignite any destructive device or any explosive with the intent to murder is guilty of a felony punishable by imprisonment in the state prison for life with the possibility of parole. (Pen. Code, § 18745.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "We have seen a worrying increase in the number of honey oil related butane explosions. In my own district, one explosion knocked a neighboring house off its foundation. Unfortunately, currently law does not provide an adequate means of addressing these butane related explosions. If a person manufacturing honey oil using butane causes an explosion, but that same explosion does not cause fire damage to the structure, the only remedy available to law enforcement is to charge vandalism. This is hardly an appropriate charge for such a dangerous act. AB 849 remedies this situation by ensuring that all honey oil related butane explosions can be charged to appropriately reflect their gravity."
- 2) **Background:** According to background materials supplied by the author, the law as it currently exists holds a defendant liable for a drug lab that catches fire but not a drug lab that explodes. This yields an inconsistent result where much more dangerous explosions that cause significant damage (to persons and property) are going unpunished or are being treated as vandalism.

The increasing popularity of Butane Honey Oil (BHO), which is a form of concentrated cannabis, and the large profits that can be made from its manufacture, has resulted in a significant public safety issue from the damage caused when BHO labs explode. BHO is manufactured through a chemical extraction process in which the THC from unused parts of a marijuana plant is extracted by using butane. Butane is highly combustible and in the "off gassing" stage of the BHO manufacturing process, often explodes when a careless manufacturer ignites a spark or flame. Because butane gas is odorless and colorless it can build up in a home or apartment without the occupants or neighbors being aware of the danger.

In Los Angeles County, there have been 32 BHO explosions in the last two years. In the majority of these cases, the exploding butane gas ignites and there is significant structural damage caused by the resulting fire. When this occurs, the district attorney normally files a

charge of violating California Penal Code section 452(b) (recklessly causing a fire). The elements of California Penal Code section 452(b) require there to be a fire and damage to a structure, and the damage must be the result of the fire. Although most of the labs that explode do result in a fire, a problematic scenario has arisen when either the damage from the fire was to personal property or the damage to the structure was caused by the explosion and not the fire.

Both problems lead to the same result- insufficient evidence for California Penal Code section 452(b) as currently written. As currently written, California Penal Code section 452(b) requires damage to a structure caused by a fire. Damage to a structure caused by an explosion does not qualify. This is an inconsistent result. This is an arbitrary distinction that leaves district attorneys with the only option of filing California Penal Code section 594(a) – vandalism -- to reflect the damage done and the loss to the property owner, but it does not adequately represent the risks taken by the defendant and the scope of the harm he or she has done. If the harm is done to the perpetrator's own property, vandalism cannot be charged either as one cannot vandalize his or her own property.

In *People v. Ellebracht*, the explosion caused significant damage, but the fire (which was put out quickly by a neighbor) did not cause any damage to the structure. All of the structural damage was caused by the explosion. In this case, the defendant was making Butane Honey Oil in apartment he was living in. He was not the renter or the owner of the property. He placed the mixture into the freezer to cool it down. The freezer door blew off. The explosion caused two glass sliding doors to break. There was no damage to the structure from fire specifically, however, the overall impact of the defendant's actions were significant.

In *People v. Jones*, the fire damaged the defendant's personal property only. The damage to the structure was caused by the explosion. In this case, the defendant was making Butane Honey Oil in mass quantities throughout the three bedroom house. The explosion occurred in the garage where it resulted in the melting of plastic on the cases of butane (defendant's property) and the bowing out of the garage door by three feet. Glass panels of the door shattered. There was no damage to the structure from fire specifically, however, the overall impact of the defendant's actions were significant.

- 3) **Argument in Support:** The *California Professional Firefighters* state, "AB 849 provides that defendants be held liable for damage caused when a drug lab explodes, whether it is caused by a resulting fire or the explosion itself. This bill insures that butane hash oil lab explosions are addressed in the same manner as other drug lab explosions.

"Drug labs provide serious, inherent risks on a myriad of fronts, particularly the high risk for explosion and hazardous material release. Such risks compromise the health and safety of neighbors, as well as the health and safety of our members who are the first to respond to an emergency situation involving such labs. This bill provides our states communities with an effective means of holding a responsible party accountable for the damage to properties and personal belongings resulting from explosions of this kind.

4) **Argument in Opposition:** The *California Public Defenders Association* submitted an opposition letter correctly pointed out that the bill as introduced penalized "causing an explosion" and did not require that any damage result. Also, the sections amended, in the introduced bill, were not amended in such a way as to require that the prohibited explosion cause damage to property, structure or lands. The bill is now being heard as proposed to be amended in Committee, and will be amended in Committee to address the stated concerns of Public Defenders Association. The bill as proposed to be amended requires that an explosion that occurs in the course of butane hash oil extraction results in great bodily injury or damage to structures, property or forest land.

5) **Related Legislation:**

- a) AB 772 (Baker) prohibited any person from purchasing more than 400 milliliters of butane in a calendar month. AB 772 was removed from this Committee's hearing agenda at the request of the author.
- b) SB 305 (Bates) expands several enhancements related to the manufacture of a controlled substance and the possession of specified precursor chemicals in a structure where a child under 16 years of age is present. SB 305 is pending hearing in the Senate Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)
 Association for Los Angeles Deputy Sheriffs Association
 Association of Deputy District Attorneys
 California Association of Code Enforcement Officers
 California College and University Police Chiefs Association
 California Correctional Supervisors Association
 California State Sheriffs' Association
 California Narcotics Officers' Association
 California Professional Firefighters
 California State Lodge Fraternal Order of Police
 California State Firefighters Association
 Central Coast Forest Association
 Los Angeles County Professional Peace Association
 Long Beach Police Officers Association
 Sacramento County Deputy Sheriffs' Association
 Santa Ana Police Officers Association

Opposition

California Public Defenders Association

Analysis Prepared by: Gregory Pagan/PUB. S./ (916) 319-3744

Amendments Mock-up for 2015-2016 AB-849 (Bonilla (A))

***** Amendments are in BOLD *****

Mock-up based on Version Number 99 - Introduced 2/26/15
Submitted by: Greg Pagan, Public Safety Committee

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 452 **452.01** is added to of the Penal Code is amended to read:

~~452. A person is guilty of unlawfully causing a fire or an explosion when he or she recklessly sets fire to or burns or to, burns, causes to be burned, or causes an explosion within or on any structure, forest land or property.~~

~~(a) Unlawfully causing a fire or an explosion that causes great bodily injury is a felony punishable by imprisonment in the state prison for two, four or six years, or by imprisonment in the county jail for not more than one year, or by a fine, or by both such that imprisonment and fine.~~

~~(b) Unlawfully causing a fire or an explosion that causes an inhabited structure or inhabited property, or its contents, to burn or to be damaged by an explosion is a felony punishable by imprisonment in the state prison for two, three or four years, or by imprisonment in the county jail for not more than one year, or by a fine, or by both such that imprisonment and fine.~~

~~(c) Unlawfully causing a fire of to, or an explosion on or of a structure or on forest land is a felony punishable by imprisonment in the state prison for 16 months, two or three years, or by imprisonment in the county jail for not more than six months, or by a fine, or by both such that imprisonment and fine.~~

~~(d) Unlawfully causing a fire of to, or an explosion on, property is a misdemeanor. For purposes of this paragraph, unlawfully causing a fire of to, or an explosion on, property does not include one burning or burning, causing to be burned, or causing an explosion on his or her own personal property unless there is injury to another person or to another person's structure, forest land or property.~~

~~(e) In the case of any If a person is convicted of violating this section while he or she is confined in a state prison, prison road camp, prison forestry camp, or other prison camp or prison farm, or while he or she is confined in a county jail while serving a term of imprisonment for a felony or~~

~~misdemeanor conviction, any the sentence imposed for a violation of this section shall be consecutive to the sentence for which the person was then confined.~~

SEC. 2. Section 452.1 of the Penal Code is amended to read:

~~452.1. (a) Notwithstanding any other law, any person who is convicted of a felony violation of Section 452 shall be punished by a one, two, or three-year enhancement for each of the following circumstances that is found to be true:~~

~~(1) The defendant has been previously convicted of a felony violation of Section 451 or 452.~~

~~(2) A firefighter, peace officer, or other emergency personnel suffered great bodily injury as a result of the offense. The additional term provided by this subdivision shall be imposed whenever applicable, including any instance in which there is a violation of subdivision (a) of Section 452.~~

~~(3) The defendant proximately caused great bodily injury to more than one victim in any single violation of Section 452. The additional term provided by this subdivision shall be imposed whenever applicable, including any instance in which there is a violation of subdivision (a) of Section 452.~~

~~(4) The defendant proximately caused multiple structures to burn or be damaged by an explosion in any a single violation of Section 452.~~

~~(b) The additional term specified in subdivision (a) of Section 452.1 shall not be imposed unless the existence of any a fact required under this section shall be is alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.~~

452.01. (a) Any person who extracts, or attempts to extract tetrahydrocannabinol (THC) or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in great bodily injury shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, four, or six years, or by imprisonment in a county jail for a term not exceeding one year, by a fine not to exceed ten thousand (\$10, 000), or both a fine and imprisonment.

(b) Any person who extracts, or attempts to extract tetrahydrocannabinol (THC) or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to an inhabited structure or inhabited property shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed ten thousand dollars (\$10,000), or by both a fine and imprisonment.

(c) Any person who extracts, or attempts to extract tetrahydrocannabinol (THC) or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to a structure, or forest land shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, two, or three years, or by imprisonment in a county jail for a term not to exceed one year, by a fine not to exceed ten thousand dollars (\$10,000), or by both a fine and imprisonment.

(d) Any person who extracts, or attempts to extract tetrahydrocannabinol (THC) or other cannabinoids, by means of solvent extraction, from marijuana leaves, flowers, or stalks and causes an explosion that results in damage to property is guilty of a misdemeanor. For purposes of this paragraph unlawfully causing an explosion that damages property does not include an explosion that damages his or her own personal property unless there is injury to another person or to another person's structure, forest land, or property.

SEC. 3. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Date of Hearing: April 28, 2015
Counsel: Sandra Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 913 (Santiago) – As Amended April 9, 2015

SUMMARY: Requires that the written jurisdictional agreements between postsecondary educational institutions and local law enforcement which designate the agency responsible for investigating specified violent crimes to also make a designation with respect to the investigation of sexual assaults and hate crimes. Specifically, **this bill:**

- 1) Requires the governing board of each community college district (CCD), the Trustees of the California State University (CSU), the Regents of the University of California (UC), and the governing board of independent post-secondary institutions to update their existing written jurisdictional agreements with local law enforcement for investigation of Part 1 violent crimes to include sexual assaults and hate crimes.
- 2) Defines "hate crime" as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics.
- 3) Defines "sexual assault" to include, but not be limited to, rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or the threat of any of these.
- 4) Requires that the agreements be reviewed and updated as necessary by July 1, 2016, and every five years thereafter.

EXISTING LAW:

- 1) States that the governing board of each CCD, the CSU Trustees, the UC Regents, and the governing boards of independent postsecondary institutions receiving public funds for student financial assistance shall require the appropriate officials at each campus within their respective jurisdictions to compile records of all occurrences reported to campus police, campus security personnel, or campus safety authorities of, and arrests for, crimes that are committed on campus and that involve violence, hate violence, theft, destruction of property, illegal drugs, or alcohol intoxication. (Ed. Code, § 67380, subd. (a)(1)(A).)
- 2) Requires the governing board of each CCD, the CSU Trustees, the UC Regents, and the governing boards of independent postsecondary institutions receiving public funds for student financial assistance to adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus. (Ed. Code, § 67381, subd. (b).)

- 3) Defines "Part 1 violent crimes" as "willful homicide, forcible rape, robbery, or aggravated assault, as defined in the Uniform Crime Reporting Handbook of the Federal Bureau of Investigation." (Ed. Code, § 67381, subd. (h)(i)(2).)
- 4) States that each written agreement entered into pursuant to this section shall designate which law enforcement agency shall have operational responsibility for the investigation of each Part 1 violent crime and delineate the specific geographical boundaries of each agency's operational responsibility, including maps as necessary. (Ed. Code, § 67381, subd. (d).)
- 5) Requires the governing board of each CCD, the CSU Trustees, the Board of Directors of Hastings College of the Law, and the UC Regents to each adopt, and implement at each of their respective campuses or other facilities, a written procedure or protocols to ensure, to the fullest extent possible, that students, faculty, and staff who are victims of sexual assault committed on grounds maintained by the institution or affiliated student organizations, receive treatment and information. (Ed. Code, § 67385, subd. (a).)
- 6) States that the written procedures or protocols must contain at least the following information:
 - a) The college policy regarding sexual assault on campus;
 - b) Personnel on campus who should be notified, and procedures for notification, with the consent of the victim;
 - c) Legal reporting requirements, and procedures for fulfilling them;
 - d) Services available to victims, and personnel responsible for providing these services, such as the person assigned to transport the victim to the hospital, to refer the victim to a counseling center, and to notify the police, with the victim's concurrence;
 - e) A description of campus resources available to victims, as well as appropriate off-campus services;
 - f) Procedures for ongoing case management, including procedures for keeping the victim informed of the status of any student disciplinary proceedings in connection with the sexual assault, and the results of any disciplinary action or appeal, and helping the victim deal with academic difficulties that may arise because of the victimization and its impact;
 - g) Procedures for guaranteeing confidentiality and appropriately handling requests for information from the press, concerned students, and parents; and,
 - h) Each victim of sexual assault should receive information about the existence of at least the following options: criminal prosecutions, civil prosecutions, the disciplinary process through the college, the availability of mediation, alternative housing assignments, and academic assistance alternatives. (Ed. Code, § 67385, subd. (b).)
- 7) Requires public postsecondary educational institution campuses to develop policies to encourage students to report any campus crimes involving sexual violence to the appropriate

campus authorities. (Ed. Code, § 67385.7, subd. (c).)

- 8) Urges campuses to adopt policies to eliminate barriers for victims who come forward to report sexual assaults, and to advise students regarding these policies. These policies may include, but are not necessarily limited to, exempting the victim from campus sanctions for being in violation of any campus policies, including alcohol or substance abuse policies or other policies of the campus, at the time of the incident. (Ed. Code, § 67385.7, subd. (d).)
- 9) Requires the governing board of each CCD, the CSU Trustees, the UC Regents, and the governing boards of independent postsecondary institutions to adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking in order to receive state funds for student financial assistance, as specified. (Ed. Code, § 67386, subd. (a).)
- 10) Requires, under the federal Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), colleges and universities, as a condition of federal student aid program participation, to (a) publish annual campus security reports, maintain crime logs, provide timely warnings of crimes that present a public safety risk, and maintain ongoing crime statistics; and (b) establish certain rights for victims of sexual assault, including notification to victims of legal rights, availability of counselling, safety options for victims, and offering prevention and awareness programs. (20 U.S.C. §1681-1688; 20 U.S.C. §1092(f).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The U.S. Department of Education's Office for Civil Rights is investigating 101 postsecondary institutions-including UC Berkeley, Stanford, UCLA, Occidental, UCSD, and USC-over their handling of sexual violence complaints under Title IX, the federal law that protects against discrimination in education. Complainants allege schools violated Title IX by failing to thoroughly investigate sexual assaults, and others assert schools violated the Clery Act-a federal law requiring reporting of campus crime-by underreporting sex crimes.

"Steps must be taken to ensure allegations of campus sexual assault are appropriately responded to and investigated. The White House Task Force to Protect Students from Sexual Assault recommended campus and local law enforcement agencies establish written agreements (MOUs) regarding campus sexual assault, stating that cooperation between campus and local law enforcement on sexual assault is critical.

"AB 913 requires the written agreements between campus law enforcement and local law enforcement-which currently designate the agency responsible for investigation of certain violent crimes-to additionally designate the agency responsible for investigation of sexual assaults and hate crimes. These MOUs can help protect students, address the needs of survivors, and ensure prompt, thorough, and fair responses to allegations of misconduct."

- 2) **Campus-Based Requirements and Remedies Required Under Federal Law:** Under Title IX of the Higher Education Amendments of 1972 and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, post-secondary educational

institutions receiving federal financial aid are required to disclose information about crimes on and around campuses (Clery Act), as well as establish certain rights for victims of sexual assault (Title IX). Title IX prohibits sex-based discrimination in education. If an institution knows, or reasonably should know, about discrimination, harassment, or violence that is creating a "hostile environment" for any student, it must act to eliminate it, remedy the harm caused, and prevent its recurrence. The rights provided under Title IX include notification to victims of the right to file a complaint, available counseling services, the results of disciplinary proceedings, and the option for victims to change their academic schedule or living arrangements, and requires postsecondary institutions to offer prevention and awareness programs to new students and employees regarding rape, domestic and dating violence, sexual assault, and stalking.

The United States Department of Education Office for Civil Rights (OCR) is responsible for enforcing campus compliance with Title IX requirements. In the past several years, OCR has issued strengthened guidance to colleges outlining campuses responsibilities and obligations to promptly investigate and respond to sexual violence. In May 2014, OCR publically identified campuses under investigation for failing to comply with the federal requirements. The initial list of campuses under investigation by OCR contained 55 institutions; by January 2015 the list had grown to 94 institutions.

- 3) **California actions:** In California, several highly publicized events and investigations have contributed to legislative attention and action on campus sexual assault. In April 2013, UC Berkeley students voted "no confidence" in the campus handling of sexual assault disciplinary actions. Subsequently, students at UC Berkeley, and at several other California campuses including Occidental, University of Southern California, and UC Santa Barbara, filed complaints with OCR.

In June 2014, the Bureau of State Audits released a report noting several deficiencies in the reporting and responding to sexual assault allegations on college campuses, as well as containing recommendations for improving training of faculty and staff regarding sexual assault prevention and response. Of particular significance, the report found that the universities do not ensure that all faculty and staff are sufficiently trained on responding to and reporting these incidents to appropriate officials, and that higher education institutions must do more to properly educate students on sexual harassment and sexual violence. (<https://www.auditor.ca.gov/reports/summary/2013-124>.)

In response, in the prior legislative session, two measures addressing sexual assault on college campuses were adopted. SB 967 (De León and Jackson), Chapter 748, Statutes of 2014, establishes a requirement for "affirmative consent" and other victim-centered standards and policies; and, AB 1433 (Gatto), Chapter 798, Statutes of 2014, requires campuses to immediately report specified crimes to law enforcement.

- 4) **White House Task Force to Protect Students from Sexual Assault:** In response to the prevalence of sexual assaults on college campuses, on January 22, 2014, the White House established the White House Task Force to Protect Students from Sexual Assault. The mission of the task force is to "work with agencies to develop a coordinated Federal response to campus rape and sexual assault." To this end, the task force is tasked with making recommendations to meet the following objectives:

"providing institutions with evidence-based best and promising practices for preventing and responding to rape and sexual assault;

"building on the Federal Government's existing enforcement efforts to ensure that institutions comply fully with their legal obligations to prevent and respond to rape and sexual assault;

"increasing the transparency of the Federal Government's enforcement activities concerning rape and sexual assault, consistent with applicable law and the interests of affected students;

"broadening the public's awareness of individual institutions' compliance with their legal obligation to address rape and sexual assault; and

"facilitating coordination among agencies engaged in addressing rape and sexual assault and those charged with helping bring institutions into compliance with the law."

(<https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>)

As to the last point, the first report issued by the task force stated, "By June 2014, we will provide schools with a sample Memorandum of Understanding (MOU) with local law enforcement. An MOU can help open lines of communication and increase coordination among campus security, local law enforcement and other community groups that provide victim services. An MOU can also improve security on and around campus, make investigations and prosecutions more efficient, and increase officers' understanding of the unique needs of sexual assault victims." (<https://www.notalone.gov/assets/report.pdf>)

- 5) **Argument in Support:** According to the *Anti-Defamation League*, "While existing federal law requires colleges and universities to disclose information about crimes that happen on or near campuses, gaps in disclosure exist on several higher education campuses in California, resulting in lawsuits and investigations by the federal government. The U.S. Department of Education's Office for Civil Rights is investigating 88 postsecondary institutions—including UC Berkeley, UCLA, Occidental, and USC—over their handling of sexual violence complaints. Complainants allege schools fail to thoroughly investigate sexual assaults, and others assert schools underreport sex crimes. The White House Task Force to Protect Students from Sexual Assault has stated that cooperation between campus and local law enforcement on sexual assault is critical, and recommended these agencies establish memorandums of understanding (MOUs) that set forth respective roles and responsibilities.

"AB 913 requires MOUs between campus law enforcement and local law enforcement to additionally designate the agency responsible for investigation of sexual assaults and hate crimes. AB 913 results in a closer working relationship between campuses, local police and sheriffs' departments, which—in turn—will lead to more thorough investigations and better outcomes for victims. By altering local law enforcement agencies to crime trends within their jurisdiction, surrounding communities will be better served and protected. Additionally, this law helps ensure victims' privacy by allowing for their names to be redacted from the report to local law enforcement if they expressly request it."

6) Prior Legislation:

- a) AB 1433 (Gatto), Chapter 798, Statutes of 2014, requires the governing board of each public, private and independent postsecondary educational institution, which receives public funds for student financial assistance, to adopt and implement written policies and procedures governing the reporting of specified crimes to law enforcement agencies.
- b) SB 967 (De León and Jackson), Chapter 748, Statutes of 2014, requires higher education institutions whose students receive financial aid to uphold an affirmative consent standard in disciplinary hearings and to educate students about the standard.

REGISTERED SUPPORT / OPPOSITION:**Support**

Anti-Defamation League
California College and University Police Chiefs Association
California State Lodge, Fraternal Order of Police
California Women's Law Center
Community College League of California
Crime Victims United
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Sacramento County Deputy Sheriffs' Association
Santa Ana Police Officers Association

Opposition

None

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1003 (Nazarian) – As Amended April 22, 2015

SUMMARY: Creates a Sexually Violent Predator (SVP) oversight board comprised of members from the Department of State Hospitals (DSH) and the criminal justice system to make recommendation to the Governor and Legislature regarding the SVP program. Specifically, **this bill:**

- 1) Requires the DSH, on or before January 30, 2016, to consult with a committee consisting of one representative of the DSH, California District Attorneys Association (CDA), California Public Defenders Association (CPDA), and the Los Angeles District Attorney's Office (LADA). The committee members shall select a member of the private defense bar, and a person with experience as a SVP evaluator to make recommendations to make possible changes to the SVP standardized assessment protocol.
- 2) States that, on or before March 1, 2016, the DSH shall initiate the regulatory process to update SVP standardized assessment protocol, including a plan for formal supervisory review of SVP evaluations and a checklist for reviewing evaluations, as recommended in a March 2015 report of the California State Auditor (CSA). The regulations shall also include requirements and procedures for training evaluators.
- 3) Creates an SVP oversight board to advise the Governor and the Legislature regarding SVP's, and the oversight board shall be comprised of seven members with one representative from each of the following organizations: DSH, CDA, CPDA, LADA, and the California Judicial Commission on Judicial Performance.
- 4) Requires the five statutorily-designated members of the oversight board to select a representative of the private defense bar and a person with experience as a SVP evaluator to serve on the oversight board.
- 5) Requires the oversight board to meet at least six times per year.
- 6) States that on or before January 1, 2017, and on or before January 1 in each subsequent year, the oversight board shall make a report to the Governor and the Legislature making recommendations regarding the SVP program, including, but not limited to, evaluating SVP's confined in the state hospitals.

EXISTING LAW:

- 1) Provides for the civil commitment for psychiatric and psychological treatment of a prison inmate found to be a SVP after the person has served his or her prison commitment. (Welf.

& Inst. Code, § 6600, et seq.)

- 2) Defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against at least one victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, § 6600, subd. (a)(1).)
- 3) Permits a person committed as a SVP to be held for an indeterminate term upon commitment. (Welf. & Inst. Code, § 6604.1.)
- 4) Requires that a person found to have been a SVP and committed to the DSH have a current examination on his or her mental condition made at least yearly. The report shall include consideration of conditional release to a less restrictive alternative or whether an unconditional release is in the best interest of the person and also what conditions can be imposed to adequately protect the community. (Welf. & Inst. Code, § 6604.9.)
- 5) Allows a SVP to seek conditional release with the authorization of the Director of State Hospitals when DSH determines that the person's condition has so changed that he or she no longer meets the SVP criteria, or when conditional release is in the person's best interest and conditions to adequately protect the public can be imposed. (Welf. & Inst. Code, § 6607.)
- 6) Allows a person committed as a SVP to petition for conditional release or an unconditional discharge any time after one year of commitment, notwithstanding the lack of recommendation or concurrence by the Director of DSH. (Welf. & Inst. Code, § 6608, subd. (a).)
- 7) Provides that, if the court deems the conditional release petition not frivolous, the court is to give notice of the hearing date to the attorney designated to represent the county of commitment, the retained or appointed attorney for the committed person, and the Director of State Hospitals at least 30 court days before the hearing date. (Welf. & Inst. Code, § 6608, subd. (b).)
- 8) Requires the court to first obtain the written recommendation of the director of the treatment facility before taking any action on the petition for conditional release if the petition is made without the consent of the director of the treatment facility. (Welf. & Inst. Code, § 6608, subd. (c).)
- 9) Provides that the court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. Provides that the attorney designated the county of commitment shall represent the state and have the committed person evaluated by experts chosen by the state and that the committed person shall have the right to the appointment of experts, if he or she so requests. (Welf. & Inst. Code, § 6608, subd. (e).)
- 10) Requires the court to order the committed person placed with an appropriate forensic conditional release program operated by the state for one year if the court at the hearing determines that the committed person would not be a danger to others due to his or her

diagnosed mental disorder while under supervision and treatment in the community. Requires a substantial portion of the state-operated forensic conditional release program to include outpatient supervision and treatment. Provides that the court retains jurisdiction of the person throughout the course of the program. (Welf. & Inst. Code, § 6608, subd. (e).)

- 11) Provides that if the court denies the petition to place the person in an appropriate forensic conditional release program, the person may not file a new application until one year has elapsed from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h))
- 12) Allows, after a minimum of one year on conditional release, the committed person, with or without the recommendation or concurrence of the Director of State Hospitals, to petition the court for unconditional discharge, as specified. (Welf. & Inst. Code, § 6608, subd. (k).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "AB 1003 establishes an oversight board that would implement interim regulations for evaluating SVP's, until that time where a special committee would make comprehensive recommendations to the Legislature and the Governor.

"In March of 2015 the California State Auditor released a report on California State Hospitals assessment protocols and training. In its review of the State Hospitals' Sex Offender Commitment program they found several the process in which they evaluated sex offenders were flawed. This bill establishes a process to address the concerns raised in the report, as well as, other issues that may not have been addressed."

- 2) **SVP Law Generally:** The Sexually Violent Predator Act (SVPA) establishes an extended civil commitment scheme for sex offenders who are about to be released from prison, but are referred to the DSH for treatment in a state hospital, because they have suffered from a mental illness which causes them to be a danger to the safety of others.

The DSH uses specified criteria to determine whether an individual qualifies for treatment as a SVP. Under existing law, a person may be deemed a SVP if: (a) the defendant has committed specified sex offenses against two or more victims; (b) the defendant has a diagnosable mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually-violent criminal behavior; and, (3) two licensed psychiatrists or psychologists concur in the diagnosis. If both clinical evaluators find that the person meets the criteria, the case is referred to the county district attorney who may file a petition for civil commitment.

Once a petition has been filed, a judge holds a probable cause hearing; and if probable cause is found, the case proceeds to a trial at which the prosecutor must prove to a jury beyond a reasonable doubt that the offender meets the statutory criteria. The state must prove "[1] a person who has been convicted of a sexually violent offense against [at least one] victim[] and [2] who has a diagnosed mental disorder that [3] makes the person a danger to the health and safety of others in that it is likely that he or she will engage in [predatory] sexually violent criminal behavior." (*Cooley v. Superior Court (Martinez)* (2002) 29 Cal.4th 228,

246.) If the prosecutor meets this burden, the person then can be civilly committed to a DSH facility for treatment.

The DSH must conduct a yearly examination of a SVP's mental condition and submit an annual report to the court. This annual review includes an examination by a qualified expert. (Welf. & Inst. Code, § 6604.9.) In addition, DSH has an obligation to seek judicial review any time it believes a person committed as a SVP no longer meets the criteria, not just annually. (Welf. & Inst. Code, § 6607.)

The SVPA was substantially amended by Proposition 83 ("Jessica's Law"), which became operative on November 7, 2006. Originally, a SVP commitment was for two years; but now, under Jessica's Law, a person committed as a SVP may be held for an indeterminate term upon commitment or until it is shown that the defendant no longer poses a danger to others. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1185-87.) Jessica's Law also amended the SVPA to make it more difficult for SVPs to petition for less restrictive alternatives to commitment. These changes have survived due process, ex post facto, and, more recently, equal protection challenges. (See *People v. McKee, supra*, 47 Cal.4th 1172 and *People v. McKee* (2012) 207 Cal.App.4th 1325.)

- 3) **Obtaining Release From Commitment:** A person committed as a SVP may petition the court for conditional release or unconditional discharge after one year of commitment. (Welf. & Inst. Code, § 6608, subd. (a).) The petition can be filed with, or without, the concurrence of the Director of State Hospitals. The Director's concurrence or lack thereof makes a difference in the process used.

A SVP can, with the concurrence of the Director of State Hospitals, petition for unconditional discharge if the patient "no longer meets the definition of a SVP," or for conditional release. (Welf. & Inst. Code, § 6604.9, subd. (d).) If an evaluator determines that the person no longer qualifies as a SVP or that conditional release is in the person's best interest and conditions can be imposed to adequately protect the community, but the Director of State Hospitals disagrees with the recommendation, the Director must nevertheless authorize the petition. (*People v. Landau* (2011) 199 Cal.App.4th 31, 37-39.) When the petition is filed with the concurrence of the DSH, the court orders a show-cause hearing. (Welf. & Inst. Code, § 6604.9, subd. (f).) If probable cause is found, the patient thereafter has a right to a jury trial and is entitled to relief unless the district attorney proves "beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent behavior if discharged." (Welf. & Inst. Code, § 6605.)

A committed person may also petition for conditional release or unconditional discharge notwithstanding the lack of recommendation or concurrence by the Director of State Hospitals. (Welf. & Inst. Code, § 6608, subd. (a).) Upon receipt of this type of petition, the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (Welf. & Inst. Code, § 6608, subd. (a).)¹ If the petition is not found to be frivolous, the court is required to

¹ Recently, in *People v. McCloud* (2013) 213 Cal.App.4th 1076, the Court of Appeal recognized that the provision in Welfare and Institutions Code section 6608, subdivision (a) allowing for dismissal of a frivolous petition for release without a hearing, may violate the equal protection clause. The petitioner's equal protection claim was based on the fact that "[n]o other commitment scheme allows the judge to deem the petition 'frivolous' and thereby deny the

hold a hearing. (*People v. Smith* (2013) 216 Cal.App.4th 947.)

The SVPA does not define the term "frivolous." The courts have applied the definition of "frivolous" found in Code of Civil Procedure section 128.5, subdivision (b)(2): "totally and completely without merit" or "for the sole purpose of harassing an opposing party." (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1411; see also *People v. McKee, supra*, 47 Cal.4th 1172; *People v. Collins* (2003) 110 Cal.App.4th 340, 349.) Additionally, in *Reynolds, supra*, 181 Cal.App.4th at p. 1407, the court interpreted Welfare and Institutions Code section 6608 to require the petitioner to allege facts in the petition that will show he or she is not likely to engage in sexually-violent criminal behavior due to a diagnosed mental disorder, without supervision and treatment in the community, since that is the relief requested.

Once the court sets the hearing on the petition, then the petitioner is entitled to both the assistance of counsel, and the appointment of an expert. (*People v. McKee, supra*, 47 Cal.4th 1172, 1193.) At the hearing, the person petitioning for release has the burden of proof by a preponderance of the evidence. (Welf. & Inst. Code, § 6608, subd. (i); *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1503.) If the petition is denied, the SVP may not file a subsequent petition until one year from the date of the denial. (Welf. & Inst. Code, § 6608, subd. (h).)

- 4) **California State Auditor Report:** In March of 2015 the California State Auditor issued an audit report on the DSH's Sex Offender Commitment Program (program). The report summary stated, "The program targets a small but extremely dangerous subset of sexually violent offenders (offenders) who present a continuing threat to society because their diagnosed mental disorders predispose them to engage in sexually violent criminal behaviors. State Hospitals evaluates these offenders to determine whether they meet criteria to be considered sexually violent predators (SVPs) and whether courts should consider committing such offenders to a state hospital.

"Our report concludes that State Hospitals' evaluations of potential SVPs were inconsistent. Although state law requires that evaluators consider a number of factors about offenders, such as their criminal and psychosexual histories, we noted instances in which evaluators did not consider all relevant information. We noted that gaps in policies, supervision, and training may have contributed to the inconsistent evaluations. Specifically, State Hospitals' standardized assessment protocol for how to perform evaluations. Further, State Hospitals' headquarters lacks a process of supervisory review of evaluators' work from a clinical perspective. We also noted that State Hospitals has not consistently offered training to its evaluators, and did not provide SVP evaluators with any training between August 2012 and May 2014. Also, State Hospitals could not demonstrate that its evaluators had training on a specific type of instrument used when assessing whether an individual would commit another sexual offense until it began offering such training at the end of 2014.

"We also noted additional areas in which State Hospitals could improve its evaluation process. Specifically, it has not documented its efforts to verify that its evaluators met the experience portion of the minimum qualifications for their positions. In addition, in March

petitioner a hearing." (*Id.* at p. 1087.) The court found there might well be actual disparate treatment of similarly situated persons—and if there was disparate treatment, the State might or might not be justified in so distinguishing between persons. The court remanded the case for further proceedings on the equal protection claim. (*Id.* at p. 1088.)

2013, State Hospitals developed a process for assigning and tracking the workload of its evaluators and recently revised it in January 2015. Although the revised process addresses some concerns about workload assignments, it omits other elements and State Hospitals has not established a formal process for periodically reviewing its workload assignment process. Finally, State Hospitals need to address its backlog of annual evaluations of currently committed SVPs at Coalinga State Hospital (Coalinga). When Coalinga fails to promptly perform these evaluations, it is not fulfilling one of its critical statutory obligations, leaving the State unable to report on whether the SVPs continue to pose risks to the public and whether unconditional release to a less restrictive environment might be an appropriate alternative.” (<https://www.auditor.ca.gov/pdfs/reports/2014-125.pdf>.)

- 5) **Related Legislation:** AB 262 (Lackey) placed additional residency restrictions on SVP's conditionally released in the community on outpatient treatment. AB 262 failed passage in this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

None

Analysis Prepared by: Gregory Pagan/PUB. S./(916) 319-3744

Date of Hearing: April 28, 2015
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1006 (Levine) – As Amended April 21, 2015

SUMMARY: Where a defendant has been convicted of an offense that will result in sentence to state prison or county jail, the defendant or the prosecutor may submit evidence that the defendant suffers from a diagnosable mental illness that contributed to the defendant's crime. The court may use that evidence to order the defendant to serve part of his or her sentence in a residential mental health treatment facility, order the defendant placed in a mental health program in the state prison or county jail, or order the detention facility to prepare a post release mental health treatment plan. Specifically, **this bill:**

- 1) Allows the defendant or the prosecutor to submit evidence that the defendant suffers from a diagnosable mental illness that was a substantial factor that contributed to the defendant's criminal conduct, when a defendant has pled guilty or no contest to, or been convicted of, an offense that will result in a sentence to state prison or county jail.
- 2) Requires the evidence of diagnosable mental illness, be filed after the defendant's plea or conviction, but before his or her sentencing.
- 3) Requires that the court consider evidence that the defendant suffers from a diagnosable mental illness that was a substantial factor that contributed to the defendant's criminal conduct in conjunction with the defendant's sentencing.
- 4) Allows the court upon consideration of the evidence of mental illness, if the court determines that it is in the best interests of public safety, the court to order one or more of the following:
 - a) That the defendant serve, if the defendant agrees, all or a part of his or her sentence in a residential mental health treatment facility instead of in the state prison or county jail, unless that placement would pose an unreasonable risk of danger to public safety. This does not apply to a defendant has a prior conviction for a serious or violent felony;
 - b) The Department of Corrections and Rehabilitation or county jail authority to place the defendant in a mental health program within the state prison or county jail system, respectively, at a level of care determined to be appropriate by the department's mental staff or county mental health staff, within 30 s days, of the defendant's placement in the state prison or county jail; and
 - c) The Department of Correction and Rehabilitation or the county jail authority, as applicable, regardless of the type of crime committed to prepare postrelease mental health treatment plan six months prior to the defendant's release to parole or postrelease community supervision. The treatment plan shall specify the manner in which the defendant will receive mental health treatment services following that release, and shall

address, if applicable and in the discretion of the court, medication management, housing, and substance abuse treatment.

- 5) Allows the defendant or prosecutor to, at any time, petition the court for approval to transfer the defendant from a residential mental health treatment facility to a mental health program within the state prison or county jail for the remainder of the defendant's sentence.
- 6) Allows the defendant, prosecutor, or Department of Corrections and Rehabilitation or county jail authority, as applicable, to at any time, petition the court for permission to remove the defendant from a mental health program within the state prison or county jail authority.
- 7) Permits the defendant, prosecutor, or Department of Corrections and Rehabilitation or county jail authority, as applicable, to at any time, petition the court for dismissal of the requirement that the Department of Corrections and Rehabilitation or county jail authority, as applicable prepare a postrelease mental health treatment plan.
- 8) Requires that the defendant have the right to counsel for all proceedings under this section.

EXISTING LAW:

- 1) Finds and declares that the provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation. (Pen. Code, § 1202.7.)
- 2) In any case in which it appears to the person in charge of a county jail, city jail, or juvenile detention facility, or to any judge of a court in the county in which the jail or juvenile detention facility is located, that a person in custody in that jail or juvenile detention facility may be mentally disordered, he or she may cause the prisoner to be taken to a facility for 72-hour treatment and evaluation pursuant and he or she shall inform the facility in writing, which shall be confidential, of the reasons that the person is being taken to the facility. The local mental health director or his or her designee may examine the prisoner prior to transfer to a facility for treatment and evaluation. (Pen. Code, § 4011.6.)
- 3) Where the court causes the prisoner to be transferred to a 72-hour facility, the court shall forthwith notify the local mental health director or his or her designee, the prosecuting attorney, and counsel for the prisoner in the criminal or juvenile proceedings about that transfer. Where the person in charge of the jail or juvenile detention facility causes the transfer of the prisoner to a 72-hour facility the person shall immediately notify the local mental health director or his or her designee and each court within the county where the prisoner has a pending proceeding about the transfer. Upon notification by the person in charge of the jail or juvenile detention facility the court shall forthwith notify counsel for the prisoner and the prosecuting attorney in the criminal or juvenile proceedings about that transfer. (Pen. Code, § 4011.6.)

- 4) If a prisoner is detained in, or remanded to, a mental health facility pursuant, the facility shall transmit a report, which shall be confidential, to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility and to the local mental health director or his or her designee, concerning the condition of the prisoner. A new report shall be transmitted at the end of each period of confinement as specified, upon conversion to voluntary status, and upon filing of temporary letters of conservatorship. (Pen. Code, § 4011.6.)
- 5) A prisoner who has been transferred to an inpatient facility pursuant to this section may convert to voluntary inpatient status without obtaining the consent of the court, the person in charge of the jail or juvenile detention facility, or the local mental health director. At the beginning of that conversion to voluntary status, the person in charge of the facility shall transmit a report to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility, counsel for the prisoner, prosecuting attorney, and local mental health director or his or her designee. (Pen. Code, § 4011.6.)
- 6) If the prisoner is detained in, or remanded to, a mental health facility, the time passed in the facility shall count as part of the prisoner's sentence. When the prisoner is detained in, or remanded to, the facility, the person in charge of the jail or juvenile detention facility shall advise the professional person in charge of the facility of the expiration date of the prisoner's sentence. If the prisoner is to be released from the facility before the expiration date, the professional person in charge shall notify the local mental health director or his or her designee, counsel for the prisoner, the prosecuting attorney, and the person in charge of the jail or juvenile detention facility, who shall send for, take, and receive the prisoner back into the jail or juvenile detention facility. (Pen. Code, § 4011.6.)
- 7) A defendant, either charged with or convicted of a criminal offense, or a minor alleged to be within the jurisdiction of the juvenile court, may be concurrently subject to mental health detention as specified by law under the Welfare and Institutions Code. (Pen. Code, § 4011.6.)
- 8) If a prisoner is detained in a mental health facility pursuant to the Welfare and Institutions Code and if the person in charge of the facility determines that arraignment or trial would be detrimental to the well-being of the prisoner, the time spent in the facility shall not be computed in any statutory time requirements for arraignment or trial in any pending criminal or juvenile proceedings. Otherwise, this section shall not affect any statutory time requirements for arraignment or trial in any pending criminal or juvenile proceedings. (Pen. Code, § 4011.6.)
- 9) States that upon conviction of any felony in which the defendant is sentenced to state prison, and the court makes any of the findings listed below, a court shall, in addition to any other terms of imprisonment, fine, and conditions, recommend in writing that the defendant participate in a counseling or education program having a substance abuse component while imprisoned:
 - a) That the defendant at the time of the commission of the offense was under the influence of any alcoholic beverages; (Pen. Code, § 1203.096, subd. (b)(1).)

- b) That the defendant at the time of the commission of the offense was under the influence of any controlled substance; (Pen. Code, § 1203.096, subd. (b)(2).)
- c) That the defendant has a demonstrated history of substance abuse; and (Pen. Code, § 1203.096, subd. (b)(3).)
- d) That the offense or offenses for which the defendant was convicted are drug related. (Pen. Code, § 1203.096, subd. (b)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Jails and prisons have become California's de facto mental health facilities with those who are mentally ill being far more likely to be incarcerated than to be in a psychiatric hospital. Incarcerating those with mental illness does not make sense from an outcomes or a fiscal stand point. Studies have found that individuals who participate in mental health courts reoffend one third of the time than those who do not and that participant's show significant improvement in quality of life. Furthermore, mental health courts have been demonstrated to save \$7 in costs for every \$1 spent. It costs \$51,000 a year to house an inmate, and \$20,412 to house and treat a person with mental illness. AB 1006 gives the court the ability to consider the presence of a mental illness in criminal sentencing."
- 2) **Prevalence of Mentally Ill Offenders:** The Department of Corrections and Rehabilitation's (CDCR) Council on Mentally Ill Offenders (COMIO) regards the growing number of inmates suffering from mental health issues as a pressing concern.¹

Nationally, a 2009 American Psychiatric Association study "found that 14.5% of male and 31.0% of female inmates recently admitted to jail have a serious mental illness" which is three to six times higher than rates found in the general population. "A serious mental illness" included major depressive disorder, depressive disorder not otherwise specified, schizophrenia spectrum disorder, schizoaffective disorder, schizophreniform disorder, brief psychotic disorder, delusional disorder, and psychotic disorder not otherwise specified.²

In 2009, the Division of Correctional Health Care Services for the CDCR estimated that 23 percent of California's prison inmates have a serious mental illness.³ According to the Berkeley Center for Criminal Justice, an estimated "40 to 70 percent of youth in the California juvenile justice system have some mental health disorder or illness," with 15 to 25 percent considered severely mentally ill. Based on these numbers, youth in California's juvenile justice system are two to four times more likely to be in need of mental health care than California youth generally.⁴ The Bureau of Justice Statistics reported in 2006 that 74 percent of mentally ill state

¹ <http://www.cdcr.ca.gov/comio/Legislation.html>

² Steadman, H., Osher, F. C., Robbins, P. C., Case, B., & Samuels, S. (2009). Prevalence of serious mental illness among jail inmates. *Psychiatric Services*, 60(6), 761-765. <<http://www.ncbi.nlm.nih.gov/pubmed/19487344>>.

³ Administrative Office of the Courts, Center for Families, Children & the Courts. (2011). *Task Force for Criminal Justice Collaboration on Mental Health Issues: Final Report*. <<http://www.mentalcompetency.org/resources/guides-standards/files/California%20Mental%20Health%20Task%20Force%20Report.pdf>>.

⁴ Berkeley Center for Criminal Justice. (2010). *Juvenile Justice Policy Brief Series: Mental Health Issues in California's Juvenile Justice System*. <https://www.law.berkeley.edu/img/BCCJ_Mental_Health_Policy_Brief_May_2010.pdf>

prisoners and 76 percent of mentally ill local jail inmates also met the criteria for substance dependence or abuse indicating a larger issue with co-occurring disorders among mentally ill offenders.⁵

- 3) **Increased Rates of Recidivism Among Mentally Ill Offenders:** A 2012 review conducted by the Utah Criminal Justice Center found that released inmates with serious mental illness experience poorer outcomes overall as they are “twice as likely to have their probation or parole revoked, are at an elevated risk for rearrest, incarceration, and homelessness, lack skills to obtain and sustain employment, and have higher rates of medical problems.”⁶ In 2009, the Council of State Governors Justice Center released a report entitled *Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision*, which stated that the reasons for increased recidivism among mental ill offenders may be multifaceted:

Once people with mental illnesses are finally released, it is often extremely difficult for them to successfully transition from incarceration to the community. Their mental illnesses may be linked to community corrections supervision failure in a number of ways. Skeem and Loudon have characterized these links as being *direct, indirect, or spurious*.

First, mental illnesses may *directly* result in probation or parole revocation. For example, an individual may not access treatment, leading him or her to decompensate, behave in a bizarre or dangerous manner in public, get arrested for this behavior, and have his or her probation revoked.

Second, mental illnesses may *indirectly* result in revocation. For example, an individual with clinical depression may have impaired functioning that prevents him or her from maintaining employment and paying court ordered fines, which are standard conditions of release. Notably, many people with mental illnesses returning to the community from jail or prison lack financial or social supports. Some were receiving Medicaid and other forms of public assistance at the time of their arrest, and these benefits are typically terminated rather than suspended during incarceration, and rarely reinstated immediately upon release. In short, there is often no safety net to compensate for functional impairments that may place individuals with mental illnesses at risk for revocation.

Third, mental illnesses may not result in revocation. Instead, the relationship between the two may be *spurious*—that is, more apparent than real—because a third variable associated with mental illness causes revocation. For example, an individual with bipolar disorder may be at risk of committing a new offense not because of his or her mental illness, but because of criminogenic attitudes or affiliation with antisocial peers. Alternatively, an individual with psychosis may be monitored exceptionally closely and revoked readily by his or her probation officer, given that traditional supervision

⁵ Treatment Advocacy Center & National Sheriffs' Association. (2010). *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of States*.

<http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf>

⁶ University of Utah, Utah Criminal Justice Center. (2012). *Treating Offenders with Mental Illness: A Review of the Literature*. <<http://ucjc.utah.edu/wp-content/uploads/MIO-butters-6-30-12-FINAL.pdf>>.

strategies often reflect misconceptions about (and stigma associated with) mental illness.⁷

CDCR data shows higher rates of recidivism in inmates identified with mental health issues when compared to those without. Upon release, inmates exhibiting mental health problems are assigned one of two mental health services designations: Enhanced Outpatient Program (EOP) or Correctional Clinical Case Management System (CCCMS). Inmates with severe mental illness expected to experience difficulty transitioning out of corrections are designated as EOP and receive treatment at a level similar to day treatment services in the community, while inmates receiving CCCMS services are housed within the general population and participate on an outpatient basis. In the 2012 CDCR Outcome Evaluation Report, 76.7 percent of first-release inmates with an EOP designation recidivated after three years, compared to lower rates found in CCCMS designees (70.6 percent) and those without a designation (62 percent).⁸

According to a 2005 CDCR report, mental health issues “comprised the single most critical gap in juvenile justice services. ... According to those surveyed, the number of at-risk youth and youthful offenders with mental health problems continues to increase as does the seriousness of their mental illnesses. The only thing not increasing is the resources to treat and confine these troubled and troubling youth.” Even if juvenile offenders receive assistance, absence of treatment after release may contribute to a path of behavior that includes continued delinquency and adult criminality.⁹

- 4) **Under Existing Law, Judges Have Discretion to Impose Conditions on Felony or Misdemeanor Cases When a Defendant is Placed on Probation:** Probation is the suspension of the imposition or execution of a sentence and the conditional release of a defendant into the community under the direction of a probation officer. “Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation.” *People v. Carbajal* (1995) 10 Cal.4th 1114,1120. Probation can be conditioned on serving a period of incarceration in county jail and on conditions reasonably related to the offense. Certain convicted felons are not eligible for probation. Other felons are presumptively ineligible for probation, but may be granted probation in an unusual case.

The primary considerations in granting probation are: (1) Public safety; (2) the nature of the offense; (3) the interests of justice; (4) the victim’s loss; and (5) the defendant’s needs. (Pen. Code, § 1202.7.)

Courts have broad general discretion to fashion and impose additional probation conditions that are particularized to the defendants. *People v. Smith* (2007) 152. Cal.App.4th 1245, 1249. Courts may impose any “reasonable” conditions necessary to secure justice and assist the rehabilitation of the probationer. Under existing law, a judge can impose a condition of probation that a defendant spend a certain amount of time in a residential mental health facility in conjunction with a jail sentence, or as an alternative to a jail sentence. In imposing probation conditions related to mental health, the court is not limited to ordering residential mental health treatment. The court can order outpatient mental health treatment, or other mental health directives the court finds appropriate. When a defendant is placed on probation the court retains jurisdiction

⁷ <https://s3.amazonaws.com/static.nicic.gov/Library/023634.pdf>.

⁸ http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf.

⁹ California Department of Corrections and Rehabilitation. (2005). *Status Report on Juvenile Justice Reform*.

over the case to ensure the defendant complies with probation. The court has the power to impose further punishment if the defendant does not comply with probation.

- 5) **California's Current Sentencing Scheme Does Not Provide an Option for a Judge to Impose a Split Prison Sentence:** Under California's sentencing scheme, if a person is sent to state prison, they are sentenced for a determinate amount of time. Once an individual is sentenced to State Prison they are committed to the custody of CDCR. Once CDCR has custody of a defendant, CDCR, not the court, decides where and in what type of custodial setting the defendant serves their state prison term.

When a court sentences a defendant to state prison, the court loses jurisdiction over the individual.

"If the judgment is for imprisonment, 'the defendant must forthwith be committed to the custody of the proper officer and by him or her detained until the judgment is complied with.' The sheriff, upon receipt of the certified abstract of judgment "or minute order thereof," is required to deliver the defendant to the warden of the state prison together with the certified abstract of judgment or minute order. 'It is clear then that at least upon the receipt of the abstract of the judgment by the sheriff, the execution of the judgment is in progress.'

"Thus, for example, in *People v. Banks*, we considered the effect of a stay of execution in the context of the trial court's authority to grant probation for certain offenses. We observed that upon entry of a guilty plea, if the trial court chooses to retain jurisdiction under the statutes dealing with probation, it may pronounce judgment and suspend its execution by refraining from issuing a commitment of the defendant to the prison authority. We stated: "The critical requirement for control over the defendant and the res of the action is that the court shall not have surrendered its jurisdiction in the premises *by committing and delivering the defendant to the prison authority.*" *People v. Karaman*, (1992) 4 Cal.4th 335,345 (citation omitted)(italics added.)

Because the court loses jurisdiction over a defendant when they are sentenced to state prison, it is unclear who would have the authority to enforce transfer of a defendant from a mental health facility to a state prison if treatment in a residential mental health treatment was ordered for a portion of the defendant's sentence at the beginning of the sentence. The same problem would exist if the court sentenced the defendant to begin their term with state prison, but directed the later part of the state prison term to be served in a mental health facility.

For the same jurisdictional reasons, it is unclear what remedies would be available if a defendant left a residential mental health treatment facility after being sentenced to such a facility for a portion of, or all of, a state prison sentence.

- 6) **Logistical Difficulties of Post Sentencing Procedures to Petition the Court to Change the Defendant's Status Regarding Their Mental Health Treatment:** The proposed legislation allows for the defendant or prosecutor to petition the court to transfer the defendant from a residential mental health facility to a state prison or county jail, and provides that defendants have a right to counsel for those proceedings. From a practical standpoint, appointing counsel for an individual who is in a residential mental health treatment facility presents challenges for a system where most of the defendants are represented by Public Defender Offices. Public

Defender Offices are accustomed to visiting and representing clients in custody at the local county jail. To see and represent clients placed in a variety of mental health facilities that can be in disparate geographic regions would present substantial obstacles to such representation. The same obstacles are present if a defendant in state prison required representation, in the sentencing court, on a petition to remove the defendant from a mental health program in the state prison.

- 7) **Michigan:** The state of Michigan passed Senate Bill 558 in 2014. That law requires county law enforcement and community mental health service programs, in coordination with courts and other key local partners, to create policies and practices that would provide mental health treatment and assistance to individuals with mental illness. Specifically, the policies and practices created would focus on individuals who are considered at risk of entering the criminal justice system; who not receiving needed mental health services during incarceration in a county jail or state prison; and who are not receiving needed mental health treatment services upon release or discharge from a county jail.
- <http://michigan.gov/snyder/0,4668,7-277-57577-323279--,00.html>

- 8) **Argument in Support:** According to David Mills (Chairman) and Michael Romano (Director), of the *Stanford Law School Three Strikes and Justice Advocacy Project*, “The Mental Health Justice Act (AB 1006) is the embodiment of the first reform proposed in our report. The bill is critically important because it will—for the first time—empower Superior Court Judges discretionary authority to order psychiatric treatment for criminal offenders who commit crimes as a result of mental illness. The bill does not require courts to do anything and protects public safety by forbidding judges from departing from traditional sentencing if doing so would endanger the public. Involving the courts in the identification and treatment of mentally ill offenders is a crucial step in addressing the massive problem of mental ill offenders in the justice system. We believe the measure will also save tax dollars and reduce recidivism by providing earlier interruption in the cycle of mental illness and incarceration.

“According to a recent report from the national Sheriff’s Association and Treatment Advocacy Center, ten times as many mentally ill people are in prison and jail in the United States than there are in mental health treatment facilities. In California, 45% of the state’s prison population is estimated to be mentally ill. In the last fifteen years the number of mentally ill people in prison has almost doubled.

“Furthermore, there are five times the numbers of seriously mental ill prisoners confined in state prison than there are patients in psychiatric hospitals, making the California Department of Corrections and Rehabilitation the de facto mental health treatment provider in the state.

“This bill will reform the way California sentences the mentally ill by allowing a court do determine if the mental illness is a substantial factor in the crime and give the court the ability to order treatment for that illness.”

9) **Prior Legislation:**

- a) SB 1054 (Steinberg), Chapter 436, Statutes of 2014, clarifies that mental health grants be divided equally between adult and juvenile mentally ill offender crime reduction grants and streamline the grant process.

- b) SB 1323 (Cedillo), of the 2005-06 Legislative Session, would have appropriated \$350,000 from the General Fund to the department for allocation, over 5 years, to the County of Los Angeles, at the consent of the county, for the purpose of funding one position to work, in conjunction with the Los Angeles County Superior Court, on a 5-year Prototype Court Pilot Program for nonviolent felony offenders in the state who have been identified as having both serious mental health and substance abuse problems. SB 1323 was held in the Senate Appropriations Committee.
- c) SB 643 (Ortiz), of the 2001-02 Legislative Session, would have enacted the Mental Health Enhancement and Crime Prevention Act of 2001, which would require the board to reimburse counties meeting specified requirements for the excess cost of providing more effective psychotropic medications to inmates in county correctional facilities during their incarceration and after release. SB 643 was held in the Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Council of Community Mental Health Agencies
Mental Health America of California
Chairman and Director of the Stanford Law School Three Strikes and Justice Advocacy Project
Legal Services for Prisoners with Children

Opposition

None

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Date of Hearing: April 28, 2015
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

AB 1051 (Maienschein) – As Amended April 20, 2015
As Proposed to be Amended in Committee

SUMMARY: Changes the definition of "pattern of criminal gang activity" to add the crime of human trafficking and creates a new one-year state prison enhancement for specified crimes committed against a minor on the grounds of, or within 1,000 feet of a school. Specifically, **this bill:**

- 1) Adds human trafficking to the list of offenses that may be used to establish a pattern of criminal activity for the purpose of enhancing the sentence of any person who commits a crime for the benefit of a criminal street gang.
- 2) Provides that any person who is convicted of human trafficking, where the offense was committed against a minor, or abduction of a minor for the purpose of prostitution, where any part of the violation takes place on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours that the school is open for classes or school-related programs or at any time when minors are using the facility, shall receive, in addition to any other penalty imposed, punishment of one year in the state prison.

EXISTING LAW:

- 1) States that any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. (Pen. Code, § 186.22, subd. (a).)
- 2) Provides the following enhancements to be added and served consecutively that applies to any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members:
 - a) An additional term of two, three, or four years at the court's discretion, unless the felony is a serious felony, as defined, or a violent felony, as defined;
 - b) If the felony is a serious felony, as defined, the person shall be punished by an additional term of five years; and,

- c) If the felony is a violent felony, as defined, the person shall be punished by an additional term of 10 years. (Pen. Code, § 186.22, subd. (b)(1).)
- 3) Specifies, if the underlying felony is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term of imprisonment. (Pen. Code, § 186.22, subd. (b)(2).)
- 4) Defines "pattern of criminal gang activity" to mean the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:
- a) Assault with a deadly weapon or by means of force likely to produce great bodily injury;
 - b) Robbery;
 - c) Unlawful homicide or manslaughter;
 - d) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances;
 - e) Shooting at an inhabited dwelling or occupied motor vehicle;
 - f) Discharging or permitting the discharge of a firearm from a motor vehicle;
 - g) Arson;
 - h) The intimidation of witnesses and victims;
 - i) Grand theft;
 - j) Grand theft of any firearm, vehicle, trailer, or vessel;
 - k) Burglary;
 - l) Rape;
 - m) Looting;
 - n) Money laundering;
 - o) Kidnapping;
 - p) Mayhem;

- q) Aggravated mayhem;
 - r) Torture;
 - s) Felony extortion;
 - t) Felony vandalism;
 - u) Carjacking;
 - v) The sale, delivery, or transfer of a firearm;
 - w) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person;
 - x) Threats to commit crimes resulting in death or great bodily injury;
 - y) Theft and unlawful taking or driving of a vehicle;
 - z) Felony theft of an access card or account information;
 - aa) Counterfeiting, designing, using, or attempting to use an access card;
 - bb) Felony fraudulent use of an access card or account information;
 - cc) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information;
 - dd) Wrongfully obtaining Department of Motor Vehicles documentation;
 - ee) Prohibited possession of a firearm;
 - ff) Carrying a concealed firearm; and,
 - gg) Carrying a loaded firearm. (Pen. Code, § 186.22, subd. (e).)
- 5) Defines a "criminal street gang" to mean any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern or criminal gang activity. (Pen. Code, § 186.22, subd. (f).)
- 6) Provides that any person who deprives or violates the personal liberty of any other with the intent to obtain forced labor or services is guilty of human trafficking and shall be punished in state prison for 5, 8, or 12 years and a fine of not more than \$500,000. (Pen. Code, § 236.1, subd. (a).)
- 7) States that any person who deprives or violates the personal liberty of any other with the intent to effect or maintain a violation of specified offenses related to sexual conduct,

obscene matter or extortion, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14 or 20 years and a fine of not more than \$500,000. (Pen. Code, § 236.1, subd. (b).)

- 8) Specifies the following penalties for any person who causes, induces, or persuades, or attempts to cause, induce, persuade, a person who is minor at the time of commission of the offense to engage in a commercial sex act, as provided:
 - a) Five, 8, or 12 years and a fine of not more than \$500,000; or,
 - b) Fifteen years to life and a fine of not more than \$500,000 when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Pen. Code, § 236.1, subd. (c).)
- 9) Provides that any person who takes away any other person under the age of 18 years from the father, mother, or guardian, or other person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison and a fine not exceeding \$2,000. (Pen. Code, § 267.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Human trafficking is increasing at an alarming rate across the country, and especially in San Diego County. Criminal street gangs have embraced pimping and human trafficking as a new revenue booster; as it now rivals narcotic sales as a major source of funding for many gangs. This crime targets our most vulnerable youth, who are often recruited within the walls of the schools they attend. AB 1051 is an important effort to put a stop to the growing epidemic of human trafficking and sexual exploitation of minors by organized gang activity."
- 2) **Current Penalties for Human Trafficking:** In 2012, California voters enacted Proposition 35, which modified many provisions of California's already tough human trafficking laws. Specifically, Proposition 35 expanded the definition of human trafficking and increased criminal penalties and fines for human trafficking offenses. The proposition specified that the fines collected are to be used for victim services and law enforcement. In criminal trials, the proposition makes evidence of sexual conduct by a victim of human trafficking inadmissible for the purposes of attacking the victim's credibility or character in court. The proposition also lowered the evidentiary requirements for showing of force in cases of minors. (See Proposition 35 voter guide available at Secretary of State's website, <<http://www.voterguide.sos.ca.gov/past/2012/general/propositions/35/analysis.htm>> (as of Apr. 22, 2015).)

The current penalties for human trafficking are very severe. Human trafficking for the purpose of obtaining forced labor or services is punishable by imprisonment in state prison for up to 12 years. If the offense involves human trafficking for the purpose of specified sexual conduct, obscene matter or extortion, the punishment proscribed is up to 20 years imprisonment in state prison. If the offense involves causing a minor to engage in a commercial sex act, the penalty imposed may be 15-years to life. (Pen. Code, § 236.1.) The

court may also impose up to a \$1.5 million fine on a person convicted of human trafficking. (Pen. Code §§ 236.1 and 236.4.)

- 3) **State Prison Overcrowding Considerations:** In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata vs. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

After continued litigation, 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 its most recent status report to the court (February 2015), 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).)

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).)

Moreover, there are still approximately 10,500 prisoners being housed in out of state and in private prisons. (See latest CDCR monthly population report, as of March 31, 2015: <http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1503.pdf>.)

This bill adds human trafficking to the list of offenses that may be used to establish a pattern of criminal activity for the purpose of enhancing the sentence of any person who commits a crime for the benefit of a criminal street gang. The gang enhancement provides for an additional two, three or four years imprisonment on top of the sentence for the underlying offense. This bill also creates a new enhancement of one year when the defendant is convicted of a human trafficking offense, where the offense was committed against a minor, or convicted of abducting a minor for the purpose of prostitution, where the offense was committed on the grounds of, or within 1,000 feet of a school.

Although the state is currently in compliance with the court-ordered population cap, creating

new enhancements that increase the length of time that an inmate must serve in prison will reverse the progress made in reducing the state prison population. This is contrary to the court's order for a durable solution to prison overcrowding.

- 4) **Proposed Amendments:** This bill is being considered as proposed to be amended. The current provisions of the bill creates a new three-year prison enhancement if the defendant was convicted of human trafficking or other specified offenses, on the grounds of, or within 1,000 feet of a school. The bill also excludes a person convicted of human trafficking or any of the other offenses listed from earning any credits while in state prison.

The proposed amendments reduce the three-year enhancement to one year, and limits applicability of the enhancement to a person convicted of human trafficking, where the offense was committed against a minor, or a conviction for abduction of a minor for prostitution, if the offense took place on the grounds of, or within 1,000 feet of a school. The proposed amendments also delete the provision that excludes defendants convicted of these crimes from earning credits in prison.

- 5) **Governor's Veto Message for SB 473:** SB 473 (Block), of the 2013 to 2014 Legislative Session, was similar to this bill. When it was referred to this Committee, the bill contained similar provisions that are in this bill, specifically the provision adding human trafficking to the list of offenses that may be used to establish a pattern of criminal activity and the provision requiring a new state prison enhancement if the offense took place upon the grounds of, or within 1,000 feet of, a school. SB 473 passed out of this Committee as proposed to be amended removing the three-year enhancement. Ultimately, the bill was vetoed by the Governor.

According to the Governor's veto message: "I am returning Senate Bill 473 without my signature.

"Under current law, human trafficking convictions impose substantial punishment, up to 20 years for sex trafficking offenses and 15 years-to-life for certain crimes involving children. These sentences are more than three times the punishment that existed two years ago. SB 473 would add yet another set of enhancements, the third in nine years. No evidence has been presented to support these new penalties."

- 6) **Argument in Support:** According to the *San Diego County Board of Supervisors*, the sponsor of this bill, "Human trafficking is increasing at an alarming rate across the country, especially in San Diego. Criminal street gangs have embraced human trafficking as a new revenue booster; as it now rivals narcotic sales as a major source of funding for many gangs. This crime targets our most vulnerable youth, who are often recruited within the walls of the schools they attend.

". . . AB 1051 adds human trafficking to the list of crimes used to enhance penalties for persons affiliated with a criminal street gang. It also creates a 'safe school zone' by increasing sentences for convictions related to human trafficking incidents that occur within 1,000 feet of a school."

- 7) **Argument in Opposition:** According to the *California Attorneys for Criminal Justice*, "In 2011 the legislature expanded the scope of "human trafficking" laws and significantly increased the penalties. There were more extreme measures the legislature declined to pass, and in 2012 the proponents qualified those extreme measures for the ballot as Proposition 35. That measure passed in November 2012 and is available to prosecute an extremely wide range of activities involving commercial activities and minors.

"No reliable studies have found federal laws and current state laws inadequate to meet the needs of law enforcement going after commercial sex traffickers.

"In particular Section 3 of the bill, which would add Section 266m to the Penal Code is wholly unnecessary. This statute would provide for a three year enhancement to specified crimes taking place within 1000 feet of a school, including human trafficking and pimping. Penal Code §236.1 already provides for penalties up to 12 years for crimes involving minors, and life if force or coercion is used. Every other crime listed in your proposed §266m can be charged under 236.1 where minors are targeted, without regard to location. Manifestly, there is no need to increase the potential penalties."

- 8) **Related Legislation:** AB 526 (Holden) would increase the fine for the crime of abducting a minor for prostitution from a maximum of \$2,000 to a maximum of \$5,000. AB 526 is pending a vote on the Assembly Floor.
- 9) **Prior Legislation:**
- a) SB 473 (Block), of the 2013-2014 Legislative Session, would have added pimping, pandering, and human trafficking to the list of offenses that may be used to establish a pattern of criminal activity for the purpose of enhancing the sentence of any person who commits a crime for the benefit of a criminal street gang. SB 473 was vetoed.
- b) AB 918 (Block), of the 2011-12 Legislative Session, was substantially similar to SB 473. AB 918 was held on the Appropriations Committee's Suspense File.

REGISTERED SUPPORT / OPPOSITION:

Support

San Diego County Board of Supervisors (Sponsor)
 Alameda County District Attorney's Office (Co-Sponsor)
 California Alliance of Child and Family Services
 California Catholic Conference
 California District Attorneys Association
 California Narcotic Officers' Association
 California Police Chiefs Association
 California State Sheriffs' Association
 California Statewide Law Enforcement Association
 Contra Costa County Board of Supervisors
 Crime Victims United
 Junior Leagues of California, State Public Affairs Committee
 Junior League of Napa-Sonoma

Junior League of San Diego
Los Angeles County Board of Supervisors
Peace Officers Research Association of California
San Francisco Unified School District
San Diego County District Attorney's Office
San Diego County Sheriff's Department
State Public Affairs Committee, Junior Leagues of California
Urban Counties Caucus

Opposition

American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Public Defenders Association
Legal Services for Prisoners with Children

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

Amendments Mock-up for 2015-2016 AB-1051 (Maienschein (A))

*****Amendments are in BOLD*****

Mock-up based on Version Number 98 - Amended Assembly 4/20/15
Submitted by: Stella Choe, Public Safety

Add co-authors: Assembly Member Baker, Assembly Member Jones-Sawyer, and Assembly Member Lackey.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 186.22 of the Penal Code, as amended by Section 1 of Chapter 508 of the Statutes of 2013, is amended to read:

186.22. (a) A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraphs (4) and (5), a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

Stella Choe
Assembly Public Safety Committee
04/24/2015
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- (3) The court shall select the sentence enhancement which, in the court's discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1.
- (4) A person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:
- (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.
- (B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.
- (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.
- (5) Except as provided in paragraph (4), a person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.
- (c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.
- (d) A person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that a person sentenced to imprisonment in a county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.
- (e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition

for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

- (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.
- (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.
- (3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.
- (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.
- (5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.
- (6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.
- (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.
- (8) The intimidation of witnesses and victims, as defined in Section 136.1.
- (9) Grand theft, as defined in subdivision (a) or (c) of Section 487.
- (10) Grand theft of any firearm, vehicle, trailer, or vessel.
- (11) Burglary, as defined in Section 459.
- (12) Rape, as defined in Section 261.
- (13) Looting, as defined in Section 463.
- (14) Money laundering, as defined in Section 186.10.
- (15) Kidnapping, as defined in Section 207.
- (16) Mayhem, as defined in Section 203.
- (17) Aggravated mayhem, as defined in Section 205.

- (18) Torture, as defined in Section 206.
- (19) Felony extortion, as defined in Sections 518 and 520.
- (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
- (21) Carjacking, as defined in Section 215.
- (22) The sale, delivery, or transfer of a firearm, as defined in *Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.*
- (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of *paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.*
- (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
- (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.
- (26) Felony theft of an access card or account information, as defined in Section 484e.
- (27) Counterfeiting, designing, using, or attempting to use an access card, as defined in Section 484f.
- (28) Felony fraudulent use of an access card or account information, as defined in Section 484g.
- (29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5.
- (30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7.
- (31) Prohibited possession of a firearm in violation of *Section 12021 until January 1, 2012, and on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.*
- (32) Carrying a concealed firearm in violation of *Section 12025 until January 1, 2012, and, on or after that date, Section 25400.*
- (33) Carrying a loaded firearm in violation of *Section 12031 until January 1, 2012, and, on or after that date, Section 25850.*
- (34) Human trafficking in violation of Section 236.1.

(f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (34), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(h) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.

(i) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(j) A pattern of gang activity may be shown by the commission of one or more of the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive, or (31) to (34), inclusive, of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.

(k) This section shall remain in effect only until January 1, 2017, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2017, deletes or extends that date.

SEC. 2. Section 186.22 of the Penal Code, as amended by Section 2 of Chapter 508 of the Statutes of 2013, is amended to read:

186.22. (a) A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraphs (4) and (5), a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

(4) A person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

(5) Except as provided in paragraph (4), a person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

(d) A person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that a person sentenced to imprisonment in a county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.

(e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034 until January 1, 2012, and, on or after that date, subdivisions (a) and (b) of Section 26100.

- (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.
- (8) The intimidation of witnesses and victims, as defined in Section 136.1.
- (9) Grand theft, as defined in subdivision (a) or (c) of Section 487.
- (10) Grand theft of any firearm, vehicle, trailer, or vessel.
- (11) Burglary, as defined in Section 459.
- (12) Rape, as defined in Section 261.
- (13) Looting, as defined in Section 463.
- (14) Money laundering, as defined in Section 186.10.
- (15) Kidnapping, as defined in Section 207.
- (16) Mayhem, as defined in Section 203.
- (17) Aggravated mayhem, as defined in Section 205.
- (18) Torture, as defined in Section 206.
- (19) Felony extortion, as defined in Sections 518 and 520.
- (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
- (21) Carjacking, as defined in Section 215.
- (22) The sale, delivery, or transfer of a firearm, as defined in *Section 12072 until January 1, 2012, and, on or after that date, Article 1 (commencing with Section 27500) of Chapter 4 of Division 6 of Title 4 of Part 6.*
- (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of *paragraph (1) of subdivision (a) of Section 12101 until January 1, 2012, and, on or after that date, Section 29610.*
- (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
- (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.
- (26) Felony theft of an access card or account information, as defined in Section 484e.

(27) Counterfeiting, designing, using, or attempting to use an access card, as defined in Section 484f.

(28) Felony fraudulent use of an access card or account information, as defined in Section 484g.

(29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5.

(30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7.

(31) Prohibited possession of a firearm in violation of *Section 12021 until January 1, 2012, and, on or after that date*, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(32) Carrying a concealed firearm in violation of *Section 12025 until January 1, 2012, and, on or after that date*, Section 25400.

(33) Carrying a loaded firearm in violation of *Section 12031 until January 1, 2012, and, on or after that date*, Section 25850.

(34) Human trafficking in violation of Section 236.1.

(f) As used in this chapter, “criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (34), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(h) Notwithstanding any other law, for each person committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.

(i) In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a

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member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(j) A pattern of gang activity may be shown by the commission of one or more of the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive, or (31) to (34), inclusive, of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone.

(k) This section shall become operative on January 1, 2017.

SEC. 3. Section 266m is added to the Penal Code, to read:

266m. ~~(a)~~ A person who is convicted of a felony violation of Section 236.1, **where the offense was committed against a minor**, ~~266, 266a, 266b, 266c, 266d, 266e, 266f, 266g, 266h, 266i, or 266j~~; or **Section 267**, where any part of the violation takes place on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours that the school is open for classes or school-related programs or at any time when minors are using the facility, shall receive, in addition to any other penalty imposed, punishment of ~~three years~~ **one year** in the state prison.

~~(b) A person sentenced pursuant to this section shall serve the entire term of his or her imprisonment for the underlying offense as well as the additional term imposed pursuant to this section in the state prison.~~

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.